ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	*	Case No. 13-0109
Plaintiff-Appellant,	*	C.A. Case No.: L-10-1194 C.P. Case No.: CR09-2300
-vs-	*	
THOMAS CAINE WHITE,	*	APPEAL FROM THE LUCAS COUNTY COURT OF APPEALS, SIXTH APPELLATE DISTRICT
Defendant-Appellee.	*	
	*	

BRIEF OF PLAINTIFF-APPELLANT

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INTRODUCTION

Prosecutors confronted with potential criminal conduct by an on-duty police officer face a difficult choice. Proceeding with criminal charges pits the prosecution against a member of the police force, a law enforcement body that prosecutors work with regularly and value for its role in the criminal justice system. Prosecutors are also aware that such criminal charges are frequently unsuccessful, perhaps because of the degree of trust that police officers enjoy in our communities.

On the other hand, overlooking a police officer's potentially criminal conduct may be construed by both that officer and other officers as tacit approval of the conduct, so that the questionable behavior may recur or worsen. Overlooking the conduct also has a broader and equally serious consequence of undermining public confidence in the consistency and fairness of the criminal justice system. Charges of bias or favoritism may result when an officer's potentially criminal conduct is not handled as just that--potentially criminal conduct--by the law enforcement community.

Such concerns have motivated the occasional prosecution of police officers for on-duty crimes despite the difficulties posed by pursuing such charges. But perhaps because of those inherent difficulties, such prosecutions are infrequent and have resulted in very little case law governing the conduct of such trials.

In this case, Thomas White was found guilty of felonious assault with a firearm specification for a shooting during a traffic stop while he was on duty for the Ottawa Hills Police Department. On appeal, the Sixth Appellate District reversed his sentence and conviction. *See State v. White*, 6th Dist. No. L-10-1194, 2013-Ohio-51. Some of the grounds for reversal rested

on findings of plain error, despite the absence of controlling or even persuasive authorities on the issues in question. The court also reversed based on an error that operated to the defendant's advantage and that was invited by the defendant as a matter of trial strategy. Finally, the opinion allowed for the possibility that the doctrine of qualified immunity to civil suits pursuant to 42 U.S.C. 1983 could be extended to bar criminal charges against an officer's on-duty crimes.

The Sixth District's decision raises questions about whether officers may be prosecuted for their on-duty criminal acts, as well as how such charges may be fairly tried. The State therefore sought this court's review.

STATEMENT OF THE CASE

On July 2, 2009, Thomas White was charged with felonious assault in violation of R.C. 2903.11(A)(2) and a firearm specification pursuant to R.C. 2941.145. A jury found White guilty of both the offense and the specification, and he was sentenced to a term of seven years imprisonment for the felonious assault conviction, along with a mandatory term of three years for the firearm specification.

On appeal, the Sixth District reversed. The court vacated the convictions and sentence, dismissed the firearm specification with prejudice, and remanded the case for a new trial. The State then sought this court's review of the decision.

STATEMENT OF FACTS

I. The evidence at trial.

The shooting. In the early morning hours of May 23, 2009, police officer Thomas White began following two motorcyclists as they rode through the village of Ottawa Hills in Lucas County. Nothing in particular drew White's attention to the motorcycles when he first saw them,

and White agreed that Ottawa Hills could be characterized as "a pretty quiet place" at that time of day. White followed the motorcyclists simply because impaired drivers are common at such times. (Trial Transcript, "TT," at 836, 856.)

The motorcycles stopped three times at marked intersections as White followed them. They accelerated out of the third intersection more rapidly than they left the first two stops, and White activated his lights and sirens and called for backup. After he turned on the cruiser's lights and sirens, the motorcyclists continued to travel for about 16 seconds, at an average speed of 38 or 39 miles per hour, covering 550 or 600 feet. (TT at 344, 355-356, 633-634, 873.)

One of the motorcyclists, Aaron Snyder, was surprised by the lights of a backup cruiser traveling west in an eastbound lane of the intersecting street. Snyder said the lights "scared me," and he drove his bike over a curb and onto grass before returning to the street and stopping. The backup officer, Christopher Sargent, took Snyder into custody while White stopped behind the other motorcyclist, Michael McCloskey. (TT at 636, 638, 411-414.)

When McCloskey stopped, he did so in his lane of travel at the stop bar at the intersection of Central Avenue and Indian Road. His left hand was on the left handlebar of the bike where the clutch is located. He raised his right hand to his head in order to remove the riding glasses he was wearing and then rested his right hand on his thigh. (Video Recording, "VR," 2:16.50.) White saw the motion and did not feel threatened. (TT at 886.)

After McCloskey stopped, while White was still in the cruiser, White radioed that one motorcycle "stopped, one's trying to take off on 42." (VR at 2:16.50; TT at 344.) McCloskey looked over his right shoulder behind him, where White's lights and sirens were still on. (VR 2:16.55.) McCloskey then looked back at Sargent taking Snyder into custody. White yelled

something over the sound of the sirens and the motorcycle, and McCloskey turned toward the sound over his right shoulder. At this backward glance, White fired a shot into McCloskey's back. (VR 2:16.54-2:16.57; TT 355.) Twenty-three seconds passed from the time White activated his lights and sirens until he fired the shot. Seven seconds passed from the time McCloskey stopped his bike until White fired the shot. Three seconds passed from the time White got out of his cruiser until he fired the shot.

The shot hit McCloskey in the back, causing him to fall to the ground, trapped beneath the bike. The shot injured McCloskey's spine, causing permanent paralysis and severe damage to most of his major organs. (TT at 509-518.)

Testimony of Michael McCloskey, Aaron Snyder, and Klint Sharpe. McCloskey, Snyder and Sharpe left a nightclub in Toledo together and headed to McCloskey's home in Ottawa Hills. Sharpe was driving a car behind the bikes until they neared Ottawa Hills. As the bikes entered Ottawa Hills, Sharpe took an alternate route in order to avoid the slow travel necessitated by the stop signs, the low speed limit, and (by his own admission) the police scrutiny characteristic of Ottawa Hills. (TT at 498, 593.)

Neither McCloskey nor Snyder knew that Sharpe was no longer behind them. McCloskey testified that he knew there were headlights behind him, but he believed the lights were those of Sharpe's car. Likewise, Snyder could see the headlights of the car behind him in his rearview mirror, but he could not see the color or any other identifying characteristics of the car. (TT at 498-499, 501, 503, 512, 632-633, 638-639, 651.)

Snyder said that as he approached Central, he saw lights of a car headed west in an eastbound lane, and it "scared me." He went up over a curb, saw that the oncoming car was a

police cruiser, and pulled back onto the road where he stopped. The officer drew his gun on Snyder and ordered him to get off the bike, put his hands on his head, and get on his knees on the ground. He handcuffed Snyder and put him in the cruiser. (TT at 636-638, 663-665, 417.)

McCloskey realized that a police cruiser was behind him only after he stopped at Central and saw the cruiser in front of him. He was "kind of wondering what was going on" when he "heard a loud noise behind me" and "thought Klint was out of his car yelling at me for some reason." He turned and saw the flashing lights. The sirens were "[e]xtremely loud, louder than my Harley-Davidson," and he could not hear well over the noise from both the motorcycles and the sirens. He heard someone yell, but not distinctly, and then he heard the shot. (TT at 505, 508, 509.)

McCloskey testified that he was unarmed, but he acknowledged that he had a small knife clipped to the outside of his right boot. (TT at 509-510.) McCloskey was also cross-examined about his consumption of alcohol and use of marijuana before the shooting. McCloskey's medical records showed that his blood serum alcohol level (not blood alcohol or whole blood level) was .09,[1] but test results for marijuana were too low to be measurable. (TT at 519, 525-526, 554-565.)

Snyder, a certified Harley-Davidson mechanic, testified that his bike weighed 750 pounds, while McCloskey's weighed 734 pounds. Both bikes had loud custom pipes. Snyder noted that "louder pipes save lives" because they improve the chances of a motorcycle being

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[1]The trial court instructed the jury that the measure of .09 grams of alcohol per deciliter of blood serum was below the limit of Ohio law forbidding operation of a motor vehicle while under the influence of alcohol. The trial court also instructed the jury to consider the medical evidence only with respect to whether it was consistent with McCloskey's testimony, because White could not have known the medical test results at the time of the stop. (TT at 1245-1246.)

noticed by other drivers. Both McCloskey and Snyder wore safety glasses to block the wind from their eyes as they rode. (TT at 637, 640, 663.)

The video recording. White's cruiser was equipped with an in-dash camera, which White manually activated. The camera recorded 14 minutes beginning 20 or 30 seconds before the manual activation. (TT at 333-334, 348, 352, 403.) The recording, with a clock superimposed to provide reference points, was played and introduced into evidence as Exhibit 1.[2]

The recording began at 2:12.48. About a minute later, the bikes made the first stop at the intersection of Indian and Evergreen. (VR at 2:13.50.) At 2:15.02, Snyder switched out of his lane of travel to ride behind McCloskey for a brief time before returning to his original position on McCloskey's right. They stopped again at Talmadge Road and a third time at the intersection of Westchester and Indian. The third stop was longer than the previous two stops, and McCloskey left the stop bar at 2:16.29. (TT at 343.) White activated his lights five seconds later. (VR at 2:16.34; TT at 343, 788.) Four seconds after turning on the lights, White notified dispatch that he was in pursuit. (VR at 2:16:38, TT at 339.)

After White turned on his lights and sirens, McCloskey continued to travel 600 feet before stopping at the intersection of Central and Indian. At about 2:16.50, McCloskey raised his right hand to his head to remove his riding glasses and then lowered his hand as he turned to look behind him over his right shoulder. He turned back again to look behind him at 2:16.55. Between 2:16:54 and 2:16.57, White got out of his car, yelled something over the sound of the cruiser's siren and the motorcycles' engines and then fired a shot. (TT at 344-346.)

Although not depicted in the video, White holstered his gun immediately after the

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[2]For the convenience of the court, a copy of the recording is included in the appendix.

shooting. When he came into the camera's range 13 seconds after the shooting, he reached to draw his gun from its holster again. (VR at 2:17.10.) A minute and a half later, White removed the external microphone from his duty belt with his left hand. (VR at 2:18.42, TT at p. 347.) He held the microphone briefly before he transferred it to his right hand. (VR at 2:18.46.) Three seconds later, he put the external microphone in the cruiser, terminating the audio recording. (VR at 2:18.49.)

David Pauly's testimony. BCI Special Agent David Pauly opined that he did not believe McCloskey was fleeing from White, but Snyder might have been. (TT at 355.) Pauly did not consider McCloskey and Snyder to be fleeing felons. (TT at 373-376.) He did not consider the situation to be a pursuit, because "[i]t was minimal in--in intensity and length." Further, McCloskey did not fail to comply with any of White's commands. (TT at 373, 378.) Pauly commented that in his experience as a road officer, there were many occasions when he would put on his overhead lights and siren "and it would take a person a while until they would stop," and that "600 feet was not out of the question for someone to stop." (TT at 379-380.)

Officer Christopher Sargent's testimony. Sargent responded to White's call for back-up by driving westbound in the center lane of Central Avenue toward Indian Road with his lights and sirens activated. He acknowledged that the motorcycles were "extremely loud," and the sirens were also very loud. (TT at 394, 402, 407-414, 426-427.)

Sargent saw that one bike was stopped, and there was no indication that it was out of control. However, Snyder failed to make a curve and operated his bike over a grassy island and then back onto Central, before he stopped. Snyder did not appear to be fleeing. Sargent got out of his cruiser with his gun drawn and yelled to Snyder to get off the bike, get on the ground and

show his hands. Sargent took Snyder into custody and charged him with driving under the influence and failure to comply. He did not charge him with felony fleeing because he did not think Snyder's conduct "rose to the level of the felony charge." Snyder did not possess any weapons. (TT at 407-417, 436.)

Several other officers also arrived, including officers from other police departments. With all the flashing lights from the various cruisers, Sargent could not see what was happening near White. Sargent was directly across the street and in the line of fire when the shot was fired, but when he heard the gunshot, he did not know what it was. (TT at 419-428.)

After Sargent placed Snyder in the rear of his cruiser, he went to assist White. McCloskey was on the ground, and White commented that "he hoped that he hadn't fucked up and he didn't want to end up in jail." (TT at 417, 420, 425.)

Although Sargent said there was nothing on Indian to obstruct lights from a police vehicle, he agreed that motorcycles are subject to vibrations, that motorcycles' mirrors aren't as clear as car mirrors, and that motorcycles' mirrors are less useful under acceleration. Sargent also agreed that motorcycles may sound louder to the rider than to someone several blocks away. Sargent testified that "numerous times" he signaled for drivers to stop by activating his lights and sirens, but that they kept driving for a period of time "simply because they don't know the police are behind them." (TT at 443-446.)

Sargent testified that Ottawa Hills' policy was for officers to leave the microphones on their belts during the time that they are working. He also said that Ottawa Hills police cruisers are equipped with public address systems. (TT at 400, 415, 445.)

Edward Biederstedt's testimony. Biederstedt, a crime scene investigator for BCI,

identified a photograph of White's firearm. He testified that the middle part of the firearm's trigger is elevated above the outer edges, and that the middle part must be depressed along with the outer edges, a feature designed to ensure that the gun can only be fired intentionally. (TT at 468.)

Thomas White's testimony. White testified at trial that he was "hanging back" when he first began following the motorcycles, so there were multiple car lengths between his car and the bikes. As he followed the bikes, he observed that "Mr. McCloskey crossed the south center yellow lines multiple times, incomplete stops at stop signs, weaving within the lane, excessive speed above the speed limit." On cross-examination, White acknowledged that touching the yellow centerline is not illegal, that each lane of a roadway contains three recognized lanes for motorcycle travel, and that changing from one lane to another is not a violation. He also acknowledged that he would not normally issue a citation to a person driving between 28 and 30 miles per hour in the 25 mile per hour zone of Ottawa Hills. (TT at 836-837, 857-859.)

White compiled a four-page list of his observations as he followed the bikes, and he was cross-examined about that list. He claimed that the bikes made incomplete stops or stops on the stop bar at the first stop sign at Evergreen and Central. He stated that as early as this first stop, he "thought they could possibly run," because of the way they accelerated away from the stop sign. He noted that both motorcycles stopped at Talmadge Road but when they left they "accelerated rapidly and then slowed." At Westchester, both motorcycles stopped "over the clearly marked white stop bar," but he admitted that they might have stopped on the stop bar. He complained that the motorcycles sat at a stop sign for an "unusually long period of time," but he acknowledged that sitting there was not a violation, that the motorcyclists could only converse

when stopped, and that he did not feel danger as a result of their conversation. (TT at 862-873.)

White acknowledged that after the bikes left the intersection of Westchester and Indian, they accelerated for about five seconds before he turned on his lights. He testified that the bikes continued for about 15 seconds, but he did not disagree that they hit their brakes during that 15 seconds. (TT at 872, 875.) White agreed that when a vehicle begins to accelerate away from a cruiser it may be more difficult for the vehicle to realize a cruiser is signaling it to stop. White also did not dispute that the size of a bike's rearview mirror makes it difficult to see much behind the bike other than headlights. (TT at 866, 873.)

When McCloskey stopped, White did not feel any immediate danger. White saw McCloskey raise his right arm to his head and then drop his hand, a movement consistent with removing his glasses and then resting his hand on his leg. White still did not feel that he was in danger. (TT at 883-886.)

When White got out of his cruiser, his headlights, overhead lights, takedown lights, and strobe lights were still on. He said "get your hands up," and McCloskey made a reaching movement that led White to believe "he was pulling a weapon." White said he believed that both he and Sargent were in danger at that point. White then fired the shot that paralyzed McCloskey. White acknowledged that he did not find out about McCloskey's boot knife until several months after the shooting. (TT at 827, 42, 851, 892-894, 903.)

Although White testified the stop was high risk, he acknowledged that when making a high risk stop, officers are trained to leave a certain distance between the subject vehicle and the cruiser, when possible, and that his cruiser stopped closer than that distance. He also said that his car was equipped with a public address system that could be used in a high risk stop, and that a

cruiser can be used for cover in a high risk stop. Finally, White did not dispute that McCloskey's left hand was on the clutch after he stopped, and that if McCloskey's kickstand was not down, he had to balance the motorcycle while straddling it. (TT at 884-889.)

Defense expert testimony. Urey Patrick was never a street officer, had never made a traffic stop, and had no experience with motorcycles. Nevertheless, he offered several opinions about White's use of force under the totality of the circumstances. Patrick said that the stop occurred at night and the motorcyclists appeared "maybe" to be under the influence. He described McCloskey as making "targeting" glances over his shoulder at White. McCloskey's movement of his hand was "consistent with reaching for a weapon." Patrick thought the motorcyclists' separation at Central appeared to be "a deliberate act." (TT at 708-710, 733-734.)

On the other hand, Patrick admitted that Snyder, not McCloskey, made the most significant movement across his lane of travel. Patrick agreed that for an officer to be in pursuit of someone fleeing, that person has to know that compliance is expected, and that for a person to be non-compliant, he would have to willfully disobey. He agreed that Snyder "appeared to lose control" and McCloskey "stopped," neither of which suggested an intentional fleeing from police. Patrick acknowledged that sirens are loud and bikes are loud, and that White's microphone, located 18 to 20 inches from his mouth, failed to clearly record White's command as he left the cruiser. Finally, Patrick agreed that most individuals react to noise from behind by looking back to see what's going on. (TT at 708, 731-739, 742, 750, 752.)

James Scanlon, a SWAT trainer, described McCloskey's backward glances as "targeting." Scanlon claimed that despite the fact that McCloskey was straddling a motorcycle, he could have turned full circle and shot White as he approached from behind. He also opined that using the

cruiser's public address system would not have been a good tactical move, and that using the cruiser as cover may put an officer at a disadvantage. (TT at 777-778, 804-805.)

Ken Katsaris' testimony at trial. The State called Ken Katsaris as an expert witness in rebuttal. Trial counsel did not object to certification of Katsaris as an expert. Katsaris distinguished between a "target" glance and an "inquiry" glance, and he testified that McCloskey was not "targeting" White when he turned to look behind. Rather, McCloskey turned to his right to look behind "in an inquiry method, in other words, what's going on." McCloskey then looked forward, "because obviously a police car came forward and the blue lights and sirens are there." Next, McCloskey heard something and looked to the right again. That glance was not "targeting" White, because McCloskey was not looking at White's location to the left. (TT at 959, 963-966.)

Katsaris also pointed out that McCloskey had limited options for movement, because he was balancing almost 800 pounds of weight, and he could not turn fully around while balancing the bike. Katsaris noted that White did not turn off his siren after he made the stop, and he did not use the cruiser's public address system so that McCloskey could hear him as he spoke. Katsaris said that the sirens alone are disorienting to individuals involved in a traffic stop. (TT at 965-969, 987-988, 1000.)

Katsaris testified that he is an experienced motorcyclist. He pointed out that many motorcyclists do not ride in the center of the roadway, because cars drop oil there and because the center curves over time due to cars' traveling over the roadway. He said that hugging the left line is legal, and when there is no oncoming traffic, it is one of the better places to ride. Katsaris also said that motorcycles vibrate and bounce, and that the rearview mirrors are quite small. (TT at 964, 971-973, 998-989.)

Like White, Katsaris analyzed the recording section by section, but he saw no indicators that either McCloskey or Snyder was impaired. The first violation he identified was when the bikes accelerated after the stop at Indian and Westchester. Katsaris testified that White's verbal command was "get down," a command that McCloskey could not obey because it would require him to put down the kickstand and dismount, a movement that would normally result in his spinning around to face the officer behind him. (TT at 991-992, 994-995.)

Katsaris said that the bikes stopped 550 feet after White turned on his siren, and that they braked before stopping. He characterized them as stopping "immediately," and he said that the sequence of events did not constitute a pursuit. (TT at 997-999.)

Katsaris also commented that when the officer is in his cruiser, he is "behind a wall of light" and behind the metal of the car and the car's motor, one of the safer places to be. (TT at 986-987, 1033.)

II. Jury Instructions.

White's counsel tendered the following written jury instructions before trial:

> **Proposed Instruction #1:** Even if not acting in self-defense, a police officer acting in pursuit of his official duties is justified in using such force, including deadly force, that is objectively reasonable under the circumstances. It is objectively reasonable under the circumstances if an officer has cause to believe that a person poses a threat of serious physical harm, either to the officer or to others.***
> **Proposed Instruction #2:** In deciding whether the Defendant had reasonable grounds to believe Officer Sargent or himself was in imminent danger of death or great bodily harm, you must put yourself in the position of the Defendant, with his characteristics and his knowledge or lack of knowledge, and under the circumstances and conditions that surrounded him at the time. You must consider the conduct of Michael McCloskey and decide whether his acts caused the Defendant reasonably and honestly to believe that Officer Sargent or himself was about to be killed or receive great bodily harm.***
> **Proposed Instruction #3:** Reasonableness must be judged from the perspective

> of a reasonable police officer in light of all the facts and circumstances confronting the officer at the time in the moments before the use of deadly force rather than with the 20/20 vision of hindsight. *Graham v. Connor* [490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)].
> What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure. ***
> Allowance must be made for the fact that officers are often forced to make split-second judgements in circumstances that are tense, uncertain, and rapidly evolving. *Graham*, at 396-397.

(Defendant's Proposed Jury Instructions #1, 2, and 3, May 10, 2010; some citations omitted.)

The prosecution objected to the defendant's reasonableness instructions based on *Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The prosecution argued that if any such instruction was to be given, it should include all factors listed in *Graham,* 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." *Graham, supra*, 490 U.S. at 396. (Prosecution's Objection and Alternate Proposed Jury Instructions, May 10, 2010 at 1-2.)

The trial court ultimately gave an instruction that included the defendant's requested instruction on reasonableness, but which also recited the *Graham* factors:

> In deciding whether the defendant had reasonable grounds to believe Officer Sargent or himself was in imminent danger of death or great bodily harm, you must put yourself in the position of the defendant, with his characteristics and his knowledge, and under the circumstances and conditions that surrounded him at the time.
> You must consider the conduct of Michael McCloskey and decide whether his acts caused the defendant reasonably and honestly to believe that Officer Sargent or himself was about to be killed or receive great bodily harm.
> Reasonableness must be judged from the perspective of a reasonable police officer in light of all the facts and circumstances confronting the officer at the time and in the moments before the use of deadly force rather than with 20/20 vision of hindsight.
> What constitutes "reasonable" action may seem quite different to someone

> facing a possible assailant than to someone analyzing the question at leisure. Allowance must be made for the fact that officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving.
>
> In determining whether the defendant acted reasonably in his use of force in the pursuit of his official duties, you must consider factors such as the severity of the crime Mr. McCloskey was a [sic] believed to have committed, whether Mr. McCloskey posed an immediate threat to the safety of defendant or another person, and whether Mr. McCloskey was actively resisting arrest or attempting to evade arrest by flight.

(TT at 1243-1244.)

The trial court also instructed the jury on the elements of felonious assault, including the definition of "knowingly:"

> A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result.
>
> A person has knowledge of circumstances when he is aware that such circumstances probably exist.
>
> Since you cannot look into the mind of another, knowledge is determined from all the facts and circumstances in evidence.

(TT at 1235.)

On appeal to the Sixth Appellate District, among other assignments of error, White claimed that the trial court improperly denied an instruction on negligent assault. The Sixth District rejected that assignment of error, but reversed because of other defects it identified in the instructions. Specifically, the court found that the trial court erred in instructing the jury on the use of excessive force, rather than deadly force, even though the trial court's instruction was based on an instruction requested by White. *See also White*, ¶209 (Singer, J., dissenting). The court also found that the trial court erred in failing to provide an instruction on mistake of fact, although White never requested such an instruction and did not assert the absence of a mistake instruction as an error on appeal. Rather, mistake was mentioned in the appeal only in the

context of an assignment of error related to the sufficiency of the evidence.

The opinion offered extensive analysis of the role of civil immunity in a criminal case, an issue not raised in the trial court. The opinion concluded that the evidence at trial "would arguably suggest that whether White's decision to shoot was objectively reasonable . . . could be resolved as a pure 'question of law' at some pretrial stage." *White*, ¶84.

Finally, the court declared the firearm specification unconstitutional as applied to White and peace officers acting in similar circumstances. *White,* ¶171. White did not challenge the specification's constitutionality in the trial court, but the Court of Appeals concluded that this court's prior precedents and App.R. 12(A)(2) permitted the issue to be decided on appeal.

The Sixth District vacated White's convictions and sentence, dismissed the firearm specification with prejudice, and remanded the matter for a new trial. The State now seeks review of that decision.

ARGUMENT

First Proposition of Law: 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.

This court recently identified several weapons possession statutes that "explicitly exclude authorized law-enforcement officers who are acting within the scope of their duties." *State v. Steele*, Slip Opinion No. 2013-Ohio-2470, ¶20, citing R.C. 2923.12(C)(1)(a) (carrying concealed weapons); 2923.121(B)(1)(a) (possessing a firearm in a liquor-permit premises); 2923.122(D)(1)(a) (possessing a deadly weapon in a school safety zone); and 2923.17(C)(1) (possessing a dangerous ordnance).

In contrast with the statutes discussed in *Steele*, the firearm specification at issue in this

case does not contain any exemption for police officers who are on duty at the time they use their weapon:

> Imposition of a three-year mandatory prison term upon an offender under division (B)(1)(a) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that **the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense.**

R.C. 2941.145(A) (emphasis added). This court recently held that it will not "add an exception . . . where there is none present" in a statute. *See Steele*, Slip Opinion No. 2013-Ohio-2470, ¶21. Here, the statute's plain language requires application of the specification without an exception for police officers who commit crimes during their on-duty hours.

However, the Sixth District declared R.C. 2941.145 unconstitutional as applied to a police officer who commits a criminal act while "acting in the scope of what he was employed to do." *White*, ¶168. The Sixth District reasoned that because an officer must carry a firearm, he does not "voluntarily introduce a firearm into a felony he was otherwise intending to commit." Accordingly, the court concluded that the statute is unconstitutional as applied to an on-duty police officer. *White*, ¶166. That conclusion is inconsistent with established constitutional principles, the law governing interpretation of statutes in Ohio, as well as case law from federal courts and other jurisdictions applying similar firearm enhancements.

A. R.C. 2941.145 is a sentence enhancement with a rational basis of deterring all crime involving firearms.

Ohio law is clear that statutes enjoy a strong presumption of constitutionality. *State v. Warren*, 118 Ohio St.3d 200, 2008-Ohio-2011, 887 N.E.2d 1145, ¶21. See also R.C. 1.47(A). When a statute's constitutionality is challenged, the court must apply all presumptions and rules of construction in order to uphold the statute if at all possible. *State v. Dorso*, 4 Ohio St.3d 60, 61, 446 N.E.2d 449 (1983). A statute may be declared unconstitutional only if it "appear[s] beyond a reasonable doubt that the legislation and constitutional provision are clearly incapable of coexisting." *State v. Gill*, 63 Ohio St.3d 53, 55, 584 N.E.2d 1200 (1992). A statute will be upheld unless the challenger can meet the burden of establishing beyond a reasonable doubt that the statute is unconstitutional. *Warren*, ¶21. In order to succeed in a constitutional challenge, White bears the burden of presenting clear and convincing evidence of a presently existing state of facts that make the statute unconstitutional and void as applied to those facts. *Id.* at ¶22.

The Fifth Amendment due process clause provides that no person shall "be deprived of life, liberty, or property, without due process of law" and applies to the states by way of the Fourteenth Amendment. This court has long recognized that the Ohio Constitution contains due process protections equivalent to those in the United States Constitution. *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, ¶69; *Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St.3d 540, 544, 38 N.E.2d 70 (1941).

The State does not dispute that the Sixth District applied the proper rational basis test in its analysis of R.C. 2941.145's constitutionality. *White* acknowledged that the enhancement does not impinge on a fundamental constitutional right, so the legislation is subject only to a rational

basis scrutiny under either the Ohio or the United States Constitution. *White,* ¶154, citing *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 478, 2007-Ohio-6948, 880 N.E.2d 420, ¶49 and *State v. Thompkins,* 75 Ohio St.3d 558, 560, 1996-Ohio-264, 664 N.E.2d 926. Under the Ohio test, laws are upheld "if they bear a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public, and are not arbitrary, discriminatory, capricious or unreasonable." The federal test similarly looks for "a rational relationship between the statute and its purpose." *Thompkins*, at 560. The state is not required to "bear the burden of proving a rational basis justifies the challenged legislation; rather, the challenger must negative every conceivable basis." *State v. Williams*, 88 Ohio St.3d 513, 531, 2000-Ohio-428, 728 N.E.2d 342.

Although the Sixth District recognized that the rational basis test applied, the court actually imposed a much stricter standard. The Sixth District held that R.C. 2941.145 was intended "*to send a message to the criminal world.*" *Id.* at ¶163 (emphasis in original), quoting *State v. Murphy*, 49 Ohio St.3d 206, 208, 551 N.E.2d 932 (1990). The Sixth District concluded that "it was never the General Assembly's intent to apply the firearm specification to a peace officer who is required by his employer, and indirectly, by the duties and requirements of state law, to possess and carry a firearm and who, consequently, might have to discharge it during a legitimate act of enforcing the law." *Id.* at ¶170.

The Sixth District's analysis is faulty when considered in light of the facts of this case. Here, the jury found that White used his weapon in committing a criminal act against McCloskey. The jury's verdict cannot be construed as a finding that White discharged his weapon "during a legitimate act of enforcing the law." The Sixth District thus analyzed the

rational basis of R.C. 2941.145 in the context of a hypothetical set of facts--the discharge of a weapon during a legitimate act of law enforcement--that simply did not exist in this case. That analysis is contrary to this court's holding that when a statute is constitutional under a set of facts, "a court will not declare it invalid because under another state of facts, not involved, its operation would be unconstitutional." *De Lozier v. Sommers*, 38 Ohio St. 2d 268, 313 N. E. 2d 386 (1974).

In essence, the Sixth District held that the General Assembly enacted a statute that had the effect of penalizing more individuals than merely those in the "criminal world." However, a claim that a statute is overbroad is insufficient to demonstrate a violation of substantive due process rights. The test for due process is not whether a reviewing court would have more precisely tailored the statute to the legislative purpose involved. Rather, the test is simply whether the legislature had a rational basis for the legislation. *See, e.g., United States v. Rich*, 708 F.3d 1135, 1139 (10th Cir.2013) (rejecting a substantive due process challenge to the use of older juvenile convictions for sentencing enhancements under the Armed Career Criminal Act).

A similar claim that a statute punished more conduct than was necessary to achieve statutory goals was rejected in *Thompkins, supra. Thompkins* upheld the mandatory drivers license suspensions of all drug offenders, even when a motor vehicle was not used in the commission of the crime in question. *Thompkins* held that the mandatory suspension serves to protect other drivers and to deter future drug use, as well as to punish offenders. *Id.,* 75 Ohio St.3d at 561, 1996-Ohio-264, 664 N.E.2d 926 (1996). The gun specification similarly serves to protect the public, deter future violent acts, and punish offenders, and those purposes are served regardless of whether an individual was on duty as a police officer when he committed a crime.

Deterrence of the use of firearms in the commission of crimes is a rational basis for an

enhanced penalty in R.C. 2941.145. That goal may rationally be advanced by applying the enhancement whenever conduct is found to be a criminal act in which a firearm is used, regardless of whether the crime is committed by a "member of the criminal world" or an on-duty police officer. Nothing in the statute purports to distinguish between hardened criminals, first-time offenders, or police officers entrusted with public safety. The legislative goal is advanced by applying the enhancement consistently to all crimes involving the use of firearms.

B. Application of R.C. 2941.145 to a police officer's on-duty crimes does not shock the conscience or interfere with rights implicit in the concept of ordered liberty.

Substantive due process protects individuals from government conduct that "shocks the conscience or interferes with rights implicit in the concept of ordered liberty." *United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The United States Supreme Court has refused to expand the concept of substantive due process, emphasizing that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.' " *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), quoting *Collins v. Harker Heights*, 503 U.S. 115, 129, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). The due process clause is intended to prevent government officials "from abusing [their] power, or employing it as an instrument of oppression." *Id.*

Due process challenges to sentencing statutes do not require a variation from these familiar tests. An individual enjoys "a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt," but a person who has been convicted of a crime "is eligible for, and the court may impose, whatever punishment is authorized for his offense so long as the penalty is not cruel and unusual . . . and so long as the

the penalty is not based on an arbitrary distinction." *Chapman v. United States*, 500 U.S. 453, 465, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991) (citations omitted). *Accord United States v. Bredy*, 209 F.3d 1193, 1197 (10th Cir.2000) (upholding the constitutionality of a "three-strikes" statute, even when a sentence was based on convictions occurring long before the crime for which punishment is imposed).

Applying Ohio's specification to all criminal acts involving a firearm does not "shock the conscience." Once a factfinder has determined that a crime was committed, and that the defendant used a firearm to commit the crime, application of the firearm specification is not in any respect "shocking." To the contrary, consistent application of the firearm specification may rationally be expected to increase its value in deterring violent crimes. And the reverse is equally true--carving out exceptions where none are stated on the face of the statute may rationally be expected to decrease the enhancement's deterrent value.

The Sixth District criticized Ohio's firearm enhancement for imposing a penalty on an individual when he did not "*voluntarily*" introduce a firearm into a felony. *Id.* at ¶166. Of course, that articulation of legislative purpose ignores the fact that all criminal liability is premised on "either a voluntary act, or an omission to perform an act or duty that the person is capable of performing." *See* R.C. 2901.21(A)(1). When a jury finds an officer guilty of committing a crime, he is found to have "voluntarily" committed the crime. An officer may be required to carry a gun, but he is not required to discharge it at every opportunity. When discharge of the firearm results in a criminal conviction, the officer's use of the gun can be considered neither involuntary nor an act in the scope of law enforcement duties.

The State acknowledges that the distinction drawn by the Sixth District might be more

relevant if an officer were charged with a crime not involving the active use of a firearm, along with a specification pursuant to R.C. 2941.141 for having a firearm on or about his person. An officer's conviction for a felony not involving the use of the firearm when he was required to carry the firearm might arguably raise different policy considerations, but even in such a case it is far from clear that those considerations would require a different result.[3] In any event, those considerations are not implicated in this case because White undeniably and voluntarily chose to use his firearm in committing a criminal offense.

C. The Sixth District's decision erroneously relies on rules of statutory construction when the statute involved in this case is unambiguous.

White contended that its conclusion was consistent with R.C. 2901.04(A), which specifies that statutes defining offenses and penalties "shall be strictly construed against the state, and liberally construed in favor of the accused." *White*, ¶169. However, R.C. 2901.04 is a rule of statutory construction, and rules of construction do not apply in the absence of ambiguity in the statute. "The first rule of statutory construction is that a statute which is clear is to be applied, not construed." *Vought Industries v. Tracy*, 72 Ohio St.3d 261, 265, 1995-Ohio-18, 648 N.E.2d 1364. *See also* R.C. 1.49 (permitting the court to examine statutory intent "if the statute is ambiguous").

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[3]When an officer is convicted of a specification for possession of his firearm, the underlying crime cannot be said to be within the scope of his employment, and application of the specification may be rationally related to the legislative aims of deterring crime when the offender possesses a firearm. For example, a firearm enhancement may properly be applied to an officer's crime when possession of the gun "emboldens" the officer to commit the crime. *See, e.g., United States v. Contreras*, 950 F.2d 232, 235, 242 (5th Cir.1991) (jury could reasonably have concluded that police officer was emboldened by his possession of a firearm to sexually assault woman involved in traffic stop, although she testified that the officer did not threaten her with the gun and that he removed his gun belt and placed it on top of the car before committing the assault inside the vehicle).

R.C. 2901.04 is no exception to this general rule. This court has held that R.C. 2901.04 is a codification of the "rule of lenity," which requires that "ambiguity in a criminal statute is construed strictly" against the state. *State v. Swidas*, 133 Ohio St.3d 460, 2012-Ohio-4638, 979 N.E.2d 254, ¶24. In other words, application of R.C. 2901.04(A) is conditioned upon the existence of ambiguity in a statute.

However, R.C. 2941.145 is unambiguous. Nothing in the statute creates a special exemption for police officers, and where the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, without "judicial modification" or the addition of language to the statute. *Bernardini v. Conneaut Area City School Dist. Bd. of Edn.*, 58 Ohio St.2d 1, 4, 567 N.E.2d 987 (1991); *Spartan Chem. Co., Inc. v. Tracy*, 72 Ohio St.3d 200, 202, 1995-Ohio-237, 648 N.E.2d 819. "'There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for.'" *Vought Industries,* 72 Ohio St. 3d at 265, 1995-Ohio-18, 648 N.E.2d 1364.

D. The Sixth District's decision conflicts with other jurisdictions' case law analyzing comparable firearm enhancements.

Other jurisdictions have upheld application of firearm enhancements to police officers committing criminal acts, and those cases are not limited to "egregious 'cop corruption' cases involving the commission of collateral felonies over extended time periods." *See White*, ¶155. For example, 18 U.S.C. 924(c)(1)(A) applies an enhancement when, "during and in relation to any crime of violence . . . for which the person may be prosecuted in a court of the United States," an individual "uses or carries a firearm, or who, in furtherance of any such crime,

possesses a firearm." The enhancement carries a 10-year sentence if the firearm is discharged during commission of the crime.

The 10-year enhancement was applied to border patrol officers' convictions for assault and other crimes when they pursued and shot a drug smuggler as he fled on foot. *See United States v. Ramos*, 537 F.3d 439 (5th Cir.2008), cert. denied, 556 U.S. 1127, 129 S.Ct. 1615, 173 L.Ed.2d 994 (2009). *Ramos* held that nothing in the statute itself offered support for an exemption of police officers:

> . . . there is no question but that a police officer's unjustifiable shooting of a victim qualifies as a crime of violence; there is no question but that a police officer's shooting a victim who poses no physical threat to the safety of the officer or the public is unjustifiable; there is no question but that during this conduct each of the defendants used a firearm.

Id. at 460. Other courts have relied on *Ramos* in rejecting due process claims by officers charged with criminal acts while on duty. *See, e.g., United States v. Bowen*, E.D.La. No. 10-204 N(1), 2012 U.S. Dist. LEXIS 50670 (Apr. 11,2012), [*45]; and *United States v. Warren*, E.D.La. No. 10-154(1), 2013 U.S. Dist. LEXIS 57260 (Apr. 22, 2013), [*2].

In *White*, the Sixth District distinguished several cases on the basis that they involved application of an enhancement to officers who commit crimes well outside the scope of their official duties. *Ramos* flatly rejected that distinction:

> We can surely debate whether there is an intuitive distinction between a violent criminal or a drug trafficker using a gun during the course of their trade and a police officer using a gun against a fleeing felon; however, neither the statute nor the cases make such a distinction. Still yet, the Supreme Court of the United States has firmly established that the conduct with which [the agents] were charged, and for which they were convicted by a jury of their peers, violates the Fourth Amendment rights of the fleeing felon if he poses no physical threat to the officers or danger to others.

Id. at 458.

Like *Ramos*, the Michigan Court of Appeals upheld application of a firearm enhancement to an on-duty officer's shooting and manslaughter conviction. Michigan's Supreme Court denied review, but reconsidered after the legislature exempted officers found guilty of crimes in the performance of their duties. *See People v. Khoury,* 181 Mich. App. 320, 327-328 (1989), 436 Mich. 876 (1990), and 437 Mich. 954 (1991).

The Sixth District found that *Khoury* was of little persuasive value, because the case did not "identify or rely on legislative purpose as it might bear on whether the specification was appropriately applied to police officers who use their guns." *White*, ¶160. The suggestion that the General Assembly's intent was somehow different from the intent of Michigan statute ignores the common motivation for such legislation. As the Sixth District noted, such enhancements were adopted to combat "a drastic rise in violent crimes involving the use of firearms," and Ohio was one of a "growing number of states seeking to deter the use of guns in the commission of violent crimes." *Id.* at ¶166.

E. In the absence of previous decisions holding the specification unconstitutional, the trial court cannot be said to have committed plain error by applying the statute.

The constitutionality of the firearm specification is subject to the plain error doctrine, because the issue was not raised in the trial court. *See White*, ¶143 (noting that even when "waiver is clear" the court may consider constitutional challenges "in specific cases of plain error or where the rights and interests involved may warrant it"). *Accord In re M.D.*, 38 Ohio St.3d 149, 151, 527 N.E.2d 286 (1988).

This court has held that "plain" within the meaning of Crim.R. 52(B) requires an

"obvious" defect in the trial proceedings." *See, e.g., State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240. However, error is not "plain" when the lower appellate courts are divided on the issue and this court has not decided the issue. *Id.* at 29. When White's case was tried, neither this court nor Ohio's lower appellate courts had held R.C. 2941.145 unconstitutional as applied to an on-duty police officer. Accordingly, the trial court did not commit plain error in failing to find the statute unconstitutional as applied to White.

R.C. 2941.145 is unambiguous, has a rational basis, and does not shock the conscience when applied to an on-duty police officer's criminal act. Further, the trial court cannot be said to have committed plain error when, at the time of trial, neither this court nor any lower appellate courts had held the statute unconstitutional. The State therefore asks that the Sixth District's dismissal of the firearm specification be reversed.

Second Proposition of Law: Ohio does not permit pre-trial dismissals of criminal charges based on civil immunity principles.

Ohio law recognizes certain forms of immunity from criminal prosecution. See, e.g., R.C. 101.44 (immunity of individuals testifying before legislature); and 2945.44 (immunity of witnesses turning state's evidence). Ohio also recognizes sovereign immunity, which precludes civil liability for political subdivisions and their employees. See R.C. 2744.02. Ohio also specifically exempts police officers from certain criminal offenses.[4] See, e.g., R.C.

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[4]Just as Ohio has exempted certain categories of individuals, including law enforcement officers, from certain criminal offenses, other states have enacted statutory immunities to criminal prosecutions when an individual's use of force conformed with state law. *See, e.g.*, Fla.Stat.Ann. 776.032; Ala.Code 13A-3-23(d); Ky.Rev.Stat.Ann. 503.085, effective July 12, 2006; and Colo.Rev.Stat. 18-1-704.5(3). At least one state recently repealed its statute extending immunity to preclude prosecution when force was legally justified. *See* Kan.Stat.Ann. 21-3219, repealed effective July 1, 2011.

4511.191(A)(5)(b) (exempting officer from criminal liability for assault for taking blood draw). *See also Steele*, Slip Opinion No. 2013-Ohio-2470, ¶20, citing R.C. 2925.12(C)(1)(a) (carrying concealed weapons); 2923.121(B)(1)(a) (possessing firearm in a liquor permit premises); and 2923.17(C)(1) (possessing a dangerous ordnance).

None of these statutes purport to extend civil immunity principles to bar the criminal prosecution of a police officer for his on-duty criminal acts. Nevertheless, based on federal case law governing qualified immunity to civil suits pursuant to 42 U.S.C. 1983, the Sixth Appellate District suggested that "whether White's decision to shoot was objectively reasonable . . . could be resolved as a pure 'question of law' at some pretrial stage." *White, supra*, ¶84.

In fact, federal authorities do not support the extension of qualified immunity to bar criminal proceedings.

A. Federal case law does not support extension of civil immunity to bar criminal prosecutions.

The United States Supreme Court has noted, "Whatever may be the case with respect to civil liability generally . . . we have never held that the performance of the duties of judicial, legislative or executive officers requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights." *O'Shea v. Littleton*, 414 U.S. 488, 503, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974). *See also United States v. Dee*, 912 F.2d 741, 744 (4th Cir.1990); *United States v. Hastings*, 681 F.2d 706, 710-12 (11th Cir.1982); *United States v. Diggs*, 613 F.2d 988, 1001 (D.C.Cir. 1979). "Criminal conduct is not part of the necessary functions performed by public officials." *United States v. Isaacs*, 493 F.2d 1124, 1144 (7th Cir.1974).

In fact, decisions "which have recognized an immunity from civil suit for state officials

have presumed the existence of federal criminal liability as a restraining factor on the conduct of state officials." *United States v. Gillock*, 445 U.S. 360, 372, 100 S.Ct. 1185, 63 L.Ed.2d 454 (1980). The "judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct . . .'" *O'Shea*, 414 U.S. at 503. Thus, criminal liability may attach even when the official is immune from civil liability under 42 U.S.C. 1983. *Dennis v. Sparks*, 449 U.S. 24, 28, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980); *Imbler v. Pachtman*, 424 U.S. 409, 429, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976).

The Sixth District's majority opinion offered a single authority for the proposition that "immunities of the kind resembling qualified immunity might also protect police officers from criminal prosecution for using deadly force." *Id.* at ¶85, citing *Idaho v. Horiuchi*, 253 F.3d 359 (9th Cir.2001)[5]. *Horiuchi* held that the Supremacy Clause protects *federal* law enforcement officers from prosecutions in *state* court, as opposed to federal court. However, *Horiuchi* does not suggest the Supremacy Clause insulates state law enforcement officers from state prosecution, nor does *Horiuchi* suggest that civil immunity principles may bar a criminal prosecution.

B. A gesture or reaching motion alone is not generally the basis for pre-trial dismissal of suit pursuant to 42 U.S.C. 1983.

The Sixth District cited numerous cases involving "body language" as danger cues. *White*, ¶65-66. These cases involve civil claims and do not require some grant of immunity to criminal charges. Moreover, they are entirely inapposite to the facts of this case, in which there

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[5]Although not noted in the *White* opinion, *Horiuchi* was vacated as moot and is no longer available on LEXIS. *See Idaho v. Horiuchi*, 266 F.3d 979 (9th Cir.2001). The opinion is online at http://caselaw.findlaw.com/us-9th-circuit/1471745.html (last accessed July 29, 2013).

was no evidence whatsoever that McCloskey or Snyder was believed to have committed a dangerous crime. For example, the court summarized one case as involving an "unarmed suspect shot while "look[ing] over shoulder" and "mov[ing] his arms as though reaching for a weapon at waist level." *White*, ¶66, citing *Thompson v. Hubbard*, 257 F.3d 896, 899 (8th Cir.2001). That summary omits the detail that the officer was responding to reports of shots having been fired with two suspects fleeing the scene of an armed robbery. White was following McCloskey because impaired drivers are common at that time of the day. White was not following up on a report of a violent crime.

White summarized another case as holding "officer could reasonably believe that suspect in car was reaching for a gun on floorboard." *White*, ¶66, citing *Reese v. Anderson*, 926 F.2d 494 (5th Cir.1991). The court's synopsis omitted the fact that after a robbery of a convenience store was reported, officers pursued the suspects in a vehicle at speeds of 40 to 60 miles per hour while the occupants of the car tossed out items that appeared to be cash register pieces. After the car finally stopped, the front seat passenger reached downward two times, and each time the officer yelled for him to raise his hands and he complied immediately. When he reached a third time, this time further down the floorboard and to the left side of the seat, and the officer believed he had picked up a gun. No similar events--a violent crime, lengthy car chase, apparent disposal of contraband related to the violent crime, or repeated reaching motions despite instructions not to do so--were involved in this case.

Other cases relied upon were also factually dissimilar, involving either locations of criminal activity or reports that individuals were armed or involved in previous shootings. *See Slattery v. Rizzo*, 939 F.2d 213, 215 (4th Cir.1991) (officers were involved in a drug sting at a

location known as an open-air drug market with past incidents of violence); *Davis v. Freels*, 583 F.2d 337 (7th Cir.1978) (officers were told to look out for two men in blue Camaro with a black vinyl top, with an identified plate number, who were wanted in a shooting); *Anderson v. Russell*, 247 F.3d 125, 132 (4th Cir.2001) (man at a mall was drinking in the early afternoon and was wearing multiple layers of clothing with a bulge at his waist; another patron of the mall reported that he appeared to have a gun under his sweater); *Montoute v. Carr*, 114 F.3d 181, 185 (11th Cir.1997) (man in a boisterous crowd in the mall was seen with a sawed off shotgun after a shotgun blast was heard). In contrast, White acknowledged that Ottawa Hills was "pretty quiet," and there was no evidence linking either man to weapons or violence.

C. Ohio's Criminal Rules do not permit pre-trial dismissals of indictments based on a central issue for trial.

The Sixth District's opinion identified the mistaken belief component of qualified immunity and stated, "in the criminal context [the defense] would operate to negate the 'knowingly' element. . . " *White*, ¶121. However, the "knowingly" element is central to the criminal case against White. Application of qualified immunity principles to determine whether White acted "knowingly" would amount to a summary disposition of a criminal case.

But Ohio law does not permit summary dispositions of a criminal case based on evidence related to a general issue for trial. *See, e.g., State v. Riley*, 12th Dist. No. CA2001-04-095, 2001-Ohio-8618. Crim.R. 12(C) permits only pretrial motions regarding "any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue." Pre-trial dismissal is inappropriate when the motion requires "consideration of the general issue for trial." *State v. Kanavel*, 5th Dist. No. 2010-CA-131, 2011-Ohio-1711, ¶37.

A pre-trial motion to dismiss an indictment should be denied when, as here, that motion ultimately seeks dismissal based on the theory that the defendant did not act "knowingly." *State v. O'Neal*, 114 Ohio App.3d 335, 336, 683 N.E.2d 105 (2nd Dist.1996) (trial court erred in dismissing indictment on grounds that the amount of cocaine discovered was insufficient to establish defendant "knowingly" possessed the drug). Any motion to dismiss that requires examination of evidence beyond the face of the complaint must be presented as a motion for acquittal under Crim.R. 29 at the close of the State's case. *See Davis v. Poulos*, 5th Dist. No. 2007CA00120, 2008-Ohio-697, ¶25; and *State v. Varner*, 81 Ohio App.3d 85, 86, 610 N.E.2d 476 (9th Dist.1991).

Although this court has distinguished *O'Neal* and *Varner* when the motion to dismiss did not embrace the general issue for trial, that distinction does not apply in this case. Here, the issue of whether White acted "knowingly" is precisely the issue to be decided by the jury. *Cf. State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 67, ¶18 (trial court could consider evidence beyond the face of the indictment when the motion to dismiss argued that federal child pornography statutes deprived the defendant of the right to expert assistance).

Even jurisdictions with immunity statutes have considered the significant policy implications involved in a pre-trial resolution of an element of a crime. *See, e.g., Rodgers v. Commonwealth*, 285 S.W.3d 740, 754 (Ky.2009). Ky. Rev. Stat. 503.085 extends immunity to criminal charges arising out of the use of force in self-defense, unless there is probable cause to conclude that the force was unlawful. However, the statute provides no mechanism for evaluating whether such probable cause exists. In weighing how to determine whether the immunity should attach, *Rodgers* first noted Kentucky's "general rule that trial courts may not

dismiss indictments prior to trial," with a few limited exceptions. *Id.* at 750 and f.n. 5. The court then held that a pre-trial evidentiary hearing was inappropriate, because such a hearing would necessarily address an issue for trial:

> First, the pretrial evidentiary hearings that are currently conducted, such as suppression hearings, do not involve proof that is the essence of the crime charged but focus instead on issues such as protection of the defendant's right to be free from unreasonable searches and seizures, right to be represented by counsel and right to Miranda warnings prior to giving a statement. Similarly, a competency hearing addresses the state of the defendant's mental health and his ability to participate meaningfully in the trial. Neither of these hearings requires proof of the facts surrounding the alleged crime. An evidentiary hearing on immunity, by contrast, would involve the same witnesses and same proof to be adduced at the eventual trial, in essence a mini-trial and thus a process fraught with potential for abuse. Moreover, it would result in one of the elements of the alleged crime (no privilege to act in self-protection) being determined in a bench trial.

Id. at 755. *See also Commonwealth v. Bushart*, 337 S.W.3d 666 (Ky.App.2011) (trial court erred in considering a defendant's affidavit in determining immunity issue because consideration of the affidavit resulted in a "mini-trial," in which the prosecution had no opportunity to cross-examine the defendant about the substance of his affidavit).

Unlike Kentucky, Ohio does not have an immunity statute applicable to the felonious assault charge, and there is no authority supporting an expansion of civil immunity to bar criminal prosecutions in Ohio. Such application of the principles of civil immunity to a criminal charge would necessitate a summary disposition of the general issue for trial, which is currently not permitted under authority of this court and the lower courts of appeals. The State therefore seeks a rule of law that immunity to civil suit will not bar criminal prosecution for an officer's acts committed in the performance of law enforcement duties.

<u>Third Proposition of Law</u>: 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.

In 1985, the U.S. Supreme Court considered the constitutionality of a statute providing that if a police officer gives notice of intent to arrest a criminal suspect, and the suspect flees or forcibly resists, "the officer may use all the necessary means to effect the arrest." *See Tennessee v. Garner*, 471 U.S. 1, 7, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). *Garner* found the statute unconstitutional when it authorized the use of deadly force against an apparently unarmed, nondangerous fleeing suspect. The court reasoned that "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." The use of deadly force violates the Fourth Amendment unless "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others," or if "there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm." *Garner*, 471 U.S. at 11. Ultimately, the issue depended on the reasonableness of the officer's belief. In that case, "Officer Hymon could not reasonably have believed that Garner--young, slight and unarmed--posed any threat." *Id.* at 21.

Four years later, the court considered the question of excessive force in the context of a civil action pursuant to 42 U.S.C. 1983. *See Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). *Graham* involved a claim that excessive force was used in an arrest or investigatory stop. As in *Garner*, the court held that the Fourth Amendment governed the issue:

> Today we make explicit what was implicit in *Garner*'s analysis, and hold that all claims that law enforcement officers have used excessive force--deadly or not--in

> the course of arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach.

Id. at 395. *Graham* held that the issue required a "careful balancing" of the facts and circumstances of each case, 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." *Id.* at 396.

In 2007, the court considered another issue related to 42 U.S.C. 1983, this time involving the question of "whether a law enforcement official can, consistent with the Fourth Amendment, attempt to stop a fleeing motorist from continuing his public-endangering flight by ramming the motorist's car from behind." *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). In *Scott*, the fleeing motorist argued that deadly force could only be used when "(1) The suspect must have posed an immediate threat of serious physical harm to the officer or others; (2) deadly force must have been necessary to prevent escape; and (3) where feasible, the officer must have given the suspect some warning."

Scott rejected the motorist's argument, noting that "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" The court noted that "*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." In the final analysis, "all that matters is whether Scott's actions were reasonable." *Id.* at 383.

Reasonableness is thus the foundation of Fourth Amendment case law, regardless of whether deadly force or non-deadly force is used to effect a seizure. But in this case, the Sixth District drew a sharp distinction between the two kinds of force. The Sixth District found the trial

court erred in instructing the jury on "excessive force" in a case in which "deadly force" was used. The court noted that there is a clear distinction between "excessive" and "deadly" force, and held that the trial court failed to give an instruction mirroring the language of *Garner*. *White*, ¶59, 108-109.

The Sixth District's analysis is flawed in several respects. First, the premise of the court's holding is untenable, because the instructions given by the trial court properly articulated considerations in assessing reasonableness. Second, the absence of a deadly force instruction operated to the prejudice of the State, not the defendant, and should not be used as a reason to reverse a guilty verdict. Third, the doctrine of invited error precludes reversal when the instruction given was based on the instruction tendered by the defendant in this case. Finally, the instructions in this case served their intended purpose of providing the legal principles to guide the jury's determination of the case based on the evidence presented at trial.

A. The trial court's instruction focus on reasonableness of White's beliefs was consistent with *Garner* and *Graham*.

Garner held that in order for the use of deadly force to be constitutional, it must be "necessary to prevent . . . escape" or the officer must have "probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officers or others," a threat which must be "immediate." *Id.*, 471 U.S. at 3. Significantly, "*reasonable* threat perception is the 'minimum requirement' before deadly force may be used." *White*, ¶62 (emphasis in original).

The trial court in this case instructed the jury that (1) reasonableness of force is determined by "whether the defendant had reasonable grounds to believe Officer Sargent or

himself was in imminent danger of death or great bodily harm," and (2) "[y]ou must consider the conduct of Michael McCloskey and decide whether his acts caused the defendant reasonably and honestly to believe that Officer Sargent or himself was about to be killed or receive great bodily harm." That instruction is not materially different from *Garner*'s language requiring "probable cause to believe that the suspect poses a threat of serious physical harm" and that the threat is "immediate," coupled with the requirement that the perception of threat be reasonable. *See Garner*, 471 U.S. at 11; *White*, ¶62. *Garner* and *Graham* both require that the judicial system "slosh . . . through the factbound morass of 'reasonableness.'" *Scott*, 550 U.S. at 383, 127 S.Ct. 1769, 167 L.Ed.2d 686. And here, the jury received detailed instructions on how to make that journey.

Even in a shooting case, the trial court properly instructs a jury to follow a "general rubric of reasonableness," because "all claims that law enforcement officers have used excessive force . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Noel v. Artson*, 641 F.3d 580, 587 (4th Cir.2011) (quoting *Graham*). Particularly after *Scott v. Harris*, application of a general reasonableness instruction is appropriate:

> Acosta appeals, arguing that the jury should have been given a separate deadly force instruction. We have jurisdiction under 28 U.S.C. § 1291.
>
> *Scott v. Harris*, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007), forecloses Acosta's deadly force argument. *Scott* held that there is no special Fourth Amendment standard for unconstitutional deadly force. See id. at 1777-78. Instead, "all that matters is whether [the police officer's] actions were reasonable." *Id.* at 1778 (emphasis added). Here, the jury was given an excessive force instruction and found for Officer Hill; it must therefore have determined that the officer acted reasonably. Under *Scott*, that is the end of the inquiry. The district court didn't err by refusing to give a separate deadly force instruction.
>
> We had previously held that "[a]n excessive force instruction is not a substitute

> for a . . . deadly force instruction." We reached this conclusion based on the observation that "the Supreme Court . . . established a special rule concerning deadly force." *Scott* explicitly contradicts that observation. 127 S. Ct. at 1777-78. *Scott* controls because it is "intervening Supreme Court authority" that is "clearly irreconcilable with our prior circuit authority."

Acosta v. Hill, 504 F.3d 1323, 1324 (9th Cir.2007) (some citations omitted).

At least one other state's appellate court has found reversible error in the failure to give an instruction based on *Graham* when an officer's use of deadly force resulted in criminal charges. *See State v. Smith*, 73 Conn. App. 173, 807 A.2d 500 (2002). Smith was a police officer convicted of manslaughter in the first degree with a firearm, but the trial court denied the defendant's request for an instruction that the jury should consider "the facts and circumstances as you find them to be, including the severity of the crimes the officer was attempting to arrest the deceased for, whether the deceased posed an immediate threat to the safety of the police officers or others, and whether the deceased was actively resisting arrest." Because the requested instruction properly allowed reasonableness to be judged from the perspective of a reasonable police officer, the court reversed the judgment and remanded for a new trial.

The majority opinion and the dissent in *White* debated whether the Supreme Court abandoned *Garner*'s test for deadly force in *Scott*. *See, e.g., White*, ¶205-206 and f.n. 23. Generally, *Scott* has been interpreted as "apparently expanding the scope of the reasonable use of deadly force." *Breedlove v. Leone*, M.D.Fla. 6:11-cv-2027-Orl-31TBS, 2013 U.S.Dist.LEXIS 56472 (M.D.Fla. Apr.19, 2013). That issue does not directly confront this court, because the State does not dispute that White used deadly force. However, the absence of the *Garner*-based instruction does not require reversal, because the party prejudiced by the absence of the instruction was the State, and the State prevailed despite the lack of the instruction. If anyone

benefitted from the lack of a *Garner*-based instruction, it was the defendant, and he may not complain or seek reversal of his conviction when he did not request and would not have benefitted from the deadly force instruction.

B. In a trial related to deadly force, a failure to quote *Garner* at worst operates to the detriment of the State, not the defendant, and that failure may not be used to reverse a defendant's conviction and sentence.

The majority opinion reasoned that in the absence of a deadly force instruction, jurors could conclude "that it was 'objectively reasonable' for the officer to shoot a suspect who posed no threat or who, in the 'escape' category, was fleeing the scene of a nonviolent misdemeanor or traffic offense rather than a violent felony." *Id.* at ¶108. Similar reasoning was employed by one of the Sixth District's authorities, *Rahn v. Hawkins*, 464 F.3d 813, 818 (8th Cir.2006).

The reasoning is fundamentally flawed when applied to this case. Crim.R. 52(A), requires the court to disregard error "which does not affect substantial rights." The harm identified in the court's failure to give a deadly force instruction is simply that the jury might err to the benefit of the defendant and find that he was justified in his use of deadly force when the victim did not actually pose a threat or was not actually fleeing after commission of a violent felony. *White*, ¶108; *Rahn* at 818. Of course, such an error does not prejudice the defendant. Rather, it works to his benefit, and one supposes that the defense request for a *Graham*-based instruction in this case was crafted with this advantage in mind. Simply because the *Graham*-based instruction was unsuccessful does not mean that the trial court committed a reversible error.

Certainly some courts continue to require an instruction based on *Garner* when considering a shooting by a law enforcement officer. However, failure to provide a special

instruction based on *Garner* is reversible error only when the jury finds in favor of the officer, so that the error operated to the officer's benefit and to the prejudice of the party alleging the error on appeal. *See, e.g., Rahn,* 464 F.3d 817 (trial court erred in refusing to provide deadly force instruction requested by plaintiff-arrestee after he was shot; the defendant officer prevailed at trial). *Accord Rasanen v. Doe,* Case No. 12-680-cv, 2013 U.S. App. LEXIS 14628 (2nd Cir.2013) (trial court erred in failing to give a deadly force instruction based on *Garner*; the defendant police officer prevailed at trial).

White also relied on an Ohio case, *State v. Sims*, 8th Dist. No. 85608, 2005-Ohio-5846, which found that the trial court erred in giving a non-deadly force instruction when deadly force was used. *Sims* is inapposite to this case. *Sims* involved deadly force, but the trial court instructed the jury that the defendant could claim self-defense if "his only means to protect himself from such danger was by the use of force *not likely to cause death or great bodily harm.*" *Id.* (emphasis added). In effect, the instruction precluded the use of deadly force in support of a self-defense claim when the defendant used deadly force, so that the instruction operated to the detriment of defendant Sims. In contrast, if the instruction in this case operated to anyone's benefit, it was to the benefit of the defendant. *Sims* does not support reversal of a verdict against a defendant based on a jury instruction which theoretically operated to the defendant's benefit.

C. The doctrine of invited error should be applied.

Finally, the Sixth District did not address the fact that the trial court's instructions were based on an instruction requested by defense counsel. The requested instruction stated:

> Even if not acting in self-defense, a police officer acting in pursuit of his official duties is justified in using such force, including deadly force, that is objectively reasonable under the circumstances. It is objectively reasonable under the

> circumstances if an officer has cause to believe that a person poses a threat of serious physical harm, either to the officer or to others.

Under the doctrine of invited error, defendant may not "take advantage of an error which he himself invited or induced." *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶145. Likewise, the plain error doctrine cannot be used to negate a deliberate, tactical decision by trial counsel. *State v. Clayton*, 62 Ohio St.2d 45, 46-48, 402 N.E.2d 1189 (1980). Especially in this case, where defense counsel wisely advocated for an excessive-force standard, application of that standard should not be the basis of reversal.

D. The trial court did not abuse its discretion in its instruction regarding "more force than reasonably necessary in pursuing his official duties."

The Sixth District also found fault in the instruction that "[i]f the defendant used more force than reasonably necessary in pursuing his official duties, the defense of justification is not available." The instruction was based on *Skinner v. Brooks*, 74 Ohio App. 288, 291-292, 58 N.E.2d 697 (1944), which held that it was reversible error to charge a jury only on self-defense when injuries complained of were inflicted by a police officer using no more force than was reasonably necessary. Defense counsel offered no authority that the instruction was improper.

This court requires instructions to be viewed "in the context of the overall charge." *See State v. Price*, 60 Ohio St.2d 136, 398 N.E.2d 772 (1979). The trial court instructed the jury to assess reasonableness from White's perspective, with his characteristics and knowledge, and under the circumstances and conditions that surrounded him at the time. The instruction also cautioned against using the "20/20 vision of hindsight," because "[w]hat constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure." Finally, the jury was told that "[a]llowance must be made for the fact

that officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving." When viewed in the context of the charge, the instruction based on *Skinner* did not amount to an abuse of discretion.

E. The instructions properly provided the legal principles to guide the jury's deliberations.

The Sixth District complained that the instructions reduced "*Garner*'s deadly force test to "[whether it] was objectively reasonable under the circumstances." *White*, ¶110. According to the Sixth District, whether White's actions were objectively reasonable "is a conclusion which the jury might draw only after it was properly instructed to apply *Garner*'s "threat" standard to (1) the segment of the videotape in the moments preceding the gunfire (2:16.47 through 2:16.57) and (2) White's testimony detailing his pre-shooting perceptions of McCloskey's movements from his angle." *Id.*

In effect, the Sixth District's complaint requires isolation of two pieces of evidence with particular instructions as to the issues related to that evidence. Any such instruction would infringe on counsel's ability to argue the evidence and the conclusions to be drawn from the evidence.

Ohio courts recognize that jury instructions should outline pertinent issues, provide the relevant principles of law, and clarify the jury's role. *See State v. McCullough*, 3d Dist. No. 12-07-09, 2008-Ohio-3055, ¶39; and *Bahm v. Pittsburgh & Lake Erie Rd. Co.*, 6 Ohio St.2d 192, 217 N.E.2d 217 (1966). Here the court instructed the jury to make its findings "after a full and impartial consideration of all the evidence." The trial court likewise instructed the jury as to the nature of evidence, including the distinction between direct and circumstantial evidence. (TT

1226-1227.) Such a general instruction to consider the evidence in its entirety was sufficient to guide the jury's deliberations.

The trial court's instructions in this case required the jury to determine whether McCloskey's actions caused White "reasonably and honestly to believe that Officer Sargent or himself was about to be killed or receive great bodily harm." Reasonableness was to be assessed from the perspective of a police officer "in light of all the facts and circumstances confronting the officer at the time and in the moments before the use of deadly force." The instructions did not prejudice defendant and should not have been found to constitute reversible error.

Fourth Proposition of Law: 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 Rules of Criminal Procedure specify the process for requesting and objecting to jury instructions. First, Crim.R. 30(A) provides that at the close of evidence, "any party may file written requests that the court instruct the jury on the law as set forth in the requests." Second, the Rule 30 requires that if a party has an objection to the trial court's instructions, it must be expressly raised before the jury begins deliberations. If an objection is not made, the party waives all but plain error. *Steele*, Slip Opinion 2013-Ohio-2470, ¶29.

Defense counsel in this case followed the procedures in Crim.R. 30. Counsel filed a written request for instructions that (1) a police officer is justified in using force "that is objectively reasonable under the circumstances;" (2) the jury should assess whether White "had reasonable grounds to believe Officer Sargent or himself was in imminent danger of death or great bodily harm;" (3) the jury should judge reasonableness from the perspective of a reasonable police officer; and (4) police officers have no obligation to retreat when effecting an arrest. The

requested instructions did not include a request for an instruction on mistaken belief or mistake of fact.

Likewise, during conferences outside the presence of the jury, the defense requested an instruction on negligent assault in violation of R.C. 2903.14. (TT at 1097.) Defense counsel did not request an instruction on mistake of fact, and the court rejected the requested instruction on negligent assault, because any argument based on negligent belief was encompassed by the instruction regarding justification that the defense had requested:

> THE COURT: Well, it appears that the argument being made really applies into a justification of the defense of the defense of justification. In other words, the justification defense is allowable because he miscalculated on the facts and negligently applied that which he saw and interpreted. It does not go to the actual elements of the offense, the assault. The elements of the felonious assault, knowingly cause physical harm with a deadly weapon, that being a firearm, at least that is the section we're charging under; is that correct?
> [PROSECUTOR]: Knowingly cause physical harm with a deadly weapon, yes.
> THE COURT: Correct. These facts have been clearly established not only by the witnesses called by the State but by the defendant himself when he was on the witness stand. Therefore, the facts are in evidence.
> Now, what the jury decides to do with them, that's in their province. But there is an instruction that will be given, at least my understanding at this point in the argument, that the justification defense, for lack of better terms, is going to be presented and instructed on. And the request that you're making [defense counsel] is going to be denied.
> But it also is more of a sub defense in the justification itself in that your articulated reason as to why he was justified in the shooting is because there was a negligent misunderstanding of it or the pressure of it, whatever your going to argue, I don't see it applying directly to the court giving the lesser offense. And quite simply it's going to be denied.

(TT at 1100-1101.)

Just as there was no request for a special instruction on mistaken belief or mistake of fact, there was likewise no objection to the absence of a such an instruction, and there was finally no

assignment of error on appeal that asserted the absence of a mistake instruction.[6] The Sixth District nevertheless found that the trial court should have provided an instruction on the defense of mistaken belief. *White*, ¶116.

White does not provide a model instruction for mistaken belief. The instruction frequently used in Ohio requires a finding that the defendant had "an honest belief arrived at in good faith in the existence of such facts and acted in accordance with the facts as he believed them to be." O.J.I. 417.05. But as *White* acknowledges, the trial court instructed the jury that it could consider whether "the defendant reasonably and honestly to believe" that his life or his colleague's life was in danger. *White*, f.n. 24. And as *White* acknowledges, Ohio courts have held that such phrases incorporate the concept of mistake. *Id.,* citing *State v. Dunivant*, 5th Dist. No. 2003-CA-00175, 2005-Ohio-1497, ¶23-27 and *State v. Evans*, 8th Dist. No. 79895, 2002-Ohio-2610, ¶53. Additionally, this court has previously rejected the idea that a mistaken belief as to factual circumstances may negate a mens rea of "knowingly." *See State v. Wenger*, 58 Ohio St.2d 336, 390 N.E.2d 801 (1979), f.n. 3 (noting that there was "no question that the defendant intended to strike Officer Whalen in the back with the stick, and his motive or purpose for intervening has no bearing on the requirements for a conviction of assault").

The State acknowledges that some appellate districts have suggested that a mistake of fact may be a defense to felonious assault, at least under certain circumstances. *See State v. Rawson*, 7th Dist. No. 05 JE 2, 2006-Ohio-496. ¶7. Even when that rule is applied, denial of the mistaken belief instruction is not error if the jury is instructed to apply the statutory definition of

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[6]On appeal, the only assignment of error that mentioned mistake was the first assignment claiming that the verdict was not supported by sufficient evidence.

"knowingly." The statutory definition of "knowingly" incorporates the defense of mistake of fact and instructs "the jury to consider the facts and circumstances in the case" in determining whether the defendant knew his conduct would seriously harm another. The statutory definition is sufficient to instruct the jury to acquit the defendant if he was "mistaken about a fact which would nullify the 'knowingly' element of the offense." *Id.* at ¶15. *Accord State v. Mooney*, 9th Dist. No. 94CA005860, 1995 Ohio App. LEXIS 3131, 4-7 (mistake of fact instruction was unnecessary when the court "gave the jury detailed instructions regarding the element of knowledge required for a finding of felonious assault"). Even the Sixth District, less than one month after the decision in *White*, noted that a mistake-of-fact instruction was unnecessary when the general jury charge on the mens rea "fully embraced" the defense. *See State v. Griffin*, 6th Dist. No. L-11-1283, 2013-Ohio-411, ¶36-39, citing *Rawson* and *State v. Harrison*, 12th Dist. No. CA87-11-151, 1988 Ohio App. LEXIS 1765 (June 30, 1988).

As in *Rawson*, here the trial court provided the statutory definition of "knowingly." Further, in this case, the parties had reached an agreement to provide the justification instruction. That instruction provided ample room for defense counsel to argue that the State did not prove the elements of "knowingly" beyond a reasonable doubt. Defense counsel exploited this opportunity, arguing that the prosecution had not proven its case if White reasonably feared for his life or another's life, even though McCloskey had no weapon:

> The officer just has to fear for his life. It doesn't matter if it's a minor misdemeanor or the most severe felony. It's not required. There doesn't have to be a weapon of any kind if the officer reasonably believes under all the circumstances that either his life or that of another was in danger.

(TT at 1165.)

Because no request for a special mistake instruction was made, and because no objection to its absence was made, the matter is subject to plain error review. At a minimum, this court has held that plain error requires a "deviation from the legal rule," which is an "obvious" defect in proceedings, and which "affected the outcome of the trial." *See State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240. Here, there was no authority requiring the mistake instruction, but there were several authorities which suggested that the need was obviated by the general charge on "knowingly." There was, moreover, the trial court's own reasoning that the justification defense subsumed any claim that the action was the result of a negligent or incorrect assessment of the circumstances. The failure to give the instruction is therefore not an "obvious" deviation from an established legal rule.

Of course, plain error in jury instructions exists only when an "alleged deficiency clearly caused a different trial result or created a manifest miscarriage of justice." *State v. Stallings*, 89 Ohio St.3d 280, 292, 2000-Ohio-164, 731 N.E.2d 159. Here, trial counsel made the same arguments regarding the reasonableness of White's belief that would have been applicable if the mistake-of-fact instruction had been given. The absence of the instruction cannot be said to have clearly caused a different result at trial. *See State v. O'Brien*, 11th Dist. No. 2011-L-011, 2013-Ohio-13, ¶73 (the trial court did not commit plain error in failing to give an "accident" instruction when crimes required a mens rea of knowingly).

This court recently recognized that even when the minimum requirements of plain error are met, application of the plain error doctrine is not required. Rather, the doctrine should be reserved "for situations involving more than merely theoretical prejudice to substantial rights." *Steele*, Slip Opinion No. 2013-Ohio-2470, ¶30. When a jury was instructed to apply the statutory

definition of "knowingly," and defense counsel appropriately argued that the officer's belief could be wrong but still reasonable, the absence of a mistaken belief instruction did not clearly cause a different trial result or create a manifest miscarriage of justice. The Sixth District's holding should be reversed.

Fifth Proposition of Law: 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.

Trial courts' evidentiary rulings must be reviewed for an abuse of discretion. *State v. Sage*, 31 Ohio St.3d 173, 180, 510 N.E.2d 343 (1987). "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). The ruling in this case fails to demonstrate that attitude.

Any testimony about what White intended would have been offered with the benefit of hindsight, in an effort to exaggerate the perception of the risk to public harm and safety, despite White's admissions that he did not feel at risk as he followed the motorcycles and even after McCloskey first stopped at the intersection of Indian and Central.

Moreover, there was clearly no evidence to support a felony charge for fleeing. R.C. 2921.331(B) provides that fleeing is a felony if (1) "the offender was fleeing immediately after the commission of a felony;" or (2) "operation of the motor vehicle by the offender was a proximate cause of serious physical harm to persons or property;" or (3) "operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property." There was no evidence that McCloskey was fleeing immediately after the commission of a felony. There was no likewise no evidence that his operation of the motorcycle proximately

caused serious physical harm or caused a substantial risk of serious physical harm to persons or property. There was simply nothing to support a felony charge.

And most significantly, the jury instruction referenced only the "severity of the crime Mr. McCloskey was believed to have committed." That instruction did not require classification of an offense in terms of felony or misdemeanor or the number of the Revised Code with which he might be charged. The jury heard evidence regarding McCloskey's conduct, including the videotape depicting the conduct in question, as well as White's meticulous recounting of each violation he perceived as he followed the motorcycles. The jury was quite capable of assessing the "severity" of the crime McCloskey was suspected of having committed based on that evidence.

Finally, evidence of a possible felony fleeing charge would have been more prejudicial than probative. There was no foundation for the intended testimony in the video recording, and that same recording let the jury assess the "severity" of McCloskey's alleged criminal acts.

Garner warned against "automatically transforming every fleeing misdemeanant into a fleeing felon." *Garner*, 471 U.S. at f.n.9, 105 S.Ct. 1694, 85 L.Ed.2d 1. The testimony offered in this case would have done precisely that. The level of the offense contemplated had no bearing on the reasonableness of the officer's actions, which was best assessed by the jury based on the video and the testimony offered at trial.

CONCLUSION

In some sense, the Sixth District's decision eases the burden on Ohio's prosecutors. If on-duty police officers are immune from criminal liability, or if firearm specifications may not be applied to officers' on-duty crimes, prosecutors no longer need concern themselves with whether

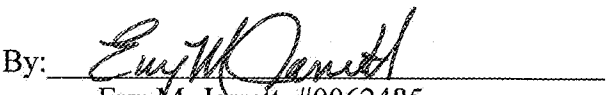
to charge certain crimes, or whether to apply firearm specifications to officers' crimes. Under the Sixth District's decision, prosecutors are equipped with a ready response to claims of bias or favoritism when members of the public protest failures to prosecute potentially criminal acts by police officers.

But the automatic response does not serve the public's best interest. Permitting criminal charges against on-duty officers provides a safeguard against abuse by those entrusted with ensuring public safety and adherence to Ohio's criminal laws. Where the General Assembly has not exempted officers from criminal liability or from application of an enhancement, the system's safeguard should be respected and the statutes should be applied as written.

And when, as in this case, an officer is convicted of a violation of a criminal statute, reversal is inappropriate on grounds that the instructions given were too favorable to the defendant. Reversal is likewise inappropriate on grounds that the trial court failed to provide an instruction that the defendant did not request at trial, particularly when the instruction was subsumed in other portions of the jury charge. The State therefore respectfully requests that the Court reverse the decision of the Sixth Appellate District and reinstate White's conviction and the trial court's sentence.

Respectfully submitted,

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By: 
Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney

CERTIFICATION

I certify that a copy of the foregoing was sent via ordinary U.S. Mail this 12th day of August, 2013, to Peter Galyardt, Assistant State Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215 and Matthew A. Kern, 72 Public Square, Medina, Ohio 44256.

Evy M. Jarrett

APPENDIX

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ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	*	Case No.: 13-0109
	*	C.A. Case No.: L-10-1194
Appellant,		C.P. Case No.: CR09-2300
-vs-	*	APPEAL FROM THE LUCAS COUNTY COURT OF APPEALS, SIXTH APPELLATE DISTRICT
THOMAS CAINE WHITE,	*	
	*	
Appellee.	*	

NOTICE OF APPEAL OF THE STATE OF OHIO

JULIA R. BATES, PROSECUTING ATTORNEY
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FILED
JAN 18 2013
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
JAN 18 2013
CLERK OF COURT
SUPREME COURT OF OHIO

Appellant the State of Ohio hereby gives notice of its appeal to the Supreme Court of Ohio from the judgment of the Lucas County Court of Appeals, Sixth Appellate District, entered in Court of Appeals Case No. L-10-1194 on January 11, 2013.

The case involves a felony and raises a substantial constitutional question and a matter of public or great general interest. See S.Ct.Prac.R. 5.02(A).

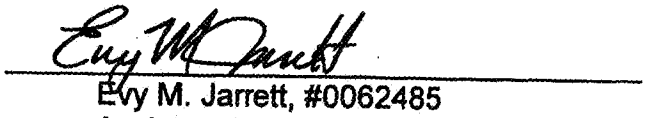
Respectfully submitted,

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By:
Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney
Counsel for Appellee

CERTIFICATION

I certify that a copy of the foregoing was sent via ordinary U.S. Mail this 17th day of January, 2013, to Deborah Kovac Rump, 1700 Canton Ave., Ste. 2, Toledo, Ohio 43604, and to the Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.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IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Appellee

v.

Thomas Caine White

Appellant

Court of Appeals No. L-10-1194

Trial Court No. CR0200902300

DECISION AND JUDGMENT

Decided: January 11, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Deborah Kovac Rump, for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} Defendant-appellant, Thomas C. White, formerly a police officer for the village of Ottawa Hills, appeals his convictions for felonious assault with a firearm specification. For the following reasons, we reverse his convictions and remand this case for a new trial.

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I. Background

{¶ 2} On July 2, 2009, White was indicted by a Lucas County Grand Jury for the on-duty shooting of a motorcyclist after a brief vehicle pursuit through the streets of Ottawa Hills. The shooting left the motorcyclist, Michael McCloskey, permanently paralyzed from the waist down. On May 14, 2010, following a four-day jury trial, White was convicted of both felonious assault and the firearm specification. On June 21, 2010, the Lucas County Court of Common Pleas sentenced him to a ten-year prison term. This appeal followed.

A. Essential Trial Testimony

{¶ 3} This case is unique. Although the propriety of Officer White's decision to shoot was, and remains, disputed, the events preceding it are not. We have thoroughly examined the testimony and other evidence in the trial record. Because an understanding of the material facts is critical to addressing the legal issues White raises, they will be rendered in considerable detail.

1) Officer Thomas White

{¶ 4} At approximately 2:15 a.m. on May 23, 2009, Officer White was on routine patrol in his Ottawa Hills police cruiser. He had been a part-time police officer and full-time dispatcher for the village since September 2005. He was driving on Indian Road which traverses the village of Ottawa Hills in a northwesterly direction from Secor Road to Central Avenue. The posted speed limit is 25 m.p.h. At or near Hempstead Road, he

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came up behind two motorcyclists traveling on Indian in the same direction. The motorcyclists were McCloskey and his friend, Aaron Snyder.

{¶ 5} As White drove behind them, he observed them "weaving from side to side." Believing them to be impaired, he continued to follow. White testified that "McCloskey crossed the south center yellow lines multiple times, [made] incomplete stops at stop signs, weav[ed] within the lane, [with] excessive speed above the speed limit." He saw Snyder "weaving, [making] incomplete stops." At Evergreen Road, after stopping for the stop sign, both motorcyclists started away quickly. White believed they were exceeding 25 m.p.h. and again observed them weaving. To the right of his rearview mirror, mounted on the dash-board of his cruiser, was a video camera. At this point White activated it "to document their driving."[1] He then requested assistance from another officer, Christopher Sargent, in preparation for stopping the two men. He told Sargent that based on the observed behavior, "they could possibly run." Sargent responded that he was on Central Avenue approaching Westchester Road. White delayed pulling them over until Sargent could arrive at his location.

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[1] This device also has an audio component that captured contemporaneous statements made during the event, though not all are equally audible. During White's cross-examination, the prosecutor played the video and White reviewed what he had observed for the jury. He specifically identified Snyder's maneuvering on Indian near Pembroke Road as: "an erratic movement in his lane, very quickly weaving from the white curb line to the centerline and cross[ing] the centerline and mov[ing] radically back to the curb [line]." McCloskey, at that point, had "cross[ed] the center yellow line a total of four times throughout that distance."

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{¶ 6} At the stop sign at Westchester Road the motorcyclists halted. They sat on their bikes talking for about 10 seconds. White, behind them in his cruiser, watched McCloskey "point at the ground" and then at Snyder's boot. White testified: "Mr. Snyder turned over his shoulder and looked at my vehicle. Mr. McCloskey turned as he was speaking with Mr. Snyder. They both pointed at the ground at various times during that stop."

{¶ 7} After this movement, the two men sped away suddenly, accelerating their bikes rapidly down Indian. White believed they were fleeing him. In response he activated his overhead emergency lights and siren and gave chase, notifying the Ottawa Hills dispatcher of his pursuit. As the motorcyclists approached the intersection of Central Avenue, where Indian ends in the form of a sharp curve, White testified that Snyder "split off from" McCloskey and increased speed just before losing control at the curve. His motorcycle bounced up and over the elevated mound of a grassy traffic island and spilled out onto Central just as Sargent's cruiser arrived. McCloskey stopped his bike at the intersection, then turned around to his right and watched White pull up behind him.

{¶ 8} White exited his cruiser and drew his .40-caliber Glock pistol. He stepped away from the open door to his left. From where he stood, White could not fully see McCloskey's right arm, nor his hands at all. McCloskey had turned forward, but then turned back to his right again. With his pistol aimed at McCloskey, White yelled "get your hands up." White described what he saw next: "He turned and looked at me, and

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with the right arm made a reaching movement." Believing that McCloskey "was pulling a weapon," and fearing that his life and Sargent's life were in danger, White fired once. McCloskey fell to the ground and the motorcycle toppled on him. Still pointing his Glock, White approached McCloskey and patted over his pockets and waist for a weapon. Only then did he find that McCloskey was not armed.[2]

{¶ 9} On cross-examination, White stated that he believed McCloskey could clearly see his cruiser's oscillating lights during the pursuit, but was uncertain whether he could also hear the siren because the motorcycles were so loud. He was unsure when McCloskey would have first recognized that he was being pursued. White stated that when he was stopped behind McCloskey at Central, before exiting the cruiser, he did not feel in immediate danger and even hurriedly radioed the dispatcher. He then got out to continue what he considered "a high-risk vehicle stop." He acknowledged the cruiser's three lighting systems created a blinding "wall of light" behind McCloskey, and agreed the sirens were very loud. He did not see a weapon before shooting. White stressed that

[2] Another officer who arrived minutes after the shooting found a knife in a sheath inside McCloskey's boot. White had not searched there. The officer confiscated it just before EMT medics took McCloskey to the hospital. The knife measured about five and a half inches in length, with a blade of about two and a half inches. At trial, the parties debated whether McCloskey's "boot knife" was a formal "weapon" with which he had armed himself or, as the state argued and McCloskey himself claimed, merely a "gentleman's knife." Also disputed was whether the confiscating officer had found it concealed or in plain view. Regardless of how the knife is characterized or whether it was concealed, there is no dispute that White was unaware of its presence *before* he fired. It is therefore an after-acquired fact which is of no consequence to our disposition here.

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the view of McCloskey seen on the videotape in the seconds before he fired was not his view.[3]

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2) Officer Christopher Sargent

{¶ 10} Officer Sargent testified that in the early morning hours of May 23, 2009, he was on routine patrol in another section of Ottawa Hills. White contacted him by radio asking about his location because he wanted assistance in stopping "a couple of motorcyclists." White told Sargent "the motorcyclists were messing with him," so Sargent proceeded toward the intersection of Talmadge Road and Central Avenue. He then received a second transmission that White was now pursuing the motorcyclists westbound on Indian towards Central.

{¶ 11} Activating his siren and overhead lights, Sargent drove west on Central toward Indian but in the eastbound lane. On his left, approximately 200 feet away, Sargent could see the lights of the motorcycles and hear their engines throttling as they accelerated up Indian. He described them as "extremely loud" and traveling at an "extremely high rate of speed." As Sargent approached to intercept them, McCloskey's motorcycle came to a stop just as Snyder failed to negotiate the sharp curve on Indian. Sargent watched him go up over the grassy traffic island and make "a sweeping turn," finally stopping out on Central.

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[3] Before his indictment, White had submitted a written statement to the Lucas County Grand Jury summarizing his version of the incident. The statement is a typed, two-page document, made shortly after the shooting. It was admitted at trial as state's exhibit No. 23. In its material respects, the statement does not differ from White's trial testimony.

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{¶ 12} Sargent immediately exited his cruiser, drew his pistol, and ordered Snyder to show his hands and get on the ground. He complied. Sargent searched him but found no weapon. Snyder exhibited an odor of alcohol, "glassy, bloodshot eyes and slurred speech." He was handcuffed and put into Sargent's cruiser. Snyder was later charged with driving under the influence, driving under suspension, and failure to comply with a police order. Sargent described Snyder's demeanor as "confused," stating "[he] didn't know that the police were behind him."

{¶ 13} Sargent, while dealing with Snyder, could not see what was happening between McCloskey and White because of the flashing lights of the police cruisers. Although he heard a shot, he did not immediately recognize it as gunfire because of the "very loud" noise from the sirens and the motorcycles. After Snyder was secured, Sargent went to check on White. He testified that McCloskey was already on the ground with the motorcycle lying next to him. Sargent asked what happened, but at first White did not respond. A few minutes later, White told Sargent "he hoped he hadn't fucked up and he didn't want to end up in jail - something to that effect." Sargent had worked with White since 2004 and described him as "a very good officer." He had never seen White use excessive force against any suspect.

3) Michael McCloskey

{¶ 14} McCloskey testified that early in the evening of May 22, 2009, he spent about six hours riding his Harley-Davidson motorcycle around Toledo, stopping at various bars and clubs. He was distributing flyers for a "bike night" event to be held at

The Omni, a nightclub where he was in charge of "security duties" and sometimes acted as a security guard himself. In 2009, McCloskey stood six feet two inches and weighed 260 pounds. His security work sometimes required McCloskey to physically restrain or remove unruly bar customers.[4] On this night he was accompanied by his friend Aaron Snyder. While McCloskey promoted The Omni, Snyder, riding his bike, handed out business cards "to drum up business" for his motorcycle-related service shop, "T & A Cycles and Seats." Over the course of their stops, McCloskey and Snyder consumed beer—about one an hour over six hours—but McCloskey denied being under the influence of alcohol at any point.

{¶ 15} About 1:00 a.m., the two men returned to The Omni and went to a kitchen in the back of the building. There they were joined by a third friend, Klint Sharpe. They ate chicken wings and talked for a while. Afterward McCloskey invited Snyder and Sharpe to go to his home in Ottawa Hills. According to Sharpe, who testified at trial, this was to "watch movies and drink a few beers." McCloskey and Snyder left on their

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[4] Considerable argument was expended below and in the appellate briefs about the relevance of McCloskey's "imposing" physical appearance, his weight-training habits, including body-building and power-lifting, and his success in local boxing events called "Tough-Man Competitions." He won that event in 2007. Yet, except for what White perceived, or reasonably could have perceived, about McCloskey's physical appearance during the pursuit and immediately before the shooting, the other facts about his physicality, even if true, could not have been known to the officer. They thus have no bearing on White's pre-shooting perceptions or state of mind under the relevant legal standard that applies here. Arguably, however, they may be relevant for others purposes, such as establishing background or context, *see State v. Swiergosz*, 197 Ohio App.3d 40, 2012-Ohio-830, 965 N.E.2d 1070, ¶ 25 (6th Dist.), or as they might bear on a witness's credibility.

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motorcycles and traveled down Bancroft Street to Secor Road, where they stopped at the light. They then proceeded into Ottawa Hills on Indian Road. Sharpe followed briefly in his car, a black two-door Chevy Monte Carlo, but turned north on Secor.[5]

{¶ 16} McCloskey testified that as he and Snyder rode down Indian they obeyed the 25 m.p.h. limit. He noticed the headlights of a car behind them, but denied recognizing it was a police cruiser. He assumed it was Sharpe's car.[6] At the intersection of Westchester and Indian, McCloskey agreed they stopped for about ten seconds. He explained that the "pointing" and hand motions seen on the video occurred as the two men were talking about the "brightness of my LED taillights" and "the bad [electrical] wiring we had found," and him wanting Snyder "to stay at my house" that night. "We took our time saying those words."

{¶ 17} After stopping at Westchester, both men accelerated quickly down Indian toward Central. McCloskey conceded, "we got on it a little too much," noting that during this acceleration Snyder's motorcycle was "just as loud as mine, if not louder." As they approached the curve at Central, McCloskey was ahead of Snyder. McCloskey stopped quickly, however, when he saw Sargent's police cruiser crossing in front of him. He then

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[5] At trial Sharpe explained he avoided driving through Ottawa Hills on Indian because "that road is a hotspot for cops" at night. After McCloskey and Snyder started up Indian, Sharpe took Secor to Central Avenue where he turned left and drove west to Indian. There he came upon the flashing lights of Sargent's police cruiser. Although he reached the scene just ahead of other police units, he neither witnessed White's pursuit of his friends nor the shooting.

[6] Ottawa Hills police cruisers are white four-door Ford Crown Victorias marked with blue striping.

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turned and saw the flashing lights of White's cruiser behind him. His riding glasses and the bright lights partially blocked his peripheral vision, and the police sirens seemed louder than the engines of the motorcycles. McCloskey shifted from first gear into neutral and remained seated on his motorcycle. He did not engage the kickstand. His left hand was on the left handlebar. He testified that "my right hand [was] on my right leg in plain sight to Officer Sargent," but conceded not knowing where White was.

{¶ 18} On cross-examination, McCloskey agreed that he had turned his body twice to look back at White, "turn[ing] my upper shoulder blades and head." He added that "I turned my head to identify the officer as law enforcement." He acknowledged telling an investigator from the Ohio Bureau of Criminal Identification that White had yelled to "put [my] hands in the air, because that's the only thing that I didn't do to comply." McCloskey then heard a loud gunshot, instantly felt "excruciating pain," and fell to his right, with the motorcycle landing on him. White searched him for a weapon after he went down. McCloskey complained he was not given time to show his hands before he was shot.[7]

4) Aaron Snyder

{¶ 19} Snyder testified that as the pair started down Indian, he too thought Sharpe was following them. For the most part, he rode in the right curb lane until a manhole

[7] The bullet struck McCloskey in the back, causing instant paralysis and damaging most of his major organs. He underwent six surgeries and was hospitalized for about 27 days. His paralysis is permanent. At the time of trial he weighed 130 pounds.

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cover forced him to swerve sharply left. When they paused at the Westchester stop sign, Snyder commented to McCloskey about the recent repairs to his motorcycle. He turned and pointed down at McCloskey's seat and taillights as they conversed. He saw the headlights of the car behind them, but assumed it was Sharpe. From Westchester, Snyder conceded they took off at a "high rate of speed," admitting that it well exceeded 25 m.p.h. He testified: "[W]e were playing around. * * * He took off. I took off." Seconds later, as Snyder came around the sharp corner, he saw the headlights of a car on Central "going westbound in the eastbound lane," but heard no siren. Feeling "in danger of being hit," he steered his motorcycle up over a grassy island and pulled it to a hard stop. Only when he noticed the flashing lights did he realize the car was a police cruiser. Snyder claimed he never attempted to evade either officer, but admitted his driver's license was then under suspension. Although he heard the gunshot, he did not see the shooting and could not recall what happened with McCloskey.

B. Video and Audio Recordings

{¶ 20} State's exhibits Nos. 1 and 2 comprise, respectively, the video and audio recordings of White's pursuit and stop of McCloskey, and the shooting. The recordings were introduced into evidence, played repeatedly, and used by both parties during the questioning and testimony of the various witnesses. On the videotape a clock can be seen at the bottom right of the screen. From the point White activated the video, the clock recorded the timeline of the incident. In summarizing the video here, we will cite to the precise times shown in relation to the sequence of the material events.

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1) Videotape

{¶ 21} Initially McCloskey and Snyder, seen from behind, are riding their motorcycles on Indian Road. Along the way they make quick stops at two stop signs. Some erratic maneuvering can be seen before they reach the third stop sign at Westchester, although the infractions, if any, would appear minor. Arguably, some of the manipulation exhibited by Snyder on his bike would suggest impairment.

{¶ 22} At Westchester, Snyder and McCloskey pause for approximately 10 seconds and plainly converse. (2:16:19-2:16:29). There is pointing and turning by both men. Snyder appears to look back at White's cruiser. Both then accelerate away at a high rate of speed. White commences pursuit at 2:16:30, turning on his lights and siren four seconds later. (2:16:34). Snyder and McCloskey rapidly gain distance on White. The audio on the video captures the loud throttling of the motorcycles under hard acceleration up Indian. McCloskey is in front as they approach the sharp curve at Central. Then Snyder, cutting left, bounces over the grassy traffic island. His bike "fishtails" slightly as he brakes and tries to regain control. (2:16:45). At that point, White's pursuit has lasted fifteen seconds (2:16:30-2:16:45). At 2:16:47, Sargent's cruiser first comes into view, its lights and siren operating, although the siren is slightly audible before then.

{¶ 23} McCloskey has stopped his bike by 2:16:47 (if not sooner). He is turned to his right watching White's cruiser come up behind him. At 2:16:51, he turns forward. His right arm is visible at his side and it moves forward with this turn. His right hand is

low, near his waist, and slightly in front. Between 2:16:50 and 2:16:53, White is heard transmitting: "I've got one. One is trying to take off on [Officer Sargent]."[8]

{¶ 24} White exits his cruiser at about 2:16:54. At 2:16:55-56, McCloskey turns to his right again, looking back toward White's cruiser. In this turning motion, his shoulder, elbow, and arm all move rearward. His right hand, discernible on the screen, comes back at waist level. Simultaneously with this motion, White shouts an inaudible command, then McCloskey is shot. White himself is not visible on the video before the shot is fired. The report can be heard at 2:16:56; McCloskey reacts and falls at 2:16:57-58. The clock indicates that about ten seconds elapsed between McCloskey halting his motorcycle at Central and the gunshot (2:16:47-2:16:57). Three seconds elapsed between White getting out, yelling a command, and firing (2:16:54-2:16:57). One second encompassed McCloskey's turning, White's command, and the shot.

{¶ 25} At the shot, McCloskey drops to his right and the motorcycle falls on him. White first comes into view from the left at 2:17:09. With his Glock pointed, he shouts at McCloskey to "get [or keep] your hands up." White then goes briefly out of view to shut off his siren. He reapproaches the fallen McCloskey, gun still pointed, and again orders him to get (or keep) his hands up. At 2:17:24-25, McCloskey says, "I don't have a weapon," to which White replies, "Why were you reaching?" White holsters his weapon

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[8] The context for this transmission is that Snyder, from 2:16:47 to 2:16:56, can be seen still maneuvering his motorcycle on Central. He has not yet stopped. Sargent is turning his cruiser to follow him.

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at 2:17:52 and approaches McCloskey, still under the motorcycle. He bends downs and searches the outer clothing of McCloskey's waist area. (2:17:56-2:18:00). McCloskey repeatedly says "I feel paralyzed."

{¶ 26} Klint Sharpe soon appears and White tells him to get the motorcycle up. McCloskey is heard screaming as Sharpe lifts the bike off him. (2:18:27). Some of their conversation at this point is inaudible. After the motorcycle is uprighted, White removes the external microphone from his belt and places it in his cruiser. The video then continues without sound. Shortly afterward a third police cruiser pulls into view, stopping near McCloskey. In the final minutes the paramedics arrive.

2) Audiotape

{¶ 27} The audiotape contains various transmissions between White, Sargent and the Ottawa Hills dispatcher during the events described above. It first reveals White asking for assistance from Sargent. He tells him that he is following two motorcyclists on Indian, saying he is "not sure what they are going to do on me." He tells Sargent to head to Central and Talmadge. White then informs the dispatcher that he is in pursuit and that both motorcycles are registered to someone at an address on Holland-Sylvania Road. White's siren can be heard. Some minutes later, he states that "I've got one; one is trying to take off on" Sargent. Afterward, a shot can be heard. Sargent notifies the dispatcher that he has Snyder in custody. White returns to the radio and requests an emergency squad.

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C. Expert Testimony

{¶ 28} Three experts testified at trial. Two were called by White; one was called by the state in rebuttal. Neither party disputed their qualifications or their extensive backgrounds in law enforcement. Before testifying, each expert had reviewed the pertinent investigative reports, the witness statements, and the video and the audio recordings. Their respective opinions were fully expressed without objection.

1) Urey W. Patrick

{¶ 29} The first defense expert was Urey Patrick, an FBI agent for 25 years, now retired. He is self-employed as an expert consultant in police use-of-force cases. He has instructed on the law and policy issues relating to the use of deadly force by police. His expertise also extends to police training and practices, firearms and ammunition, and wound ballistics. He is widely published on these subjects as well.

{¶ 30} Patrick began by explaining the legal standard for deadly force and certain principles of its use that police are taught during their training. Officers are instructed that deadly force may be employed to prevent an imminent risk of serious injury or death, either to themselves, another officer or innocent civilians. The perceived risk must be assessed from the totality of the circumstances in which it arises. In determining the reasonableness of an officer's perception that serious injury or death was imminent, Patrick identified several factors: "what the officer knew, what he could see and perceive, what the individual he was interacting with did, what the circumstances were, [and the] behavior of the individual in conjunction with those circumstances[.] * * *

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Police officers don't have to be certain that the risk is there. * * * Their perception has to be reasonable."

{¶ 31} Patrick next explained that in use-of-force training, officers are taught the principle that "action always beats reaction." He noted that "an officer is always reacting to what the individual he is confronting does." In police work, the officer must place himself in close proximity to people—whether making an arrest, writing a traffic citation or merely conversing. As a suspect takes some particular hostile action, "an officer is always reacting to that and trying to catch up." Such acts include being punched, kicked, stabbed with an edged weapon, or shot with a firearm. Using the latter as an example, Patrick explained that "a person holding a gun can invariably turn and/or get off a shot before you can react to stop or prevent it." Because of this, officers often have "less than a second" to decide whether to use deadly force.[9]

{¶ 32} Officers do not have to be absolutely certain of the risk of attack, he testified, nor must they actually see a weapon before using deadly force. Rather, when such force is used preemptively, they must be able to show that their *perception* that the risk existed was reasonable. Patrick testified:

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[9] Patrick further explained that police training includes the study of actual officer-involved shootings. Among these are cases in which officers were dispatched to scenes where people were threatening suicide with a firearm. They are used to illustrate the brevity of the action-reaction cycle. He stated: "A [suicidal] person holding a gun to their head in the fraction of a second can move it and fire before even a trained police officer could react."

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> If the circumstances are such that what is happening is consistent with an imminent attack or an imminent risk of injury, then that's enough. And they may use deadly force if necessary to prevent that imminent attack from becoming an actual attack. * * * The most successful use of justified deadly force is preemptive in nature. It prevents an imminent risk of serious injury from the coming impact or attack or actual attempt.

{¶ 33} No ideal model exists for officers to use in determining beforehand when an imminent threat will occur. All that can be done, Patrick indicated, is to instruct officers on "risk assessment, the realities of action versus reaction, the realities of deadly force, the relatively limited effectiveness of handguns, [and] the realities of risk and how quickly it can turn."

{¶ 34} In light of the training principles and the legal standard for deadly force, Patrick then gave his impressions of the videotape. He first noted that White was an officer patrolling alone late at night who had encountered two motorcyclists who were not operating their bikes in a safe or consistent manner. In fact, to Patrick, they seemed to be impaired. As White followed, the motorcyclists appeared to look back at him. "It got to the point where the two riders were conferring with each other, looking back at the cruiser and then taking off at high speed." Patrick testified that "it looks like collusion between [them]" and "like an incipient pursuit." When White activated his lights and sirens, the fact that the motorcyclists "pull[ed] away and then separated" indicated to Patrick "something more than just a routine traffic stop." Referring to Snyder's and

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McCloskey's actions seen earlier on the video, Patrick stated: "there is some forethought, there's something unusual going on. The two had conferred. They had talked before this began."

{¶ 35} After Snyder lost control of his motorcycle and McCloskey finally stopped, Patrick found it significant that his engine was still running and the kickstand was not down. "He's already indicated a willingness to flee." Next, McCloskey did not raise his hands when instructed. White was outside his cruiser by then, off to the left, when McCloskey made "a motion with his hand that is consistent with reaching for a weapon, rather than raising his hands or putting them in plain sight." At that point, White fired.

{¶ 36} Patrick opined: "Under those circumstances I think Officer White's perception that this was an imminent risk was reasonable." The fact that McCloskey had no weapon changed nothing. "Officer White could not have known that at that time." Patrick agreed that White "could have waited to see what McCloskey was doing with his hand"; however, "if Mr. McCloskey had in fact drawn a weapon to use against Officer White, [he] would have been conceding the first shot to McCloskey." So, "it would not be unreasonable for [White] to choose not to wait to see if McCloskey was in fact drawing a weapon."

{¶ 37} Referring to McCloskey's turning motions seen on the video, Patrick explained the term "targeting." It means locating the person you plan to assault or attack. McCloskey's repeated turning to look back—to see where White was—were instances of targeting the officer, Patrick contended. He noted that the video's view of McCloskey

sitting on his bike was not White's view from the left of his cruiser. McCloskey's second turning motion, from White's position and perspective, "in conjunction with the movement of [McCloskey's] hand down to his waist area [is] consistent with reaching for a weapon. It's where an officer would expect a weapon to be held." Patrick identified this as the critical point where White could reasonably perceive an imminent threat of injury or death—"[McCloskey's] hand is moving back and to the right again as if bringing a weapon out."

{¶ 38} In rendering his opinion, Patrick emphasized that the benefit of "20/20 hindsight" is not permitted. It is irrelevant, even if true, that the motorcyclists were unarmed, that they did not realize a police cruiser was following them, or that they had no plan to flee or engage in any other illegal activity. White could act based only on what he perceived as it was happening, along with the inferences he could reasonably draw, not on what he did not know or could not have known.

2) James J. Scanlon

{¶ 39} White's second defense expert was James Scanlon, a police officer in Columbus, Ohio for 32 years. When not on-duty, he self-employs as an expert witness on issues involving police tactics and the use of deadly force. A company he co-owns, called North American SWAT Training Association, trains officers in responding to hostage/barricade scenarios, active-shooter calls, special tactical missions, and advanced patrol assignments.

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{¶ 40} In his opinion, it was reasonable for White to believe that he was facing an imminent risk of physical harm when he shot McCloskey. He believed that White's perception of imminent harm was the cumulative result of several suspicious behaviors by the motorcyclists, particularly McCloskey, and that these behaviors made White's fear for his safety reasonable. In reviewing the videotape, Scanlon first pointed to the motorcyclists' erratic maneuvering as they rode stop sign to stop sign along Indian. He believed this would naturally cause an officer following them to become suspicious. Then Scanlon noted White's comment early on the audiotape that, "I think they might be messing with me." To Scanlon, this indicated that White not only knew something was wrong, but he could also reasonably assume "[the motorcyclists] know there's a cruiser behind them." This would merely increase an officer's suspicion.

{¶ 41} Third, Scanlon found their extended pause at Westchester, where they conversed and pointed, to be a cause for concern. He stated that an officer would normally wonder, after having followed them in a marked cruiser, if the two men "were sizing [him] up" in deciding whether to "flee or fight." Fourth, from Westchester, Snyder and McCloskey illegally fled away at speed, prompting White to engage his lights and siren. When McCloskey finally stopped, he did not turn off his engine, drop the kickstand, or raise his arms when ordered. Instead, Scanlon noted, McCloskey's "right hand [was] suspiciously down at the right on his lap." Scanlon agreed with Patrick that White could reasonably perceive the turning motions as "targeting." He specifically noted that White, standing off to the left rear, could see even less of McCloskey's right

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arm than is seen from the "straight-on view" of the video. The less he saw of McCloskey's right arm, Scanlon testified, the more dangerous the situation became in White's mind. He concluded that White's decision to shoot was "reasonable and justified." In assessing an officer's use of deadly force, "the facts known to the officer at the time that the shot is fired [are] all that matters."

{¶ 42} Scanlon too cited the pressure of the action-reaction principle as a factor affecting how White perceived the situation. At best, an officer has "three-quarters of a second" to respond. Summarizing his view of the shooting, Scanlon testified:

> So it's not the turning necessarily that does it or the second turn or the weaving or the traffic violation. [It's] the culmination of all those things incorporated with the officer's knowledge of reaction time, believing the person has a gun and knowing that if the person actually turns full circle [to face] him, that if he does have a gun, he loses the gunfight. * * * [T]hat's what we have to instruct civilians about because they don't understand the whole idea of reaction time and * * * if you wait to see the gun and the person who has their back to you, as they turn, * * * they're going to get at least one or two shots off."

3) W. Ken Katsaris

{¶ 43} The state's expert witness was Ken Katsaris, a police officer for various departments in Florida for over 48 years and formerly the elected sheriff of Leon County, Florida. As a patrol officer he worked street duty for eight years. Katsaris is presently

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self-employed as a law enforcement trainer and expert consultant on use-of-force issues. A certified firearms instructor, he also trains officers in emergency vehicle driving, suspect pursuit and street tactics. In both local and national seminars, he lectures on police lethal-force encounters and "street survival," and has reviewed many officer-involved shootings. He is also an experienced motorcyclist.

{¶ 44} Katsaris began his testimony by responding to certain issues the defense experts discussed. He explained that in police training the term "target glance" depends on correctly assessing "whether the person is actually targeting you, or is it an inquiry glance?" Targeting is "getting ready to implement a use of force of some kind." Genuine "targeting" involves "multiple glances" and "it's going to be in exactly the same way that they're going to carry out whatever they're targeting you for."

{¶ 45} In reviewing the video for the jury, Katsaris disputed Patrick's conclusion that McCloskey was "targeting" White. Just before being shot, McCloskey's "turn to his right to look behind" was "an inquiry method, in other words, what's going on?" Because he was balancing the motorcycle between his legs, he could not move very far. His ability to turn—to draw a gun and fire it—was restricted. Katsaris noted that McCloskey turned forward to see the other police car in front of him, "then [he] hears something and looks to his right." That was not "targeting" because "he wasn't looking at the target"—Officer White—who was well back and left of McCloskey. Also, he was turning in the opposite direction from White. McCloskey was merely engaging in

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"inquiry looks," trying to understand what was going on. There was action in front of him, "and then [he] hears something and attempts to turn to see what is being said."

{¶ 46} Essentially, Katsaris maintained, White misread the physical cues: McCloskey's turning was not "targeting." This misreading, Katsaris asserted, was only aggravated by White's earlier mistake when McCloskey halted his bike at Central. White violated "one of the tenets of traffic stops" by not turning off his cruiser's siren before getting out and shouting orders. This is necessary so people in the vicinity of the officer's vehicle can hear him. The added blare from Sargent's siren only worsened McCloskey's ability to hear White.

{¶ 47} Another problem was created by the "wall of light" from White's cruiser. Katsaris explained that this effect is a legitimate safety tactic police use in nighttime traffic stops. The wall of light involves the simultaneous use of the cruiser's strobe lights, overhead takedown lights and high-beam headlights. It is extremely difficult for the person stopped to see the officer, but the officer's view is unaffected. White had testified that all three lights were on when he pulled up behind McCloskey. Katsaris pointed out that the combined effect of the wall of light *and* the high-decibel sirens likely so disoriented McCloskey that he could not see White and would barely hear his commands.

{¶ 48} Katsaris next disagreed with the defense experts' evaluation of the presence or significance of certain "threat-assessment indicators." Although the terminology

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varies, these indicators pertained to the suspicious driving and other behavior White said he observed before the motorcyclists stopped at Central.

{¶ 49} First, on the portion of the video showing Snyder and McCloskey riding along Indian up to Westchester, Katsaris saw no traffic violations, no impaired driving and no threat-indicators. In his view, "McCloskey especially [was] extremely straight arrow in his driving, extremely straight." As an experienced rider himself, Katsaris testified that motorcyclists often ride close to the left lane. They "accelerate a little bit" to gain speed, steadying their forward momentum, and then throttle back to maintain lawful speed. Motorcyclists, he explained, face different factors in traveling the road than do those riding in a car. They tend to avoid the center of the road because passing cars drop oil there, making it slippery for a two-wheeled bike. Second, the fact that the men stopped and talked at Westchester would not be a threat-indicator. Katsaris noted that when two motorcyclists ride together, the only time they can talk is when they stop. The hand motions seen on the video were innocuous movements, not threatening ones. However, their rapid, "full acceleration" after Westchester, in excess of the speed limit, was a traffic violation and Katsaris agreed that White was justified in pursuing them to a stop; yet, even that chase was too brief to be considered a "high-risk pursuit."

{¶ 50} Finally, at the point where McCloskey is stopped and sitting on his bike, Katsaris had to replay the video several times before he understood White to be yelling "get down." This was a command McCloskey could not obey initially, assuming he heard it, because he was trying to keep an 800-pound motorcycle balanced. Even after

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lowering the kickstand to prevent the bike from falling, McCloskey would still have to do too many separate physical motions in dismounting the bike to be able to comply immediately. In his opinion of the video, Katsaris saw nothing about McCloskey's behavior, in the seconds before White fired, that was threatening. When White yelled his command, McCloskey's "obvious reaction" was to turn and look, notwithstanding the sensory distortion from the blinding lights and ambient noise.

{¶ 51} Katsaris did not dispute the deadly force standard to which police are trained, nor the validity of the action-reaction principle nor its significance in police firearms training. He agreed that officers, in making deadly force decisions, must do so "in split-seconds." He acknowledged that the video's view of McCloskey turning and then being shot was not White's view. Still, Katsaris saw nothing there to indicate "those objectively reasonable [circumstances] that would justify a shooting in this situation." In his opinion, to do so was "excessive force."

II. Analysis

A. Prefatory Issues

{¶ 52} White has assigned six errors for our review. Before considering them, certain prefatory issues must be addressed as they provide the larger context for correctly resolving the substantive issues raised by White's assignments. This case is important not just to the parties, but to the public, to law enforcement, and to the judicial system which can be expected to encounter similar cases over time. It warrants an analysis of

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some depth, and because we are reversing and ordering a new trial, the import of these matters should not be left to implication on remand.

1) Applicable Law

{¶ 53} This appeal arises from the criminal prosecution of an Ohio peace officer for an on-duty use of deadly force. In recent decades, when a police officer engaging in enforcement activity shoots and wounds (or kills) a civilian, such conduct has typically resulted in a civil suit, in state or federal court, for monetary damages pursuant to 42 U.S.C. 1983. The common gravamen of the Section 1983 claim is that the officer's use of deadly force was an "unreasonable seizure" and therefore a violation of the Fourth Amendment. The merits of such claims are determined under the doctrines for evaluating police uses of force that have evolved principally from *Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) (deadly force) and *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (non-deadly "excessive force").

{¶ 54} It would seem logical, then, that in a criminal prosecution for what amounts to the same conduct the same doctrines and standards would apply. Yet neither party has cited any precedent directly on point, and the question is not one that answers itself. The parties have also characterized this case as "novel," with issues of first impression. While not new, reported instances of Ohio law enforcement officers prosecuted for their on-duty conduct are at least infrequent. *See, e.g.*, *McGaw v. State*, 123 Ohio St. 196, 174 N.E. 741 (1931) ("malicious wounding"); *State v. Sells*, 30 Ohio Law Abs. 355 (2d Dist.1939) (assault); *State v. Yingling*, 36 Ohio Law Abs. 436, 44 N.E.2d 361 (9th

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Dist.1942) (manslaughter); *State v. Elder*, 67 Ohio Law Abs. 385, 120 N.E.2d 508 (Muni.1953) (unlawful discharge of weapon); *State v. Herrman*, 115 Ohio App. 271, 184 N.E.2d 921 (2d Dist.1961) ("willful oppression"); *State v. Foster*, 60 Ohio Misc. 46, 396 N.E.2d 246 (C.P.1979) (voluntary manslaughter). The cases where force was used, however, offer no consistent standard and were decided well before *Garner* and *Graham*.[10]

{¶ 55} In state courts, choice of law varies. Maryland, for example, follows federal law when prosecuting police officers for the unlawful use of deadly force. *See State v. Pagotto*, 361 Md. 528, 549-550, 762 A.2d 97 (2000) (Involuntary manslaughter—"[W]here the accused is a police officer, * * * the reasonableness of the conduct must be evaluated not from the perspective of a reasonable civilian but rather from the perspective of a reasonable police officer similarly situated.") California, in contrast, has not adopted the federal standard; instead, it uses the state tort-law standard of the "reasonable person" to assess police conduct under the criminal microscope. *See People v. Mehserle,* 206 Cal.App.4th 1125, 1145-46, 142 Cal.Rptr.3d 423 (Manslaughter

[10] In a more recent criminal case, *State v. Pecora,* 87 Ohio App.3d 687, 622 N.E.2d 1142 (9th Dist.1993), the court quoted and relied on *Garner's* deadly-force standard, but the defendant there was not a police officer. He was a private citizen who had attempted a "citizen's arrest" by .38-caliber gunfire. Citing *Garner*, the Ninth District stated that "the rights of a private citizen to use deadly force are no greater than those of a police officer." *Id.* at 690. That at least suggests that had the defendant been an officer his conduct would have been gauged under *Garner* and its progeny.

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prosecution—calling "[t]he reasonable person standard" the "measuring stick in California" for evaluating "public officers' conduct involving use of force.")

{¶ 56} Not surprisingly, in the prosecution of law enforcement officers for civil-rights crimes based on excessive force, the federal courts have shown no reluctance to import use-of-force law from *Garner* and *Graham*. In *United States v. Reese*, 2 F.3d 870 (9th Cir.1993), a non-deadly force case, the police-defendants claimed error in the use of jury instructions based on *Graham's* "reasonableness" standard for evaluating an officer's use of such force. The Ninth Circuit rejected that challenge, stating:

> Appellants [argue that] because *Graham* was a civil case arising under 42 U.S.C. § 1983, it is somehow an inappropriate model in the context of a criminal prosecution under section 242. * * * There is nothing wrong with looking to a civil case brought under 42 U.S.C. § 1983 for guidance as to the nature of the constitutional right whose alleged violation has been made the basis of a [criminal] charge. The protections of the Constitution do not change according to the procedural context in which they are enforced - whether the allegation that constitutional rights have been transgressed is raised in a civil action or in a criminal prosecution, they are the same constitutional rights. *Id.* at 883-884.[11]

[11] Similarly, in *United States v. Bigham*, 812 F.2d 943 (5th Cir.1987), the appeals court rejected using different legal standards in criminal cases for instructing the jury on use-of-force, noting that "whether a case is brought on the civil or criminal side of the docket, the actionable conduct is deprivation of rights secured by the Constitution or laws of the

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{¶ 57} We agree. Given that a police officer is authorized and, indeed, frequently obligated to use force—and sometimes deadly force—the benchmark of the "objectively reasonable officer" is not just appropriate for criminal prosecutions, but necessary. Unlike the prosaic "reasonable person" or "reasonable civilian" standard, the standard of the reasonable officer takes into account not only the specialized training and experience of police officers, but also the public-safety role for which they are uniquely employed. In that sense it is a more tailored standard than what suffices for tort law—because in circumstances relevant to the law enforcement function, the reasonable officer can do more than the reasonable civilian. But if federal use-of-force law applies to the prosecution of a police officer for an alleged misuse of force on duty, then *all* of its doctrines, standards and derivative rules apply to the extent their use is supported by the evidence and is consistent with the nature of the crime charged.

2) Use of Force Doctrines

a) General Requirement

{¶ 58} In *Garner*, the United States Supreme Court held that "apprehension [of a suspect] by use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Garner*, 471 U.S. at 7. In *Graham*, decided after *Garner*, the court reiterated that principle unequivocally: "*[A]ll claims* that law enforcement officers

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United States." *Id.* at 948. *See also United States v. Schatzle*, 901 F.2d 252, 254-55 (2d Cir.1990) (applying *Graham* jury instruction in the federal prosecution of a secret service agent for non-deadly "excessive force").

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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[.]" (Emphasis added.) *Graham,* 490 U.S. at 395.[12] For both levels of force, "reasonableness" is generally to be gauged from "a totality of the circumstances" then confronting the officer. *Garner* at 8-9; *Graham* at 396.

{¶ 59} *Graham*, however, was a non-deadly "excessive force" case, and although "excessive force" is used loosely when referring to both levels of force, they are not the same. Different standards apply. *Jarrett v. Town of Yarmouth,* 331 F.3d 140, 149 (1st Cir.2003) ("The deadly/non-deadly distinction is significant in the Fourth Amendment context"); *Gutierrez v. City of San Antonio,* 139 F.3d 441, 446 (5th Cir.1998) (deadly force cases are "a subset of excessive force claims").

b) Non-Deadly Force Standard

{¶ 60} Under *Graham*, an officer's use of *non-deadly* force is reasonable if the jury is merely persuaded that a reasonable officer in the same situation could have believed the same force was necessary. *Graham,* 490 U.S. at 396-397; *Lee v. Ferraro,* 284 F.3d 1188, 1197 (11th Cir.2002) (slamming arrestee's head against car trunk after handcuffing her held unreasonable); *Spencer v. Rau,* 542 F.Supp.2d 583, 592-594 (W.D.Texas 2007) (use of "arm bar technique" to handcuff resisting suspect not

[12] We read *Graham's* "*all* claims" to include not just the allegations of a civil complaint brought under Section 1983, but those which appear in a criminal charging document, such as an indictment, asserting that the force the officer used constituted a crime.

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unreasonable even if injury resulted). Instructionally, courts articulate this standard as using force that was "reasonable under the circumstances," or as using no more force than was "reasonable and necessary," or in similar terms. For deadly force, however, the standard is more stringent.

c) Deadly Force Standard: "Threat" Circumstance

{¶ 61} For this standard, *Garner* imposes two special circumstances or conditions that limit an officer's authority to use gunfire to affect a seizure. But if kept within those limits, the use of deadly force will be deemed reasonable. The first circumstance, and the one claimed here, is suspect conduct that threatens the officer at a level of serious physical harm or death. It requires asking whether the officer could reasonably have had "probable cause to believe that *the suspect pose[d] a threat of serious physical harm,* either to the officer or to others." (Emphasis added.) *Garner,* 471 U.S. at 11; *Williams v. City of Grosse Pointe Park,* 496 F.3d 482, 487-488 (6th Cir.2007).[13]

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[13] *Garner's* second circumstance for deadly force exists where "there is probable cause to believe that [the suspect] has committed a crime involving the infliction or threatened infliction of serious physical harm[.]" *Garner,* 471 U.S. at 11-12. Often denoted as the "escape" circumstance, this is broader than it first appears. It refers to a suspect whose immediate past criminal acts or threats have demonstrated a disregard for human life. This person, in committing a violent felony, has seriously injured or killed others, or has threatened to do so, and will continue unless stopped *or* he is attempting to flee the scene of that crime. *See Scott v. Harris,* 550 U.S. 372, 382, 127 S.Ct. 1769, 167 L.Ed.2d 632 (2007), fn. 9 ("[S]o that his mere being at large poses an inherent danger to society.") In that circumstance, deadly force may also be used, even if there is no imminent, proximal threat to the officer taking action (e.g., a police sniper some distance away). In both the threat and escape situations, *Garner* requires some warning before firing "where feasible." That requirement is not ironclad, however, but is entirely circumstance and time dependent. *McLenagan v. Karnes,* 27 F.3d 1002, 1007 (4th Cir.1994).

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d) Threat Perception

{¶ 62} A serious and imminent threat to the officer's safety will permit him to respond with gunfire. *Garner*, 471 U.S. at 11-12 (compare: "where the suspect *poses no immediate threat* to the officer and *no threat* to others," with: "the suspect *poses a threat* of serious physical harm [to] the officer"). Thus, *reasonable* threat perception is the "minimum requirement" before deadly force may be used. *Untalan v. City of Lorain*, 430 F.3d 312, 314 (6th Cir.2008). Whether the officer reasonably perceived a threat must be assessed objectively. The focus is specifically on the moment he used his weapon and in the moments directly preceding it. *Livermore ex rel. Rohm v. Lubelan*, 476 F.3d 397, 406-407 (6th Cir.2007) ("focus on the 'split-second judgments' made immediately before the officer [fired]"). Earlier errors in the officer's judgment do not make a shooting unreasonable if he was acting reasonably then. *Bouggess v. Mattingly*, 482 F.3d 886, 889 (6th Cir.2007).

{¶ 63} In deadly-force cases involving both armed *and* unarmed suspects, courts have accepted the action-reaction principle on facts justifying the officer's anticipatory use of his weapon to protect himself. In other words, a nascent threat can be sufficient; it need not materialize to the point of harm. *See Ontiveros v. City of Rosenberg*, 564 F.3d 379, 382-385 and fn. 2 (5th Cir.2009) ("[U]se of deadly force is presumptively reasonable" when the officer could reasonably have interpreted the suspect's movement as "reaching for a weapon"); *Anderson v. Russell*, 247 F.3d 125, 132 (4th Cir.2001) (officer "does not have to wait until a gun is pointed" before acting); *Montoute v. Carr*,

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114 F.3d 181, 185 (11th Cir.1997) (same); *McLenagan, supra,* 27 F.3d 1002, 1007 (4th Cir.1994) (officer need not "actually detect the presence of an object in a suspect's hands before firing on him").

{¶ 64} As the court observed in *Elliot v. Leavitt*, 99 F.3d 640 (4th Cir.1996):

> The critical point [is] precisely that [the suspect] was "threatening" - threatening the lives of [the officers]. The Fourth Amendment does not require police officers to wait until a suspect shoots to confirm that a serious threat of harm exists. * * * Officers need not be absolutely sure [of] the suspect's intent to cause them harm - the Constitution does not require that certitude precede the act of self-protection. *Id.* at 643-644.

{¶ 65} Rather, it is the *perceived* threat of attack by a suspect, apart from the actual attack, to which the officer may respond preemptively. If his perceptions were objectively reasonable, he incurs no liability even if no weapon was seen, or the suspect was later found to be unarmed, or if what the officer mistook for a weapon was something innocuous. *Ontiveros*, 564 F.3d at 385 (officer reasonably believed suspect was reaching into his boot for a weapon. No weapon found); *Reese v. Anderson*, 926 F.2d 494 (5th Cir.1991) (unarmed suspect shot after furtive movement in vehicle); *Bell v. City of East Cleveland,* 125 F.3d 855 (6th Cir.1997) (juvenile shot after pointing toy gun); *McLenagan*, at 1007-1008 (no weapon seen, but declining to "second-guess the split-second judgment of a trained police officer merely because that judgment turns out

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to be mistaken, particularly where inaction could have resulted in [his] death or serious injury").

{¶ 66} In evaluating reasonableness in the threat-perception cases, courts have also accepted that officers are trained to recognize certain behaviors and "body language" as danger cues. These include obvious attempts to evade the officer, furtive gestures and glances, sudden turns, and the ignoring of commands, such as an order to show one's hands. Because such encounters often occur at night, this limits vision significantly and enhances risk to both the officer and the suspect. *See Thompson v. Hubbard*, 257 F.3d 896, 899 (8th Cir.2001) (unarmed suspect shot while "look[ing] over shoulder" at officer and "mov[ing] his arms as though reaching for a weapon at waist level." No weapon found); *Reese, supra,* at 500-501 (officer could reasonably believe that suspect in car was reaching for a gun on floorboard. No weapon found); *Slattery v. Rizzo,* 939 F.2d 213, 215 (4th Cir.1991) (officer reasonably felt threatened by suspect turning toward him without left hand in view. No weapon found); *Davis v. Freels,* 583 F.2d 337 (7th Cir.1978) (suspect, ordered to raise hands, shot in back after officer saw "sudden motion with his right elbow in a backward direction." No weapon found).

{¶ 67} The motion most commonly identified by courts that prompted the officer to believe preemptive gunfire was needed is the reach toward the waistband or into a pocket.[14] In *Anderson v. Russell, supra*, the officer shot an unarmed suspect who,

[14] That officers commonly infer threats from the way a suspect moves, based on their immediate perceptions and street experience, has been highlighted as well by state courts:

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ignoring the officer's orders, "was lowering his hands in the direction of a bulge" near "[his] waistband." *Id.* 247 F.3d at 130. The bulge was afterward discovered to be a Walkman radio. The Fourth Circuit found "[Officer] Russell's split-second decision to use deadly force * * * reasonable in light of Russell's well-founded, though mistaken, belief that [the suspect] was reaching for a handgun." *Id.* at 132. *See also Sherrod v. Berry,* 856 F.2d 802, 804-05 (7th Cir.1988) (unarmed suspect shot while making a "quick movement with his hand into his coat [as if reaching] for a weapon"); *Lamont v. New Jersey,* 637 F.3d 177, 179 (3d Cir.2011) ("suspect [shot after] suddenly pull[ing] his right hand out of his waistband [as] though he were drawing a gun." Crack pipe found).[15]

> It is quite apparent to an experienced police officer, and indeed it may almost be considered common knowledge, that *a handgun is often carried in the waistband.* It is equally apparent that law-abiding persons do not normally step back while reaching to the rear of the waistband, with both hands, to where such a weapon might be carried. Although such action may be consistent with innocuous or innocent behavior, *it would be unrealistic to require [the officer] * * * to assume the risk that the [suspect's] conduct was in fact innocuous or innocent.* * * * It would, indeed, be absurd to suggest that a police officer has to await the glint of steel before he can act to preserve his safety. (Emphasis added.) *People v. Benjamin,* 51 N.Y.2d 267, 271, 414 N.E.2d 645 (1980).

[15] Nothing in *Garner* contradicts the cases in which unarmed suspects have been shot but the officer's threat-perception was found objectively reasonable. *Garner* held that it was constitutionally unreasonable to shoot an unarmed felony suspect where (1) the officer *could see* that the suspect's hands held no weapon, (2) he was "reasonably sure" the suspect was unarmed, and (3) the suspect was fleeing over a fence, not reaching for an unknown object or repeatedly defying an order to raise his hands in close proximity to the officer. *Garner,* 471 U.S. at 1. On those facts the *Garner* suspect posed "no immediate threat to the officer." *Id.* at 11. In the reasonable threat-perception cases, all the signs were to the contrary. That the suspect was found to be unarmed afterward was irrelevant.

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e) *Graham* Factors

{¶ 68} In *Graham,* the Supreme Court identified several contextual considerations, some drawn from *Garner*, for evaluating whether a particular use of deadly or non-deadly force was objectively reasonable under the applicable standard. These include "the severity of the crime at issue, whether the suspect pose[d] 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." *Graham,* 490 U.S. at 396, citing *Garner*, 471 U.S. at 8-9. The so-called *Graham* factors, however, are not some judicially-imposed checklist the officer must run down before employing force. Rather, they are simply *examples* to assist the trier of fact in assessing the reasonableness of force under particular circumstances. They present a "non-exhaustive list" in the calculus of what is reasonable. *Bouggess*, 482 F.3d at 889.

{¶ 69} Other relevant considerations may, and often do, exist. These include whether the incident occurred at night, "the suspect's demeanor," the "size and stature of the parties involved," and whether the suspect was "intoxicated and noncompliant." *Davenport v. Causey,* 521 F.3d 544, 551 (6th Cir.2008). Also relevant is whether the suspect is, or appears to be, violent or dangerous, the duration of the confrontation, whether it occurs during a chase or an arrest, the possibility that the suspect may be armed, and the number of suspects with whom the officer must contend. *See, e.g.*, *Kopec v. Tate*, 361 F.3d 772, 777 (3d Cir.2004).

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f) Constraints on Evaluating Reasonableness

{¶ 70} *Graham* explicitly cautions deference to the law enforcement perspective:

> "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation. (Citations omitted.) *Graham*, 490 U.S. at 396-397.

{¶ 71} The Sixth Circuit Court of Appeals has described *Graham's* deference this way:

> [W]e must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure. *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir.1992).

{¶ 72} In evaluating reasonableness, some leeway must be given the officer for on-scene judgments made during the uncertainty of a confrontational encounter. Unlike judges and juries, "officers on the beat are not often afforded the luxury of armchair

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reflection." *Elliott, supra,* 99 F.3d at 642. For that reason, certain constraints are imposed.

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i) Trier of Fact

{¶ 73} In assessing the officer's decision to use force, including deadly force, juries (and judges when they are fact-finders) are strictly forbidden from using "the 20/20 vision of hindsight." *Graham,* 490 U.S. at 396. Instead, *Graham* mandates a tightly constrained frame of reference within which to calculate reasonableness. The required perspective is that of the "reasonable officer on the scene," standing in the *defendant-officer's* shoes, perceiving what *he* then perceived and acting within the limits of *his* knowledge or information as it then existed. *Id.* When the jury reviews the officer's action against the standard applicable to the force used, it must do so from *that* viewpoint. This constraint is unique to police-defendant cases, in contrast to the jury's normal freedom to envision the dynamics of a confrontation through the eyes of other parties or witnesses. *Schultz v. Braga*, 455 F.3d 470, 477 (4th Cir.2006) (facts must "be filtered through the lens of the officer's perceptions at the time of the incident").

{¶ 74} Facts learned or discovered later, and actions taken afterward, are irrelevant in this review, even if they would be relevant for some other purpose. *Davenport,* 521 F.3d at 553 ("Even though [in retrospect] it may seem that serious physical injury or death was not imminent, we cannot say that a reasonable officer [facing] such a suspect and having to decide very quickly could not have reasonably believed it was"); *compare Ryburn v. Huff,* 132 S.Ct. 987, 991-992, 181 L.Ed.2d 966 (2012) ("Judged from the

proper perspective of a reasonable officer forced to make a split-second decision in response to [the suspect's mother] turning and running into the house after refusing to answer a question about guns, [the officers'] belief that entry was necessary to avoid injury to themselves or others was imminently reasonable").

ii) Experts

{¶ 75} *Graham's* prohibition similarly extends to the testimony of even the most erudite police-procedure consultant when it crosses into the prohibited territory of second-guessing and "armchair reflection." This includes comparative speculation, couched in backward-looking terms, about what the officer "could have" or "might have" done differently, and whether he "should have" employed alternate or lesser means of force, or different tactics. *Davenport,* 521 F.3d at 552; *Plakas v. Drinski,* 19 F.3d 1143, 1148 (7th Cir.1994); *Medina v. Cram,* 252 F.3d 1124, 1133 (10th Cir.2001) ("[I]f we [considered] the expert's assertions regarding the failure to use pepper spray and other tactical measures, we would be evaluating the officers' conduct from the 20/20 perspective of hindsight rather than from the perspective of an officer making split-second judgments on the scene"). This is because the relevant legal consideration is not what *this* defendant-officer "should have" known or done, but rather what the *reasonable officer*, placed in his shoes, "*could have believed*" about the situational need for deadly force in reacting to an imminent threat. *Hunter v. Bryant,* 502 U.S. 224, 227-228, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) ("could have believed" standard adopted in applying the perspective of the "reasonable officer" to the facts).

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{¶ 76} More generally, conclusional testimony guised as "expert opinion" on the issue of whether the force used was reasonable is inadmissible. *See, e.g., Thompson v. City of Chicago*, 472 F.3d 444, 457-458 (7th Cir.2006) ("experts' insight" on objective reasonableness of force used held inadmissible); *Hygh v. Jacobs*, 961 F.2d 359, 364 (2d Cir.1992) (expert testimony that force used was "not justified" held inadmissible); *Pena v. Leombruni*, 200 F.3d 1031, 1034 (7th Cir.1999) ("[T]he jury needed no help in deciding whether [the officer acted] reasonably" in shooting the suspect); *Berry v. City of Detroit*, 25 F.3d 1342, 1348-50 (6th Cir. 994) (citing "junk science" concerns regarding plaintiff's force expert).[16]

g) Reasonable but Mistaken Belief

{¶ 77} The objectively reasonable officer can be mistaken. What is a "reasonable" belief in light of the officer's perceptions could also be a *mistaken* belief, and the fact that it turned out to be mistaken does not detract from its reasonableness when considered within the factual context and compressed time-frame of his decision to act. *Saucier v.*

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[16] We do not discount the many subjects on which a police expert may admissibly testify, provided they are within his area of knowledge and expertise. These include: the practices and procedures used in modern police work, the details of police training, including use-of-force training, techniques and tactics, the standards and legal principles on which that training is based, the use of firearms and other instruments of force (e.g., restraint devices, batons, Tasers, etc.), and areas of specialized training, such as vehicle pursuit or forensic investigations. However, opining on the ultimate issue of force in police cases is generally inadmissible. *Hubbard v. Gross,* 199 Fed.Appx. 433, 442-443 (6th Cir.2006); *compare State v. Johnson*, 10th Dist. No. 02AP373, 2002-Ohio-6957, ¶ 37-39 (expert testimony on reasonableness of deadly force in self-defense held inadmissible). Although neither party objected to the opposing expert's conclusion on the reasonableness of White's decision to shoot, we identify the error here because it is capable of repetition on remand.

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Katz, 533 U.S. 194, 205-206, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001); *Davenport*, 521 F.3d at 551.

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{¶ 78} In *Saucier*, where an officer's entitlement to qualified immunity turned on the reasonableness of his perceptions at the moment he used force, the United States Supreme Court specifically extended the mistaken-belief defense to police use-of-force cases:[17]

> Because "police officers are often forced to make split-second judgments [about the amount of force necessary]," the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective [.] * * * *If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.* * * *[R]easonable mistakes can be made* as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the

[17] Noting that officers "can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example," and still be deemed immune for such mistakes, the *Saucier* court applied "[t]he same analysis [to] excessive force cases, where in addition to the deference officers receive on the underlying constitutional claim, qualified immunity can apply *in the event the mistaken belief was reasonable.*" (Emphasis added.) *Id.* at 206. *Saucier*'s two-step procedure for addressing an officer's assertion of qualified immunity was recently modified in *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.565 (2009), but that case left undisturbed the availability of *Saucier's* defense for police-defendants. If the officer's mistake is reasonable, immunity attaches "regardless of whether the [officer's] error is 'a mistake of fact, a mistake of law, or a mistake based on mixed questions of law and fact.'" (Internal citation omitted.) *Pearson* at 231.

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relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. *An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.* (Emphasis added; internal citations omitted.) *Id.* at 205.

B) White's Assigned Errors

{¶ 79} Given the foregoing law applicable to White's use of deadly force, we turn to his six assigned errors, some of which will be treated out of order.

{¶ 80} The first assigned error states:

> I. The convictions are legally insufficient in violation of his right to due process. The state failed to prove [the] essential elements, and because White was acting under a good-faith mistake, he should have immunity from criminal prosecution. Further he did not act "knowingly" to harm McCloskey, as defined by case law.

1) Immunity

{¶ 81} White first asserts that if federal qualified immunity might shield him from civil liability for shooting McCloskey, then it should also shield him from criminal liability. Because his entitlement to immunity would follow from a conclusion that his act was objectively reasonable under *Garner*, he argues, we should decide that question

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as a matter of law. Less cogently, White then seeks to tie his claim for immunity to an argument that the evidence was insufficient to convict. He asks us to "acquit" him on insufficiency grounds if we determine that his deadly-force decision was objectively reasonable. The state replies, first, that the immunity issue was never raised below and so cannot be considered now. Second, and somewhat dismissively, the state asserts that qualified immunity, "as a defense," simply "offers no protection from criminal liability."

{¶ 82} While a claim of immunity (qualified or otherwise) generally is a question of law, there are at least two predicates for a de novo review. *Hubbell v. City of Xenia* 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, ¶ 20-21. It must have been raised initially in the trial court where it could be properly briefed and argued. Secondly, immunity is rendered a question of law only when there are no disputes over material facts relevant to its entitlement that would be outcome determinative. *Id.* at ¶ 21.

{¶ 83} We agree with the state that immunity and insufficiency, as legal doctrines, are effectively "apples and oranges," but to label immunity an affirmative defense, such as self-defense, is incorrect. Immunity generally, and qualified immunity in particular, is an "entitlement not to stand trial," rather than "a mere defense to liability." *Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522, ¶ 40, quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). The state is also a little quick in dismissing certain substantive features of White's immunity claim. It first notes that White cites no precedent where civil qualified-immunity barred an officer's criminal liability. The state then contends that the issue of objective

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reasonableness, on which his claim would turn, is always a jury question. This latter contention, however, is no longer tenable.

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{¶ 84} Recently, the United States Supreme Court rejected the argument that objective reasonableness in excessive force cases is "a question of fact best reserved for a jury." *Scott v. Harris,* 550 U.S. 372, 381, 127 S.Ct. 1769, 167 L.Ed.2d 632 (2007), fn. 8. In *Scott,* although the motorist and the officer who pursued him gave sharply conflicting accounts of the chase, the Supreme Court found that those disputes did not necessitate a trial because the record included a *videotape* capturing the police chase. The videotape clearly contradicted the motorist's claims that he drove carefully and committed no infractions. Instead, on summary judgment, the *Scott* court held that "once we have determined the relevant set of facts * * * *the reasonableness of [the officer's] actions * * * is a pure question of law.*" (Emphasis added.) *Id.* at 378-379. Here, the videotape in White's cruiser, along with his testimony, would arguably suggest that whether White's decision to shoot was objectively reasonable under *Garner* could be resolved as "a pure question of law" at some pretrial stage.[18]

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[18] In fact, appellate courts are applying *Scott* in just that way, at least in civil suits. *See Dunn v. Matatall,* 549 F.3d 348, 350 (6th Cir.2008) (officer's use of force objectively reasonable based on court's review of police video); *Williams v. City of Grosse Pointe Park,* 496 F.3d 482, 486 (6th Cir.2007) (officer's use of force objectively reasonable based almost exclusively on the police video); *Marvin v. City of Taylor,* 509 F.3d 234, 239 (6th Cir.2007) ("[T]his Court will view the events as they unfolded in the light most favorable to [plaintiff], but never in such a manner that is wholly unsupportable * * * by the video recording"); *see also Griffin v. Hardrick,* 604 F.3d 949, 954 (6th Cir.2010) (videotape evidence properly considered at the summary-judgment stage); *Coble v. City of White House, Tenn.*, 634 F.3d 865, 868-869 (6th Cir.2011) (audio recording properly considered).

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{¶ 85} But such determinations, the state further claims, are restricted to civil cases. That too is not an absolute proposition. Under certain circumstances, immunities of the kind resembling qualified immunity might also protect police officers from criminal prosecution for using deadly force. *See Idaho v. Horiuchi*, 253 F.3d 359, 366-367 (9th Cir.2001) (state prosecution of a federal agent for involuntary manslaughter stemming from the controversial "Ruby Ridge incident").[19] We cite *Horiuchi* simply to make the point that the question of an officer's possible entitlement to immunity in criminal cases, while complex, is not as farfetched as the state suggests. *Horiuchi*

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[19] From some 200 yards away, Horiuchi, an FBI sniper, shot and killed an unarmed female holding an infant as she stood behind the open door of a cabin into which her fugitive husband was fleeing. Following his indictment for manslaughter by Idaho, Horiuchi removed the criminal case to federal court and promptly sought dismissal of the charge based on Supremacy Clause immunity under Article VI of the United States Constitution. Without holding an evidentiary hearing, the district court granted his motion. Idaho appealed and the Ninth Circuit reversed, finding too many "material questions of fact in dispute which, if resolved against Horiuchi, would strip him of Supremacy Clause immunity." *Id.* at 374. In reaching that finding, the court first cited *Garner's* deadly-force standard as the substantive controlling law for Horiuchi's alleged criminal misuse of long-distance rifle fire. *Id.* at 367. Although Supremacy Clause immunity stems from a textually explicit, constitutional source, the Ninth Circuit directly analogized to the procedure in Section 1983 cases for identifying when a police officer is entitled to *qualified immunity*, citing *Harlow v. Fitzgerald,* 457 U. S. 800, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982). ("*Harlow*'s reasoning [for qualified immunity] would seem to apply equally to Supremacy Clause immunity." *Id.* at 366-367, fn. 11.) The court, however, found too many material facts in question that made it impossible, at that stage, to resolve Horiuchi's immunity as a matter of law. *See id.* at 368-374. It remanded the case for "an evidentiary hearing to determine whether the evidence supports Agent Horiuchi's entitlement to immunity *under the legal principles applicable to the use of deadly force*." (Emphasis added.) *Id.* at 377. Presumably this suggests the converse: had there been *no* disputed material facts relevant to Horiuchi's immunity claim under *Garner*, then resolving it as a matter of law through a pretrial proceeding was the proper course.

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identified substantial considerations favoring a pretrial immunity procedure for federal agents charged with state crimes. *See id.* at 375-376. Several of those considerations would appear to carry no less weight in the state prosecution of a local police officer for his on-duty use of deadly force during official enforcement activity—at least in close cases.

{¶ 86} Certainly this is not a case where the officer left his patrol route to engage in some sort of "spontaneous lark" of criminality apart from his assigned enforcement duties. *See Rogers v. Youngstown,* 61 Ohio St.3d 205, 574 N.E.2d 451 (1991). Nor is it one involving the use of physically abusive and sadistic force during otherwise normal enforcement activity. *See United States v Koon,* 34 F.3d 1416 (9th Cir.1994), *rev'd on other grounds,* 518 U.S. 81 (1996) (federal prosecution of state command officer in the so-call "Rodney King incident"). Nor is this a case involving collateral crimes perpetrated over long periods, as in the so-called "cop corruption" cases, where the officer employs the attributes of his position, including his weapon, to engage in long term criminal activity, like drug trafficking. *See, e.g., United States v. Haynes,* 582 F.3d 686 (7th Cir.2009).

{¶ 87} Ultimately, however, the procedure for resolving an officer's assertion of immunity from criminal liability for his good-faith use of force, deadly or non-deadly, in the line of duty is a matter best left to the General Assembly. This might be accomplished through a special statutory proceeding under R.C. Chapter 2744. So, while wise policy counsels the state never to say "never," White's attempt to merge his plea for

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immunity with an insufficiency review is, at day's end, unconvincing. And even accepting that no material facts have been left in doubt, *Scott, supra*, the sheer complexity of an issue never raised below precludes our review now.

2) Insufficiency

{¶ 88} White was convicted of one count of felonious assault under R.C. 2903.11(A)(2), a second degree felony. The conduct thereby criminalized is that "[no] person shall knowingly * * * cause or attempt to cause physical harm to another * * * by means of a deadly weapon[.]"[20] White asserts insufficiency on due process grounds, by which he means that one or more of these elements were not proven beyond a reasonable doubt. His specific attack is on the "knowingly" element, but he points to facts implicating defenses like "justification" and self-defense.

{¶ 89} On four evidentiary points in the trial record there can be no dispute: (1) White was armed with his departmentally-issued pistol; (2) he intentionally shot McCloskey with it; (3) the injury resulting to McCloskey from this act was catastrophic and permanent; and (4) (to White's point) *no* evidence indicated that he shot McCloskey for any reason *other than* from an immediate fear for his safety and that of Officer Sargent.

{¶ 90} Yet appellate review for sufficiency does not encompass the strength or merits of defenses, whether characterized as "affirmative" or not. *State v. Hancock,* 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 37. In terms of the core sufficiency

[20] In Part 4 hereof, we separately address White's challenge to his conviction on the firearms specification under R.C. 2941.145.

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of the state's case against White, without regard to his status as a peace officer, the impact of federal use-of-force law or the assertion of any defenses, the evidentiary test is simply one of *adequacy*. *State v. Morris*, 10th Dist. No.05AP-1139, 2009-Ohio-2396, ¶ 25 (insufficiency analysis is inapplicable to jury's rejection of self-defense claim).

{¶ 91} "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1981), paragraph two of the syllabus, superseded by constitutional amendment on other grounds in *State v. Smith,* 80 Ohio St.3d 89, 684 N.E.2d 668 (1997).

{¶ 92} Viewed in that light, and without reference to any other consideration, we find that sufficient evidence was submitted which, if believed, would prove the elements of felonious assault beyond a reasonable doubt. Separately under the first assignment, White argues that he made a "good-faith mistake" and that the state failed to prove the "knowingly" element of felonious assault *in relation to that mistake*. We will take up that argument in addressing his challenges to the trial court's jury instructions. But to the extent indicated, the remainder of White's first assigned error is not well-taken.

3) Jury Instructions and Evidentiary Issue

{¶ 93} White's fourth assigned error states:

> IV. The trial court erred by instructing the jury on the issue of reasonableness and excessive force, but would not permit White to offer evidence needed to establish he acted in a reasonable manner.

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{¶ 94} Under this assignment, White is actually asserting two distinct points of error. One challenges the jury instructions on several grounds, while the other contends that the trial court improperly restricted testimony relevant to his defense. We will address the instruction issues first, since that is the principal basis necessitating the reversal of White's conviction and a remand for a new trial.

a) Arguments

{¶ 95} White first maintains that the court's "excessive-force" instruction was erroneous because it mingled non-deadly force language into what should have been a pure deadly force instruction. Second, he complains that the jury was not instructed on "mistake," nor on "the impact of a good-faith mistake" in using deadly force. For this, he refers to "United States Supreme Court pronouncements after *Garner* and [*Graham*]" on the mistaken-belief defense. Third, White finds fault with the court's instructions on the *Graham* factors and "reasonableness."[21]

{¶ 96} The state replies that instructing on the *Graham* factors was appropriate to the facts, and if White expected to benefit from *Graham's* prohibition on 20/20 hindsight, then in fairness to the prosecution, all of its components were properly included. Oddly, the state has not addressed White's argument regarding the failure to instruct on mistake. Finally, the state maintains that the "excessive force" instruction was complete and accurate, noting that because "there were no standard Ohio Jury Instructions" for several

[21] Counsel for White and the state agreed on a separate instruction on the affirmative defense of "justification," which incorporated some language from the standard Ohio instruction on self-defense. Defense counsel had initially intended to request an instruction on self-defense, but later withdrew it in favor of the justification instruction.

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of these issues, both parties tendered proposals drawn from *Garner* and *Graham.* White's counsel objected to the state's proposed force instruction, stating: "[I]t really is not an issue of excessive force. It's the reasonableness or the actions of a reasonable police officer under the facts and circumstances of the event [a police shooting], and excessive force is not an issue in this particular case." He also objected to the state's request to include the *Graham* factors. His objections were overruled and the court adopted the state's instructions.

b) Standard of Review

{¶ 97} Abuse of discretion is the standard of review for disputed instructions. *State v. Lillo*, 6th Dist. No. H-10-001, 2010-Ohio-6221, ¶ 15. Generally, a trial court has broad discretion in deciding how to fashion jury instructions. The court must not, however, fail to "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*, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus. Further, the defendant is entitled to "complete and accurate jury instructions on all the issues raised by the evidence." *State v. Sneed*, 63 Ohio St.3d 3, 9, 584 N.E.2d 1160 (1992).

c) Instructions Given

{¶ 98} We have thoroughly examined the record containing all of the instructions, including that portion reflecting the court and counsels' discussion and arguments as to the order, form and substance of those instructions. White's complaints are not quite the

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quibbles the state urges. The following summary fairly reflects the substance of the court's instructions relevant to White's claims of error under the fourth assignment.

{¶ 99} Before giving the "excessive force" instruction, the court instructed the jury on the affirmative defense of "justification." The portion relevant here stated:

> 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.)

{¶ 100} From that instruction, the court segued into:

{¶ 101} "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.) The "excessive force" instruction stopped there. The court next gave the jury the "test for [the] reasonableness of force," stating:

> In deciding whether [White] had reasonable grounds to believe Officer Sargent or himself was in imminent danger of death or great bodily harm you must put yourself in the position of [White], with his characteristics and his knowledge, and under the circumstances and conditions that surrounded him at that time. You must consider the conduct of Michael McCloskey and decide whether his acts caused [White]

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reasonably and honestly to believe that Officer Sargent or himself was about to be killed or receive great bodily harm.

{¶ 102} The court then instructed the jury to determine "reasonableness" from "the perspective of a reasonable officer in light of all the facts and circumstances then confronting the officer at the time and in the moments before the use of *deadly force*[.]" This portion of the court's "reasonableness" instruction included *Graham's* language prohibiting 20/20 hindsight and giving deference to an officer's split-second judgments.

{¶ 103} The court next stated:

> In determining whether [White] acted reasonably in his use of force in the pursuit of his official duties, you must consider factors such as the severity of the crime Mr. McCloskey was believed to have committed, whether Mr. McCloskey posed an immediate threat to the safety of [White] or another person, and whether Mr. McCloskey was actively resisting arrest or attempting to evade arrest by flight.

{¶ 104} After this instruction, the court told the jury not to consider certain facts "not known to [White] before the use of force," citing the medical evidence of McCloskey's use of alcohol and marijuana and his possession of a knife. The jury, however, could consider, "in deciding whether [White] acted reasonably," "[what] he observed before the use of force as well [as] his conclusions based on those observations that Mr. McCloskey was intoxicated or armed with a weapon."

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d) "Excessive Force" Instruction

{¶ 105} White's use of his .40-caliber Glock to shoot McCloskey was unquestionably the paradigm use of *deadly force* under both federal and Ohio law.[22] In a police deadly-force case, it is reversible error to give the jury a non-deadly force instruction. *Rahn v. Hawkins*, 464 F.3d 813, 818 (8th Cir.2006). Here, the trial court's "excessive force" instruction, phrasing the standard to be, "*if [White] used more force than reasonably necessary,*" was error. That is the standard for non-deadly force. The court should have instructed on the deadly-force standard just as *Garner* states it or in substantially equivalent language. *See, e.g., Harris v. Roderick*, 126 F.3d 1189, 1201 (9th Cir.1997) ("[O]fficers may not shoot to kill unless, at a minimum, [1] *the suspect presents an immediate threat to the officer or others* or [2] *is fleeing and his escape will result in a serious threat of injury to persons.*" Emphasis added.)

{¶ 106} This error was compounded by the earlier *justification* instruction in which the terms "use of force," "deadly force" and "objectively reasonable" were scattered about. Instead of one concise and accurate instruction, the upshot of both was a hodgepodge of confusing language that misstated the applicable standard. While "reasonableness" applies generally to both types of force, *Garner* established explicit restraints when police confront suspects with their firearms. Deadly force by police gunfire is constitutionally reasonable *only* in the "threat" or "escape" circumstances. *Id.*, 471 U.S. at 11-12. This does not necessarily benefit White, since lethal force under

[22] R.C.2901.01(A)(2) defines "deadly force" as "any force that creates a substantial risk of causing death or serious bodily harm."

Garner is significantly more circumscribed than what the elasticity of the non-deadly force standard would allow if such force is merely "reasonable under the circumstances." The need to instruct correctly on the level of force corresponding to the facts should be readily apparent.

{¶ 107} For a court to give a deadly force instruction in a non-deadly "excessive force" case obviously makes no sense, not just because that level of force would be factually unsupported, but also because it would improperly hold the officer to *Garner's* more stringent standard. *See Dunfee v. Greenwood,* S.D.Ohio No. 02-XC-00315, 2005 WL 2085953 (Aug. 24. 2005) (rejecting as "confusing and prejudicial" a deadly-force instruction on "excessive force" facts.)

{¶ 108} Conversely, to give a non-deadly force instruction in a *deadly force* case is worse, for it could mislead the jury as to what *Garner* permits. They might conclude, for example, that it was "objectively reasonable" for the officer to shoot a suspect who posed no threat or who, in the "escape" category, was fleeing the scene of a nonviolent misdemeanor or traffic offense rather than a violent felony. That is not just an academic error. Human life has inherent constitutional value and either outcome would *judicially sanction* deadly force beyond the limits *Garner* has set. Hence, we cannot let it pass uncorrected. *Compare Sample v. Bailey,* 409 F.3d 689, 697-698 (6th Cir.2005) ("[Suspect's] hands were *visible and empty* [when shot] * * * [His] mere action of moving his arm to grab the top of the cabinet would not cause a *reasonable officer to perceive a serious threat* of physical harm to himself or others." Emphasis added.)

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{¶ 109} In a police shooting case, where there is no dispute that deadly force was used, the trial court abuses its discretion by not instructing on *Garner's* deadly force standard. *Rahn*, 464 F.3d 813. Because the jury was improperly instructed on this issue, reversal is required. *Compare State v. Sims*, 8th Dist. No. 85608, 2005-Ohio-5846, ¶ 13-17 (prejudicial error in felonious assault prosecution to give non-deadly force/self-defense instruction on deadly force facts.)[23]

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[23] Our dissenting colleague confuses the general *Graham*-factors jury instruction, which can apply to both levels of force, with *Garner's* more specific deadly-force standard that would inform the jury precisely when police may shoot to kill fleeing or threatening suspects, an instruction that was never given here. Second, and without citing any authority, the dissent would apparently find no error in instructing on both deadly *and* non-deadly ("excessive") force, despite undisputed facts indicating that *only* deadly force was used. Finally, the dissent incorrectly contends that in *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686, the United States Supreme Court "revisited" *Garner*, quoting the statement that "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" *Id.* at 382. Taking that sentence out of context, the dissent appears to suggest that *Scott* overruled *Garner*. This belies a serious misreading of *Scott*, for nowhere in that opinion did the Supreme Court explicitly or even implicitly remove *Garner's* restrictions on when police may justifiably shoot suspects. *Scott* involved a *police vehicle pursuit* in which the officer rammed the suspect's fleeing vehicle from behind, causing it to crash. The issue was whether that particular use of force (the vehicle-to-vehicle contact) was susceptible to *Garner's* deadly force standard. *Id.* at 381-382. After quoting *Garner's* holding "that it was unreasonable to kill a 'young, slight, and unarmed burglary suspect,' by shooting him 'in the back of the head' while he was running away on foot [and] when the officer 'could not reasonably have believed that [the suspect] ... posed any threat,'" the *Scott* court *distinguished Garner*, stating:

> Whatever *Garner* said about the factors that *might have* justified shooting the suspect in that case, such "preconditions" *have scant applicability to this case, which has vastly different facts*. "*Garner* had nothing to do with one car striking another or even with car chases in general * * * A police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person." (Citations omitted; emphasis sic and added.) *Id.* at 382-383.

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e) Justification Instruction

{¶ 110} The justification instruction created a different problem. It was both unnecessary and, as worded, contributed to the error previously discussed. This instruction muddled the specificity of the decisional issue in relation to the critical evidence by imprecisely reducing *Garner's* deadly force test to "[whether it] was objectively reasonable under the circumstances." No—that is *a conclusion* which the jury might draw only *after* it was properly instructed to apply *Garner's* "threat" standard to (1) the segment of the videotape in the moments preceding the gunfire (2:16:47 through 2:16:57) *and* (2) White's testimony detailing *his* pre-shooting perceptions of McCloskey's movements from his angle. On this issue, only *his* perceptions matter in forming the baseline for the jury to employ the reasonable officer to decide the

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Scott left open the question of whether the pursuing officer's vehicle-ramming technique was even "deadly force," stating, "*whether or not* [Deputy] *Scott's* actions constituted the application of 'deadly force,' all that matters is whether [his] actions were reasonable." (Emphasis added.) *Id.* at 383. In light of the factual distinction the Supreme Court drew between police vehicle-contact techniques during chases and shooting suspects dead with their firearms, it is simply untenable to construe one sentence of dicta as overturning *Garner's* limiting circumstances on the latter. Indeed, notwithstanding the dissent's reading of *Scott*, courts have continued to apply *Garner* to disputed police shootings. *See, e.g., Hulstedt v. City of Scottsdale*, D.Ariz. No. CV-09-1258, 2012 WL 3234286 (Aug. 6, 2012) ("The use of a firearm as deadly force is governed specifically by *Garner* and its progeny"); *Rush v. City of Mansfield*, 771 F.Supp.2d 827, 853 (N.D.Ohio 2011) (Citing *Garner* for "clearly established [law] 'that if a suspect threatens an officer with a weapon or threatens another person with serious physical harm or death, deadly force is authorized in self-defense or defense of another person'"); *Henry v. Purcell*, 652 F.3d 524, 531-32 (4th Cir.2011) (Applying *Garner* to the police shooting of an unarmed, fleeing misdemeanant.)

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fundamental predicate question on which guilt or innocence turns: Could White, in the moments before he fired, have *reasonably perceived* an *imminent threat* to his or Sargent's safety from McCloskey's turning/reaching motions, i.e., as if "he was pulling a weapon"?

{¶ 111} From an affirmative answer to that question, the jury could *conclude* that it was objectively reasonable for White to shoot. A negative answer would entail the *conclusion* that it was objectively unreasonable. *See Chappell v. City of Cleveland,* 584 F.Supp.2d 974, 994 (N.D.Ohio 2008) ("a reasonable juror could find that [the suspect] did not pose 'a serious and immediate threat to the safety of others' when he was shot by the detectives"). That is also why the justification instruction was superfluous. If the jury, correctly instructed under *Garner,* had found that White reasonably perceived an imminent threat from McCloskey, then his deadly-force response was *justified.* An opposite finding, by definition, would mean that it was *not justified. Jiron v. City of Lakewood,* 392 F.3d 410, 415 (10th Cir.2004) ("deadly force is justified" if a reasonable officer would have believed a threat of serious physical harm existed).

f) Failure to Instruct on Mistaken Belief

{¶ 112} In describing McCloskey's turning and arm motion, White testified: "I believed he was pulling a weapon." That this misperception was understood by the parties and the court to raise the issue of "mistake" or mistaken belief is clear from the record. During the pre-instruction conference, defense counsel requested an instruction on negligent assault under R.C. 2903.14. He stated: "there is a question of justification

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[in the] reasonable officer's *interpretation* of facts and circumstances occurring prior to the use of force [and] there's an issue as to whether or not Officer White was *negligent in assessing those facts and circumstances* prior to making the decision to fire his weapon[.]" (Emphasis added.)

{¶ 113} The prosecutor opposed this instruction, arguing that White's decision to fire was an intentional act, supported by his own testimony. Noting that the court was going to instruct on the affirmative defense of justification, he replied: "[T]he issue as to whether [White] *improperly saw [the] facts* or *misinterpreted* them, I mean, may go to an issue of self-defense * * * *where you talk about mistake of fact* [and] would still allow the person to claim self-defense[.] * * * *Maybe that would be more appropriate at this point* as opposed to a negligent assault instruction." (Emphasis added.)

{¶ 114} In refusing to give the negligent assault instruction, the court stated: "[T]he justification defense is allowable *because [White] miscalculated on the facts* and *negligently applied that which he saw and interpreted.* It does not go to the actual elements of the offense [of] felonious assault, [but] is more of a sub-defense in the justification [defense] itself, in that your articulated reason as to why [White] was justified in the shooting is *because there was a negligent misunderstanding* of it, or the pressure of it, whatever you're going to argue, [and] I don't see it applying directly to the court [instructing on] the lesser offense." (Emphasis added.)

{¶ 115} Despite this circuitous discussion of "negligent assessment," "misinterpreted" perception, "mistake of fact," "miscalculation" and "negligent

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misunderstanding," as all these descriptions pertained to White's factual belief at the moment he fired, no instruction was given on mistake—either in terms of *Saucier's* mistaken belief defense or what is effectively its criminal analog under Ohio law, the mistake-of-fact defense. The instruction on "excessive force," though erroneous for the reasons stated above, instructed *only* on force. It did not instruct the jury on the legal significance of a reasonable mistake an officer might make in believing that such force was needed. Nor did the instructions on justification, "reasonableness" or the *Graham* factors even passingly touch on mistake.

{¶ 116} White claims this was error. We agree. A separate instruction on mistaken belief should have followed a proper *Garner* instruction.[24]

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[24] In the "test for reasonableness" instruction, the court used the phrase, "caused the defendant reasonably and honestly to believe," which also appeared in White's proposed instruction on self-defense. Although not cited by either party, there is some authority holding that a self-defense instruction which employs those or similar words, like "honest belief," incorporates "the concept of mistake," even if "mistake" is never explicitly mentioned. *See State v. Dunivant*, 5th Dist. No. 2003-CA-00175, 2005-Ohio-1497, ¶ 23-27. In *Dunivant,* a murder case with a self-defense instruction, the Fifth District relied for its holding on *State v. Evans*, 8th Dist. No.79895, 2002-Ohio-2610, also a murder/self-defense case. *Evans*, citing no authority whatsoever, stated that "an 'honest belief' naturally includes the possibility that the defendant may have been mistaken in his belief." *Id.* at ¶ 53.

At least in the case of a police officer to whose on-duty use of deadly force federal law applies, we disagree with this sub silentio approach. The mistaken-belief defense was specifically extended in *Saucier* to mistakes that *police* make in using force. The substance of that defense needs to be communicated to the jury in explicit terms by separate instruction. The decisional relevance to the officer's *criminal* liability of whether his mistake was reasonable or unreasonable is too important to be palmed off as an inferential matter, based on some presumed intellectual ability of the jury to divine the mitigating effect of a reasonable mistake from the words "honest belief."

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{¶ 117} We have discretion under Crim.R. 52(B) to conduct a plain-error review of jury instructions—both of those that were improperly or incompletely given and those that were not given but which were clearly applicable. *State v. Williford*, 49 Ohio St.3d 247, 551 N.E.2d 1279 (1990). A finding of plain error is appropriate in "exceptional circumstances," where the omission of such an instruction "affected the outcome of the trial." *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). Even apart from a plain-error review, the discussions between counsel and the court on the issue of mistake (or "miscalculation," as the court phrased it) were sufficient to preserve the issue. *See State v. Wolons*, 44 Ohio St.3d 64, 67, 541 N.E.2d 443 (1989).

{¶ 118} The culpable mental state for felonious assault is "knowingly," which is defined in R.C. 2901.22(B). That section states:

{¶ 119} "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 probably exist."

{¶ 120} That the "knowingly" element of felonious assault can be negated by a *factually-mistaken* belief is clearly established in Ohio's mistake-of-fact defense. This defense, if accepted by the jury, renders the state's case insufficient on that element, entitling the defendant to an acquittal. *State v. Snowden*, 7 Ohio App.3d 358, 363, 455 N.E.2d 1058 (10th Dist.1982) ("Mistake of fact can, in an appropriate circumstance, negate either *'knowingly'* or 'purposely'"); *see also State v. Pecora*, 87 Ohio App.3d 687,

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690, 622 N.E.2d 1142 (9th Dist.1993); *State v. Rawson,* 7th Dist. No. 05-JE-2, 2006-Ohio-496, ¶ 7.

{¶ 121} While *Saucier's* mistaken belief defense cloaks the officer's act with immunity in Section 1983 suits, in the criminal context it would operate to negate the "knowingly" element in the same way as the mistake-of-fact defense (being modified instructionally for a finding of guilt or innocence.) In other words, if the jury finds that the officer held a reasonable but mistaken belief as to the facts that prompted him to act, it is effectively finding that he acted without the culpable mental state (mens rea) necessary to satisfy that element of the offense. *Compare Rawson, supra,* at ¶ 15 ("[I]f [the defendant] was mistaken about a fact that would nullify the 'knowingly' element, [then] the jury should acquit him"); *Culosi v. Bullock,* 596 F.3d 195, 201 (4th Cir.2010) ("A mistaken use of deadly force [is] not necessarily a constitutional violation under the Fourth Amendment [if based on] a mistaken understanding of facts that is reasonable in the circumstances[.]")

{¶ 122} In the civil context the law does not punish police officers for making honest and reasonable mistakes in using force under ambiguous, split-second conditions, even when those mistakes cause injury. *Saucier.* Neither, in our view, should the criminal law of this state if under similar conditions the officer's evidence could conceivably support the same finding. Here, the state presented *no* evidence—*none*—that White shot McCloskey for any reason other than from an instantaneous inference that the "reaching movement" of McCloskey's right arm signaled the drawing of a

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weapon. Nor has the state ever suggested, here or during trial, that his belief was not honestly held. *Sargent v. City of Toledo,* 150 Fed.Appx. 470, 475 (6th Cir.2006) ("No evidence suggest[s] that [Officer] Taylor shot Sargent for reasons other than self-defense"). In hindsight, of course, White's on-scene belief was tragically mistaken, but the jury might plausibly have found it reasonable if they had been instructed on the defense. The state is free to argue (and we assume it would) that his belief was not a reasonable one. It is an issue over which reasonable minds could differ, but White was entitled to the instruction. If the jury found his mistaken belief unreasonable, he could be convicted.

{¶ 123} In *Williford,* 49 Ohio St.3d 247, 551 N.E.2d 1279, where a manslaughter defendant had claimed self-defense, the Ohio Supreme Court found plain error in the trial court's failure to instruct the jury on "defense of family" and to give a correct "no retreat" instruction, where the *defendant's* evidence, "*if believed by a properly instructed jury, would support an acquittal* [.]" (Emphasis added.) *Id.* at 252. The same reasoning applies here. Mistaken belief was an issue plainly raised by White's own testimony and, "if believed by a properly instructed jury," it would support an acquittal. The failure to instruct on this defense was plain error.

g) The *Graham* and "Reasonableness" Instructions

{¶ 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. As far as the *Graham* instruction

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went, with one exception, it substantially comported with that case. It properly instructed the jury not to engage in 20/20 hindsight or consider later-learned facts, such as the knife and the medical documentation of McCloskey's blood-alcohol content and drug use, since those were things White could not have known beforehand. The instruction also correctly indicated that the medical findings could be considered *against McCloskey* to the extent they bore on his credibility. At least as important, however, was that White did not know McCloskey was unarmed. The court should have balanced its recitation of the *Graham* factors with a corresponding admonishment to the jury that the fact no weapon was found could not be considered in assessing the reasonableness of White's threat perception. *See Reese, supra,* 926 F.2d at 501 ("Also irrelevant is the fact that [the suspect] was actually unarmed. [The officer] did not and could not have known this.")

h) Evidentiary Issue

{¶ 125} White's counsel objected to the jury being instructed that, per *Graham*, they could consider "the severity of the crime [McCloskey] *was believed* to have committed," even though he was never charged with anything. His real objection, however, and the one argued here, is less about that instruction and more about the trial court's related evidentiary ruling during trial. In sustaining an objection by the prosecutor, the court would not permit White to tell the jury what crime or crimes he would have charged McCloskey with.

{¶ 126} Given how the court later worded the *Graham* instruction, White points out, the question is, "believed by whom?" This instruction, which focused on

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"determining whether the defendant acted reasonably," referred to *White's* belief. White argues that it made no sense, and was patently unfair, to tell the jury to consider the crimes McCloskey "*was believed* to have committed" without having heard from the *believer*—him—about just what those crimes were. In contrast, White complains, McCloskey and Snyder were allowed to give the jury "unimpeded testimony" explaining away their behavior as innocent, and hence to disallow his testimony was prejudicial. The state counters that White's testimony about possible charges would have been "speculation."

{¶ 127} We disagree. His testimony should have been allowed.

{¶ 128} *Graham*, as noted earlier, does not state a definitive checklist of factors. The parties may argue, and the jury may consider, any fact in evidence that bears on the reasonableness of White's pre-shooting perceptions, so long as it is not a later-learned fact that the hindsight prohibition would bar. White's understanding of what violations McCloskey may have committed *leading up to* the shooting was relevant and admissible for that purpose. It would be yet another factor for the jury to consider in gauging how *White* perceived the circumstances in which he found himself, including any illegalities (large or small) he observed the suspects commit. How probative it is of reasonableness is for the jury to determine. Whether the prosecutor's office, well after the fact, would have felt McCloskey's conduct warranted a felony charge, a misdemeanor charge, or no charge at all, is irrelevant. As well, McCloskey and Snyder's explanations of their behavior, while admissible, can have no role for the jury in determining whether *White*

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reasonably perceived a threat justifying deadly force. For that purpose they are irrelevant. Apart from the video, only *his* perceptions matter as the threshold for gauging what the objectively reasonable officer could have believed.[25]

{¶ 129} Accordingly, to the extent indicated above, the fourth assigned error is well-taken.

i) Failure to Instruct on Negligent Assault

{¶ 130} White's third assigned error states:

> III. The trial court erred by not providing the jury with the requested instruction for negligent assault as a lesser include offense.

{¶ 131} The gist of negligent assault under R.C. 2903.14(A) is that "[n]o person shall negligently, by means of a deadly weapon * * * cause physical harm to another[.]" R.C. 2901.22(D) defines the culpable mental state required for criminal negligence:

> A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

{¶ 132} Thus, "a substantial lapse from due care" is the attribute of conduct or perception which R.C. 2903.14 (A) criminalizes for the "negligent" use of a deadly

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[25] On this point, a cautionary instruction would not be inappropriate in order to contain the jury's assessment of the ultimate issue solely to *Graham's* constrained perspective of the reasonable officer placed in White's shoes in the moments before he fired.

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weapon that harms another person. Counsel for White argues that he "acted in good faith, but was erroneous in [concluding] that McCloskey was armed," and thus this misperception furnished the evidentiary predicate for a negligent assault instruction. The jury, he argues, could have found a "substantial lapse from due care" in his pre-shooting judgment. The state replies that the instruction was correctly refused because White himself maintained that he *intentionally* shot McCloskey. Never once did he suggest that his weapon discharged from accident or inadvertence.

{¶ 133} As is evident, the parties are using "negligence" in two different senses. For the state, negligence under R.C. 2901.22(D) applies *only* to inadvertent conduct. For White, criminal negligence can be found in an intentional act done carelessly from a "substantial lapse" in one's evaluative judgment. That view of negligent assault, however, finds no support in the decisional law on the lesser-included issue.

{¶ 134} While several cases involving deadly weapons have held that negligent assault is a lesser included offense of felonious assault, *see, e.g., State v. McCornell*, 91 Ohio App.3d 141, 147-148, 631 N.E .2d 1110 (8th Dist.1993), they also hold that instructing on that offense is not automatic. "[It] is required only where the evidence presented at trial would reasonably support *both* an acquittal on the crime charged *and* a conviction upon the lesser included offense." (Emphasis added.) *Id.* at 147. *See also State v. Anderson,* 10th Dist. No. 06AP-174, 2006-Ohio-6152, ¶ 38-39. The latter condition is the problem here.

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{¶ 135} In reviewing felonious assault convictions specifically involving firearms, appellate courts have consistently upheld the refusal to instruct on negligent assault where the evidence, even when viewed most favorably to the defendant, unambiguously demonstrated an intentional, rather than a careless or inadvertent, shooting. *See, e.g., State v. Stephens*, 8th Dist. No.93252, 2010-Ohio-3997, ¶ 17 (Evidence "showed that appellant put on rubber gloves before picking up the firearm; pointed the gun at [victim] and said, 'You think I won't?' [and] pulled the trigger [.] * * *Although he argues that the shooting was purely accidental, appellant's actions on the day in question indicate otherwise."); *State v. McCormick*, 2d Dist. No. 19505, 2003-Ohio-5330, ¶ 56 ("[Shooting] was not the result of negligence."); *compare State v. Ollison*, 8th Dist. No. 91637, 2009-Ohio-1691, ¶ 23 (aggravated assault conviction; "[appellant] testified that he shot at [victim] 'intending to sprinkle him.' This was not a situation where he accidently fired the gun; [appellant] intended to shoot [victim], and he did.")

{¶ 136} In resolving this assignment, the question is simply what the evidence demonstrated as to White's pre-shooting state of mind. His own testimony supplies the answer. Having drawn his gun as he exited his cruiser, White claimed he saw an imminent threat in McCloskey's turns and arm motion, from which he inferred that a weapon was being drawn. He responded by firing to stop the threat. That reflexive act, though in hindsight spurred by an erroneous inference, was deliberate. Indeed, it would be hard to imagine any act of *self-preservation* that was not. His mindset was one of survival—believing immediate action was needed against an apparently armed suspect.

This reveals the flawed premise underlying White's argument: "act[ing] in good faith but erroneously," as he puts it, did not *lessen* the intentionality of his act. On these facts, the appropriate instruction was not negligent assault; it was mistaken belief.

{¶ 137} But the secondary problem for White is the instruction on the affirmative defense of justification (notwithstanding the defect it contributed to what should have been a pure deadly-force instruction). "Justification" itself is merely a genus label for any affirmative defense which functions to excuse admitted conduct that is otherwise unlawful. *See State v. Poole*, 33 Ohio St.2d 18, 19, 294 N.E.2d 888 (1973). Here, that instruction read like a self-defense instruction, despite language that White "was acting in pursuit of official police duties." In substance, it expressed that White used deadly force *intentionally*, but was justified in doing so. The justification defense is therefore plainly inconsistent with the claim that White is, at best, guilty of negligent assault. *Compare State v. McDowell*, 10th Dist. No. 10AP-509, 2011-Ohio-6815, ¶ 45 ("[T]here was overwhelming evidence that appellant intentionally and purposely fired two shots at [victim] in rapid fire [.] * * * [T]o instruct on the lesser offense of assault would be incongruous, particularly given appellant's self-defense claim, which asserts a *purposeful act* that was purportedly justified." (Emphasis added.)

{¶ 138} Had the jury accepted White's justification defense, his acquittal on felonious assault would necessarily have followed. That acquittal, in turn, would operate as an acquittal on all lesser included offenses. *State v. Nolton*, 19 Ohio St.2d 133, 249 N.E.2d 797 (1969). Instructing on an affirmative defense, where it would be a complete

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defense to the elements of the crime charged, precludes a defendant from obtaining an instruction on lesser included offenses. That has been the rule in this district, as it is in others. *See State v. Grace,* 50 Ohio App.2d 259, 260-261, 362 N.E.2d 1237 (6th Dist.1976); *see also State v. Densmore,* 3d Dist. No. 7-08-04, 2009-Ohio-6870, ¶ 18, citing *Nolton, supra* (defendant's choice is either-or, not both).

{¶ 139} Accordingly, the trial court correctly refused to instruct on negligent assault, and the third assigned error is not well-taken.

4) Firearm Specification Conviction

{¶ 140} White's sixth assigned error states:

> VI. It was unconstitutional to convict White for a firearms specification given he was required to carry a firearm in the course of his employment, and utilize the firearm within the course of his employment as a police officer.

a) Forfeiture of the Issue?

{¶ 141} This assignment raises the issue of the constitutionality of White's conviction under Ohio's firearm specification statute, R.C. 2941.145. We first note, and the state points out, that White did not raise the issue of constitutionality below. When such challenges are not raised and argued in the lower court, they are generally deemed forfeited on appeal. *State v. 1981 Dodge Ram Van,* 36 Ohio St.3d 168, 170, 522 N.E.2d 524 (1988). That is not, however, an invariable rule for several reasons.

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{¶ 142} First, in *Dodge Ram*, not only was constitutionality not raised in the trial court, but the issue was also neither assigned as error nor briefed on appeal by either party. The appeals court there simply acted sua sponte, declaring the criminal statute to be unconstitutional. Although the Supreme Court reversed that ruling as an abuse of appellate discretion, it stated: "[N]othing prevents a court of appeals from passing upon an error which was neither briefed nor pointed out by a party." *Id.* at 170, citing *Hungler v. Cincinnati*, 25 Ohio St.3d 338, 496 N.E.2d 912 (1986). Here, the constitutional issue was raised and argued in the briefs, which distinguishes it from the posture of the issue in *Dodge Ram*.

{¶ 143} Second, in decisions since *Dodge Ram*, the Supreme Court has made it clear that the so-called "waiver doctrine" is discretionary: "Even where waiver is clear, this court reserves the right to consider constitutional challenges to the application of statutes in specific cases of plain error or *where the rights and interests involved may warrant it.*" (Emphasis sic.) *Hill v. Urbana*, 79 Ohio St.3d 130, 133-134, 679 N.E.2d 1109 (1997).

{¶ 144} Even apart from *Hill's* less restrictive view of waiver, we have discretion under App.R. 12(A)(2) to reach legal issues which, though not originally raised below, appear in the evidentiary record and have had the benefit of briefing. *See State v. Peagler*, 76 Ohio St.3d 496, 499, 668 N.E.2d 489 (1996). Here, there exists a patently clear "evidentiary basis in the record" involving White's use of his duty pistol in relation to having incurred the firearm specification penalty, and the constitutional issue has been

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briefed. *Id.* Finally, there are wider dimensions to the constitutional issue which simply cannot be ignored. White's conviction on these facts establishes a precedent involving "the rights and interests" of a class of persons whose daily activity potentially subjects them to the imposition of this penalty: Ohio peace officers.[26] *Compare Hill* at 134. And it is these facts—*unique to peace officers*—that provide several contextual imperatives for addressing whether the specification may be constitutionally so applied.

{¶ 145} First, there is the driving premise underscoring all police-citizen encounters that rise to the level of a "seizure" under the Fourth Amendment: during legitimate acts of enforcement, a police officer's "right to make an arrest or investigatory stop *necessarily carries with it the right to use some degree of physical coercion or threat thereof* to effect [it]." (Emphasis added.) *Graham,* 490 U.S. at 396. If faced with life-threatening behavior by a suspect during a particular stop, arrest or capture, that right under *Garner* allows the officer to use, or threaten to use, his firearm to accomplish the seizure and to defend himself or others. Second, under R.C. 2935.03, and generally under R.C. 737.11, state law places an affirmative duty on peace officers to *enforce* the criminal and traffic laws of Ohio, to arrest violators, and to "preserve the peace, [and] *protect* persons and property." (Emphasis added.) R.C. 737.11. The discharge of these

[26] White is a certified Ohio "peace officer" as defined by R.C. 109.71(A) and 2935.01(B). In his testimony he explained that the Ottawa Hills police department traditionally employs full-time dispatchers who are also certified peace officers and, as needed, these "part-time officers * * * fill in for full-time officers on the road." This is what he was doing on May 23, 2009.

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duties of enforcement and protection necessarily places the officers in situations where deadly or non-deadly force might have to be used. Further, in enforcing the laws of Ohio and their local jurisdictions, peace officers are *compelled* by their departments and agencies to train with and carry departmentally-issued (or approved) firearms for that purpose. This includes not just handguns, but shotguns and rifles as well. Third, their employers fully expect that the officers, at least on occasion, will deploy and use these firearms, or threaten to use them, if required to defend themselves or to apprehend and arrest lawbreakers. Finally, under R.C. 109.71 et seq., and the rules promulgated by the Ohio Peace Officer Training Commission (OPOTC), all officers are required annually to meet minimum OPOTC firearms training and qualification standards, in order to retain their state certifications (essentially, their right to be employed as peace officers.) *See* R.C. 109.801(A)(1) and (A)(2). Beyond what OPOTC mandates, the officers' departments may require that they meet higher proficiency standards and undergo specialized training in using firearms.

{¶ 146} In sum, in order even to be employed as a peace officer in Ohio, and to remain so employed over the course of a career, it is an undisputed *mandatory* "job requirement" for the officer to possess, carry and use a firearm while discharging his official enforcement duties.

{¶ 147} While the issue before us concerns the firearms-specification conviction of a particular officer, ultimately it touches the rights and interests of any Ohio peace officer who, under similarly hurried conditions during an on-duty encounter, may have to

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draw, point and fire his gun at a criminal suspect, and thereby subject himself to a felony charge *and* the imposition of the specification. "Accordingly, we not only have the authority to consider this issue, but we believe we also have the duty to do so." *Hill*, 79 Ohio St.3d at 134, 679 N.E.2d 1109.

b) Arguments

{¶ 148} White challenges the constitutionality of his firearm specification conviction on as-applied grounds, and secondarily suggests that the statute is void-for-vagueness. His as-applied attack cites his rights under the due process and equal protection clauses of the Ohio and United States Constitutions. The state counters in two ways. First, the firearm specification statute is presumptively constitutional and White's as-applied challenge fails to demonstrate how peace officers are exempted from its reach. Second, any vagueness attack must fail, the state insists, because the statute is unambiguous as to what conduct is penalized, "even when the crime is committed by a police officer [who is] required to carry a gun."[27] For both points, the state cites several federal cases and one Michigan case where law enforcement officers, having been convicted of an underlying felony offense, were given upward increases in prison time due to a firearm specification or similar penalty enhancement.

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[27] Since White makes no coherent vagueness argument, we will not make it for him, and we agree with the state that R.C. 2941.145 is facially unambiguous. Its meaning is not in question, only its scope. Further, because it is sufficient to address the statute's application to White on due process grounds, we need not address his equal-protection claim, which too is only asserted and not argued.

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c) Standard of Review

{¶ 149} The constitutionality of a lawfully enacted statute is strongly presumed. *State v. Carswell,* 114 Ohio St.3d 210, 2007-Ohio-3723, 871 N.E.2d 547, ¶ 6. The party questioning its constitutionality bears the burden of proving beyond a reasonable doubt that the statute conflicts with some provision of the Ohio or United States Constitutions. *State v. Williams,*126 Ohio St.3d 65, 2010-Ohio-2453, 930 N.E.2d 770, ¶ 20.

i) As-Applied.

{¶ 150} The parties agree that R.C. 2941.145 is not facially unconstitutional, one of two ways it might be attacked. *Cleveland Gear Co. v. Limbach,* 35 Ohio St.3d 229, 231, 520 N.E.2d 188 (1988). Instead, White maintains that R.C. 2941.145 is unconstitutional on due process grounds as applied to him and to any on-duty Ohio peace officer engaged in legitimate law enforcement functions in which having to brandish, use, or threaten to use their firearm might occur.

{¶ 151} While a facial challenge permits a statute to be attacked for its effect on conduct other than the conduct for which the defendant is charged, *see Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 503, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985), an as-applied challenge requires clear and convincing evidence of a presently existing set of facts that makes the statute unconstitutional *when applied to the defendant on those facts. State v. Beckley,* 5 Ohio St.3d 4, 6, 448 N.E.2d 1147 (1983), citing *Belden v. Union Cent. Life Ins. Co.,* 143 Ohio St. 329, 55 N.E.2d 629 (1944). A statute may be unconstitutional as applied to a class of persons or to an individual person. *Oliver v. Feldner,* 149 Ohio

App.3d 114, 121, 2002-Ohio-3209, 776 N.E.2d 499, ¶ 40 (7th Dist.), citing *Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). In challenging the statute "as applied," the party is contending that the "application of the statute *in the particular context in which he has acted* * * * 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*." (Emphasis added; citations omitted.) *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 109, 2004-Ohio-357, 802 N.E.2d 632 (2004); *see also Women's Med. Professional Corp. v. Voinovich*, 130 F.3d 187, 193 (6th Cir.1997) ("If a statute is unconstitutional as applied, the state may continue to enforce the statute in different circumstances where it is not unconstitutional, but if a statute is unconstitutional on its face, the state may not enforce the statute under any circumstances").

{¶ 152} Thus, if we find R.C. 2941.145 unconstitutional on as-applied grounds, White's firearm specification conviction must be reversed and the specification ordered dismissed. While R.C. 2941.145 could not be applied to him or to any other similarly-situated peace officer, the state could continue to apply and enforce the specification beyond that factual context. *Yajnik*; *Voinovich*.

ii) Due Process

{¶ 153} For purposes of White's substantive due process claim, "[t]he 'due course of law' clause of Section 16, Article I of the Ohio Constitution, has been considered the equivalent of the 'due process of law' clause in the Fourteenth Amendment." *Direct*

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Plumbing Supply Co. v. City of Dayton, 138 Ohio St. 540, 544, 38 N.E.2d 70 (1941). In a due-process analysis of a statute's constitutionality, courts employ a rational-basis review unless a fundamental right is involved, which draws the more severe review of strict scrutiny. *Reno v. Flores*, 507 U.S. 292, 301-302, 309, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993); *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 478, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 49.

{¶ 154} Employment as a peace officer is not a "fundamental right," as traditionally construed, nor is White claiming it is, and thus strict scrutiny is not warranted. Under a rational basis review, the statute will be upheld if it bears a real and substantial relation to the public health, safety, morals or general welfare *and* if it is not unreasonable, arbitrary or discriminatory. *Arbino* at ¶ 49; *State v. Thompkins* (1996), 75 Ohio St.3d 558, 561, 664 N.E.2d 926 (1996). The federal version of rational basis is simply whether there exists a rational relationship between the application of the challenged statute and its purpose. *Id.* Here, there is no question that R.C. 2941.145 has a "real and substantial relation" to public safety. The critical question is whether applying the firearm specification to White on these facts, and to Ohio peace officers in similar circumstances, is unreasonable, arbitrary or discriminatory in light of the purpose for which the statute was enacted. If it is, then its application in this context cannot be upheld.

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d) Distinguishable Authority

{¶ 155} In arguing that R.C. 2941.145 is not unconstitutional as applied to White, the state first cites five federal cases in which the courts imposed a penalty enhancement on police officers for using their gun or related equipment (e.g., body armor, restraint devices) during the commission of a felony offense. None of those cases, however, bears even the remotest similarity to the facts here. All were egregious "cop corruption" cases involving the commission of collateral felonies over extended time periods. The flagitious conduct for which those officers were properly prosecuted was completely unrelated to their official duties and was not triggered by any act of on-duty enforcement.

{¶ 156} Among them is *United States v. Haynes,* 582 F.3d 686 (7th Cir.2009). *Haynes* involved a Chicago officer convicted of racketeering, drug conspiracy, robbery, and extortion. From 1999 to 2005, the officer was principally involved in "ripping off" drug dealers and drug couriers, and generally acting like the armed career criminals he was supposed to be arresting. *Id.* at 692-697. The *Haynes* court articulated the theme which distinguishes all these cases from White's situation, stating: "[a]s you read this, it may be difficult to tell the cops from the crooks. That's because many of the actors in these events are both. You may be reminded of a popular movie [Training Day]. In our case, life imitates art." *Id.* at 692, fn. 1.

{¶ 157} In *United States v. Shamah,* 624 F.3d 449 (7th Cir.2010), two Chicago street officers spent two years "supplement[ing] their income by shaking down drug dealers." *Id.* at 451-452. Hardly an isolated instance of "cops behaving badly," they

were properly convicted of RICO conspiracies, civil-rights crimes, theft of government funds, and gun possession during violent crimes—all involving the liberal use of their duty weapons, handcuffs and body armor to facilitate these offenses.

{¶ 158} In *United States v. Partida*, 385 F.3d 546 (5th Cir.2004) two police officers were convicted of extortion, drug trafficking and conspiracy. The gist of their misdeeds involved escorting and protecting known drug dealers as they transported large quantities of marijuana through their jurisdiction. Even then, the *Partida* court noted that under the federal sentencing statute, any penalty enhancement must still be based on evidence that the officer possessed "a weapon at the time he *uses his official position* to facilitate a drug offense." (Emphasis added.) *Id.* at 562. The enhancement provision, in other words, is not automatic. Some evidentiary connection must be shown between the possession or use of the weapon and the collateral offense, beyond its happenstance possession in the officer's official capacity. *Id.* at 563. The federal cases thus provide no authority whatsoever for upholding the application of R.C. 2941.145 to White's circumstances.[28]

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[28] The remaining two federal cases on which the state relies are just as easily differentiated. In *United States v. Sivils*, 960 F.2d 587, 596 (6th Cir.1992), two officers were convicted of conspiring to possess and distribute cocaine and firearms possession while drug trafficking over a period of several months. In *United States v. Ruiz*, 905 F.2d 499, 508 (1st Cir.1990), a Massachusetts cop was convicted of drug-trafficking conspiracies and racketeering activity occurring over a six-year period. This stellar officer, among other nefarious conduct, assisted drug traffickers in return for "personal use" cocaine by protecting them from detection and arrest. *Id.* at 502-505. Ruiz's duty weapon was not "incidental to his vocation as a police officer," but was employed "as a means of facilitating his avocation as a criminal." *Id.* at 507. In noting the connection between his position and his felonious behavior, the court stated:

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{¶ 159} The state also cites *People v. Khoury*, 181 Mich.App. 320, 448 N.W.2d 836 (1989), which, though non-binding, is arguably more analogous to this case. There, an on-duty officer, dispatched to an apartment complex to break up a fight, shot and killed a knife-wielding combatant. That resulted in Khoury's trial and convictions for manslaughter and the gun specification penalty under Michigan's felony-firearm statute. *Id.* at 837. The appeals court first rejected his void-for-vagueness challenge to the specification conviction, summarily holding that the statute "provides fair notice of proscribed conduct." The court next dismissed his "public policy" argument, which attempted an analogy with police immunity in civil cases. On this point, the court held:

> We know of no public policy consideration that would justify granting police officers immunity from criminal prosecution for their criminal acts. The fact that the Legislature has determined that there are such policy considerations to support the grant of immunity from civil liability to police officers for their actions under some circumstances is not persuasive. At such time as the Legislature deems it advisable, the Legislature will doubtless enact similar measures with regard to the

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> [Ruiz's] ability to intimidate [drug] dealers with the power of arrest, his access to [computer] data and inside information and warrants, his assistance in transporting cocaine, and his ability to supply ammunition were all made possible through, or facilitated by, his employment. [His] illegal activities were clearly helped along by the authority vested in him as a police officer[.] *Id.* at 504.

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criminal prosecution of police officers for actions arising in the course of their duties. *Id.* at 839.[29]

{¶ 160} The state asks us to follow *Khoury's* reasoning here and simply pitch the issue to the General Assembly to resolve. Yet, in deferring to the legislature in a conclusory way, the *Khoury* court did not indicate whether its deference was due to some discernible legislative purpose behind Michigan's felony-firearm specification. That is, the court did not identify or rely on legislative purpose as it might bear on whether the specification was appropriately applied to police officers who use their guns while plainly performing official investigative or enforcement functions.

e) Legislative Purpose of R.C. 2941.145

{¶ 161} R.C. 2941.145 creates a penalty enhancement, not a separate criminal offense, and consequently it does not merge with the underlying felony at sentencing. *State v. Ford,* 128 Ohio St.3d 398, 2011-Ohio-765, 945 N.E.2d 498, ¶ 19. The specification carries a three-year mandatory prison term where the jury finds "that the offender had a firearm on or about the offender's person or under the offender's control

[29] The majority opinion affirmed the officer's specification conviction. The dissenting judge thought the evidence was insufficient to convict on the manslaughter charge, feeling also that it strongly indicated an act of reasonable self-defense, and would have reversed both convictions. *Id.* at 840. Thereafter, the Michigan legislature amended the felony-firearm statute to create an exemption for on-duty officers. The penalty enhancement "does not apply to a law enforcement officer who is authorized to carry a firearm while in the official performance of his or her duties, and who is in the performance of those duties" when use of the firearm occurs. *See People v. Khoury,* 437 Mich. 954, 954, 467 N.W.2d 810, 810 (1991). Khoury then moved for, and the court granted, reconsideration of its earlier ruling in light of this amendment, and reversed his specification conviction. *Id.*

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while committing the offense *and* displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense." (Emphasis added.) *Id.*[30]

{¶ 162} On several occasions the Ohio Supreme Court has identified the legislative purpose behind the mandatory incarceration penalty for using a firearm while committing a felony. *See State v. Thompkins*, 78 Ohio St.3d 380, 385, 678 N.E.2d 541 (1997); *State v. Powell*, 59 Ohio St.3d 62, 63, 571 N.E.2d 125 (1991); *State v. Murphy*, 49 Ohio St.3d 206, 208, 551 N.E.2d 932 (1990).

{¶ 163} Among these, in *Murphy*, the court bluntly stated:

> In enacting this statute [former R.C. 2929.71(A)] *the legislature wanted to send a message to the criminal world*: "If you use a firearm you will get an extra three years of incarceration." That is why it chose the

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[30] R.C. 2929.71 formerly contained the firearm enhancement provisions, but was repealed effective July 1 1996. Applicable here, R.C. 2929.14(B)(1)(a) now provides, in relevant part:

> Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of * * * a felony also is convicted or pleads guilty to a specification of the type described in section * * * 2941.145 of the Revised Code, the court shall impose on the offender * * *:
>
> (ii) A prison term of three years if the specification is of the type described in section R.C. 2941.145 of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense[.]

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word "firearm," instead of simply "deadly weapon," which can include all types of lethal instruments. The foregoing definition includes loaded as well as unloaded guns. It also includes operable guns, as well as inoperable guns that can readily be rendered operable. *Id.* at 208. (Emphasis added.)

{¶ 164} In *Powell*, the court observed:

By enacting [former] R.C. 2929.71, the General Assembly sought to deter and punish both the use and possession of firearms by people who commit crimes. The public policy behind this enactment is apparent: a criminal with a gun is both more dangerous and harder to apprehend than one without a gun. Further, it is obvious that a gun stolen during a burglary can be as dangerous as one which the burglar has at the start of the crime. Accordingly, we hold that a three-year additional term of actual incarceration may be imposed pursuant to R.C. 2929.71 if the defendant has a firearm in his or her possession at any time during the commission of a felony, even if, as in the instant case, the firearm is acquired by theft during the course of the felony. (Emphasis added.) Id. at 63.

{¶ 165} There is also Justice Resnick's perspicacious observation in *State v. Gaines*, 46 Ohio St.3d 65, 545 N.E.2d 68 (1989) (Resnick, J. dissenting):

[A]t the time [former R.C.2929.71] was enacted *there was a drastic rise in violent crimes involving the use of firearms,* and therefore state legislatures throughout the country enacted statutes *designed to curb violent*

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crime. One of the major avenues utilized by state lawmakers was the adoption of enhancement statutes. The basic premise of this type of law was to "enhance" the sentence of a defendant convicted of an enumerated felony who used or possessed a firearm in the perpetration of said crime. By enacting R.C. 2929.71 in 1983, *Ohio joined the growing number of states seeking to deter the use of guns in the commission of violent crimes.* (Emphasis added.) *Id.* at 71.

f) Analysis

{¶ 166} Today, the legislative purpose behind R.C. 2941.145 remains unchanged from its predecessor and is just as unequivocal. The underlying theory may be embedded in deterrence, but where that fails, the express purpose is to punish the offender who *voluntarily* introduces a firearm into a felony he was otherwise intending to commit. Indeed, to harshly punish the criminal *for making that choice* was the legislature's clear intent, since committing the felony unarmed draws only the penalty for the substantive crime.

{¶ 167} It is one thing for an on-duty officer to engage in a "personal frolic" of criminality, having no relation to a legitimate law enforcement task, that injures another person. *See Rogers,* 61 Ohio St.3d at 212, 574 N.E.2d 451 (on-duty officer, in uniform and armed, left patrol assignment, drove to his mother's house and allegedly assaulted sister). By definition, once an officer commits some collateral crime, as in the "cop corruption" cases, he is no longer performing his official duties and is properly subject to

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prosecution and, where warranted, to the firearm specification. An officer has a statutory duty to enforce the law, but he is under *no duty* to break the law through a separate act of illegal conduct. Thus, for example, an Ohio highway patrolman who left the state patrol's training facility, went home and shot his wife, is properly convicted of both felonious assault *and* the firearm specification under R.C. 2941.145. *See State v. McCormick*, 2d Dist. No. 19505, 2003-Ohio-5330.

{¶ 168} The line of demarcation is straightforward: was the officer acting within the scope of what he was employed to do when he used a firearm? Was he performing an official enforcement function that involved, e.g., the investigation, detention, apprehension, pursuit or arrest of a person suspected of some offense? Regardless of whether the core act is afterward thought by the state to warrant a felony prosecution, the specification should not attach in that circumstance merely because it is artfully possibly to allege in the indictment that the officer possessed his duty firearm "while committing the offense *and* [the officer] displayed the firearm, brandished the firearm, * * * or used it to facilitate the offense." R.C. 2941.145.

{¶ 169} Consistent with this analysis is the relevance of R.C. 2901.04(A), which states: "[S]ections of the Revised Code defining offenses or *penalties* shall be *strictly construed* against the state, and *liberally construed* in favor of the accused." (Emphasis added.) As it would relate to R.C. 2941.145 and the significance of the legislative purpose behind it, the Ohio Supreme Court has stated: "[A]lthough criminal statutes are strictly construed against the state, R.C. 2901.04(A), they should not be given an

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artificially narrow interpretation that would defeat *the apparent legislative intent*." (Emphasis added.) *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, 972 N.E.2d 534, ¶ 20.

{¶ 170} In our view, it was never the General Assembly's intent to apply the firearm specification to a peace officer who is required by his employer and, indirectly, by the duties and requirements of state law, to possess and carry a firearm and who, consequently, might have to discharge it during a legitimate act of enforcing the law. The purpose of the statute, in other words, was not to ensnare an officer with this type of penalty *when he had no choice* but to bring the firearm into an on-duty confrontation with a suspected lawbreaker, where he might be expected to brandish it and, possibly, have to use it. To maintain otherwise is to ignore the plain rationale for the specification, as recognized in *Murphy*, *Powell* and *Gaines*. We are therefore unpersuaded that the approach of the *Khoury* court should be ours.

g) R.C. 2941.145 is Unconstitutional as Applied

{¶ 171} We hold that R.C. 2941.145 may not be constitutionally applied to White on these facts and to persons in his class—Ohio peace officers—acting in similar circumstances. To convict the officer of the firearm specification for an act he unambiguously took in the good-faith performance of a law enforcement function, using a firearm he was compelled to carry, violates his due process rights. It bears no reasonable relation to the purpose for which the statute was enacted and to impose the specification penalty on White or other peace officers in this fashion is unreasonable and

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arbitrary. As a predicate requirement for that holding, the trial record easily offers clear and convincing evidence of a presently existing set of facts that renders R.C. 2941.145 unconstitutional, under the appropriate level of scrutiny, when applied to a peace officer's use of his firearm in the line of duty. *Eppley v. Tri-Valley Local School Dist. Bd.*, 122 Ohio St.3d 56, 2009-Ohio-1970, 908 N.E.2d 401 (2009), ¶ 13, citing *Belden,* 143 Ohio St. 329, 55 N.E.2d 629.

{¶ 172} Accordingly, White's sixth assigned error is well-taken.

{¶ 173} White's second and fifth assigned errors state:

> II. As evidenced by the trial court record, the jury lost its way and White's convictions were against the manifest weight of the evidence.
>
> V. The trial court erred in imposing a sentence of seven years for the [felonious] assault, with the mandatory three years consecutive for the firearms specification.

{¶ 174} Given the previous disposition of White's other assigned errors, these assignments are moot and need not be addressed. *See* App.R. 12(A)(1)(c)

III. Conclusion

{¶ 175} White's fourth and sixth assigned errors, to the extent previously indicated, are well-taken. The first and third assigned errors are not well-taken. The second and fifth assigned errors are deemed moot.

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{¶ 176} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is hereby reversed, the convictions and sentence are vacated, the firearm specification is ordered dismissed with prejudice, and the case is remanded for a new trial consistent with this decision. It is ordered that appellee pay the court costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

Arlene Singer, J.,
CONCURS IN PART AND
DISSENTS IN PART AND
WRITES SEPARATELY.

SINGER, P.J., concurring in part and dissenting in part.

{¶ 177} I write separately to concur in judgment only with the majority's decision as to appellant's first, second, and third assignments of error. I respectfully dissent from the majority's conclusions with regard to appellant's fourth, fifth and sixth assignments

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of error. Specifically, I respectfully dissent from the majority's decision to reverse appellant's conviction on the basis of the trial court's jury instructions regarding deadly force. Furthermore, I respectfully dissent from the majority's conclusion that appellant is immune from being convicted on a gun specification.

{¶ 178} In his first assignment of error, appellant contends that the state failed to sufficiently prove the elements of felonious assault.

{¶ 179} "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks,* 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 180} Appellant was convicted of felonious assault in violation of R.C. 2903.11(A)(2). The elements are as follows: "(A) No person shall knowingly do either of the following: * * * (2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance."

{¶ 181} Appellant claims that the state failed to prove the element of "knowingly." Appellant argues that because he was mistaken as to the factual circumstances of the present case, he lacked the criminal mens rea to commit the crime of felonious assault. I disagree.

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{¶ 182} "Knowingly" is defined in R.C. 2901.22(B), which states that: "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 probably exist."

{¶ 183} Some Ohio courts have found that "'[M]otive, purpose or mistake of fact is no significance' when determining whether a defendant acted knowingly." *State v. Chambers*, 4th Dist. No. 10CA902, 2011-Ohio-4352, ¶ 35, quoting *State v. Wenger*, 58 Ohio St.2d 336, 339, 390 N.E.2d 801 (1979). The *Chambers* court further explained:

> [T]o act "knowingly" is not to act "purposely," or with a specific intent to do the prohibited act. Katz & Gianelli, Ohio Criminal Law (2010 Ed.), Section 85.7. See *State v. Huff* (2001), 145 Ohio App.3d 555, 563, 763 N.E.2d 695 (stating that "[k]nowingly" does not require the offender to have the specific intent to cause a certain result. That is the definition of "purposely"); see, also, *State v. Dixon*, Cuyahoga App. No. 82951, at ¶ 16, 2004-Ohio-2406.

{¶ 184} Because knowing precisely what existed in a defendant's mind at the time of the wrongful act may be impossible, the trier of fact may consider circumstantial evidence, i.e., the facts and circumstances surrounding the defendant's wrongful act, when determining if the defendant was subjectively "aware that his conduct will probably cause a certain result or will probably be of a certain nature." *See, Huff, supra.* ("Whether a person acts knowingly can only be determined, absent a defendant's

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admission, from all the surrounding facts and circumstances, including the doing of the act itself.")

{¶ 185} Other courts have held that that a mistake of fact can, in certain circumstances, negate the knowingly element of a specific intent crime. *State v. Cooper*, 10th Dist. No. 09AP-511, 2009-Ohio-6275, *State v. Feltner*, 2d Dist. No. 06-CA-20, 2007-Ohio-866, *State v. Snowden*, 7 Ohio App.3d 358, 363, 455 N.E.2d 1058 (10th Dist.1982).

{¶ 186} In *State v. Rawson*, 7th Dist. No. 05 JE 2, 2006-Ohio-496, an appellant attempted to get his felonious assault conviction overturned on the basis of a mistake of fact defense. The appellant had punched a man in the face causing severe injury. He claimed he mistook the man for someone he knew and jokingly began fighting with him before he realized his mistake. His "joke" ultimately led to a fight and to the appellant's indictment for felonious assault. The appellant argued that because he never would have gotten in a fight with the man had he not been mistaken about his identity, he could not be found to have knowingly caused him physical harm. The court disagreed:

> [T]he crime for which [the appellant] was convicted required him to knowingly cause serious physical harm to another. The only fact which [the appellant] was mistaken about was the identity of the man he spoke with * * * but this fact is unrelated to any of the elements of the crime he committed. Thus, a mistake of fact defense is simply inapplicable in this situation. *Id.* at ¶17.

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{¶ 187} In this case, appellant was mistaken when he believed that McCloskey was armed and preparing to shoot him. As in the *Rawson* case, appellant's mistaken belief is unrelated to the elements of felonious assault. His mistaken belief does not change or "negate" the fact that he knowingly (aware that if he pointed and shot a gun at someone they would be injured) caused serious physical harm to McCloskey.

{¶ 188} Having thoroughly considered the entire record of proceedings in the trial court and the testimony, I find that the state presented sufficient evidence from which, when viewed in a light most favorable to the state, a rational trier of fact could have found appellant guilty of knowingly causing physical harm to McCloskey by means of a deadly weapon. The jury could infer from the testimony at trial that appellant was aware that shooting someone could result in serious injury to that person. *See State v. Mobley-Melbar*, 8th Dist. No. 92314, 2010-Ohio-3177.

{¶ 189} In his second assignment of error, appellant contends that his conviction is against the manifest weight of the evidence.

{¶ 190} A challenge to the weight of the evidence questions whether the greater amount of credible evidence was admitted to support the conviction than not. *Thompkins,* 78 Ohio St.3d at 387, 678 N.E.2d 541. The standard for determining whether a conviction is contrary to the manifest weight of the evidence is whether the appellate court finds that the trier of fact clearly "lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Id.*, citing *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). *See*

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also State v. Smith, 80 Ohio St.3d 89, 114, 684 N.E.2d 668 (1997). In making this determination, the court reviews the entire record, weighs the evidence and all reasonable inferences therefrom, and considers the credibility of witnesses. *Martin, supra.*

{¶ 191} "Weight is not a question of mathematics, but depends on its effect in inducing belief." (Emphasis deleted.) *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. We must keep in mind, however, that "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact may believe all, some, or none of what a witness says. *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964). In this case, the jury chose to believe the state's witnesses. Based on the testimony and the law, I cannot say that the jury clearly lost its way or created a manifest miscarriage of justice by finding appellant guilty of the charge against him. *Thompkins,* 78 Ohio St.3d at 386, 678 N.E.2d 541. Accordingly, I do not believe that the jury's verdict was against the manifest weight of the evidence.

{¶ 192} In his third assignment of error, appellant contends that the court erred in not instructing the jury on the lesser included offense of negligent assault. Once again, appellant disputes the jury's finding that he acted knowingly and argues he acted negligently.

{¶ 193} The court must view the evidence in the light most favorable to the defendant when deciding whether to instruct the jury on a lesser included offense. *State v. Campbell,* 69 Ohio St.3d 38, 630 N.E.2d 339 (1994). An instruction is not warranted,

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however, every time "some evidence" is presented on a lesser included offense. *State v. Smith*, 8th Dist. No. 90478, 2009-Ohio2244, ¶ 12, citing *State v. Shane*, 63 Ohio St.3d 630, 590 N.E.2d 272 (1992).

{¶ 194} A trial court has discretion in determining whether the record contains sufficient evidentiary support to warrant a jury instruction on a lesser included offense; an appellate court should not reverse that determination absent an abuse of discretion. *State v. Henderson*, 8th Dist. No. 89377, 2008-Ohio-1631, ¶ 10, citing *State v. Wright*, 4th Dist. No. 01 CA2781, 2002-Ohio-1462.

{¶ 195} R.C. 2903.14(A), negligent assault, provides that: "[n]o person shall negligently, by means of a deadly weapon or dangerous ordnance * * * cause physical harm to another or to another's unborn." "A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature." (Emphasis added.) R.C. 2901.22(D).

{¶ 196} As stated above, a person acts knowingly when he is aware that his conduct will probably cause a certain result. R.C. 2901.22(B).

{¶ 197} Courts have consistently held that shooting a gun in a place where there is risk of injury to one or more persons supports the inference that the offender acted knowingly. *See, e.g., State v. Brooks*, 44 Ohio St.3d 185, 192, 542 N.E.2d 636 (1989); *State v. Ivory*, 8th Dist. No. 83170, 2004-Ohio-2968, ¶ 6; *State v. Roberts*, 1st Dist. No. C-000756, 2001 WL 1386149 (Nov. 9, 2001), citing *State v. Gregory*, 90 Ohio App.3d

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124, 628 N.E.2d 86 (1993); and *State v. Phillips*, 75 Ohio App.3d 785, 792, 600 N.E.2d 825 (12th Dist.1991).

{¶ 198} The Ohio Supreme Court has held that a charge on a lesser included offense is only required where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense. *State v. Thomas,* 40 Ohio St.3d 213, 533 N.E.2d 286 (1988), paragraph two of the syllabus.

{¶ 199} In *State v. McDowell,* 10th Dist. No. 10AP-509, 2011-Ohio-6815, the court found that an appellant was not entitled to a jury instruction on negligent assault as a lesser included offense of felonious assault when it was undisputed he shot at the victim even though he claimed he did it in self-defense. The court noted that "to instruct on the lesser offense of assault would be incongruous, particularly given appellant's self-defense claim, which asserts a purposeful act that was purportedly justified." *See also Mobley-Melbar, supra,* 8th Dist. No. 92314, 2010-Ohio-3177. In *State v. Ollison,* 8th Dist. No. 91637, 2009-Ohio-1691, the court, facing a similar question, stated "that [the appellant] acted 'knowingly' rather than 'negligently.' He testified that he shot at [victim] 'intending to sprinkle him.' This was not a situation where he accidently fired the gun. [The appellant] intended to shoot [the victim], and he did." *Id.* at ¶ 23. In *State v. Person,* 1st Dist. No. C-060656, 2007-Ohio-6869, the court found that the appellant was not entitled to an instruction on negligent assault as a lesser included offense of felonious assault because there was no evidence that the appellant accidentally shot the victim in

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the face as a result of a weapon malfunction. In *State v. Bucci*, 11th Dist. No. 2001-L-091, 2002-Ohio-7134, the appellant was likewise denied a jury instruction for negligent assault when the evidence showed that appellant admitted to the police he hit the victim with a beer bottle.

{¶ 200} Consistent with these analyses, the court in *State v. Hawkins*, 2d Dist. No. 21691, 2007-Ohio-2979, found that there was evidence presented at trial to support an acquittal of felonious assault and a conviction of negligent assault. The facts showed that the victim, who was unsteady on his feet because of drinking all day, approached the appellant who was holding a knife. The court found that there was an issue for the trier of fact as to whether the appellant negligently failed to use due care when the victim approached her. Moreover, the victim told the police he was to blame for his injuries. (*See also In re Justin Tiber*, 154 Ohio App.3d 360, 2003-Ohio-5155, 797 N.E.2d 161, (7th Dist.), upholding a juvenile's negligent assault delinquency adjudication where a friend was visiting the juvenile's house, and the juvenile was showing the friend his father's new gun, when it accidentally discharged and hit the friend).

{¶ 201} A court of appeals is bound by and must follow decisions of the Ohio Supreme Court, which are regarded as law unless and until reversed or overruled. *Schlachet v. Cleveland Clinic,* 104 Ohio App.3d 160, 168, 661 N.E.2d 259 (8th Dist.1995).

{¶ 202} It is undisputed in this case that appellant, aware that shooting someone with a gun would cause physical harm, aimed and fired his gun at McCluskey. Having

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already determined that the evidence at trial would not reasonably support an acquittal on the charge of felonious assault, I cannot, pursuant to *State v. Thomas, supra*, say that the trial court abused its discretion in failing to instruct the jury on the lesser included offense of negligent assault. A finding that the jury was entitled to an instruction on negligent assault would be inconsistent with my conclusion in appellant's first assignment of error and in direct opposition to *State v. Thomas, supra*. Finding no abuse of discretion, I also believe appellant's third assignment of error to be without merit.

{¶ 203} The majority recites the testimony of the witnesses in agonizing detail and I see no reason to reiterate. However, before addressing my concerns with the majority's conclusion regarding appellant's fourth assignment of error, it may be helpful to note that the recordings were played for the jury several times during the trial. The video recording closely reflects appellant's testimony of his pursuit. It initially shows McCloskey and Snyder, riding their motorcycles while appellant is driving behind them. McCloskey and Snyder make quick stops at two stop signs. At the third stop sign, they pause for a few seconds and appear to have a conversation. They then both take off at a high rate of speed. Appellant activates his sirens. He pursues them for eight seconds before Snyder drives up onto the grassy island and McCloskey stops his motorcycle. McCloskey turns around and looks at the police car. His right arm is clearly visible at his side. He then turns around and looks ahead. Again, he turns around to look at the police car. At the same time, appellant can be heard to yell something inaudible and he shoots McCloskey. Between the time McCloskey and appellant stop and McCloskey gets shot,

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eight seconds elapse. Between the time appellant opened the car door and shoots McCloskey, *a mere three seconds elapse.*

{¶ 204} The majority contends that the court erred in instructing the jury on non-deadly force. Citing *Rahn v. Hawkins*, 464 F.3d 813 (8th Cir.2006), *overruled on other grounds, Rivera v. Illinois*, 556 U.S. 148, 129 S.Ct. 1446, 173 L.Ed.2d 220 (2009), the majority states that "[i]n a police deadly-force case, it is reversible error to give the jury a non-deadly force instruction." However, the *Rahn* case is easily distinguishable from the instant case in that the *Rahn* jury was only given a non-deadly force instruction despite clear evidence that the officers used deadly force. In this case, unlike *Rahn*, the jury received an instruction regarding deadly force in addition to an instruction regarding excessive force. I see no reversible error in giving the jury both instructions.

{¶ 205} Second, the majority states that the jury should have received a jury instruction "just as *Garner* states the standard or in a substantially equivalent language." The so called *Garner* standard provides that police use of deadly force is reasonable:

> If the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where, feasible, some warning has been given.

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The court in this case instructed the jury as follows:

> In determining whether the defendant acted reasonable in his use of force in the pursuit of his official duties, you must consider factors such as the severity of the crime Mr. McCloskey was believed to have committed, whether Mr. McCloskey posed an immediate threat to the safety of defendant or another person, and whether Mr. McCloskey was actively resisting arrest or attempting to evade arrest by flight.

In my view, the language used by the court in this case instructed the jury in language, as the majority terms it, "substantially equivalent" to *Garner*. Even so, it should be noted that the United States Supreme Court has revisited *Garner*.

{¶ 206} Commenting on *Garner* some 22 years later, the United States Supreme Court in *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007), Justice Scalia writing for the court, stated:

> *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, *Graham, supra*, at 388, 109 S.Ct. 1865, to the use of a particular type of force in a particular situation. *Garner* held that it was unreasonable to kill a "young, slight, and unarmed" burglary suspect, 471 U.S., at 21, 105 S.Ct. 1694, by shooting him "in the back of the head" while he was running away on foot, id., at 4, 105 S.Ct. 1694, and when the officer

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"could not reasonably have believed that [the suspect] ... posed any threat," and "never attempted to justify his actions on any basis other than the need to prevent an escape," *id.*, at 21, 105 S.Ct. 1694. * * * Although respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of "reasonableness." Whether or not Scott's actions constituted application of "deadly force," all that matters is whether [the defendant's] actions were reasonable. *Scott*, at 382-383.

{¶ 207} In *Scott*, an individual was injured when he was forced off the road by a police officer after he had engaged another police officer in a high speed chase. The driver was rendered a quadriplegic. The court held that because the car chase that respondent initiated posed a substantial and immediate risk of serious physical injury to others, the officer's attempt to terminate the chase by forcing respondent off the road was reasonable, even though that action posed high likelihood of serious injury or death for respondent. Interestingly, the *Scott* case also involved a videotape which the court heavily relied on in determining the reasonableness of the officer's use of force.

[In the videotape], we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for

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considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury. *Id.* at 379-380.

{¶ 208} Mindful of the *Scott* court's emphasis on reasonableness, we turn to *Graham v. Conner, supra.*

Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," Bell v. Wolfish, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979), however, its proper application requires careful attention to the facts and circumstances of each particular case, 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. * * * The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. * * * The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are

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tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. *Graham*, 490 U.S. at 395-397, 109 S.Ct. 1865, 104 L.Ed.2d 443.

In this case, the trial court instructed as follows:

> Reasonableness must be judged from the perspective of a reasonable police officer in light of all the facts and circumstances confronting the officer at the time and in the moments before the use of deadly force rather than with 20/20 vision of hindsight.
>
> What constitutes reasonable action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure. Allowance must be made for the fact that that officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving.
>
> In determining whether the defendant acted reasonable in his use of force in the pursuit of his official duties, you must consider factors such as the severity of the crime Mr. McCloskey was believed to have committed, whether Mr. McCloskey posed an immediate threat to the safety of defendant or another person, and whether Mr. McCloskey was actively resisting arrest or attempting to evade arrest by flight.

{¶ 209} It is my opinion that the above jury instructions closely mirrored the standard of reasonableness set forth in *Graham*. Perhaps more importantly, as I am

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disagreeing with the majority's decision to reverse in favor of appellant on the issue of jury instructions, the court's instructions closely followed the proposed instructions submitted by appellant's counsel, instructions which cited *Graham*. Those proposed instructions read as follows:

> Reasonableness must be judged from the perspective of a reasonable police officer in light of all the facts and circumstances confronting the officer at the time in the moments before the use of deadly force rather than with the 20/20 vision of hindsight. *Graham v. Connor*, (1989), 490 U.S. 386, 396.
>
> What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure. *Smith v. Freland* (6th Cir.1992), 954 F.2d 343, 347. Allowance must be made for the fact that officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving. *Graham*, at 396-397.

{¶ 210} Once again, quoting Justice Scalia, "[A]lthough respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of "reasonableness." *Scott*, 550 U.S. at 383, 127 S.Ct. 1769, 167 L.Ed.2d 686. The *Scott* case involved a civil § 1983 action. In the instant case, a criminal jury trial, "* * * it was up to the jury to do the

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sloshing." *Estate of Grigsby ex rel. Grigsby v. Falat,* N.D.Ill. No. 09 C 1956, 2011 WL 2297680 (June 6, 2011).

{¶ 211} One purpose of jury instructions is to inform the jury of various permissible ways of resolving the issues in the case, and a party is entitled to an instruction on its theory of the case so long as it is legally correct and there is factual evidence to support it. *Rahn, supra,* 474 F.3d 813. Courts "frequently trust juries to answer questions regarding reasonableness; that is the jury's proper role." *Falat, supra.*

{¶ 212} In this case, the jury, after viewing the videotape multiple times, was asked to determine whether or not appellant's actions in shooting McCloskey were reasonable under the circumstances. The jury determined that his actions were not reasonable under the circumstances. Upon a review of the jury instructions, it is my conclusion that the instructions were legally correct and were based on the evidence presented at trial. Further, I find no basis to conclude that the instructions as given in this case misled or confused the jury.

{¶ 213} A determination as to which jury instructions are proper is a matter left to the sound discretion of the trial court. *State v. Guster,* 66 Ohio St.2d 266, 271, 421 N.E.2d 157 (1981). Abuse of discretion requires more than simply an error in judgment; it implies unreasonable, arbitrary, or unconscionable conduct by the court. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). I disagree with the majority that the jury instructions, as given, meet the *Blakemore* standard for abuse of discretion.

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{¶ 214} Because the majority has determined that appellant's conviction is reversible, they have found appellant's fifth assignment of error regarding his sentencing moot. For purposes of consistency with my conclusion, I will briefly address appellant's fifth assignment of error.

{¶ 215} First, he argues that the trial judge erroneously informed him that he could have been sentenced on the day the verdict was returned. Appellant argues that the trial judge is wrong as a defendant has a right to request a presentence report. Given that the trial court did not immediately proceed to sentencing upon the verdict's return and that a presentence report was prepared before appellant was sentenced, I fail to see how appellant was prejudiced.

{¶ 216} Appellant also contends that the trial judge erred in commenting on the testimony of the motorcyclists. I see no error in the trial judge discussing evidence, at sentencing, that has already been admitted.

{¶ 217} Next, appellant contends that the trial judge erred in sentencing appellant when he used the terms "taking time to reflect," "split-second decision" and "Monday morning quarterbacking." Appellant also contends that the trial judge erred in explaining that he once attended a short training session regarding police decision making at the Toledo Police Academy. Once again, I fail to see how appellant was prejudiced by these comments. What is important at sentencing is that, as established by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶ 100, the trial court is vested with full

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discretion to impose any sentence within the statutory range without any corollary requirement to issue specific reasons or findings prior to imposition of such a sentence.

{¶ 218} Appellant was convicted of a second degree felony with a gun specification. Pursuant to R.C. 2929.14(A)(2), the maximum term that appellant could be sentenced for a second degree felony is eight years. Appellant was also found guilty of a gun specification. Pursuant to R.C. 2929.14(B)(1)(a)(ii), the sentencing court is mandated to impose a three-year period of incarceration in addition to any other penalty. Here, appellant was sentenced to seven years in prison for felonious assault and an additional three years in prison for the gun specification. As appellant's sentence is within the sentencing parameters of R.C. 2929.14, I find no abuse of discretion.

{¶ 219} Finally, the majority concludes, in appellant's sixth assignment of error that the court erred in convicting him of a gun specification when appellant was required to carry a gun as a condition of his employment. R.C.2929.14(B)(1)(a)(ii) states:

> Except as provided in division (B)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.141, 2941.144, or 2941.145 of the Revised Code, the court shall impose on the offender one of the following prison terms:
>
> (ii) A prison term of three years if the specification is of the type described in section 2941.145 of the Revised Code that charges the offender with having a firearm on or about the offender's person or under

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the offender's control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense[.]

{¶ 220} When construing a statute and its legislative interest, a court has a duty to give effect to that statute's express wording and plain meaning. *See State v. Teamer*, 82 Ohio St.3d 490, 491, 696 N.E.2d 1049 (1998).

{¶ 221} The above penalty enhancement statute provides neither an exception nor an exemption for offenders who are required to carry a firearm in the course of their employment. Nor can I find any Ohio case law supporting appellant's contention that he should be exempt from a penalty enhancement by virtue of his employment at the time of the offense.

{¶ 222} As pointed out in the state's brief, other jurisdictions have declined to exempt on-duty police officers from being charged with a firearm enhancement simply because the officers are required to carry a firearm as part of their employment. *U.S. v. Shamah,* 624 F.3d 449 (7th Cir.2010), *United States v. Partida*, 385 F.3d 546, 562 (5th Cir.2004); *United States v. Sivils*, 960 F.2d 587, 596 (6th Cir.1992); *United States v. Ruiz*, 905 F.2d 499, 508 (1st Cir.1990).

{¶ 223} The state of Michigan has taken a different approach. In 1991, the Michigan legislature specifically amended its gun specification statute to read:

> This section does not apply to a law enforcement officer who is authorized to carry a firearm while in the official performance of his or her

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duties, and who is in the performance of those duties. As used in this subsection, "law enforcement officer" means a person who is regularly employed as a member of a duly authorized police agency or other organization of the United States, this state, or a city, county, township, or village of this state, and who is responsible for the prevention and detection of crime and the enforcement of the general criminal laws of this state.

Shortly after this amendment, the Supreme Court of Michigan, citing the amendment, reversed a police officer's conviction for using a firearm while committing involuntary manslaughter. He remained convicted of involuntary manslaughter, a crime which he was found to have committed while in the official performance of his duties. *People v. Khoury*, 437 Mich. 954, 467 N.W.2d 810 (1991).

{¶ 224} The legislature in this state is free to enact such a provision similar to Michigan's, but it has not done so. The majority finds, in appellant's first assignment of error, that there was sufficient evidence to convict appellant of felonious assault. If we are to accept the fact that a police officer, believing that he is acting in his capacity as a police officer, can be convicted of assaulting someone using a firearm, it would be inconsistent to find that the same officer could not be convicted of a gun specification under R.C. 2929.14.

{¶ 225} The elements for both of appellant's convictions were conclusively proven at trial. Absent any language in R.C. 2929.14 exempting on-duty police officers

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from being charged with gun specifications, I believe we must affirm appellant's conviction on the gun specification.

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This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.

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FILED
LUCAS COUNTY

2010 JUN 21 P 3: 18

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COMMON PLEAS COURT, LUCAS COUNTY, OHIO

STATE OF OHIO Plaintiff.	*	CASE NO: G-4801-CR-0200902300-000
v.	*	JUDGMENT ENTRY
THOMAS CAINE WHITE Defendant.	*	JUDGE GARY G. COOK

* * * * * * *

On June 21, 2010 defendant's sentencing hearing was held pursuant to R.C. 2929.19. Court reporter CHRISTINE ARDLEY, defense attorney JEROME PHILLIPS and the State's attorney JEFF LINGO and J. CHRISTOPHER ANDERSON were present as was the defendant THOMAS CAINE WHITE, who was afforded all rights pursuant to Crim.R. 32. The Court has considered the record, oral statements, any victim impact statement and presentence report prepared, as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12.

On May 14, 2010 the defendant was found guilty by a jury of the offense of Felonious Assault, a violation of R.C. 2903.11(A)(2), a felony of the 2nd degree.

It is ORDERED that defendant serve a term of 7 years in prison. An additional term is imposed as a mandatory and consecutive term pursuant to R.C. 2929.14(D)(1) of 3 years for a total of 10 years in prison.

It is further ORDERED the defendant is subject to 3 years mandatory post-release control as to count 1 after the defendant's release from imprisonment pursuant to R.C. 2967.28 and 2929.14.

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Defendant given notice of appellate rights under R.C. 2953.08. Defendant notified of 3 years mandatory post-release control as to count 1.

Defendant notified that if post release control conditions are violated the adult parole authority or parole board may impose a more restrictive or longer control sanction or return a defendant to prison for up to nine months for each violation, up to a maximum of 50% of the stated term originally imposed. Defendant further notified that if the violation of post release control conditions is a new felony, a defendant may be both returned to prison for the greater of one year or the time remaining on post release control, plus receive a prison term for the new felony.

Defendant is therefore ORDERED conveyed to the custody of the Ohio Department of Rehabilitation and Corrections forthwith. Credit for 1 day is granted as of this date along with future custody days while defendant awaits transportation to the appropriate state institution.

Defendant found to have, or reasonably may be expected to have, the means to pay all or part of the applicable costs of supervision, confinement, assigned counsel, and prosecution as authorized by law. Defendant ordered to reimburse the State of Ohio and Lucas County for such costs. This order of reimbursement is a judgment enforceable pursuant to law by the parties in whose favor it is entered. Defendant further ordered to pay the cost assessed pursuant to R.C. 9.92(C), 2929.18 and 2951.021. Notification pursuant to R.C. 2947.23 given.

Defendant ordered remanded into custody of Lucas County Sheriff for immediate transportation to appropriate state institution.

Defendant's oral motion for appellate bond is hereby GRANTED. Appellate Bond is set at $100,000.00 cash, no 10%.

JUDGE GARY G. COOK

SCANNED

ATTACHMENT NOT SCANNED

18 USCS § 924
Practitioner's Toolbox History Interpretive Notes and Decisions History; Ancillary Laws and Directives Resources & Practice Tools Related Statutes & Rules > Sentencing Guidelines for the United States Courts, 18 USCS Appx §§ 2K2.1, 2K2.4, 2K2.5, 2L1.2, 3B1.5, 3D1.1, 4B1.1, 4B1.2, 4B1.4, 5G1.2. > This section is referred to in 8 USCS § 1101; 11 USCS § 707; 15 USCS § 7903; 18 USCS §§ 844, 1028, 1956, 2516, 3142, 3559, 3592, 4042, 5032; 42 USCS §§ 3796ll-3, 13726a. Research Guide Federal Procedure: > 10 Moore's Federal Practice (Matthew Bender 3d ed.), ch 54, Judgment; Costs § 54.172. > 24 Moore's Federal Practice (Matthew Bender 3d ed.), ch 607, The Indictment and the Information § 607.04. > 26 Moore's Federal Practice (Matthew Bender 3d ed.), ch 632, Sentencing and Judgment § 632.20. Forms: > 17 Bender's Federal Practice Forms, Form CrR30:85, Federal Rules of Criminal Procedure. Criminal Law and Practice: > 1 Criminal Defense Techniques (Matthew Bender), ch 1, Bail Reform Act of 1984 § 1.04. > 3 Criminal Defense Techniques (Matthew Bender), ch 60A, Defending Aliens in Criminal Cases § 60A.10. > 4 Criminal Defense Techniques (Matthew Bender), ch 90, The Armed Career Criminal Act §§ 90.01, 90.05. More...
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*** Current through PL 113-22, approved 7/25/13 ***
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 44. FIREARMS

Go to the United States Code Service Archive Directory
18 USCS § 924
THE CASE NOTES SEGMENT OF THIS DOCUMENT HAS BEEN SPLIT INTO 2 DOCUMENTS.
THIS IS PART 1.
USE THE BROWSE FEATURE TO REVIEW THE OTHER PART(S).

§ 924. Penalties [Caution: See prospective amendment notes below.]

(a) (1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929 [18 USCS § 929], whoever--

(A) knowingly makes any false statement or representation with respect to the information required by this chapter [18 USCS §§ 921 et seq.] to be kept in the records of a person licensed under this chapter [18 USCS §§ 921 et seq.] or in applying for any license or exemption or relief from disability under the provisions of this chapter [18 USCS §§ 921 et seq.];

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922 [18 USCS § 922];

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l) [18 USCS § 922(1)]; or

(D) willfully violates any other provision of this chapter [18 USCS §§ 921 et seq.],

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 [18

USCS § 922] shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly--

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter [18 USCS §§ 921 et seq.] to be kept in the records of a person licensed under this chapter [18 USCS §§ 921 et seq.], or

(B) violates subsection (m) of section 922 [18 USCS § 922],

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) [18 USCS § 922(q)] shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) [18 USCS § 922(q)] shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 [18 USCS § 922] shall be fined not more than $ 1,000, imprisoned for not more than 1 year, or both.

(6) (A) (i) A juvenile who violates section 922(x) [18 USCS § 922(x)] shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if--

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) [18 USCS § 922(x)] or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x) [18 USCS § 922(x)]--

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 [18 USCS § 931] shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c) (1) (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection--

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall--

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law--

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 [46 USCS §§ 70501 et seq.].

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime

of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section--

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition--

(i) if the killing is murder (as defined in section 1111 [18 USCS § 1111]), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112 [18 USCS § 1112]), be punished as provided in section 1112 [18 USCS § 1112].

(d) (1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922 [18 USCS § 922], or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(l) [18 USCS § 922(1)], or knowing violation of section 924 [18 USCS § 924], or willful violation of any other provision of this chapter [18 USCS §§ 921 et seq.] or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1954 [Internal Revenue Code of 1986] [26 USCS §§ 1 et seq.] relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code [26 USCS § 5845(a)], shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter [18 USCS §§ 921 et seq.]: Provided, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2) (A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter [18 USCS §§ 921 et seq.], the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter [18 USCS §§ 921 et seq.], the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter [18 USCS §§ 921 et seq.] or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection,

where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are--

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title [18 USCS § 924(c)(3)] [subsec. (c)(3) of this section];

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title [18 USCS § 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3)] where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title [18 USCS § 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3)];

(D) any offense described in section 922(d) of this title [18 USCS § 922(d)] where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(l), 922(n), or 924(b) of this title [18 USCS § 922(i), 922(j), 922(l), 922(n), or 924(b)]; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e) (1) In the case of a person who violates section 922(g) of this title [18 USCS § 922(g)] and has three previous convictions by any court referred to in section 922(g)(1) of this title [18 USCS § 922(g)(1)] for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g) [18 USCS § 922(g)].

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 [46 USCS §§ 70501 et seq.], for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p) [18 USCS § 922(p)], such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which--

(1) constitutes an offense listed in section 1961(1) [18 USCS § 1961(1)],

(2) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 [46 USCS §§ 70501 et seq.],

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i) (1) A person who knowingly violates section 922(u) [18 USCS § 922(u)] shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall--

(1) if the killing is a murder (as defined in section 1111 [18 USCS § 1111]), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112 [18 USCS § 1112]), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that--

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 [46 USCS §§ 70501 et seq.];

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or
(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(l) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A) [18 USCS § 922(a)(1)(A)], travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

(p) Penalties relating to secure gun storage or safety device.
(1) In general.
(A) Suspension or revocation of license; civil penalties. With respect to each violation of section 922(z)(1) [18 USCS § 922(z)(1)] by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing--
(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter [18 USCS §§ 921 et seq.] that was used to conduct the firearms transfer; or
(ii) subject the licensee to a civil penalty in an amount equal to not more than $ 2,500.
(B) Review. An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f) [18 USCS § 923(f)].
(2) Administrative remedies. The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.

History:

(Added June 19, 1968, P.L. 90-351, Title IV, § 902, 82 Stat. 233; Oct. 22, 1968, P.L. 90-618, Title I, § 102, 82 Stat. 1223; Jan. 2, 1971, P.L. 91-644, Title II, § 13, 84 Stat. 1890); Oct. 12, 1984, P.L. 98-473, Title II, Ch II, § 223(a), Ch X, Part D, § 1005, 98 Stat. 2038, 2138; May 19,

1986, P.L. 99-308, § 104(a), 100 Stat. 456; Oct. 27, 1986, P.L. 99-570, Title I, Subtitle I, § 1402, 100 Stat. 3207-39; Nov. 11, 1988, P.L. 100-649, § 2(b), 102 Stat. 3817; Nov. 18, 1988, P.L. 100-690, Title VI, Subtitle G, § 6211, Subtitle N, §§ 6451, 6460, 6462, Title VII, Subtitle B, §§ 7056, 7060(a), 102 Stat. 4361, 4371, 4373, 4374, 4402, 4403; Nov. 29, 1990, P.L. 101-647, Title XI § 1101, Title XVII, § 1702(b)(3), Title XXII, §§ 2203(d), 2204(c), Title XXXV, §§ 3526-3529, 104 Stat. 4829, 4845, 4857, 4924; Nov. 30, 1993, P.L. 103-159, Title I, § 102(c), Title III, § 302(d), 107 Stat. 1541, 1545; Sept. 13, 1994, P.L. 103-322, Title VI, § 60013, Title XI, Subtitle A, §§ 110102(c), 110103(c), Subtitle B, § 110201(b), Subtitle D, § 110401(e), Subtitle E, §§ 110503, 110504(a), 110507, 110510, 110515(a), 110517, 110518, Title XXXIII, §§ 330002(h), 330003(f)(2), 330011(i), (j), 330016(1)(H), (K), (L), 108 Stat. 1973, 1998, 1999, 2011, 2015, 2016, 2018-2020, 2140, 2141, 2145, 2147; Oct. 11, 1996, P.L. 104-294, Title VI, § 603(m)(1), (n), (o), (p)(1), (q)-(s), 110 Stat. 3505; Nov. 13, 1998, P.L. 105-386, § 1(a), 112 Stat. 3469; Nov. 2, 2002, P.L. 107-273, Div B, Title IV, § 4002(d)(1)(E), Div C, Title I, Subtitle A, § 11009(e)(3), 116 Stat. 1809, 1821; Dec. 9, 2003, P.L. 108-174, § 1(2), (3), 117 Stat. 2481; Oct. 26, 2005, P.L. 109-92, §§ 5(c)(2), 6(b), 119 Stat. 2100, 2102; Oct. 6, 2006, P.L. 109-304, § 17(d)(3), 120 Stat. 1707.)

History; Ancillary Laws and Directives:

1. Explanatory notes
2. Prospective amendment
3. Effective date of section
4. Amendments
5. Other provisions

1. Explanatory notes:

"Internal Revenue Code of 1986" has been inserted in brackets in subsec. (d)(1) pursuant to § 2 of Act Oct. 22, 1986, P.L. 99-514, which redesignated the Internal Revenue Code of 1954 (Act Aug. 16, 1954, ch 736) as the Internal Revenue Code of 1986. In redesignating the Internal Revenue Code of 1954 as the Internal Revenue Code of 1986, Congress provided, in Act Oct. 22, 1986, P.L. 99-514, § 2(b), 100 Stat. 2095, for construction of references to the Internal Revenue Code as follows: except when inappropriate, any reference in any law, Executive Order, or other document to the Internal Revenue Code of 1954 shall include a reference to the Internal Revenue Code of 1986 and any reference to the Internal Revenue Code of 1986 shall include a reference to the provisions of law formerly known as the Internal Revenue Code of 1954.

2. Prospective amendment:

Repeal of subsec. (f) and redesignation of subsecs. (g) through (o), effective December 10, 2013. Section 2(f)(2)(B) of Act Nov. 11, 1988, P.L. 100-649, which appears as 18 USCS § 922 note, provides that effective 25 years after the effective date of such Act (effective on the 30th day after Nov. 10, 1988) subsection (f) of this section is repealed and subsections (g) through (o) are redesignated as subsections (f) through (n), respectively.

Amendment of subsec. (a)(1), effective December 10, 2013. Section 2(f)(2)(D) of Act Nov. 11,

1988, P.L. 100-649, which appears as 18 USCS § 922 note, provides that effective 25 years after the effective date of such Act (effective on the 30th day after Nov. 10, 1988) subsec. (a)(1) of this section is amended by striking "this subsection, subsection (b), (c), or (f) of this section, or in section 929" and inserting "this chapter".

3. Effective date of section:
This section became effective 180 days after June 19, 1968, as provided by § 907 of Act June 19, 1968, P.L. 90-351, which appears as 18 USCS § 921 note.

4. Amendments:

1968. Act Oct. 22, 1968 (effective 12/16/68, as provided by § 105 of such Act, which appears as 18 USCS § 921 note), in subsec. (a), added a comma after "$ 5,000" and added ", and shall become eligible for parole as the Board of Parole shall determine"; in subsec. (b), added "or any ammunition" and added a comma after "$ 10,000"; substituted subsec. (c), exclusive of subsequent amendment, for one which read: "(c) Any firearm or ammunition involved in, or used or intended to be used in, any violation of the provisions of this chapter, or a rule or regulation promulgated thereunder, or violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5848(1) of said Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter."; and added subsec. (d).

1971. Act Jan 2, 1971, substituted subsec. (c) for one which read:
"(c) Whoever--
"(1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
"(2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,
"shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor more than 25 years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence.".

1984. Act Oct. 12, 1984 substituted subsec. (c) for one which read:
"(c) Whoever--
"(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or
"(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,
shall, in addition to the punishment provided for the commission of such felony, be sentenced

to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.".

Such Act further (effective on the first day of the first calendar month beginning 36 months after enactment on 10/12/84, as provided by § 235(a)(1) of such Act, as amended by Act Dec. 26, 1985, P.L. 99-217, § 4, 99 Stat. 1728, which appears as 18 USCS § 3551 note, and applicable as provided by such § 235, which appears as 18 USCS § 3551 note), in subsec. (a)(1), in the concluding matter, deleted ", and shall become eligible for parole as the Parole Commission shall determine" following "both".

1986. Act May 19, 1986 (effective 180 days after enactment on 5/19/86, as provided by § 110(a) of such Act, which appears as 18 USCS § 921 note) substituted subsec. (a) for one which read: "Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $ 5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine."; in subsec. (c), designated the existing provisions as para. (1), and, in para. (1) as so designated, substituted "violence or drug trafficking crime," for "violence" wherever appearing, substituted ", and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for ten years." for a period, substituted ", and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for twenty years." for a period, inserted "or drug trafficking crime" before "in which the firearm was used or carried.", and added paras. (2) and (3); substituted subsec. (d) for one which read: "Any firearm or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter"; and added subsec. (e).

Act Oct. 27, 1986, in subsec. (e), in para. (1), substituted "for a violent felony or a serious drug offense, or both," for "for robbery or burglary, or both,", and in para. (2), substituted subparas. (A) and (B) for ones which read:

"(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

"(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee,

and the United States shall be liable therefor.".

1988. Act Nov. 11, 1988 (effective on the 30th day beginning after enactment as provided by § 2(f)(1) of such Act, which appears as 18 USCS § 922 note), in subsec. (a)(1), substituted ", (c), or (f)" for "or (c)"; and added subsec. (f).

Act Nov. 18, 1988, in subsec. (a), in para. (1), in the introductory matter, inserted "or 3", in subpara. (B), deleted "(g), (i), (j)," following "(f),", redesignated para. (2) as para. (3), and added a new para. (2); in subsec. (c), in para. (1), deleted double commas preceding "(including", substituted "(including a crime" for "including a crime", deleted a comma preceding "which provides", substituted "device) for" for "device, for", substituted a comma for double commas preceding "be sentence to imprisonment", substituted "thirty years" for "ten years", substituted "twenty years" for "ten years", and deleted ", or drug trafficking crime" preceding "in which the firearm", and substituted para. (2) for one which read: "(2) For purposes of this subsection, the term 'drug trafficking crime' means any felony violation of Federal law involving the distribution, manufacture, or importation of any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).'"; in subsec. (e), in para. (1), inserted "committed on occasions different from one another,", in para. (2), in subpara. (B), in the introductory matter, inserted ", or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult,", and added subpara. (C); and added subsecs. (f) and (g).

Such Act further purported to amend subsec. (c)(1) by substituting "life imprisonment without release" for "20 years"; however, the substitution was made for "twenty years" in order to effectuate the probable intent of Congress.

1990. Act Nov. 29, 1990, § 3528, as amended by § 330011(i) of Act Sept. 13, 1994, P.L. 103-322 (effective as of the date on which § 3528 of the 1990 Act took effect, as provided by § 330011(i) of the 1994 Act, which appears as 18 USCS § 922 note), in subsec. (a)(1), in the introductory matter, purported to substitute "(3)" for "3"; however, the amendment could not be executed because "3" did not appear in such subsection.

Section 2204(c) of such Act, in subsec. (a)(1)(B), substituted "(k), or (g)" for "or (k)".

Section 3529(l) of such Act, in subsec. (a)(2), substituted "subsection" for "subsections" and inserted a comma following "years".

Section 1702(b)(3) of such Act (applicable as provided by § 1702(b)(4) of such Act, which appears as 18 USCS § 921 note), in subsec. (a), added para. (4).

Section 2203(d) of such Act (effective with respect to any offense committed after 11/1/87, as provided by such section, which appears as a note to this section), in subsec. (a), in the concluding matter, deleted ", and shall become eligible for parole as the Parole Commission shall determine" preceding the concluding period.

Section 1101 of such Act, in subsec. (c)(1), inserted "and if the firearm is a short-barreled rifle, short-barreled shotgun to imprisonment for ten years," and purported to insert "or a destructive device," following "machine gun" wherever appearing; however, such matter was inserted following "machinegun" as the probable intent of Congress.

Section 3527 of such Act, as amended by § 330011(j) of Act Sept. 13, 1994, P.L. 103-322

(effective as of the date on which § 3527 of the 1990 Act took effect, as provided by § 330011(j) of the 1994 Act, which appears as a note to this section), in subsec. (c)(1), deleted "imprisonment for" preceding "life imprisonment".

Section 3529(2) of such Act, in subsec. (e)(2)(A)(ii), deleted "and" following the semicolon.

Section 3529(3) of such Act, in subsec. (e)(2)(B)(ii), substituted "; and" for a concluding period.

Section 3526(a) of such Act redesignated subsecs. (f) and (g) as (g) and (h), respectively.

Section 3526(b) of such Act made technical changes to Act Nov. 18, 1988, P.L. 100-649, without affecting the text of this section.

1993. Act Nov. 30, 1993, in subsec. (a), in para. (1), deleted "paragraph (2) or (3) of" preceding "this section", and added para. (5); and added subsec. (i).

1994. Act Sept. 13, 1994, in subsec. (a), in para. (1), in the concluding matter, substituted "under this title" for "not more than $ 5,000", in para. (3), in the concluding matter, substituted "under this title" for "not more than $ 1,000", in para. (4), substituted "under this title" for "not more than $ 5,000", and added para. [(6)](5); in subsec. (b), substituted "under this title" for "not more than $ 10,000"; in subsec. (c)(1), deleted "No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein." following "used or carried."; in subsec. (d)(1), substituted "or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished" for "the seized"; in subsec. (e), in para. (1), deleted ", and such person shall not be eligible for parole with respect to the sentence imposed under this subsection" following "922(g) and, in para. (2)(A)(i), substituted "the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)" for "the first section or section 3 of Public Law 96-350 (21 U.S.C. 955a et seq.)"; in subsec. (i), in para. (1), substituted "under this title" for "not more than $ 10,000"; and added subsecs. [(j)](i), [(k)](j), [(l)](k), [(m)](l), [(n)](m), and [(o)](n).

Such Act further purported to amend subsec. (a) by deleting "paragraph (2) or (3) of"; however, the amendment could not be executed because the language to be deleted did not appear in such subsection.

Act Sept. 13, 1994 (effective 9/13/94 and repealed 9/13/2004, as provided by § 110105 of such Act, which appears as 18 USCS § 921 note), in subsec. (a)(1)(B), substituted "(r), (v), or (w) of section 922" for "or (q) of section 922".

Such Act further (effective as above), as amended by Act Oct. 11, 1996 (effective as provided by § 603(p)(2) of such Act, which appears as a note to this section), in subsec. (c)(1), inserted ", or semiautomatic assault weapon," after "short-barreled shotgun".

Such Act further (effective as of the date on which § 3528 of Act Nov. 29, 1990, P.L. 101-647, took effect, as provided by § 330011(i) of the 1994 Act, which appears as 18 USCS § 922 note), amended the directory language of § 3528 of the 1990 Act without affecting the text of this section.

Such Act further (effective as of the date on which § 3527 of Act Nov. 29, 1990, P.L. 101-647, took effect, as provided by § 330011(j) of the 1994 Act, which appears as a note to this section), amended the directory language of § 3527 of the 1990 Act.

Act Sept. 13, 1994, as amended by Act Oct. 11, 1996 (effective as as provided by § 603(m)(2) of such Act, which appears as a note to this section), in subsec. (a), in para. (1), in subpara. (B) deleted "(a)(6)" after "(a)(4)" and, in para. (2), inserted "(a)(6),".

1996. Act Oct. 11, 1996, in subsec. (a), redesignated para. [(6)](5) as para. (6); in subsec. (j)(3), inserted a close parenthesis before the concluding comma; and redesignated subsecs. [(j)](i), [(k)](j), [(l)](k), [(m)](l), [(n)](m), and [(o)](n) as subsecs. (j)-(o), respectively.

Such Act further (effective as provided by §§ 603(m)(2) and 603(p)(2) of such Act, which appear as notes to this section) amended the directory language of Act Oct. 11, 1996, without affecting the text of this section.

Such Act further repealed § 330002 of Act Sept. 13, 1994, which purported to amend subsec. (a)(1)(B) by substituting "(r)" for "(q)", which amendment, because of a prior amendment, could not be executed.

Such Act further amended the directory language of § 110504(a) of Act Sept. 13, 1994, without affecting the text of this section.

1998. Act Nov. 13, 1998, in subsec. (c), substituted para. (1), for one which read: "(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.", and added para. (4).

2002. Act Nov. 2, 2002, in subsec. (a), added para. (7); and, in subsec. (e)(1), substituted "under this title" for "not more than $ 25,000".

2005. Act Oct. 26, 2005, in subsec. (c), added para. (5).

Such Act further (effective 180 days after enactment, as provided by § 5(d) of such Act, which appears as 18 USCS § 922 note), in subsec. (a)(1), in the introductory matter, substituted "(f), or (p)" for "or (f)"; and added subsec. (p).

2006. Act Oct. 6, 2006, in subsecs. (c)(2) and (e)(2)(A)(i), substituted "chapter 705 of title 46" for "the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)"; in subsec. (g)(2), substituted "801" for "802" and "chapter 705 of title 46" for "the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)"; and, in subsec. (k)(1), substituted "chapter 705 of title 46" for "the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)".

5. Other provisions:

State firearms laws and published ordinances to be provided to licensees; annual publication in Federal Register. Act May 19, 1986, P.L. 99-308, § 110(a), 100 Stat. 460, which appears as 18 USCS § 921 note, provides that the Secretary shall publish and provide to all licensees a compilation of the State laws and published ordinances of which licensees are presumed to have knowledge pursuant to 18 USCS §§ 921 et seq., and publish same in the Federal Register.

Effective date of Nov. 29, 1990 amendment. Act Nov. 29, 1990, P.L. 101-647, Title XXII, § 2203(d), 104 Stat. 4857, provides: "This amendment [amending subsec. (a) of this section] shall be effective with respect to any offense committed after November 1, 1987.".

Effective date of amendment made by § 330011(j) of Act Sept. 13, 1994. Act Sept. 13, 1994, P.L. 103-322, § 330011(j), 108 Stat. 2145, provides that the amendment made by such section, substituting "5th" for "4th" in the directory language of § 3527 of Act Nov. 29, 1990, P.L. 101-647, is effective on the date on which such § 3527 took effect.

Effective date of amendments made by § 603(m)(1) of Act Oct. 11, 1996. Act Oct. 11, 1996, P.L. 104-294, Title VI, § 603(m)(2), 110 Stat. 3505, provides: "The amendments made by paragraph (1) [amending § 110507 of Act Sept. 13, 1994, which amended this section] shall take effect as if the amendments had been included in section 110507 of the Act referred to in paragraph (1) on the date of the enactment of such Act.".

Effective date of amendments made by § 603(p)(1) of Act Oct. 11, 1996. Act Oct. 11, 1996, P.L. 104-294, Title VI, § 603(p)(2), 110 Stat. 3505, provides: "The amendment made by paragraph (1) [amending § 110102(c)(2) of Act Sept. 13, 1994, which amended this section] shall take effect as if the amendment had been included in section 110102(c)(2) of the Act referred to in paragraph (1) on the date of the enactment of such Act.".

Notes:

Related Statutes & Rules:

Sentencing Guidelines for the United States Courts, 18 USCS Appx §§ 2K2.1, 2K2.4, 2K2.5, 2L1.2, 3B1.5, 3D1.1, 4B1.1, 4B1.2, 4B1.4, 5G1.2.

This section is referred to in 8 USCS § 1101; 11 USCS § 707; 15 USCS § 7903; 18 USCS §§ 844, 1028, 1956, 2516, 3142, 3559, 3592, 4042, 5032; 42 USCS §§ 3796ll-3, 13726a.

42 USCS § 1983

Practitioner's Toolbox History Interpretive Notes and Decisions History; Ancillary Laws and Directives Resources & Practice Tools Related Statutes & Rules > Offenses against civil rights of citizens, 18 USCS §§ 241-247. > Jurisdiction of district courts, generally, 28 USCS § 1343. > Conspiracy to interfere with civil rights, 42 USCS § 1985. More... Research Guide Federal Procedure: > 1 Moore's Federal Practice (Matthew Bender 3d ed.), ch 3, Commencing an Action § 3.05. > 1 Moore's Federal Practice (Matthew Bender 3d ed.), ch 4, Summons § 4.56. > 1 Moore's Federal Practice (Matthew Bender 3d ed.), ch 6, Computing and Extending Time; Time for Motion Papers §§ 6.03, 6.04. Forms: > 1 Bender's Federal Practice Forms, Form 8:9, Federal Rules of Civil Procedure. > 1 Bender's Federal Practice Forms, Forms 8(I):700, 8(I):710, 8(I):711, 8(I):712, 8(I):713, 8(I):720, 8(I):721, 8(I):730, 8(I):731, 8(I):732, 8(I):733, 8(I):740, 8(I):741, 8(I):742, 8(I):743, 8(I):750, 8(I):751, 8(I):752, 8(I):753, 8(I):754, 8(I):755, 8(I):757, 8(I):758, 8(I):770, 8(I):771, 8(I):780, 8(I):781, 8(I):782, 8(I):800, 8(I):801, 8(I):900, Federal Rules of Civil Procedure. > 2 Bender's Federal Practice Forms, Forms 8(III):400, 8(III):401, 8(III):402, 8(III):403, 8(III):501, 8(III):505, 8(III):601, 8(III):602, 8(III):603, 8(III):604, Federal Rules of Civil Procedure. Intellectual Property: > 5 Chisum on Patents (Matthew Bender), ch 16, Direct Infringement § 16.06. More...

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TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS
GENERALLY

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42 USCS § 1983
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§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

History:

(R. S. § 1979; Dec. 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284; Oct. 19, 1996, P.L. 104-317, Title III, § 309(c), 110 Stat. 3853.)

History; Ancillary Laws and Directives:

1. Explanatory notes
2. Amendments
3. Other provisions

1. Explanatory notes:
This section formerly appeared as 8 USC § 43.
R.S. § 1979 was derived from Act April 20, 1871, ch 22, § 1, 17 Stat. 13.

2. Amendments:

1979. Act Dec. 29, 1979 inserted "or the District of Columbia" and "For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.".

1996. Act Oct. 19, 1996 inserted ", except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.".

3. Other provisions:
Application of Dec. 29, 1979 amendments. Act Dec. 29, 1979, P.L. 96-170, § 3, 93 Stat. 1284, which appears as 28 USCS § 1343 note, provided that the amendments made to this section by such Act are applicable with respect to any deprivation of rights, privileges, or immunities secured by the Constitution and laws occurring after enactment on Dec. 29, 1979.

ORC Ann. 1.47
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OHIO REVISED CODE GENERAL PROVISIONS
CHAPTER 1. DEFINITIONS; RULES OF CONSTRUCTION
CONSTRUCTION

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ORC Ann. 1.47 (2013)
§ 1.47. Intentions in the enactment of statutes

In enacting a statute, it is presumed that:

(A) Compliance with the constitutions of the state and of the United States is intended;

(B) The entire statute is intended to be effective;

(C) A just and reasonable result is intended;

(D) A result feasible of execution is intended.

History:

134 v H 607. Eff 1-3-72

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CONSTRUCTION

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ORC Ann. 1.49 (2013)
§ 1.49. Ambiguous statutes

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

(A) The object sought to be attained;

(B) The circumstances under which the statute was enacted;

(C) The legislative history;

(D) The common law or former statutory provisions, including laws upon the same or similar subjects;

(E) The consequences of a particular construction;

(F) The administrative construction of the statute.

History:

134 v H 607. Eff 1-3-72.

ORC Ann. 101.44

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TITLE 1. STATE GOVERNMENT

CHAPTER 101. GENERAL ASSEMBLY

POWERS OF COMMITTEES

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ORC Ann. 101.44 (2013)

§ 101.44. Testimony before committee not to be used in criminal prosecution of witness; exception

Except a person who, in writing, requests permission to appear before a committee or subcommittee of the general assembly, or of either house thereof, or who, in writing, waives the rights, privileges, and immunities granted by this section, the testimony of a witness examined before a committee or subcommittee shall not be used as evidence in a criminal proceeding against such witness. This section does not exempt a witness from the penalties for perjury.

History:

RS § 53; 69 v 61, § 5; 98 v 268; GC § 60; 122 v 321; Bureau of Code Revision, 10-1-53; 136 v S 545. Eff 1-17-77.

ORC Ann. 101.44

ORC Ann. 2744.02

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TITLE 27. COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES
CHAPTER 2744. POLITICAL SUBDIVISION TORT LIABILITY

ORC Ann. 2744.02 (2013)

§ 2744.02. Classification of functions of political subdivisions; liability; exceptions

(A) (1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

(2) The defenses and immunities conferred under this chapter apply in connection with all governmental and proprietary functions performed by a political subdivision and its employees, whether performed on behalf of that political subdivision or on behalf of another political subdivision.

(3) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision.

(C) An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.

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141 v H 176 (Eff 11-20-85); 143 v H 381 (Eff 7-1-89); 145 v S 221 (Eff 9-28-94); 146 v H 350 (Eff 1-27-97); 147 v H 215 (Eff 6-30-97); 149 v S 108, § 2.01 (Eff 7-6-2001); 149 v S 106. Eff 4-9-2003; 152 v H 119, § 101.01, eff. 9-29-07.

Return to Practitioner's Toolbox Section Notes:

Editor's Notes

The effective date is set by § 812.03 of 152 v H 119.

See provisions, § 3 of SB 106 (149 v --) following RC § 2744.01.

EFFECT OF AMENDMENTS

152 v H 119, effective September 29, 2007, inserted (A)(2) and redesignated the remaining subdivisions accordingly.

ORC Ann. 2901.04

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ORC Ann. 2901.04 (2013)

§ 2901.04. Rules of construction; references to previous conviction; interpretation of statutory references that define or specify a criminal offense

(A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

(B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.

(C) Any provision of a section of the Revised Code that refers to a previous conviction of or plea of guilty to a violation of a section of the Revised Code or of a division of a section of the Revised Code shall be construed to also refer to a previous conviction of or plea of guilty to a substantially equivalent offense under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance.

(D) Any provision of the Revised Code that refers to a section, or to a division of a section, of the Revised Code that defines or specifies a criminal offense shall be construed to also refer to an existing or former law of this state, another state, or the United States, to an existing or former municipal ordinance, or to an existing or former division of any such existing or former law or ordinance that defines or specifies, or that defined or specified, a substantially equivalent offense.

Return to Practioner's Toolbox History:

134 v H 511 (Eff 1-1-74); 148 v S 107. Eff 3-23-2000; 150 v S 146, § 1, eff. 9-23-04.

Return to Practitioner's Toolbox Section Notes:

Editor's Notes

Not analogous to former RC § 2901.04 (GC § 12402-1; 109 v 545; 111 v 77; Bureau of Code Revision, 10-1-53), repealed 134 v H 511, § 2, eff 1-1-74.

1974 Committee Comment to H 511

This section codifies the rule that penal statutes must be strictly construed against the state and liberally construed in favor of the accused. See, Harrison v. Ohio, 112 Ohio St. 429, 147 N.E. 650 (1925) aff'd 270 U.S. 632; State ex rel. Moore Oil Co. v. Dauben, 99 Ohio St. 406, 124 N.E. 232 (1919). In addition, the section provides a rule for the construction of procedural measures, based on the premise that the prime object of procedural statutes and rules is to promote justice both to the accused and to the state. Thus, procedural measures are not to be construed in terms of strictness or liberality, but rather to effect the fair, impartial, speedy, and sure administration of justice.

Page's Ohio Revised Code Annotated:
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Current through Legislation passed by the 130th Ohio General Assembly
and filed with the Secretary of State through File 24
*** Annotations current through April 22, 2013 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2901. GENERAL PROVISIONS
CRIMINAL LIABILITY

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ORC Ann. 2901.21 (2013)

§ 2901.21. Requirements for criminal liability

(A) Except as provided in division (B) of this section, a person is not guilty of an offense unless both of the following apply:

(1) The person's liability is based on conduct that includes either a voluntary act, or an omission to perform an act or duty that the person is capable of performing;

(2) The person has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.

(B) When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.

(C) Voluntary intoxication may not be taken into consideration in determining the existence of a mental state that is an element of a criminal offense. Voluntary intoxication does not relieve a person of a duty to act if failure to act constitutes a criminal offense. Evidence that a person was voluntarily intoxicated may be admissible to show whether or not the person was physically capable of performing the act with which the person is charged.

(D) As used in this section:

(1) Possession is a voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of the possessor's control of the thing possessed for a sufficient time to

have ended possession.

(2) Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts.

(3) "Culpability" means purpose, knowledge, recklessness, or negligence, as defined in section 2901.22 of the Revised Code.

(4) "Intoxication" includes, but is not limited to, intoxication resulting from the ingestion of alcohol, a drug, or alcohol and a drug.

Return to Practioner's Toolbox History:

134 v H 511 (Eff 1-1-74); 148 v H 318. Eff 10-27-2000.

Return to Practitioner's Toolbox Section Notes:

Editor's Notes

Not analogous to former RC § 2901.21 (RS § 6819-1a; 98 v 124; GC § 12418; Bureau of Code Revision, 10-1-53), repealed 134 v H 511, § 2, eff 1-1-74.

1974 Committee Comment to H 511

The first part of this section codifies the fundamental distinction between criminal conduct on the one hand and innocent conduct or accident on the other: that, generally, an offense is not committed unless a person not only does a forbidden act or fails to meet a prescribed duty, but also has a certain guilty state of mind at the time of his act or failure. The guilty state of mind, the mens rea, may attach to one, several, or all of the elements of an offense, and different culpable (blameworthy) mental states may attach to different elements in the same offense, depending on the statute defining the offense.

The second part of the section provides a uniform rule for determining whether culpability is required when the statute is silent as to the offender's mental state at the time of the offense. Although the case law is not entirely clear, the apparent rule is that even if the statute fails to specify any degree of culpable mental state, strict criminal liability will not be applied unless the statute plainly indicates that the legislature intended to impose strict liability. In essence, the section codifies this rule, and also provides that when an intention to impose strict liability is not apparent, recklessness is sufficient culpability to commit the offense. Under existing case law, either intent or scienter is required in such instances, although it is not clear which is required in a given case.

ORC Ann. 2903.11 (2013)

§ 2903.11. Felonious assault

(A) No person shall knowingly do either of the following:

(1) Cause serious physical harm to another or to another's unborn;

(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following:

(1) Engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct;

(2) Engage in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome;

(3) Engage in sexual conduct with a person under eighteen years of age who is not the spouse of the offender.

(C) The prosecution of a person under this section does not preclude prosecution of that person under section 2907.02 of the Revised Code.

(D) (1) (a) Whoever violates this section is guilty of felonious assault. Except as otherwise provided in this division or division (D)(1)(b) of this section, felonious assault is a felony of the second degree. If the victim of a violation of division (A) of this section is a peace officer or an investigator of the bureau of criminal identification and investigation, felonious assault is a felony of the first degree.

(b) Regardless of whether the felonious assault is a felony of the first or second degree under division (D)(1)(a) of this section, if the offender also is convicted of or pleads guilty to a specification as described in section 2941.1423 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, except as otherwise provided in this division or unless a longer prison term is required under any other provision of law, the court shall sentence the offender to a mandatory prison term as provided in division (B)(8) of section 2929.14 of the Revised Code. If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, and if the victim suffered serious physical harm as a result of the commission of the offense, felonious assault is a felony of the first degree, and the court, pursuant to division (F) of section 2929.13 of the Revised Code,

shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(2) In addition to any other sanctions imposed pursuant to division (D)(1) of this section for felonious assault committed in violation of division (A)(2) of this section, if the deadly weapon used in the commission of the violation is a motor vehicle, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(E) As used in this section:

(1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(2) "Motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

(3) "Peace officer" has the same meaning as in section 2935.01 of the Revised Code.

(4) "Sexual conduct" has the same meaning as in section 2907.01 of the Revised Code, except that, as used in this section, it does not include the insertion of an instrument, apparatus, or other object that is not a part of the body into the vaginal or anal opening of another, unless the offender knew at the time of the insertion that the instrument, apparatus, or other object carried the offender's bodily fluid.

(5) "Investigator of the bureau of criminal identification and investigation" means an investigator of the bureau of criminal identification and investigation who is commissioned by the superintendent of the bureau as a special agent for the purpose of assisting law enforcement officers or providing emergency assistance to peace officers pursuant to authority granted under section 109.541 of the Revised Code.

(6) "Investigator" has the same meaning as in section 109.541 of the Revised Code.

Return to Practioner's Toolbox History:

134 v H 511 (Eff 1-1-74); 139 v S 199 (Eff 7-1-83); 139 v H 269 (Eff 7-1-83); 140 v S 210 (Eff 7-1-83); 146 v S 2 (Eff 7-1-96); 146 v S 239 (Eff 9-6-96); 148 v S 142 (Eff 2-3-2000); 148 v H 100. Eff 3-23-2000; 151 v H 95, § 1, eff. 8-3-06; 151 v H 347, § 1, eff. 3-14-07; 151 v H 461, § 1, eff. 4-4-07; 152 v H 280, § 1, eff. 4-7-09; 2011 HB 86, § 1, eff. Sept. 30, 2011.

Return to Practitioner's Toolbox Section Notes:

Editor's Notes

The provisions of § 5 of 152 v H 280 read in part as follows:

SECTION 5. * * * Section 2903.11 of the Revised Code is presented in this act as a composite of the section as amended by both Sub. H.B. 347 and Am. Sub. H.B. 461 of the 126th General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act.

Governor Taft's veto of HB 347 was overridden by the Ohio General Assembly.

Not analogous to former RC § 2903.11 (126 v 1039; 130 v 658), repealed 133 v H 84, § 2, eff 9-15-70.

EFFECT OF AMENDMENTS

The 2011 amendment substituted "division (B)(8)" for "division (D)(8)" in the first sentence of (D)(1)(b).

152 v H 280, effective April 7, 2009, rewrote (D)(1).

151 v H 461, effective April 4, 2007, added (D)(2); and inserted (E)(2) and redesignated the remaining subdivisions accordingly.

151 v H 347, effective March 14, 2007, in (D), inserted "or an investigator of the bureau of criminal identification and investigation" twice, and deleted "as defined in section 2935.01 of the Revised Code" following "offense is a peace officer"; and added (E)(4) and (5).

151 v H 95, effective August 3, 2006, in (E)(3), substituted "opening" for "cavity".

1974 Committee Comment to H 511

This section prohibits knowingly causing serious physical harm to any person, or knowingly causing or attempting to cause physical harm to another by means of a deadly weapon or dangerous ordnance as defined in section 2923.11.

The section replaces a number of special assault offenses while utilizing a different approach than that taken in former law. Previously, a number of statutes prohibited specific acts such as shooting, maiming, or cutting, or prohibited attacks on certain persons such as law enforcement officers. This section does not distinguish among persons and, except with respect to deadly weapons and dangerous ordnance, is not based on the means used to commit the offense. The relative gravity of this offense and of the three lesser assault offenses following it is graded according to three factors: the degree of culpability; the seriousness of the actual or potential

harm involved; and whether or not a deadly weapon is used.

This section is a lesser included offense to attempted murder, which is a felony of the first degree. See, section 2923.02. For example, if with purpose to kill, an offender shoots and wounds another, he may be charged with attempted murder. If it is not clear that the offender had a murderous purpose, his act may be an offense under this section.

Felonious assault is a felony of the second degree.

ORC Ann. 2903.14 (2013)

§ 2903.14. Negligent assault

(A) No person shall negligently, by means of a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code, cause physical harm to another or to another's unborn.

(B) Whoever violates this section is guilty of negligent assault, a misdemeanor of the third degree.

Return to Practioner's Toolbox History:

134 v H 511 (Eff 1-1-74); 146 v S 239. Eff 9-6-96.

Return to Practitioner's Toolbox Section Notes:

Editor's Notes

Not analogous to former RC § 2903.14 (133 v H 84), repealed 134 v H 511, § 2, eff 1-1-74.

1974 Committee Comment to H 511

This section forbids negligently causing physical harm to another by means of a deadly weapon or dangerous ordnance as defined in section 2923.11. The offense thus complements section 2903.05, negligent homicide. That is, circumstances which would constitute the more serious offense if someone is killed would constitute this offense if the victim is merely injured.

Negligent assault is a misdemeanor of the third degree.

§ 2921.331. Failure to comply with order or signal of police officer

(A) No person shall fail to comply with any lawful order or direction of any police officer invested with authority to direct, control, or regulate traffic.

(B) No person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop.

(C) (1) Whoever violates this section is guilty of failure to comply with an order or signal of a police officer.

(2) A violation of division (A) of this section is a misdemeanor of the first degree.

(3) Except as provided in divisions (C)(4) and (5) of this section, a violation of division (B) of this section is a misdemeanor of the first degree.

(4) Except as provided in division (C)(5) of this section, a violation of division (B) of this section is a felony of the fourth degree if the jury or judge as trier of fact finds by proof beyond a reasonable doubt that, in committing the offense, the offender was fleeing immediately after the commission of a felony.

(5) (a) A violation of division (B) of this section is a felony of the third degree if the jury or judge as trier of fact finds any of the following by proof beyond a reasonable doubt:

(i) The operation of the motor vehicle by the offender was a proximate cause of serious physical harm to persons or property.

(ii) The operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property.

(b) If a police officer pursues an offender who is violating division (B) of this section and division (C)(5)(a) of this section applies, the sentencing court, in determining the seriousness of an offender's conduct for purposes of sentencing the offender for a violation of division (B) of this section, shall consider, along with the factors set forth in sections 2929.12 and 2929.13 of the Revised Code that are required to be considered, all of the following:

(i) The duration of the pursuit;

(ii) The distance of the pursuit;

(iii) The rate of speed at which the offender operated the motor vehicle during the pursuit;

(iv) Whether the offender failed to stop for traffic lights or stop signs during the pursuit;

(v) The number of traffic lights or stop signs for which the offender failed to stop during the pursuit;

(vi) Whether the offender operated the motor vehicle during the pursuit without lighted lights during a time when lighted lights are required;

(vii) Whether the offender committed a moving violation during the pursuit;

(viii) The number of moving violations the offender committed during the pursuit;

(ix) Any other relevant factors indicating that the offender's conduct is more serious than conduct normally constituting the offense.

(D) If an offender is sentenced pursuant to division (C)(4) or (5) of this section for a violation of division (B) of this section, and if the offender is sentenced to a prison term for that violation, the offender shall serve the prison term consecutively to any other prison term or mandatory prison term imposed upon the offender.

(E) In addition to any other sanction imposed for a felony violation of division (B) of this section, the court shall impose a class two suspension from the range specified in division (A)(2) of section 4510.02 of the Revised Code. In addition to any other sanction imposed for a violation of division (A) of this section or a misdemeanor violation of division (B) of this section, the court shall impose a class five suspension from the range specified in division (A)(5) of section 4510.02 of the Revised Code. If the offender previously has been found guilty of an offense under this section, in addition to any other sanction imposed for the offense, the court shall impose a class one suspension as described in division (A)(1) of that section. The court shall not grant limited driving privileges to the offender on a suspension imposed for a felony violation of this section. The court may grant limited driving privileges to the offender on a suspension imposed for a misdemeanor violation of this section as set forth in section 4510.021 of the Revised Code. No judge shall suspend the first three years of suspension under a class two suspension of an offender's license, permit, or privilege required by this division on any portion of the suspension under a class one suspension of an offender's license, permit, or privilege required by this division.

(F) As used in this section:

(1) "Moving violation" has the same meaning as in section 2743.70 of the Revised Code.

(2) "Police officer" has the same meaning as in section 4511.01 of the Revised Code.

Return to Practioner's Toolbox History:

GC § 6307-3; 119 v 766, § 3; Bureau of Code Revision, RC § 4511.02, 10-1-53; 132 v H 380

(Eff 1-1-68); 137 v S 381 (Eff 10-19-78); RC § 2921.33.1, 143 v S 49 (Eff 11-3-89); 148 v H 29. Eff 10-29-99; 149 v S 123, § 1, eff. 1-1-04; 2012 SB 337, § 1, eff. Sept. 28, 2012.

Return to Practitioner's Toolbox Section Notes:

Editor's Notes

The effective date is set by section 4 of S.B. 123.

The provisions of § 5 of S.B. 123 (149 v --), as amended by § 3 of H.B. 163 (150 v --), read as follows:

SECTION 5. (A) Notwithstanding division (B) of section 1.58 of the Revised Code, the provisions of the Revised Code amended or enacted in Sections 1 and 2 of Am. Sub. S.B. 123 of the 124th General Assembly shall apply only in relation to conduct and offenses committed on or after January 1, 2004. Conduct and offenses committed prior to January 1, 2004, shall be governed by the law in effect on the date the conduct or offense was committed. * * *

EFFECT OF AMENDMENTS

The 2012 amendment, in (E), substituted "felony violation of division (B) of" for "violation of" in the first sentence, inserted the second and fifth sentences, inserted "in addition to any other sanction imposed for the offense" in the present third sentence, and added "on a suspension imposed for a felony violation of this section" to the end of the present fourth sentence.

ORC Ann. 2923.12 (2013)

§ 2923.12. Carrying concealed weapons

(A) No person shall knowingly carry or have, concealed on the person's person or concealed ready at hand, any of the following:

(1) A deadly weapon other than a handgun;

(2) A handgun other than a dangerous ordnance;

(3) A dangerous ordnance.

(B) No person who has been issued a concealed handgun license shall do any of the following:

(1) If the person is stopped for a law enforcement purpose and is carrying a concealed handgun, fail to promptly inform any law enforcement officer who approaches the person after the person has been stopped that the person has been issued a concealed handgun license and that the person then is carrying a concealed handgun;

(2) If the person is stopped for a law enforcement purpose and is carrying a concealed handgun, knowingly fail to keep the person's hands in plain sight at any time after any law enforcement officer begins approaching the person while stopped and before the law enforcement officer leaves, unless the failure is pursuant to and in accordance with directions given by a law enforcement officer;

(3) If the person is stopped for a law enforcement purpose, if the person is carrying a concealed handgun, and if the person is approached by any law enforcement officer while stopped, knowingly remove or attempt to remove the loaded handgun from the holster, pocket, or other place in which the person is carrying it, knowingly grasp or hold the loaded handgun, or knowingly have contact with the loaded handgun by touching it with the person's hands or fingers at any time after the law enforcement officer begins approaching and before the law enforcement officer leaves, unless the person removes, attempts to remove, grasps, holds, or has contact with the loaded handgun pursuant to and in accordance with directions given by the law enforcement officer;

(4) If the person is stopped for a law enforcement purpose and is carrying a concealed handgun, knowingly disregard or fail to comply with any lawful order of any law enforcement officer given while the person is stopped, including, but not limited to, a specific order to the person to keep the person's hands in plain sight.

(C) (1) This section does not apply to any of the following:

(a) An officer, agent, or employee of this or any other state or the United States, or to a law

enforcement officer, who is authorized to carry concealed weapons or dangerous ordnance or is authorized to carry handguns and is acting within the scope of the officer's, agent's, or employee's duties;

(b) Any person who is employed in this state, who is authorized to carry concealed weapons or dangerous ordnance or is authorized to carry handguns, and who is subject to and in compliance with the requirements of section 109.801 of the Revised Code, unless the appointing authority of the person has expressly specified that the exemption provided in division (C)(1)(b) of this section does not apply to the person;

(c) A person's transportation or storage of a firearm, other than a firearm described in divisions (G) to (M) of section 2923.11 of the Revised Code, in a motor vehicle for any lawful purpose if the firearm is not on the actor's person;

(d) A person's storage or possession of a firearm, other than a firearm described in divisions (G) to (M) of section 2923.11 of the Revised Code, in the actor's own home for any lawful purpose.

(2) Division (A)(2) of this section does not apply to any person who, at the time of the alleged carrying or possession of a handgun, is carrying a valid concealed handgun license, unless the person knowingly is in a place described in division (B) of section 2923.126 of the Revised Code.

(D) It is an affirmative defense to a charge under division (A)(1) of this section of carrying or having control of a weapon other than a handgun and other than a dangerous ordnance that the actor was not otherwise prohibited by law from having the weapon and that any of the following applies:

(1) The weapon was carried or kept ready at hand by the actor for defensive purposes while the actor was engaged in or was going to or from the actor's lawful business or occupation, which business or occupation was of a character or was necessarily carried on in a manner or at a time or place as to render the actor particularly susceptible to criminal attack, such as would justify a prudent person in going armed.

(2) The weapon was carried or kept ready at hand by the actor for defensive purposes while the actor was engaged in a lawful activity and had reasonable cause to fear a criminal attack upon the actor, a member of the actor's family, or the actor's home, such as would justify a prudent person in going armed.

(3) The weapon was carried or kept ready at hand by the actor for any lawful purpose and while in the actor's own home.

(E) No person who is charged with a violation of this section shall be required to obtain a concealed handgun license as a condition for the dismissal of the charge.

(F) (1) Whoever violates this section is guilty of carrying concealed weapons. Except as otherwise provided in this division or division (F)(2) of this section, carrying concealed weapons in violation of division (A) of this section is a misdemeanor of the first degree. Except as otherwise provided in this division or division (F)(2) of this section, if the offender previously has been convicted of a violation of this section or of any offense of violence, if the weapon involved is a firearm that is either loaded or for which the offender has ammunition ready at hand, or if the weapon involved is dangerous ordnance, carrying concealed weapons in violation of division (A) of this section is a felony of the fourth degree. Except as otherwise provided in division (F)(2) of this section, if the offense is committed aboard an aircraft, or with purpose to carry a concealed weapon aboard an aircraft, regardless of the weapon involved, carrying concealed weapons in violation of division (A) of this section is a felony of the third degree.

(2) If a person being arrested for a violation of division (A)(2) of this section promptly produces a valid concealed handgun license, and if at the time of the violation the person was not knowingly in a place described in division (B) of section 2923.126 of the Revised Code, the officer shall not arrest the person for a violation of that division. If the person is not able to promptly produce any concealed handgun license and if the person is not in a place described in that section, the officer may arrest the person for a violation of that division, and the offender shall be punished as follows:

(a) The offender shall be guilty of a minor misdemeanor if both of the following apply:

(i) Within ten days after the arrest, the offender presents a concealed handgun license, which license was valid at the time of the arrest to the law enforcement agency that employs the arresting officer.

(ii) At the time of the arrest, the offender was not knowingly in a place described in division (B) of section 2923.126 of the Revised Code.

(b) The offender shall be guilty of a misdemeanor and shall be fined five hundred dollars if all of the following apply:

(i) The offender previously had been issued a concealed handgun license, and that license expired within the two years immediately preceding the arrest.

(ii) Within forty-five days after the arrest, the offender presents a concealed handgun license to the law enforcement agency that employed the arresting officer, and the offender waives in writing the offender's right to a speedy trial on the charge of the violation that is provided in section 2945.71 of the Revised Code.

(iii) At the time of the commission of the offense, the offender was not knowingly in a place described in division (B) of section 2923.126 of the Revised Code.

(c) If neither division (F)(2)(a) nor (b) of this section applies, the offender shall be punished under division (F)(1) of this section.

(3) Except as otherwise provided in this division, carrying concealed weapons in violation of division (B)(1) of this section is a misdemeanor of the first degree, and, in addition to any other penalty or sanction imposed for a violation of division (B)(1) of this section, the offender's concealed handgun license shall be suspended pursuant to division (A)(2) of section 2923.128 of the Revised Code. If, at the time of the stop of the offender for a law enforcement purpose that was the basis of the violation, any law enforcement officer involved with the stop had actual knowledge that the offender has been issued a concealed handgun license, carrying concealed weapons in violation of division (B)(1) of this section is a minor misdemeanor, and the offender's concealed handgun license shall not be suspended pursuant to division (A)(2) of section 2923.128 of the Revised Code.

(4) Carrying concealed weapons in violation of division (B)(2) or (4) of this section is a misdemeanor of the first degree or, if the offender previously has been convicted of or pleaded guilty to a violation of division (B)(2) or (4) of this section, a felony of the fifth degree. In addition to any other penalty or sanction imposed for a misdemeanor violation of division (B)(2) or (4) of this section, the offender's concealed handgun license shall be suspended pursuant to division (A)(2) of section 2923.128 of the Revised Code.

(5) Carrying concealed weapons in violation of division (B)(3) of this section is a felony of the fifth degree.

(G) If a law enforcement officer stops a person to question the person regarding a possible violation of this section, for a traffic stop, or for any other law enforcement purpose, if the person surrenders a firearm to the officer, either voluntarily or pursuant to a request or demand of the officer, and if the officer does not charge the person with a violation of this section or arrest the person for any offense, the person is not otherwise prohibited by law from possessing the firearm, and the firearm is not contraband, the officer shall return the firearm to the person at the termination of the stop. If a court orders a law enforcement officer to return a firearm to a person pursuant to the requirement set forth in this division, division (B) of section 2923.163 of the Revised Code applies.

Return to Practioner's Toolbox History:

134 v H 511 (Eff 1-1-74); 135 v H 716 (Eff 1-1-74); 141 v H 51 (Eff 7-30-86); 146 v S 2. Eff 7-1-96; 150 v H 12, § 1, eff. 4-8-04; 151 v H 347, § 1, eff. 3-14-07; 152 v S 184, § 1, eff. 9-9-08; 2012 HB 495, § 1, eff. Mar. 27, 2013.

Return to Practitioner's Toolbox Section Notes:

Editor's Notes

Governor Taft's veto of HB 347 was overridden by the Ohio General Assembly.

The provisions of § 6, H.B. 12 (150 v --), read as follows:

SECTION 6. In amending sections 1547.69, 2911.21, 2921.13, 2923.12, 2923.121, 2923.123, 2923.13, 2923.16, 2953.32, and 4749.10 of the Revised Code and in enacting sections 109.69, 109.731, 311.41, 311.42, and 2923.124 to 2923.1213 of the Revised Code in this act, the General Assembly hereby declares its intent to recognize both of the following:

(A) The inalienable and fundamental right of an individual to defend the individual's person and the members of the individual's family;

(B) The fact that the right described in division (A) of this section predates the adoption of the United States Constitution, the adoption of the Ohio Constitution, and the enactment of all statutory laws by the General Assembly and may not be infringed by any enactment of the General Assembly.

The provisions of § 7, H.B. 12 (150 v --), read as follows:

SECTION 7. In enacting sections 109.69, 109.731, 311.41, 311.42, and 2923.124 to 2923.1213 of the Revised Code in this act and in amending sections 1547.69, 2911.21, 2921.13, 2923.12, 2923.121, 2923.123, 2923.13, 2923.16, 2953.32, and 4749.10 of the Revised Code in this act relative to licenses to carry a concealed handgun, the General Assembly hereby declares that it is not its intent to declare or otherwise give the impression that, prior to the effective date of this act, an individual did not have an inalienable and fundamental right, or a right under the Ohio Constitution or the United States Constitution, to carry a concealed handgun or other firearm for the defense of the individual's person or a member of the individual's family while engaged in lawful activity. Further, the General Assembly declares that it is not its intent to invalidate any prior convictions for violating any section of the Revised Code or a municipal ordinance prior to the effective date of this act or to prevent the prosecution of any violation committed prior to the effective date of this act.

The provisions of § 9, H.B. 12 (150 v --), read as follows:

SECTION 9. The General Assembly finds that licenses to carry concealed handguns are a matter of statewide concern and wishes to ensure uniformity throughout the state regarding the qualifications for a person to hold a license to carry a concealed handgun and the authority granted to a person holding a license of that nature. It is the intent of the General Assembly in amending sections 1547.69, 2911.21, 2921.13, 2923.12, 2923.121, 2923.123, 2923.16, 2953.32, and 4749.10 and enacting sections 109.69, 109.731, 311.41, 311.42, and 2923.124 to 2923.1213 of the Revised Code to enact laws of a general nature, and, by enacting those laws of a general nature, the state occupies and preempts the field of issuing licenses to carry a concealed handgun and the validity of licenses of that nature. No municipal corporation may adopt or continue in existence any ordinance, and no township may adopt or continue in existence any resolution, that is in conflict with those sections, including, but not limited to, any ordinance or resolution that attempts to restrict the places where a person possessing a valid license to carry a concealed handgun may carry a handgun concealed.

The provisions of § 10, H.B. 12 (150 v --), read as follows:

SECTION 10. If any provision of sections 1547.69, 2911.21, 2913.02, 2921.13, 2923.12, 2923.121, 2923.123, 2923.16, 2929.14, 2953.32, and 4749.10 of the Revised Code, as amended by this act, any provision of sections 109.69, 109.731, 311.41, 311.42, 2923.124, 2923.125, 2923.126, 2923.127, 2923.128, 2923.129, 2923.1210, 2923.1211, 2923.1212, and 2923.1213 of the Revised Code, as enacted by this act, or the application of any provision of those sections to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the particular section or related sections that can be given effect without the invalid provision or application, and to this end the provisions of the particular section are severable.

Not analogous to former RC § 2923.12 (GC § 13421-23; 108 v PtI, 189; Bureau of Code Revision, 10-1-53), repealed 134 v H 511, § 2, eff 1-1-74.

The effective date is set by section 6 of SB 2.

EFFECT OF AMENDMENTS

The 2012 amendment substituted "concealed handgun license" for "license or temporary emergency license to carry a concealed handgun under section 2923.125 or 2923.1213 of the Revised Code or a license to carry a concealed handgun that was issued by another state with which the attorney general has entered into a reciprocity agreement under section 109.69 of the Revised Code" in the introductory language of (B); substituted "concealed handgun license" for "license or temporary emergency license to carry a concealed handgun" wherever it appears in (B)(1), (F)(3), and (F)(4); deleted "if the person" following "purpose and" in (B)(2) and (B)(4); rewrote (C)(2); substituted "concealed handgun license" for "license or temporary emergency license to carry a concealed handgun under section 2923.125 or 2923.1213 of the Revised Code" in (E); and rewrote (F)(2).

152 v S 184, effective September 9, 2008, added (C)(1)(c) and (d); deleted (D)(4), pertaining to weapons being transported in a motor vehicle; deleted (E), pertaining to affirmative defense, and redesignated the remaining subsections accordingly; in (F)(1), deleted "if the weapon involved is a firearm and the violation of this section is committed at premises for which a D permit has been issued under Chapter 4303. of the Revised Code or" preceding "if the offense is committed"; in (F)(3), added the exception to the beginning, and added the last sentence; added the last sentence to (G); and corrected internal references.

151 v H 347, effective March 14, 2007, rewrote (B), (C), and (G)(3); and added (G)(4) and (5).

1974 Committee Comment to H 511

This section prohibits having or carrying any deadly weapon or dangerous ordnance, either concealed on one's person, or concealed where it may readily be picked up and used.

The prohibition does not apply to state or federal officers, agents, or employees, or to law enforcement officers, when they are authorized to carry concealed weapons and are acting within the scope of their duties. Also, the section specifies affirmative defenses to a charges of carrying concealed weapons, including: (1) that the accused was engaged in, or going to, or coming from his lawful business or occupation, which was of such character or carried on at such a time or place as to justify a prudent man in going armed; (2) that the accused was engaged in a lawful activity and had good reason to fear an attack on himself or member of his family, such as to justify a prudent man in going armed; (3) that the weapon was carried or kept in the accused's own home for any lawful purpose; and (4) that the weapon was a firearm being transported in a motor vehicle in compliance with new section 2923.16.

Carrying concealed weapons (other than dangerous ordnance or a firearm which is either loaded or for which the ammunition is ready at hand) is a first degree misdemeanor, or a third degree felony if the offender has a prior conviction of an offense of violence. Carrying concealed dangerous ordnance or a firearm which is either loaded or for which the ammunition is ready at hand is a third degree felony. Carrying a concealed weapon of any kind aboard an aircraft or with purpose to carry it aboard an aircraft is a felony of the second degree.

ORC Ann. 2923.121 (2013)

§ 2923.121. Illegal possession of firearm in liquor permit premises

(A) No person shall possess a firearm in any room in which any person is consuming beer or intoxicating liquor in a premises for which a D permit has been issued under Chapter 4303. of the Revised Code or in an open air arena for which a permit of that nature has been issued.

(B) (1) This section does not apply to any of the following:

(a) An officer, agent, or employee of this or any other state or the United States, or to a law enforcement officer, who is authorized to carry firearms and is acting within the scope of the officer's, agent's, or employee's duties;

(b) Any person who is employed in this state, who is authorized to carry firearms, and who is subject to and in compliance with the requirements of section 109.801 of the Revised Code, unless the appointing authority of the person has expressly specified that the exemption provided in division (B)(1)(b) of this section does not apply to the person;

(c) Any room used for the accommodation of guests of a hotel, as defined in section 4301.01 of the Revised Code;

(d) The principal holder of a D permit issued for a premises or an open air arena under Chapter 4303. of the Revised Code while in the premises or open air arena for which the permit was issued if the principal holder of the D permit also possesses a valid concealed handgun license and as long as the principal holder is not consuming beer or intoxicating liquor or under the influence of alcohol or a drug of abuse, or any agent or employee of that holder who also is a peace officer, as defined in section 2151.3515 of the Revised Code, who is off duty, and who otherwise is authorized to carry firearms while in the course of the officer's official duties and while in the premises or open air arena for which the permit was issued and as long as the agent or employee of that holder is not consuming beer or intoxicating liquor or under the influence of alcohol or a drug of abuse.

(e) Any person who is carrying a valid concealed handgun license, as long as the person is not consuming beer or intoxicating liquor or under the influence of alcohol or a drug of abuse.

(2) This section does not prohibit any person who is a member of a veteran's organization, as defined in section 2915.01 of the Revised Code, from possessing a rifle in any room in any premises owned, leased, or otherwise under the control of the veteran's organization, if the rifle is not loaded with live ammunition and if the person otherwise is not prohibited by law from having the rifle.

(3) This section does not apply to any person possessing or displaying firearms in any room used to exhibit unloaded firearms for sale or trade in a soldiers' memorial established pursuant to

Chapter 345. of the Revised Code, in a convention center, or in any other public meeting place, if the person is an exhibitor, trader, purchaser, or seller of firearms and is not otherwise prohibited by law from possessing, trading, purchasing, or selling the firearms.

(C) It is an affirmative defense to a charge under this section of illegal possession of a firearm in a liquor permit premises that involves the possession of a firearm other than a handgun, that the actor was not otherwise prohibited by law from having the firearm, and that any of the following apply:

(1) The firearm was carried or kept ready at hand by the actor for defensive purposes, while the actor was engaged in or was going to or from the actor's lawful business or occupation, which business or occupation was of such character or was necessarily carried on in such manner or at such a time or place as to render the actor particularly susceptible to criminal attack, such as would justify a prudent person in going armed.

(2) The firearm was carried or kept ready at hand by the actor for defensive purposes, while the actor was engaged in a lawful activity, and had reasonable cause to fear a criminal attack upon the actor or a member of the actor's family, or upon the actor's home, such as would justify a prudent person in going armed.

(D) No person who is charged with a violation of this section shall be required to obtain a concealed handgun license as a condition for the dismissal of the charge.

(E) Whoever violates this section is guilty of illegal possession of a firearm in a liquor permit premises. Except as otherwise provided in this division, illegal possession of a firearm in a liquor permit premises is a felony of the fifth degree. If the offender commits the violation of this section by knowingly carrying or having the firearm concealed on the offender's person or concealed ready at hand, illegal possession of a firearm in a liquor permit premises is a felony of the third degree.

(F) As used in this section, "beer" and "intoxicating liquor" have the same meanings as in section 4301.01 of the Revised Code.

Return to Practioner's Toolbox History:

141 v H 51 (Eff 7-30-86); 141 v H 39 (Eff 2-21-87); 146 v S 2. Eff 7-1-96; 150 v H 12, § 1, eff. 4-8-04; 151 v H 347, § 1, eff. 3-14-07; 152 v S 184, § 1, eff. 9-9-08; 2011 SB 17, § 1, eff. Sept. 30, 2011; 2012 HB 495, § 1, eff. Mar. 27, 2013.

Return to Practitioner's Toolbox Section Notes:

Editor's Notes

Governor Taft's veto of HB 347 was overridden by the Ohio General Assembly.

See the provisions of §§ 6, 7, 9, and 10 of H.B. 12 (150 v --) following RC § 2923.12.

The effective date is set by section 6 of SB 2.

EFFECT OF AMENDMENTS

The 2012 amendment substituted "concealed handgun license" for "license or temporary emergency license to carry a concealed handgun issued to the principal holder under section 2923.125 or 2923.1213 of the Revised Code or a license to carry a concealed handgun that was issued to the principal holder by another state with which the attorney general has entered into a reciprocity agreement under section 109.69 of the Revised Code" in (B)(1)(d); substituted "concealed handgun license" for "license or temporary emergency license to carry a concealed handgun issued to the person under section 2923.125 or 2923.1213 of the Revised Code or a license to carry a concealed handgun that was issued to the person by another state with which the attorney general has entered into a reciprocity agreement under section 109.69 of the Revised Code" in (B)(1)(e); and substituted "concealed handgun license" for "license or temporary emergency license to carry a concealed handgun under section 2923.125 or 2923.1213 of the Revised Code" in (D).

The 2011 amendment inserted "beer or intoxicating" throughout (A), (B)(1)(d), and (B)(1)(e); deleted "and who possesses the firearm in a retail store with D-6 and D-8 permits issued for that store under sections 4303.182 and 4303.184 of the Revised Code or a D-8 permit issued for that store under section 4303.184 of the Revised Code" preceding "as long as" in (B)(1)(e); added (F); and made stylistic changes.

152 v S 184, effective September 9, 2008, in (A), substituted "any person is consuming liquor" for "liquor is being dispensed"; redesignated (B)(2) as (B)(1)(c) and redesignated the remaining subdivisions accordingly; in (B)(1)(c), deleted "This section does not apply to" from the beginning; added (B)(1)(d) and (e); and, in (E), added the exception to the beginning of the second sentence, and added the last sentence.

151 v H 347, effective March 14, 2007, rewrote (B)(1).

ORC Ann. 2923.122 (2013)
§ 2923.122. Illegal conveyance or possession of deadly weapon or dangerous ordnance or illegal possession of object indistinguishable from firearm in school safety zone

(A) No person shall knowingly convey, or attempt to convey, a deadly weapon or dangerous ordnance into a school safety zone.

(B) No person shall knowingly possess a deadly weapon or dangerous ordnance in a school safety zone.

(C) No person shall knowingly possess an object in a school safety zone if both of the following apply:

(1) The object is indistinguishable from a firearm, whether or not the object is capable of being fired.

(2) The person indicates that the person possesses the object and that it is a firearm, or the person knowingly displays or brandishes the object and indicates that it is a firearm.

(D) (1) This section does not apply to any of the following:

(a) An officer, agent, or employee of this or any other state or the United States, or a law enforcement officer, who is authorized to carry deadly weapons or dangerous ordnance and is acting within the scope of the officer's, agent's, or employee's duties, a security officer employed by a board of education or governing body of a school during the time that the security officer is on duty pursuant to that contract of employment, or any other person who has written authorization from the board of education or governing body of a school to convey deadly weapons or dangerous ordnance into a school safety zone or to possess a deadly weapon or dangerous ordnance in a school safety zone and who conveys or possesses the deadly weapon or dangerous ordnance in accordance with that authorization;

(b) Any person who is employed in this state, who is authorized to carry deadly weapons or dangerous ordnance, and who is subject to and in compliance with the requirements of section 109.801 of the Revised Code, unless the appointing authority of the person has expressly specified that the exemption provided in division (D)(1)(b) of this section does not apply to the person.

(2) Division (C) of this section does not apply to premises upon which home schooling is conducted. Division (C) of this section also does not apply to a school administrator, teacher, or employee who possesses an object that is indistinguishable from a firearm for legitimate school purposes during the course of employment, a student who uses an object that is indistinguishable from a firearm under the direction of a school administrator, teacher, or employee, or any other person who with the express prior approval of a school administrator possesses an object that is indistinguishable from a firearm for a legitimate purpose, including the use of the object in a

ceremonial activity, a play, reenactment, or other dramatic presentation, or a ROTC activity or another similar use of the object.

(3) This section does not apply to a person who conveys or attempts to convey a handgun into, or possesses a handgun in, a school safety zone if, at the time of that conveyance, attempted conveyance, or possession of the handgun, all of the following apply:

(a) The person does not enter into a school building or onto school premises and is not at a school activity.

(b) The person is carrying a valid concealed handgun license.

(c) The person is in the school safety zone in accordance with 18 U.S.C. 922(q)(2)(B).

(d) The person is not knowingly in a place described in division (B)(1) or (B)(3) to (10) of section 2923.126 of the Revised Code.

(4) This section does not apply to a person who conveys or attempts to convey a handgun into, or possesses a handgun in, a school safety zone if at the time of that conveyance, attempted conveyance, or possession of the handgun all of the following apply:

(a) The person is carrying a valid concealed handgun license.

(b) The person is the driver or passenger in a motor vehicle and is in the school safety zone while immediately in the process of picking up or dropping off a child.

(c) The person is not in violation of section 2923.16 of the Revised Code.

(E) (1) Whoever violates division (A) or (B) of this section is guilty of illegal conveyance or possession of a deadly weapon or dangerous ordnance in a school safety zone. Except as otherwise provided in this division, illegal conveyance or possession of a deadly weapon or dangerous ordnance in a school safety zone is a felony of the fifth degree. If the offender previously has been convicted of a violation of this section, illegal conveyance or possession of a deadly weapon or dangerous ordnance in a school safety zone is a felony of the fourth degree.

(2) Whoever violates division (C) of this section is guilty of illegal possession of an object indistinguishable from a firearm in a school safety zone. Except as otherwise provided in this division, illegal possession of an object indistinguishable from a firearm in a school safety zone is a misdemeanor of the first degree. If the offender previously has been convicted of a violation of this section, illegal possession of an object indistinguishable from a firearm in a school safety zone is a felony of the fifth degree.

(F) (1) In addition to any other penalty imposed upon a person who is convicted of or pleads guilty to a violation of this section and subject to division (F)(2) of this section, if the offender has not attained nineteen years of age, regardless of whether the offender is attending or is

enrolled in a school operated by a board of education or for which the state board of education prescribes minimum standards under section 3301.07 of the Revised Code, the court shall impose upon the offender a class four suspension of the offender's probationary driver's license, restricted license, driver's license, commercial driver's license, temporary instruction permit, or probationary commercial driver's license that then is in effect from the range specified in division (A)(4) of section 4510.02 of the Revised Code and shall deny the offender the issuance of any permit or license of that type during the period of the suspension.

If the offender is not a resident of this state, the court shall impose a class four suspension of the nonresident operating privilege of the offender from the range specified in division (A)(4) of section 4510.02 of the Revised Code.

(2) If the offender shows good cause why the court should not suspend one of the types of licenses, permits, or privileges specified in division (F)(1) of this section or deny the issuance of one of the temporary instruction permits specified in that division, the court in its discretion may choose not to impose the suspension, revocation, or denial required in that division.

(G) As used in this section, "object that is indistinguishable from a firearm" means an object made, constructed, or altered so that, to a reasonable person without specialized training in firearms, the object appears to be a firearm.

History:

144 v H 154 (Eff 7-31-92); 146 v S 2 (Eff 7-1-96); 146 v H 72 (Eff 3-18-97); 146 v H 124 (Eff 9-30-97); 148 v S 1. Eff 8-6-99; 149 v S 123, § 1, eff. 1-1-04; 150 v H 12, §§ 1, 3, eff. 4-8-04*; 151 v H 347, § 1, eff. 3-14-07; 152 v S 184, § 1, eff. 9-9-08; 2012 SB 337, § 1, eff. Sept. 28, 2012; 2012 HB 495, § 1, eff. Mar. 27, 2013.

Section Notes:

Editor's Notes

Governor Taft's veto of HB 347 was overridden by the Ohio General Assembly.

See provisions, § 5 of S.B. 123 (149 v --), following RC § 2923.01.

The provisions of § 3 of SB 1 (148 v --) read as follows:

SECTION 3. Section 2923.122 of the Revised Code is presented in this act as a composite of the section as amended by both Am. Sub. H.B. 72 and Am. Sub. H.B. 124 of the 121st General Assembly, with the new language of neither of the acts shown in capital letters. This is in recognition of the principle stated in division (B) of section 1.52 of the Revised Code that such

amendments are to be harmonized where not substantively irreconcilable and constitutes a legislative finding that such is the resulting version in effect prior to the effective date of this act.

FOOTNOTE

* Section 3, H.B. 12, Acts 2004, purported to amend the version of RC § 2923.122 as amended by S.B. 123 (149 v --), which took effect on January 1, 2004. However, H.B. 12, Acts 2004 was approved January 8, 2004, and became effective April 8, 2004.

EFFECT OF AMENDMENTS

The 2012 amendment by HB 495, substituted "concealed handgun license" for "license or temporary emergency license to carry a concealed handgun issued to the person under section 2923.125 or 2923.1213 of the Revised Code or a license to carry a concealed handgun that was issued by another state with which the attorney general has entered into a reciprocity agreement under section 109.69 of the Revised Code" in (D)(3)(b) and (D)(4)(a).

The 2012 amendment SB 337, added "but the court, in its discretion, instead may require the offender to perform community service for a number of hours determined by the court" to the end of (F)(2).

152 v S 184, effective September 9, 2008, added (D)(4).

151 v H 347, effective March 14, 2007, rewrote (D).

ORC Ann. 2923.17 (2013)
§ 2923.17. Unlawful possession of dangerous ordnance; illegally manufacturing or processing explosives

(A) No person shall knowingly acquire, have, carry, or use any dangerous ordnance.

(B) No person shall manufacture or process an explosive at any location in this state unless the person first has been issued a license, certificate of registration, or permit to do so from a fire official of a political subdivision of this state or from the office of the fire marshal.

(C) Division (A) of this section does not apply to:

(1) Officers, agents, or employees of this or any other state or the United States, members of the armed forces of the United States or the organized militia of this or any other state, and law enforcement officers, to the extent that any such person is authorized to acquire, have, carry, or use dangerous ordnance and is acting within the scope of the person's duties;

(2) Importers, manufacturers, dealers, and users of explosives, having a license or user permit issued and in effect pursuant to the "Organized Crime Control Act of 1970," 84 Stat. 952, 18 U.S.C. 843, and any amendments or additions thereto or reenactments thereof, with respect to explosives and explosive devices lawfully acquired, possessed, carried, or used under the laws of this state and applicable federal law;

(3) Importers, manufacturers, and dealers having a license to deal in destructive devices or their ammunition, issued and in effect pursuant to the "Gun Control Act of 1968," 82 Stat. 1213, 18 U.S.C. 923, and any amendments or additions thereto or reenactments thereof, with respect to dangerous ordnance lawfully acquired, possessed, carried, or used under the laws of this state and applicable federal law;

(4) Persons to whom surplus ordnance has been sold, loaned, or given by the secretary of the army pursuant to 70A Stat. 262 and 263, 10 U.S.C. 4684, 4685, and 4686, and any amendments or additions thereto or reenactments thereof, with respect to dangerous ordnance when lawfully possessed and used for the purposes specified in such section;

(5) Owners of dangerous ordnance registered in the national firearms registration and transfer record pursuant to the act of October 22, 1968, 82 Stat. 1229, 26 U.S.C. 5841, and any amendments or additions thereto or reenactments thereof, and regulations issued thereunder.

(6) Carriers, warehouses, and others engaged in the business of transporting or storing goods for hire, with respect to dangerous ordnance lawfully transported or stored in the usual course of their business and in compliance with the laws of this state and applicable federal law;

(7) The holders of a license or temporary permit issued and in effect pursuant to section 2923.18 of the Revised Code, with respect to dangerous ordnance lawfully acquired, possessed,

carried, or used for the purposes and in the manner specified in such license or permit.

(D) Whoever violates division (A) of this section is guilty of unlawful possession of dangerous ordnance, a felony of the fifth degree.

(E) Whoever violates division (B) of this section is guilty of illegally manufacturing or processing explosives, a felony of the second degree.

History:

134 v H 511 (Eff 1-1-74); 137 v H 728 (Eff 8-22-78); 146 v S 2. Eff 7-1-96; 2011 HB 9, § 1, eff. June 29, 2011.

Section Notes:

Editor's Notes

Acts 2011, HB 9, § 3 provides: "This act applies to transactions entered into on or after the effective date of this act."

Not analogous to former RC § 2923.17 (RS § 6990; 73 v 154; GC § 12678; Bureau of Code Revision, 10-1-53), repealed 134 v H 511, § 2, eff 1-1-74.

Analogous to former RC § 2923.04 (GC §§ 12819-4, 12819-5; 115 v 189; Bureau of Code Revision, 10-1-53; 132 v H 43), repealed 134 v H 511, § 2, eff 1-1-74.

The effective date is set by section 6 of SB 2.

EFFECT OF AMENDMENTS

The 2011 amendment made stylistic changes.

1974 Committee Comment to H 511

This section contains a flat prohibition against possessing dangerous ordnance, but provides a list of specific exceptions. The exceptions include: authorized state and federal officers, agents, and employees, members of the armed forces, national guardsmen, and regular law enforcement officers, when acting within the scope of their duties; persons having a federal destructive device license or an explosives license or user permit, as allowed by the license or permit; persons whose dangerous ordnance is registered as required by federal law; carriers and warehousemen transporting or storing dangerous ordnance in the usual course of business; and holders of a license or permit issued by local law enforcement authorities under 2923.18.

Unlawful possession of dangerous ordnance is a misdemeanor of the first degree.

ORC Ann. 2925.12 (2013)

§ 2925.12. Possessing drug abuse instruments

(A) No person shall knowingly make, obtain, possess, or use any instrument, article, or thing the customary and primary purpose of which is for the administration or use of a dangerous drug, other than marihuana, when the instrument involved is a hypodermic or syringe, whether or not of crude or extemporized manufacture or assembly, and the instrument, article, or thing involved has been used by the offender to unlawfully administer or use a dangerous drug, other than marihuana, or to prepare a dangerous drug, other than marihuana, for unlawful administration or use.

(B) This section does not apply to manufacturers, licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies, and other persons whose conduct was in accordance with Chapters 3719., 4715., 4723., 4729., 4730., 4731., and 4741. of the Revised Code.

(C) Whoever violates this section is guilty of possessing drug abuse instruments, a misdemeanor of the second degree. If the offender previously has been convicted of a drug abuse offense, a violation of this section is a misdemeanor of the first degree.

(D) In addition to any other sanction imposed upon an offender for a violation of this section, the court shall suspend for not less than six months or more than five years the offender's driver's or commercial driver's license or permit. If the offender is a professionally licensed person, in addition to any other sanction imposed for a violation of this section, the court immediately shall comply with section 2925.38 of the Revised Code.

Return to Practioner's Toolbox History:

136 v H 300 (Eff 7-1-76); 143 v S 258 (Eff 11-20-90); 145 v H 377 (Eff 9-30-93); 145 v H 391 (Eff 7-21-94); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 147 v S 66 (Eff 7-22-98); 148 v H 241. Eff 5-17-2000; 149 v S 123, § 1, eff. 1-1-04; 151 v S 154, § 1, eff. 5-17-06.

Return to Practitioner's Toolbox Section Notes:

Editor's Notes

The effective date is set by section 4 of S.B. 123.

See provisions of § 5 of S.B. 123 (149 v --) following RC § 2925.01.

EFFECT OF AMENDMENTS

151 v S 154, effective May 17, 2006, inserted "4730" in (B).

ORC Ann. 2941.141 (2013)
§ 2941.141. Specification that offender had a firearm while committing the offense

(A) Imposition of a one-year mandatory prison term upon an offender under division (B)(1)(a) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense. The specification shall be stated at the end of the body of the indictment, count, or information, and shall be in substantially the following form:

"SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The Grand Jurors (or insert the person's or the prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense.)"

(B) Imposition of a one-year mandatory prison term upon an offender under division (B)(1)(a) of section 2929.14 of the Revised Code is precluded if a court imposes a three-year or six-year mandatory prison term on the offender under that division relative to the same felony.

(C) The specification described in division (A) of this section may be used in a delinquent child proceeding in the manner and for the purpose described in section 2152.17 of the Revised Code.

(D) As used in this section, "firearm" has the same meaning as in section 2923.11 of the Revised Code.

History:

139 v S 199 (Eff 1-5-83); 143 v S 258 (Eff 11-20-90); 143 v H 669 (Eff 1-10-91); 146 v S 2 (Eff 7-1-96); 148 v S 107 (Eff 3-23-2000); 148 v S 179, § 3. Eff 1-1-2002; 2011 HB 86, § 1, eff. Sept. 30, 2011.

Section Notes:

Editor's Notes

The effective date is set by section 5 of SB 179.

EFFECT OF AMENDMENTS

The 2011 amendment substituted "division (B)(1)(a)" for "division (D)(1)(a)" in the first sentence of the introductory language of (A) and in (B).

ORC Ann. 2941.145 (2013)

§ 2941.145. Specification that offender displayed, brandished, indicated possession of or used firearm

(A) Imposition of a three-year mandatory prison term upon an offender under division (B)(1)(a) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense. The specification shall be stated at the end of the body of the indictment, count, or information, and shall be stated in substantially the following form:

"SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The Grand Jurors (or insert the person's or the prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense)."

(B) Imposition of a three-year mandatory prison term upon an offender under division (B)(1)(a) of section 2929.14 of the Revised Code is precluded if a court imposes a one-year or six-year mandatory prison term on the offender under that division relative to the same felony.

(C) The specification described in division (A) of this section may be used in a delinquent child proceeding in the manner and for the purpose described in section 2152.17 of the Revised Code.

(D) As used in this section, "firearm" has the same meaning as in section 2923.11 of the Revised Code.

Return to Practioner's Toolbox History:

146 v S 2 (Eff 7-1-96); 148 v S 107 (Eff 3-23-2000); 148 v S 179, § 3. Eff 1-1-2002; 2011 HB 86, § 1, eff. Sept. 30, 2011.

Return to Practitioner's Toolbox Section Notes:

Editor's Notes

The effective date is set by section 5 of SB 179.

EFFECT OF AMENDMENTS

The 2011 amendment substituted "division (B)(1)(a)" for "division (D)(1)(a)" in the first sentence of the introductory language of (A) and in (B).

ORC Ann. 2945.44 (2013)

§ 2945.44. Immunity of witnesses turning state's evidence

(A) In any criminal proceeding in this state or in any criminal or civil proceeding brought pursuant to Chapter 2981. of the Revised Code, if a witness refuses to answer or produce information on the basis of the witness's privilege against self-incrimination, the court of common pleas of the county in which the proceeding is being held, unless it finds that to do so would not further the administration of justice, shall compel the witness to answer or produce the information, if both of the following apply:

(1) The prosecuting attorney of the county in which the proceedings are being held makes a written request to the court of common pleas to order the witness to answer or produce the information, notwithstanding the witness's claim of privilege;

(2) The court of common pleas informs the witness that by answering, or producing the information the witness will receive immunity under division (B) of this section.

(B) If, but for this section, the witness would have been privileged to withhold an answer or any information given in any criminal proceeding, and the witness complies with an order under division (A) of this section compelling the witness to give an answer or produce any information, the witness shall not be prosecuted or subjected to any criminal penalty in the courts of this state for or on account of any transaction or matter concerning which, in compliance with the order, the witness gave an answer or produced any information.

(C) A witness granted immunity under this section may be subjected to a criminal penalty for any violation of section 2921.11, 2921.12, or 2921.13 of the Revised Code, or for contempt committed in answering, failing to answer, or failing to produce information in compliance with the order.

Return to Practioner's Toolbox History:
137 v H 491 (Eff 5-30-78); 141 v H 5. Eff 1-1-86; 151 v H 241, § 1, eff. 7-1-07.
Return to Practitioner's Toolbox Section Notes:
Editor's Notes
See provisions of § 4 of 151 v H 241 following RC § 2901.01.
Analogous to former RC § 2945.44 (134 v H 511; 136 v S 234), repealed 137 v H 491, § 2, eff 5-30-78; and RC § 2945.44 (GC § 13444-4; 113 v 123(186); Bureau of Code Revision, 10-1-53; 126 v 168), repealed 134 v H 511, § 2, eff 1-1-74.
The effective date is set by section 3 of HB 5.
EFFECT OF AMENDMENTS

151 v H 241, effective July 1, 2007, corrected internal references and made gender neutral changes.

ORC Ann. 4511.191 (2013)

Return to Legislative Alert in Practitioner's Toolbox Legislative Alert:

LEXSEE 2013 Ohio HB 59 -- See sections 101X01 and 101X02.

§ 4511.191. Implied consent

(A) (1) As used in this section:

(a) "Physical control" has the same meaning as in section 4511.194 of the Revised Code.

(b) "Alcohol monitoring device" means any device that provides for continuous alcohol monitoring, any ignition interlock device, any immobilizing or disabling device other than an ignition interlock device that is constantly available to monitor the concentration of alcohol in a person's system, or any other device that provides for the automatic testing and periodic reporting of alcohol consumption by a person and that a court orders a person to use as a sanction imposed as a result of the person's conviction of or plea of guilty to an offense.

(2) Any person who operates a vehicle, streetcar, or trackless trolley upon a highway or any public or private property used by the public for vehicular travel or parking within this state or who is in physical control of a vehicle, streetcar, or trackless trolley shall be deemed to have given consent to a chemical test or tests of the person's whole blood, blood serum or plasma, breath, or urine to determine the alcohol, drug of abuse, controlled substance, metabolite of a controlled substance, or combination content of the person's whole blood, blood serum or plasma, breath, or urine if arrested for a violation of division (A) or (B) of section 4511.19 of the Revised Code, section 4511.194 of the Revised Code or a substantially equivalent municipal ordinance, or a municipal OVI ordinance.

(3) The chemical test or tests under division (A)(2) of this section shall be administered at the request of a law enforcement officer having reasonable grounds to believe the person was operating or in physical control of a vehicle, streetcar, or trackless trolley in violation of a division, section, or ordinance identified in division (A)(2) of this section. The law enforcement agency by which the officer is employed shall designate which of the tests shall be administered.

(4) Any person who is dead or unconscious, or who otherwise is in a condition rendering the person incapable of refusal, shall be deemed to have consented as provided in division (A)(2) of this section, and the test or tests may be administered, subject to sections 313.12 to 313.16 of the Revised Code.

(5) (a) If a law enforcement officer arrests a person for a violation of division (A) or (B) of section 4511.19 of the Revised Code, section 4511.194 of the Revised Code or a substantially equivalent municipal ordinance, or a municipal OVI ordinance and if the person if convicted

would be required to be sentenced under division (G)(1)(c), (d), or (e) of section 4511.19 of the Revised Code, the law enforcement officer shall request the person to submit, and the person shall submit, to a chemical test or tests of the person's whole blood, blood serum or plasma, breath, or urine for the purpose of determining the alcohol, drug of abuse, controlled substance, metabolite of a controlled substance, or combination content of the person's whole blood, blood serum or plasma, breath, or urine. A law enforcement officer who makes a request pursuant to this division that a person submit to a chemical test or tests is not required to advise the person of the consequences of submitting to, or refusing to submit to, the test or tests and is not required to give the person the form described in division (B) of section 4511.192 of the Revised Code, but the officer shall advise the person at the time of the arrest that if the person refuses to take a chemical test the officer may employ whatever reasonable means are necessary to ensure that the person submits to a chemical test of the person's whole blood or blood serum or plasma. The officer shall also advise the person at the time of the arrest that the person may have an independent chemical test taken at the person's own expense. Divisions (A)(3) and (4) of this section apply to the administration of a chemical test or tests pursuant to this division.

(b) If a person refuses to submit to a chemical test upon a request made pursuant to division (A)(5)(a) of this section, the law enforcement officer who made the request may employ whatever reasonable means are necessary to ensure that the person submits to a chemical test of the person's whole blood or blood serum or plasma. A law enforcement officer who acts pursuant to this division to ensure that a person submits to a chemical test of the person's whole blood or blood serum or plasma is immune from criminal and civil liability based upon a claim for assault and battery or any other claim for the acts, unless the officer so acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

(B) (1) Upon receipt of the sworn report of a law enforcement officer who arrested a person for a violation of division (A) or (B) of section 4511.19 of the Revised Code, section 4511.194 of the Revised Code or a substantially equivalent municipal ordinance, or a municipal OVI ordinance that was completed and sent to the registrar of motor vehicles and a court pursuant to section 4511.192 of the Revised Code in regard to a person who refused to take the designated chemical test, the registrar shall enter into the registrar's records the fact that the person's driver's or commercial driver's license or permit or nonresident operating privilege was suspended by the arresting officer under this division and that section and the period of the suspension, as determined under this section. The suspension shall be subject to appeal as provided in section 4511.197 of the Revised Code. The suspension shall be for whichever of the following periods applies:

(a) Except when division (B)(1)(b), (c), or (d) of this section applies and specifies a different class or length of suspension, the suspension shall be a class C suspension for the period of time specified in division (B)(3) of section 4510.02 of the Revised Code.

(b) If the arrested person, within six years of the date on which the person refused the request to consent to the chemical test, had refused one previous request to consent to a chemical test or had been convicted of or pleaded guilty to one violation of division (A) or (B) of section 4511.19 of the Revised Code or one other equivalent offense, the suspension shall be a class B suspension

imposed for the period of time specified in division (B)(2) of section 4510.02 of the Revised Code.

(c) If the arrested person, within six years of the date on which the person refused the request to consent to the chemical test, had refused two previous requests to consent to a chemical test, had been convicted of or pleaded guilty to two violations of division (A) or (B) of section 4511.19 of the Revised Code or other equivalent offenses, or had refused one previous request to consent to a chemical test and also had been convicted of or pleaded guilty to one violation of division (A) or (B) of section 4511.19 of the Revised Code or other equivalent offenses, which violation or offense arose from an incident other than the incident that led to the refusal, the suspension shall be a class A suspension imposed for the period of time specified in division (B)(1) of section 4510.02 of the Revised Code.

(d) If the arrested person, within six years of the date on which the person refused the request to consent to the chemical test, had refused three or more previous requests to consent to a chemical test, had been convicted of or pleaded guilty to three or more violations of division (A) or (B) of section 4511.19 of the Revised Code or other equivalent offenses, or had refused a number of previous requests to consent to a chemical test and also had been convicted of or pleaded guilty to a number of violations of division (A) or (B) of section 4511.19 of the Revised Code or other equivalent offenses that cumulatively total three or more such refusals, convictions, and guilty pleas, the suspension shall be for five years.

(2) The registrar shall terminate a suspension of the driver's or commercial driver's license or permit of a resident or of the operating privilege of a nonresident, or a denial of a driver's or commercial driver's license or permit, imposed pursuant to division (B)(1) of this section upon receipt of notice that the person has entered a plea of guilty to, or that the person has been convicted after entering a plea of no contest to, operating a vehicle in violation of section 4511.19 of the Revised Code or in violation of a municipal OVI ordinance, if the offense for which the conviction is had or the plea is entered arose from the same incident that led to the suspension or denial.

The registrar shall credit against any judicial suspension of a person's driver's or commercial driver's license or permit or nonresident operating privilege imposed pursuant to section 4511.19 of the Revised Code, or pursuant to section 4510.07 of the Revised Code for a violation of a municipal OVI ordinance, any time during which the person serves a related suspension imposed pursuant to division (B)(1) of this section.

(C) (1) Upon receipt of the sworn report of the law enforcement officer who arrested a person for a violation of division (A) or (B) of section 4511.19 of the Revised Code or a municipal OVI ordinance that was completed and sent to the registrar and a court pursuant to section 4511.192 of the Revised Code in regard to a person whose test results indicate that the person's whole blood, blood serum or plasma, breath, or urine contained at least the concentration of alcohol specified in division (A)(1)(b), (c), (d), or (e) of section 4511.19 of the Revised Code or at least the concentration of a listed controlled substance or a listed metabolite of a controlled substance specified in division (A)(1)(j) of section 4511.19 of the Revised Code, the registrar shall enter

into the registrar's records the fact that the person's driver's or commercial driver's license or permit or nonresident operating privilege was suspended by the arresting officer under this division and section 4511.192 of the Revised Code and the period of the suspension, as determined under divisions (C)(1)(a) to (d) of this section. The suspension shall be subject to appeal as provided in section 4511.197 of the Revised Code. The suspension described in this division does not apply to, and shall not be imposed upon, a person arrested for a violation of section 4511.194 of the Revised Code or a substantially equivalent municipal ordinance who submits to a designated chemical test. The suspension shall be for whichever of the following periods applies:

(a) Except when division (C)(1)(b), (c), or (d) of this section applies and specifies a different period, the suspension shall be a class E suspension imposed for the period of time specified in division (B)(5) of section 4510.02 of the Revised Code.

(b) The suspension shall be a class C suspension for the period of time specified in division (B)(3) of section 4510.02 of the Revised Code if the person has been convicted of or pleaded guilty to, within six years of the date the test was conducted, one violation of division (A) or (B) of section 4511.19 of the Revised Code or one other equivalent offense.

(c) If, within six years of the date the test was conducted, the person has been convicted of or pleaded guilty to two violations of a statute or ordinance described in division (C)(1)(b) of this section, the suspension shall be a class B suspension imposed for the period of time specified in division (B)(2) of section 4510.02 of the Revised Code.

(d) If, within six years of the date the test was conducted, the person has been convicted of or pleaded guilty to more than two violations of a statute or ordinance described in division (C)(1)(b) of this section, the suspension shall be a class A suspension imposed for the period of time specified in division (B)(1) of section 4510.02 of the Revised Code.

(2) The registrar shall terminate a suspension of the driver's or commercial driver's license or permit of a resident or of the operating privilege of a nonresident, or a denial of a driver's or commercial driver's license or permit, imposed pursuant to division (C)(1) of this section upon receipt of notice that the person has entered a plea of guilty to, or that the person has been convicted after entering a plea of no contest to, operating a vehicle in violation of section 4511.19 of the Revised Code or in violation of a municipal OVI ordinance, if the offense for which the conviction is had or the plea is entered arose from the same incident that led to the suspension or denial.

The registrar shall credit against any judicial suspension of a person's driver's or commercial driver's license or permit or nonresident operating privilege imposed pursuant to section 4511.19 of the Revised Code, or pursuant to section 4510.07 of the Revised Code for a violation of a municipal OVI ordinance, any time during which the person serves a related suspension imposed pursuant to division (C)(1) of this section.

(D) (1) A suspension of a person's driver's or commercial driver's license or permit or

nonresident operating privilege under this section for the time described in division (B) or (C) of this section is effective immediately from the time at which the arresting officer serves the notice of suspension upon the arrested person. Any subsequent finding that the person is not guilty of the charge that resulted in the person being requested to take the chemical test or tests under division (A) of this section does not affect the suspension.

(2) If a person is arrested for operating a vehicle, streetcar, or trackless trolley in violation of division (A) or (B) of section 4511.19 of the Revised Code or a municipal OVI ordinance, or for being in physical control of a vehicle, streetcar, or trackless trolley in violation of section 4511.194 of the Revised Code or a substantially equivalent municipal ordinance, regardless of whether the person's driver's or commercial driver's license or permit or nonresident operating privilege is or is not suspended under division (B) or (C) of this section or Chapter 4510. of the Revised Code, the person's initial appearance on the charge resulting from the arrest shall be held within five days of the person's arrest or the issuance of the citation to the person, subject to any continuance granted by the court pursuant to section 4511.197 of the Revised Code regarding the issues specified in that division.

(E) When it finally has been determined under the procedures of this section and sections 4511.192 to 4511.197 of the Revised Code that a nonresident's privilege to operate a vehicle within this state has been suspended, the registrar shall give information in writing of the action taken to the motor vehicle administrator of the state of the person's residence and of any state in which the person has a license.

(F) At the end of a suspension period under this section, under section 4511.194, section 4511.196, or division (G) of section 4511.19 of the Revised Code, or under section 4510.07 of the Revised Code for a violation of a municipal OVI ordinance and upon the request of the person whose driver's or commercial driver's license or permit was suspended and who is not otherwise subject to suspension, cancellation, or disqualification, the registrar shall return the driver's or commercial driver's license or permit to the person upon the occurrence of all of the conditions specified in divisions (F)(1) and (2) of this section:

(1) A showing that the person has proof of financial responsibility, a policy of liability insurance in effect that meets the minimum standards set forth in section 4509.51 of the Revised Code, or proof, to the satisfaction of the registrar, that the person is able to respond in damages in an amount at least equal to the minimum amounts specified in section 4509.51 of the Revised Code.

(2) Subject to the limitation contained in division (F)(3) of this section, payment by the person to the registrar or an eligible deputy registrar of a license reinstatement fee of four hundred seventy-five dollars, which fee shall be deposited in the state treasury and credited as follows:

(a) One hundred twelve dollars and fifty cents shall be credited to the statewide treatment and prevention fund created by section 4301.30 of the Revised Code. Money credited to the fund under this section shall be used for purposes identified in the comprehensive statewide alcohol and drug addiction services plan developed under section 3793.04 of the Revised Code.

(b) Seventy-five dollars shall be credited to the reparations fund created by section 2743.191 of the Revised Code.

(c) Thirty-seven dollars and fifty cents shall be credited to the indigent drivers alcohol treatment fund, which is hereby established in the state treasury. Except as otherwise provided in division (F)(2)(c) of this section, moneys in the fund shall be distributed by the department of alcohol and drug addiction services to the county indigent drivers alcohol treatment funds, the county juvenile indigent drivers alcohol treatment funds, and the municipal indigent drivers alcohol treatment funds that are required to be established by counties and municipal corporations pursuant to division (H) of this section, and shall be used only to pay the cost of an alcohol and drug addiction treatment program attended by an offender or juvenile traffic offender who is ordered to attend an alcohol and drug addiction treatment program by a county, juvenile, or municipal court judge and who is determined by the county, juvenile, or municipal court judge not to have the means to pay for the person's attendance at the program or to pay the costs specified in division (H)(4) of this section in accordance with that division. In addition, a county, juvenile, or municipal court judge may use moneys in the county indigent drivers alcohol treatment fund, county juvenile indigent drivers alcohol treatment fund, or municipal indigent drivers alcohol treatment fund to pay for the cost of the continued use of an alcohol monitoring device as described in divisions (H)(3) and (4) of this section. Moneys in the fund that are not distributed to a county indigent drivers alcohol treatment fund, a county juvenile indigent drivers alcohol treatment fund, or a municipal indigent drivers alcohol treatment fund under division (H) of this section because the director of alcohol and drug addiction services does not have the information necessary to identify the county or municipal corporation where the offender or juvenile offender was arrested may be transferred by the director of budget and management to the statewide treatment and prevention fund created by section 4301.30 of the Revised Code, upon certification of the amount by the director of alcohol and drug addiction services.

(d) Seventy-five dollars shall be credited to the Ohio rehabilitation services commission established by section 3304.12 of the Revised Code, to the services for rehabilitation fund, which is hereby established. The fund shall be used to match available federal matching funds where appropriate, and for any other purpose or program of the commission to rehabilitate people with disabilities to help them become employed and independent.

(e) Seventy-five dollars shall be deposited into the state treasury and credited to the drug abuse resistance education programs fund, which is hereby established, to be used by the attorney general for the purposes specified in division (F)(4) of this section.

(f) Thirty dollars shall be credited to the state bureau of motor vehicles fund created by section 4501.25 of the Revised Code.

(g) Twenty dollars shall be credited to the trauma and emergency medical services fund created by section 4513.263 of the Revised Code.

(h) Fifty dollars shall be credited to the indigent drivers interlock and alcohol monitoring fund, which is hereby established in the state treasury. Moneys in the fund shall be distributed by

the department of public safety to the county indigent drivers interlock and alcohol monitoring funds, the county juvenile indigent drivers interlock and alcohol monitoring funds, and the municipal indigent drivers interlock and alcohol monitoring funds that are required to be established by counties and municipal corporations pursuant to this section, and shall be used only to pay the cost of an immobilizing or disabling device, including a certified ignition interlock device, or an alcohol monitoring device used by an offender or juvenile offender who is ordered to use the device by a county, juvenile, or municipal court judge and who is determined by the county, juvenile, or municipal court judge not to have the means to pay for the person's use of the device.

(3) If a person's driver's or commercial driver's license or permit is suspended under this section, under section 4511.196 or division (G) of section 4511.19 of the Revised Code, under section 4510.07 of the Revised Code for a violation of a municipal OVI ordinance or under any combination of the suspensions described in division (F)(3) of this section, and if the suspensions arise from a single incident or a single set of facts and circumstances, the person is liable for payment of, and shall be required to pay to the registrar or an eligible deputy registrar, only one reinstatement fee of four hundred seventy-five dollars. The reinstatement fee shall be distributed by the bureau in accordance with division (F)(2) of this section.

(4) The attorney general shall use amounts in the drug abuse resistance education programs fund to award grants to law enforcement agencies to establish and implement drug abuse resistance education programs in public schools. Grants awarded to a law enforcement agency under this section shall be used by the agency to pay for not more than fifty per cent of the amount of the salaries of law enforcement officers who conduct drug abuse resistance education programs in public schools. The attorney general shall not use more than six per cent of the amounts the attorney general's office receives under division (F)(2)(e) of this section to pay the costs it incurs in administering the grant program established by division (F)(2)(e) of this section and in providing training and materials relating to drug abuse resistance education programs.

The attorney general shall report to the governor and the general assembly each fiscal year on the progress made in establishing and implementing drug abuse resistance education programs. These reports shall include an evaluation of the effectiveness of these programs.

(5) In addition to the reinstatement fee under this section, if the person pays the reinstatement fee to a deputy registrar, the deputy registrar shall collect a service fee of ten dollars to compensate the deputy registrar for services performed under this section. The deputy registrar shall retain eight dollars of the service fee and shall transmit the reinstatement fee, plus two dollars of the service fee, to the registrar in the manner the registrar shall determine.

(G) Suspension of a commercial driver's license under division (B) or (C) of this section shall be concurrent with any period of disqualification under section 3123.611 or 4506.16 of the Revised Code or any period of suspension under section 3123.58 of the Revised Code. No person who is disqualified for life from holding a commercial driver's license under section 4506.16 of the Revised Code shall be issued a driver's license under Chapter 4507. of the Revised Code during the period for which the commercial driver's license was suspended under division (B) or (C) of

this section. No person whose commercial driver's license is suspended under division (B) or (C) of this section shall be issued a driver's license under Chapter 4507. of the Revised Code during the period of the suspension.

(H) (1) Each county shall establish an indigent drivers alcohol treatment fund, each county shall establish a juvenile indigent drivers alcohol treatment fund, and each municipal corporation in which there is a municipal court shall establish an indigent drivers alcohol treatment fund. All revenue that the general assembly appropriates to the indigent drivers alcohol treatment fund for transfer to a county indigent drivers alcohol treatment fund, a county juvenile indigent drivers alcohol treatment fund, or a municipal indigent drivers alcohol treatment fund, all portions of fees that are paid under division (F) of this section and that are credited under that division to the indigent drivers alcohol treatment fund in the state treasury for a county indigent drivers alcohol treatment fund, a county juvenile indigent drivers alcohol treatment fund, or a municipal indigent drivers alcohol treatment fund, all portions of additional costs imposed under section 2949.094 of the Revised Code that are specified for deposit into a county, county juvenile, or municipal indigent drivers alcohol treatment fund by that section, and all portions of fines that are specified for deposit into a county or municipal indigent drivers alcohol treatment fund by section 4511.193 of the Revised Code shall be deposited into that county indigent drivers alcohol treatment fund, county juvenile indigent drivers alcohol treatment fund, or municipal indigent drivers alcohol treatment fund. The portions of the fees paid under division (F) of this section that are to be so deposited shall be determined in accordance with division (H)(2) of this section. Additionally, all portions of fines that are paid for a violation of section 4511.19 of the Revised Code or of any prohibition contained in Chapter 4510. of the Revised Code, and that are required under section 4511.19 or any provision of Chapter 4510. of the Revised Code to be deposited into a county indigent drivers alcohol treatment fund or municipal indigent drivers alcohol treatment fund shall be deposited into the appropriate fund in accordance with the applicable division of the section or provision.

(2) That portion of the license reinstatement fee that is paid under division (F) of this section and that is credited under that division to the indigent drivers alcohol treatment fund shall be deposited into a county indigent drivers alcohol treatment fund, a county juvenile indigent drivers alcohol treatment fund, or a municipal indigent drivers alcohol treatment fund as follows:

(a) Regarding a suspension imposed under this section, that portion of the fee shall be deposited as follows:

(i) If the fee is paid by a person who was charged in a county court with the violation that resulted in the suspension or in the imposition of the court costs, the portion shall be deposited into the county indigent drivers alcohol treatment fund under the control of that court;

(ii) If the fee is paid by a person who was charged in a juvenile court with the violation that resulted in the suspension or in the imposition of the court costs, the portion shall be deposited into the county juvenile indigent drivers alcohol treatment fund established in the county served by the court;

(iii) If the fee is paid by a person who was charged in a municipal court with the violation that resulted in the suspension or in the imposition of the court costs, the portion shall be deposited into the municipal indigent drivers alcohol treatment fund under the control of that court.

(b) Regarding a suspension imposed under section 4511.19 of the Revised Code or under section 4510.07 of the Revised Code for a violation of a municipal OVI ordinance, that portion of the fee shall be deposited as follows:

(i) If the fee is paid by a person whose license or permit was suspended by a county court, the portion shall be deposited into the county indigent drivers alcohol treatment fund under the control of that court;

(ii) If the fee is paid by a person whose license or permit was suspended by a municipal court, the portion shall be deposited into the municipal indigent drivers alcohol treatment fund under the control of that court.

(3) Expenditures from a county indigent drivers alcohol treatment fund, a county juvenile indigent drivers alcohol treatment fund, or a municipal indigent drivers alcohol treatment fund shall be made only upon the order of a county, juvenile, or municipal court judge and only for payment of the cost of an assessment or the cost of the attendance at an alcohol and drug addiction treatment program of a person who is convicted of, or found to be a juvenile traffic offender by reason of, a violation of division (A) of section 4511.19 of the Revised Code or a substantially similar municipal ordinance, who is ordered by the court to attend the alcohol and drug addiction treatment program, and who is determined by the court to be unable to pay the cost of the assessment or the cost of attendance at the treatment program or for payment of the costs specified in division (H)(4) of this section in accordance with that division. The alcohol and drug addiction services board or the board of alcohol, drug addiction, and mental health services established pursuant to section 340.02 or 340.021 of the Revised Code and serving the alcohol, drug addiction, and mental health service district in which the court is located shall administer the indigent drivers alcohol treatment program of the court. When a court orders an offender or juvenile traffic offender to obtain an assessment or attend an alcohol and drug addiction treatment program, the board shall determine which program is suitable to meet the needs of the offender or juvenile traffic offender, and when a suitable program is located and space is available at the program, the offender or juvenile traffic offender shall attend the program designated by the board. A reasonable amount not to exceed five per cent of the amounts credited to and deposited into the county indigent drivers alcohol treatment fund, the county juvenile indigent drivers alcohol treatment fund, or the municipal indigent drivers alcohol treatment fund serving every court whose program is administered by that board shall be paid to the board to cover the costs it incurs in administering those indigent drivers alcohol treatment programs.

In addition, upon exhaustion of moneys in the indigent drivers interlock and alcohol monitoring fund for the use of an alcohol monitoring device, a county, juvenile, or municipal court judge may use moneys in the county indigent drivers alcohol treatment fund, county juvenile indigent drivers alcohol treatment fund, or municipal indigent drivers alcohol treatment fund in the

following manners:

(a) If the source of the moneys was an appropriation of the general assembly, a portion of a fee that was paid under division (F) of this section, a portion of a fine that was specified for deposit into the fund by section 4511.193 of the Revised Code, or a portion of a fine that was paid for a violation of section 4511.19 of the Revised Code or of a provision contained in Chapter 4510. of the Revised Code that was required to be deposited into the fund, to pay for the continued use of an alcohol monitoring device by an offender or juvenile traffic offender, in conjunction with a treatment program approved by the department of alcohol and drug addiction services, when such use is determined clinically necessary by the treatment program and when the court determines that the offender or juvenile traffic offender is unable to pay all or part of the daily monitoring or cost of the device;

(b) If the source of the moneys was a portion of an additional court cost imposed under section 2949.094 of the Revised Code, to pay for the continued use of an alcohol monitoring device by an offender or juvenile traffic offender when the court determines that the offender or juvenile traffic offender is unable to pay all or part of the daily monitoring or cost of the device. The moneys may be used for a device as described in this division if the use of the device is in conjunction with a treatment program approved by the department of alcohol and drug addiction services, when the use of the device is determined clinically necessary by the treatment program, but the use of a device is not required to be in conjunction with a treatment program approved by the department in order for the moneys to be used for the device as described in this division.

(4) If a county, juvenile, or municipal court determines, in consultation with the alcohol and drug addiction services board or the board of alcohol, drug addiction, and mental health services established pursuant to section 340.02 or 340.021 of the Revised Code and serving the alcohol, drug addiction, and mental health district in which the court is located, that the funds in the county indigent drivers alcohol treatment fund, the county juvenile indigent drivers alcohol treatment fund, or the municipal indigent drivers alcohol treatment fund under the control of the court are more than sufficient to satisfy the purpose for which the fund was established, as specified in divisions (H)(1) to (3) of this section, the court may declare a surplus in the fund. If the court declares a surplus in the fund, the court may expend the amount of the surplus in the fund for:

(a) Alcohol and drug abuse assessment and treatment of persons who are charged in the court with committing a criminal offense or with being a delinquent child or juvenile traffic offender and in relation to whom both of the following apply:

(i) The court determines that substance abuse was a contributing factor leading to the criminal or delinquent activity or the juvenile traffic offense with which the person is charged.

(ii) The court determines that the person is unable to pay the cost of the alcohol and drug abuse assessment and treatment for which the surplus money will be used.

(b) All or part of the cost of purchasing alcohol monitoring devices to be used in conjunction

with division (H)(3) of this section, upon exhaustion of moneys in the indigent drivers interlock and alcohol monitoring fund for the use of an alcohol monitoring device.

(5) For the purpose of determining as described in division (F)(2)(c) of this section whether an offender does not have the means to pay for the offender's attendance at an alcohol and drug addiction treatment program or whether an alleged offender or delinquent child is unable to pay the costs specified in division (H)(4) of this section, the court shall use the indigent client eligibility guidelines and the standards of indigency established by the state public defender to make the determination.

(6) The court shall identify and refer any alcohol and drug addiction program that is not certified under section 3793.06 of the Revised Code and that is interested in receiving amounts from the surplus in the fund declared under division (H)(4) of this section to the department of alcohol and drug addiction services in order for the program to become a certified alcohol and drug addiction program. The department shall keep a record of applicant referrals received pursuant to this division and shall submit a report on the referrals each year to the general assembly. If a program interested in becoming certified makes an application to become certified pursuant to section 3793.06 of the Revised Code, the program is eligible to receive surplus funds as long as the application is pending with the department. The department of alcohol and drug addiction services must offer technical assistance to the applicant. If the interested program withdraws the certification application, the department must notify the court, and the court shall not provide the interested program with any further surplus funds.

(7) (a) Each alcohol and drug addiction services board and board of alcohol, drug addiction, and mental health services established pursuant to section 340.02 or 340.021 of the Revised Code shall submit to the department of alcohol and drug addiction services an annual report for each indigent drivers alcohol treatment fund in that board's area.

(b) The report, which shall be submitted not later than sixty days after the end of the state fiscal year, shall provide the total payment that was made from the fund, including the number of indigent consumers that received treatment services and the number of indigent consumers that received an alcohol monitoring device. The report shall identify the treatment program and expenditure for an alcohol monitoring device for which that payment was made. The report shall include the fiscal year balance of each indigent drivers alcohol treatment fund located in that board's area. In the event that a surplus is declared in the fund pursuant to division (H)(4) of this section, the report also shall provide the total payment that was made from the surplus moneys and identify the treatment program and expenditure for an alcohol monitoring device for which that payment was made. The department may require additional information necessary to complete the comprehensive statewide alcohol and drug addiction services plan as required by section 3793.04 of the Revised Code.

(c) If a board is unable to obtain adequate information to develop the report to submit to the department for a particular indigent drivers alcohol treatment fund, the board shall submit a report detailing the effort made in obtaining the information.

(I) (1) Each county shall establish an indigent drivers interlock and alcohol monitoring fund and a juvenile indigent drivers interlock and alcohol treatment fund, and each municipal corporation in which there is a municipal court shall establish an indigent drivers interlock and alcohol monitoring fund. All revenue that the general assembly appropriates to the indigent drivers interlock and alcohol monitoring fund for transfer to a county indigent drivers interlock and alcohol monitoring fund, a county juvenile indigent drivers interlock and alcohol monitoring fund, or a municipal indigent drivers interlock and alcohol monitoring fund, all portions of license reinstatement fees that are paid under division (F)(2) of this section and that are credited under that division to the indigent drivers interlock and alcohol monitoring fund in the state treasury, and all portions of fines that are paid under division (G) of section 4511.19 of the Revised Code and that are credited by division (G)(5)(e) of that section to the indigent drivers interlock and alcohol monitoring fund in the state treasury shall be deposited in the appropriate fund in accordance with division (I)(2) of this section.

(2) That portion of the license reinstatement fee that is paid under division (F) of this section and that portion of the fine paid under division (G) of section 4511.19 of the Revised Code and that is credited under either division to the indigent drivers interlock and alcohol monitoring fund shall be deposited into a county indigent drivers interlock and alcohol monitoring fund, a county juvenile indigent drivers interlock and alcohol monitoring fund, or a municipal indigent drivers interlock and alcohol monitoring fund as follows:

(a) If the fee or fine is paid by a person who was charged in a county court with the violation that resulted in the suspension or fine, the portion shall be deposited into the county indigent drivers interlock and alcohol monitoring fund under the control of that court.

(b) If the fee or fine is paid by a person who was charged in a juvenile court with the violation that resulted in the suspension or fine, the portion shall be deposited into the county juvenile indigent drivers interlock and alcohol monitoring fund established in the county served by the court.

(c) If the fee or fine is paid by a person who was charged in a municipal court with the violation that resulted in the suspension, the portion shall be deposited into the municipal indigent drivers interlock and alcohol monitoring fund under the control of that court.

Return to Practioner's Toolbox History:

132 v H 380 (Eff 1-1-68); 132 v S 512 (Eff 3-10-68); 133 v H 1 (Eff 3-18-69); 134 v H 792 (Eff 2-3-72); 136 v H 1 (Eff 6-13-75); 136 v H 451 (Eff 1-3-77); 137 v H 219 (Eff 11-1-77); 137 v H 469 (Eff 10-25-78); 139 v S 432 (Eff 3-16-83); 141 v H 201 (Eff 7-1-85); 141 v S 262 (Eff 3-20-87); 142 v H 303 (Eff 10-20-87); 142 v S 308 (Eff 3-14-89); 142 v H 643 (Eff 3-17-89); 143 v H 329 (Eff 6-30-89); 143 v H 381 (Eff 7-1-89); 143 v H 317 (Eff 10-10-89); 143 v S 131 (Eff 7-25-90); 143 v H 837 (Eff 7-25-90); 144 v S 275 (Eff 9-1-93); 145 v H 152 (Eff 7-1-93); 145 v S 62, §§ 1, 4 (Eff 9-1-93); 145 v S 82 (Eff 5-4-94); 145 v H 236 (Eff 9-29-94); 145 v H

687 (Eff 10-12-94); 146 v H 117 (Eff 6-30-95); 146 v S 2 (Eff 7-1-96); 146 v H 353, § 1 (Eff 9-17-96); 146 v S 166, § 1 (Eff 10-17-96); 146 v H 167 (Eff 5-15-97); 146 v H 353, § 4 (Eff 5-15-97); 146 v S 166, § 6 (Eff 5-15-97); 147 v S 85 (Eff 5-15-97); 147 v H 210 (Eff 6-30-97); 147 v S 60 (Eff 10-21-97); 147 v S 80 (Eff 9-16-98); 148 v H 283 (Eff 6-30-99); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v H 138 (Eff 11-3-2000); 148 v S 180. Eff 3-22-2001; 149 v S 123, § 1, eff. 1-1-04; 150 v H 87, § 1, eff. 6-30-03; 150 v H 163, § 1, eff. 9-23-04; 151 v H 66, § 101.01, eff. 9-29-05; 151 v S 8, § 1, eff. 8-17-06; 152 v H 562, § 101.01, eff. 9-23-08; 152 v S 17, § 1, eff. 9-30-08; 152 v H 215, § 1, eff. 4-7-09; 153 v H 2, § 101.01, eff. 7-1-09; 153 v H 1, § 101.01, eff. 10-16-09; 2011 HB 114, § 101.01, eff. June 29, 2011; 2011 HB 153, § 101.01, eff. June 30, 2011; 2012 HB 487, § 101.01, eff. Sept. 10, 2012.

Return to Practitioner's Toolbox Section Notes:

Editor's Notes

The effective date is set by § 812.10 of 153 v H 1.

The effective date is set by § 812.10 of 153 v H 2.

The effective date is set by § 812.10 of 152 v H 562.

The effective date is set by § 612.03 of 151 v H 66.

The provisions of § 7, H.B. 87 (150 v --), read as follows:

SECTION 7. The amendment of section 4511.191 of the Revised Code by this act does not supersede the earlier amendment with delayed effective date of that section by Am. Sub. S.B. 123 of the 124th General Assembly.

The effective date is set by section 26 of H.B. 87.

See provisions, § 5 of S.B. 123 (149 v --), following RC § 4501.01.

Acts 2011, HB 114, § 806.10 provides: "The items of law contained in this act, and their applications, are severable. If any item of law contained in this act, or if any application of any item of law contained in this act, is held invalid, the invalidity does not affect other items of law contained in this act and their applications that can be given effect without the invalid item or application."

Acts 2011, HB 114, § 815.10 provides: "Section 4511.191 of the Revised Code is presented in this act as a composite of the section as amended by both Am. Sub. H.B. 1 and Am. Sub. H.B. 2 of the 128th General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section

in effect prior to the effective date of the section as presented in this act."

The provisions of § 3 of 152 v H 215 read as follows:

SECTION 3. Section 4511.191 of the Revised Code is presented in this act as a composite of the section as amended by both Am. Sub. H.B. 562 and Am. Sub. S.B. 17 of the 127th General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act.

EFFECT OF AMENDMENTS

The 2012 amendment deleted "grants" following "medical services" in (F)(2)(g).

The 2011 amendment by HB 153 inserted "of motor vehicles" in the first sentence of the introductory language of (B)(1); deleted "of motor vehicles" following "the registrar" in the introductory language of (F)(2); rewrote (F)(2)(a); and made a stylistic change.

The 2011 amendment by HB 114, in the introductory language of (F)(2), substituted "registrar of motor vehicles or an eligible deputy registrar" for " bureau of motor vehicles"; in (F)(3), substituted "registrar or an eligible deputy registrar" for "bureau"; and added (F)(5).

153 v H 1, effective October 16, 2009, in (F)(2)(c), added "in the state treasury" to the end of the first sentence and inserted "division (H) of" in the second sentence; and added (H)(7).

153 v H 2, effective July 1, 2009, in (F)(3), substituted "seventy-five" for "twenty-five".

152 v H 215, effective April 7, 2009, in (A)(5)(a), inserted "is not required to advise ... but the officer"; rewrote (H)(1) and (2); and, in (H)(6), substituted "addiction program" for "treatment program".

152 v S 17, effective September 30, 2008, added (A)(5); in (B)(1)(b), inserted "or had been convicted ... other equivalent offense"; in (B)(1)(c), inserted "had been convicted of or ... led to the refusal"; in (B)(1)(d), inserted "had been convicted of or ... convictions, and guilty pleas"; in the introductory language of (F)(2), substituted "seventy-five" for "twenty-five"; added (F)(2)(h); in the first paragraph of (H)(3), inserted "an assessment or the cost of" twice, and inserted "obtain an assessment or"; in the second paragraph of (H)(3), inserted "upon exhaustion of moneys in the indigent drivers interlock and alcohol monitoring fund for the use of an alcohol monitoring device"; in (H)(4)(b), added the language beginning "upon exhaustion of moneys" to the end; added (H)(5) and (6); added (I); and corrected internal references.

152 v H 562, effective September 23, 2008, added the introductory language of (A)(1) and (A)(1)(b); in (F)(2)(c), deleted "electronic continuous" preceding "alcohol monitoring device"; and rewrote (H).

151 v S 8, effective August 17, 2006, in (A)(2), substituted "of abuse, controlled substance, metabolite of a controlled substance, or combination" for "or alcohol and drug"; and, in the introductory language of (C)(1), inserted "or at least the concentration ... 4511.19 of the Revised Code".

151 v H 66, effective September 29, 2005, inserted the third sentence in (F)(2)(c); added (H)(3); rewrote (H)(4); and corrected internal references.

COMMENT, LEGISLATIVE SERVICE COMMISSION

Section 4511.191 of the Revised Code is amended by Am. Sub. H.B. 1 and H.B. 2 of the 128th General Assembly. Comparison of these amendments in pursuance of section 1.52 of the Revised Code discloses that they are not irreconcilable so that they are required by that section to be harmonized to give effect to each amendment.

KRS § 503.085 (2013)

503.085. Justification and criminal and civil immunity for use of permitted force -- Exceptions.

(1) A person who uses force as permitted in KRS 503.050, 503.055, 503.070, and 503.080 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom the force was used is a peace officer, as defined in KRS 446.010, who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law, or the person using force knew or reasonably should have known that the person was a peace officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.

(2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1) of this section, but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.

(3) The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of any civil action brought by a plaintiff, if the court finds that the defendant is immune from prosecution as provided in subsection (1) of this section.

HISTORY: (Enact. Acts 2006, ch. 192, § 6, effective July 12, 2006.)

Fla. Stat. § 776.032 (2013)
§ 776.032. Immunity from criminal prosecution and civil action for justifiable use of force

(1) A person who uses force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom force was used is a law enforcement officer, as defined in s. 943.10(14), who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.

(2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1), but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.

(3) The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of any civil action brought by a plaintiff if the court finds that the defendant is immune from prosecution as provided in subsection (1).

History:

S. 4, ch. 2005-27.

Code of Ala. § 13A-3-23 (2013)
Legislative Alert:
LEXSEE 2013 Al. ALS 283 -- See section 8.

§ 13A-3-23. Self-defense -- Defense of others.

(a) A person is justified in using physical force upon another person in order to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he or she reasonably believes to be necessary for the purpose. A person may use deadly physical force, and is legally presumed to be justified in using deadly physical force in self-defense or the defense of another person pursuant to subdivision (4), if the person reasonably believes that another person is:

(1) Using or about to use unlawful deadly physical force.

(2) Using or about to use physical force against an occupant of a dwelling while committing or attempting to commit a burglary of such dwelling.

(3) Committing or about to commit a kidnapping in any degree, assault in the first or second degree, burglary in any degree, robbery in any degree, forcible rape or forcible sodomy.

(4) In the process of unlawfully and forcefully entering, or has unlawfully and forcefully entered, a dwelling, residence, or occupied vehicle, or federally licensed nuclear power facility, or is in the process of sabotaging or attempting to sabotage a federally licensed nuclear power facility, or is attempting to remove, or has forcefully removed, a person against his or her will from any dwelling, residence, or occupied vehicle when the person has a legal right to be there, and provided that the person using the deadly physical force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring. The legal presumption that a person using deadly physical force is justified to do so pursuant to this subdivision does not apply if:

a. The person against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling, residence, or vehicle, such as an owner or lessee, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person;

b. The person sought to be removed is a child or grandchild, or is otherwise in the lawful custody or under the lawful guardianship of, the person against whom the defensive force is used;

c. The person who uses defensive force is engaged in an unlawful activity or is using the dwelling, residence, or occupied vehicle to further an unlawful activity; or

d. The person against whom the defensive force is used is a law enforcement officer acting in the performance of his or her official duties.

(b) A person who is justified under subsection (a) in using physical force, including deadly physical force, and who is not engaged in an unlawful activity and is in any place where he or she has the right to be has no duty to retreat and has the right to stand his or her ground.

(c) Notwithstanding the provisions of subsection (a), a person is not justified in using physical force if:

(1) With intent to cause physical injury or death to another person, he or she provoked the use of unlawful physical force by such other person.

(2) He or she was the initial aggressor, except that his or her use of physical force upon another person under the circumstances is justifiable if he or she withdraws from the encounter and effectively communicates to the other person his or her intent to do so, but the latter person nevertheless continues or threatens the use of unlawful physical force.

(3) The physical force involved was the product of a combat by agreement not specifically authorized by law.

(d) A person who uses force, including deadly physical force, as justified and permitted in this section is immune from criminal prosecution and civil action for the use of such force, unless the force was determined to be unlawful.

(e) A law enforcement agency may use standard procedures for investigating the use of force described in subsection (a), but the agency may not arrest the person for using force unless it determines that there is probable cause that the force used was unlawful.

HISTORY: Acts 1977, No. 77-607; Acts 1979, No. 79-599; Acts 2006, No. 06-303.

NOTES: Cross references.

This law is referred to in: § 13A-3-25.

§ 13A-3-23 Commentary

This section codifies much of the contemporary doctrine on self-defense and the protection of others. Little distinction exists between former Alabama law and that of these codifications, except in the aspect pertaining to third persons in whose aid defendant has acted.

As a result of 1979 legislative amendments (Acts 1979, No. 599) this section essentially restores the Criminal Code's original draft, with two notable exceptions.

First, the use of "deadly physical force" was broadened to include kidnapping, burglary, or robbery "in any degree," and "assault in the first or second degree" was substituted for "mayhem"

(subsumed under assaults). Section 13A-3-23(a)(3).

Second, the necessity for defendant's "surrendering possession of property to a person claiming a right thereto, or by complying with a demand to abstain from performing an act which he is not obligated to perform" was deleted. Former § 13A-3-23(b)(2) & (3).

There are two kinds of force involved in subsection (1): ordinary physical force and "deadly physical force", i.e., readily capable of causing death or serious physical injury.

The section recognizes the opinion justifying one to whom it reasonably appears that he is imminently threatened with violence or actually attacked, to ward off his attacker with a counter-force which reasonably appears to be necessary under the circumstances. Michigan Revised Criminal Code § 615, New York Penal Law § 35.15, Proposed Revision Texas Penal Code §§ 9.31, 9.32, 9.33, Model Penal Code §§ 3.04, 3.05.

Indeed, under former Alabama law it was not essential that imminent danger of death or great bodily harm actually existed to justify a homicide on the grounds of self-defense, but it was sufficient if defendant bona fidely believed, and had reasonable ground to believe, that he was in such danger. See cases, Ala. Dig., Homicide, Key 116 (1) -- (4).

The test "reasonably believes" shifts the emphasis to defendant's reliance upon reasonable appearances, rather than expose him to the peril of defending himself where appearances were deceiving and there was no actual imminent danger. The question is not merely what the defendant believed, but also, what did he have the right to believe. Moreover, "reasonable belief" as defined elsewhere in the Criminal Code, is one not formed recklessly or negligently. See also, section on the defense of mistake of fact, § 13A-2-6.

The same test of reasonable appearances applies where defendant goes to another person's defense. This represents a major departure from former Alabama law which required the defendant to "stand in the shoes" of the person aided. Kilpatric v. State, 257 Ala. 316, 59 So.2d 61 (1952); Thompson v. State, 37 Ala. App. 446, 70 So.2d 282 (1954). Thus, if he is mistaken, he bears the fault of the apparent victim who in fact may have been the wrongdoer. Lovejoy v. State, 31 Ala. App. 244, 15 So.2d 300 (1943).

The doctrine that the intervener steps into the shoes of the person assisted has been criticized and rejected by some jurisdictions. "The culpability of one who acts in defense of another is measured by the intent with which he acted and not by the intent of the person aided, unless defendant knew or might reasonably have known the intent of the other party." Mayhew v. State, 144 S.W. 229 (Texas, 1912).

Besides, it is difficult to justify the former anomalous view in Alabama when a different posture is taken regarding the right to claim self-defense. The argument in favor of the harsher rule is that it punishes for taking innocent life. Lawmakers must determine, therefore, whether to measure the intervener by his own reasonable belief or by the right of the other person to defend himself. The adopted formulation finds support in contemporary revisions, e.g., Proposed Federal

Criminal Code §§ 604, 608(1); Texas § 9.33; Illinois § 6-4; New York § 35.15; Michigan § 615; Oregon § 22.

Specific limitation upon the permissible degree of counter force was deemed desirable by the Advisory Committee to emphasize the sanctity of human life. Accordingly, and following the view taken by most American jurisdictions, the original draft limited a force calculated to produce death to life-endangering occurrences: (a)(1) to meet a deadly attack; (a)(2) to protect a victim in the course of a burglary of a dwelling; or (a)(3) to protect a victim of a life-endangering crime whose avowed purpose, however, is not necessarily to cause death as in (a)(1) above. Subdivision (a)(3) preserved what is usually referred to as the defense of prevention of crime, commonly restricted to "atrocious" crimes that by their nature are life-endangering situations. Storey v. State, 71 Ala. 329, 339 (1882); Suell v. Derricott, 161 Ala. 259, 49 So. 895 (1909).

However, under the 1979 amendment a person may use deadly physical force if he reasonably believes (threat may be apparent, though not real) another is "committing or about to commit" a burglary "in any degree" (not limited to dwelling). Also, the 1979 legislature broadened the scope of burglary in the third degree to cover the entering or remaining unlawfully in a building with intent to commit a crime (Acts 1979, No. 471, § 2612). Section 13A-7-7. This is a substantial departure from traditional law as there are varying factual situations where a person may be technically trespassing in a building (remains unlawfully) with the intent to commit some kind of crime (misdemeanor or felony) that is not life-endangering or even serious; but under the literal wording of this section the owner may kill him. Cf. Russell v. State, 219 Ala. 567, 122 So. 683 (1929):

"It is a settled principle of our law, that every one has the right to defend his person and property against unlawful violence and may employ as much force as is necessary to prevent its invasion. Property would be of little value, if the owner was bound to stand with folded arms and suffer it taken by him who is bold and unscrupulous enough to seize it. But when it is said a man may rightfully use as much force as is necessary for the protection of his person and property, it must be recollected the principle is subject to this most important qualification, that he shall not, except in extreme cases, inflict great bodily harm, or endanger human life. * * * The preservation of human life, and of limb and member from grievous harm, is of more importance to society than the protection of property. Compensation may be made for injuries to, or the destruction of, property; but for the deprivation of life there is no recompense; and for grievous bodily harm, at most, but a poor equivalent. It is an inflexible principle of the criminal law of this state, and we believe of all the states, as it is of the common law, that for the prevention of a bare trespass upon property, not the dwelling-house, human life can not be taken, nor grievous bodily harm inflicted. If in the defense of property, not the dwelling-house, life is taken with a deadly weapon, it is murder, though the killing may be actually necessary to prevent the trespass." ...

"The rule at common law is that one may prevent an aggressor from entering his home, when the door is closed, even to the taking of life. But once inside peaceably, even though misbehaving, the owner cannot intentionally take his life for his refusal to leave, though he may use reasonable force to exclude him." Russell v. State, supra. Cf. Law v. State, 318 A.2d 859 (Md.) (1974); People v. Ceballos, 526 P. 2d 241 (Cal.) (1974).

Whether the incorporating-by-reference provision that permits one to use "deadly physical force" if he believes another is about to remain unlawfully in a building with intent to commit any crime is unconstitutionally vague or overbroad, remains for future judicial interpretation.

Subsection (b) further qualifies the use of deadly force. If the defendant can avoid the necessity of taking life by retreating, in general he must give way. Former Alabama law required retreat if it is "reasonably apparent" that it can be done without increasing the danger. Some contemporary codifications require the defendant to "know" that safe retreat is possible. The Criminal Code retains the obligation to retreat in the interest of preserving life, but gives the defendant the benefit of reasonable appearances rather than actual knowledge of an alternative. Not requiring retreat from "in" one's dwelling or place of business conforms to Alabama case law. Bryant v. State, 252 Ala. 153, 39 So. 2d 657 (1949); Cole v. State, 41 Ala. App. 465, 144 So.2d 54 (1961).

In either case, the defendant who is not required to retreat because of the location of the attack must not have brought on the difficulty, i.e., was the original aggressor. This provision codifies Alabama law requiring complete freedom from fault in provoking the difficulty for one who claims defense of self, Brewer v. State, 160 Ala. 66, 49 So. 336 (1909), and conforms to contemporary revisions. Cf. Proposed New Federal Criminal Code § 603. Furthermore, no requirement to give way in the face of a forceful attack is placed upon either an officer of the law or another that is lawfully assisting such an officer, for the officer is under an affirmative duty, Cobb v. State, 19 Ala. App. 345, 97 So. 779 (1923), and he may call upon private persons to assist him. See § 13A-3-27. Private persons acting under police orders apparently lawful are not guilty of assaults. Watson v. State, 83 Ala. 60, 3 So. 441 (1888); Cf. Proposed New Federal Criminal Code § 602(2). The protection of a private person who uses deadly force while lawfully assisting a public servant should be clearly expressed, and insofar as the necessity of retreat is concerned, he should be placed on the same footing, as the section states.

Subdivisions (c)(1) and (c)(2) continue the policy that one who claims justification in the use of force must not have brought on the necessity of using it; he must have been entirely free from fault. Shack v. State, 236 Ala. 667, 184 So. 688 (1938). The usual exception to this requirement is recognized: the initial aggressor may "effectively" withdraw and be restored to his position of defense while the erstwhile victim assumes the role of aggressor. Former Alabama law required withdrawal in "good faith." This may not include the situation in which the initial aggressor has rendered the initial victim unable to perceive his peaceful intentions; "effectively communicates" would seem to correct this deficiency.

Subdivision (c)(3) recognizes a limitation on consensual assaults. A prearranged fist fight will not justify the use of force by the defendant which ultimately leads him to claim self-defense. Neither of the mutually consenting combatants can set up self-defense. Galloway v. State, 28 Ala. App. 82, 178 So. 896 (1938); Russell v. State, 27 Ala. App. 10, 165 So. 256 (1936). Bodily harm incurred in the joint participation of lawful sports is not criminal. See § 13A-2-7, consent.

Code of Ala. § 13A-3-23

KRS § 503.085 (2013)

503.085. Justification and criminal and civil immunity for use of permitted force -- Exceptions.

(1) A person who uses force as permitted in KRS 503.050, 503.055, 503.070, and 503.080 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom the force was used is a peace officer, as defined in KRS 446.010, who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law, or the person using force knew or reasonably should have known that the person was a peace officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.

(2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1) of this section, but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.

(3) The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of any civil action brought by a plaintiff, if the court finds that the defendant is immune from prosecution as provided in subsection (1) of this section.

HISTORY: (Enact. Acts 2006, ch. 192, § 6, effective July 12, 2006.)

C.R.S. 18-1-704.5 (2012)
18-1-704.5. Use of deadly physical force against an intruder

(1) The general assembly hereby recognizes that the citizens of Colorado have a right to expect absolute safety within their own homes.

(2) Notwithstanding the provisions of section 18-1-704, any occupant of a dwelling is justified in using any degree of physical force, including deadly physical force, against another person when that other person has made an unlawful entry into the dwelling, and when the occupant has a reasonable belief that such other person has committed a crime in the dwelling in addition to the uninvited entry, or is committing or intends to commit a crime against a person or property in addition to the uninvited entry, and when the occupant reasonably believes that such other person might use any physical force, no matter how slight, against any occupant.

(3) Any occupant of a dwelling using physical force, including deadly physical force, in accordance with the provisions of subsection (2) of this section shall be immune from criminal prosecution for the use of such force.

(4) Any occupant of a dwelling using physical force, including deadly physical force, in accordance with the provisions of subsection (2) of this section shall be immune from any civil liability for injuries or death resulting from the use of such force.

HISTORY: Source: L. 85: Entire section added, p. 662, § 1, effective June 6.