

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2013-0109
Plaintiff-Appellant,	:	
	:	On Appeal from the Lucas
v.	:	County Court of Appeals, Sixth
	:	Appellate District, Case No. L-10-1194
THOMAS CAINE WHITE,	:	
	:	
Defendant-Appellee.	:	

APPELLEE THOMAS WHITE'S MERIT BRIEF

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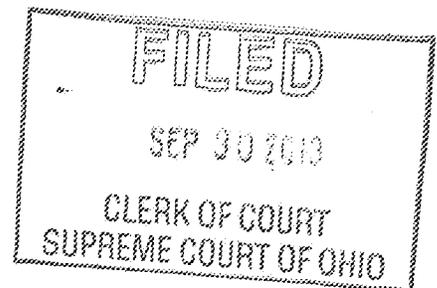
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INTRODUCTION

This case should be dismissed as improvidently accepted or the decision below affirmed. Initially, the gun-specification penalty enhancement is unreasonable and arbitrary when applied to police-officer-good-faith-in-the-line-of-duty shootings.¹ And, because seizures of suspects are governed by the Fourth Amendment, its objective-reasonableness standard controls the prosecution of such shootings. Fundamentally, state actors are not exposed to criminal or civil liability for force used during their seizure of a person if they did not violate the person's Fourth Amendment right to be free from unreasonable seizures.

Here, the Fourth Amendment required the jury to answer a precise question: Could Officer Thomas White have *reasonably perceived*, in the moments before he fired, an *imminent threat* to his or Officer Christopher Sargent's safety from Michael McCloskey's motions, i.e., as if he were pulling a weapon? But the trial court's explanation of the objective-reasonableness standard was inadequate to guide the jury's answer to that question.

First, the description was imprecise and misleading. Second, it did not inform the jury that Officer White's belief that Mr. McCloskey was pulling a gun could be both mistaken and objectively reasonable. And third, it did not tell the jury that objective reasonableness is a threshold inquiry to be decided before any consideration of the

¹ There is no doubt that the shooting in this case occurred in the line of duty and in good faith. *State v. White*, 6th Dist. No. L-10-1194, 2013-Ohio-51, ¶ 122. This is not a case involving rogue conduct. *Id.* Throughout the remainder of this brief, the terms "police shootings," "police efforts," and "police acts" all refer to good-faith conduct performed by police in the line of duty.

statutory elements of the charged crime. Those errors created a synergistic, prejudicial impact.

Accordingly, the court below applied the proper constitutional analysis for both the gun-specification issue and the objective-reasonableness standard. In doing so, it corrected the trial court's plain errors and ensured that an Ohio police officer is not unconstitutionally convicted of a crime and penalty enhancement. Its decision is correct and must stand.

STATEMENT OF THE CASE AND OF THE FACTS

About 2 a.m. on May 23, 2009, Officer White was on patrol in the village of Ottawa Hills, Lucas County, Ohio. While on duty, he:

- Encountered two motorcyclists, Mr. McCloskey and Aaron Snyder, travelling northwest on Indian Road ahead of him.
- Followed them in his marked police cruiser because many drivers in the early morning hours are impaired.
- Turned on the camera in his cruiser.
- Had a clear view of the rearview mirror on each motorcycle.
- Believed both men knew he was behind them and knew his car was a police cruiser.
- Noticed both drivers make quick stops at two stop signs and aggressively accelerate out of those stops before slowing.
- Observed Mr. McCloskey make an incomplete stop at both of the stops.
- Thought they were exceeding the 25-m.p.h. speed limit during their initial acceleration out of the stops.
- Saw each driver weave to varying degrees more than once.

- Noticed Mr. McCloskey cross the solid-yellow center line more than four times.
- Observed Mr. Snyder make a line-to-line swerve within his lane.
- Watched Mr. Snyder look back at him.
- Thought they were taunting him and could possibly flee.
- Believed they were impaired.
- Decided to stop them for violations and inquire as to impairment.
- Was aware that it was dark and knew the dangers associated with night stops.
- Requested help from Officer Sargent for the stop.
- Watched them sit at the third stop sign for 10 seconds, during which they talked to each other, pointed, and turned their eyes back toward him.
- Possibly wondered if they could be organizing a flight or attack plan.
- Saw them accelerate out of the third stop at a high rate of speed.
- Was certain they had significantly exceeded the 25-m.p.h. speed limit.
- Radioed that he was going to initiate the stop.
- Activated his lights and sirens.
- Believed they were fleeing.
- Watched them split in the respective directions that they pointed earlier, which reinforced that they had possibly planned their actions.
- Was convinced they were fleeing after the split.
- Felt the events were chaotic.
- Saw Mr. Snyder go over a grassy island, and both of its curbs, then onto Central Avenue.

- Noticed that Officer Sargent approached the intersection of Indian and Central from the east, headed west.
- Ascertained that Mr. Snyder, after clearing the island, headed east on Central toward Officer Sargent.
- Watched Mr. McCloskey stop his motorcycle at Central.
- Saw Mr. McCloskey turn and look at him.
- Knew that Mr. McCloskey's right hand was at waist level, but could not see it.
- Observed Mr. McCloskey turn his eyes and body forward to Officer Sargent, his right hand still near his waist.
- Perceived the events to be tense, uncertain, and rapidly evolving.
- Radioed dispatch, "I've got one, one is trying to take off on [Officer Sargent]."
- Believed Mr. McCloskey's right arm and hand were moving near his waistline.
- Was on high alert.
- Exited his cruiser, drew his gun, and aimed it at Mr. McCloskey.
- Ordered Mr. McCloskey to put his hands up.
- Noticed Mr. McCloskey's right arm was bent and engaged so as to be able to rapidly pull a weapon, but could not see most of that arm, and could not see his hand at all.
- Saw Mr. McCloskey turn his torso and again move his right arm.
- Knew that Mr. McCloskey was not showing him his right hand.
- Perceived that Mr. McCloskey was reaching with his right arm and hand at waist level.
- Believed Mr. McCloskey was pulling a weapon.
- Had been trained that if he waited to see a weapon, Officer Sargent or he would be shot before he could return fire.

- Feared for his and Officer Sargent's life.
- Relied on his training that action beats reaction, and did not wait to see a weapon before firing.
- Fired one shot, striking Mr. McCloskey in the back.
- Approached Mr. McCloskey, ordering him to keep his hands up.
- Asked Mr. McCloskey why he was reaching.
- Searched Mr. McCloskey for a weapon and learned he was unarmed.
- Radioed "shots fired."
- Requested immediate medical help.
- Called supervisors to the scene.
- Agonized over his decision and the magnitude of what had happened.
- Was in shock, and taken to the hospital.

See State v. White, 6th Dist. No. L-10-1194, 2013-Ohio-51, ¶ 4-9, 21-27, 29-42, 51; *see also* State's Exhibit 1, at 2:12.48 – 2:18.49; State's Exhibit 29; Tr. 836-936.

Officer White was indicted for the shooting. *White* at ¶ 2. He was charged with felonious assault enhanced with a "brandished-or-used" gun specification. *Id.* There was a jury trial. *Id.* At trial:

1. The jury heard testimony about Mr. McCloskey's and Mr. Snyder's subjective knowledge, beliefs, and motivations.
2. Officer White was not permitted to tell the jury all of the facts and circumstances that formed his perception that he or Officer Sargent faced a serious threat of physical harm.
3. The court did not accurately instruct the jury how to apply the crucial considerations of their objective-reasonableness inquiry to the facts.

4. The court did not inform the jury that Officer White's belief that Mr. McCloskey was pulling a gun could be both mistaken and objectively reasonable.
5. The court did not tell the jury that the objective-reasonableness determination is a threshold inquiry to be decided before any consideration of the statutory elements of the charged crime.

Id. at ¶ 52-78, 93-129.

Officer White was convicted of felonious assault and the gun specification. *Id.* at ¶ 2. He was sentenced to ten years in prison—seven for felonious assault and three for the gun specification, to be served consecutively. *Id.*; *see also* June 21, 2010 Judgment Entry.

He appealed. *White* at ¶ 2. The court of appeals reversed his felonious-assault conviction due to the trial court's plain errors surrounding its faulty application of the Fourth Amendment's objective-reasonableness standard, admission of evidence without a proper limiting instruction about the evidence's role within that standard, and exclusion of proper evidence as to that standard. *Id.* at ¶ 52-78, 93-129. The court also reversed his gun-specification conviction, holding Ohio's three-year-gun-specification penalty enhancement unconstitutional as applied to police shootings. *Id.* at ¶ 140-172.

The State appealed to this Court. January 18, 2013 Notice of Appeal. This Court accepted the appeal. May 22, 2013 Entry. The State has presented five propositions of law. Brief of Plaintiff-Appellant, at 16, 27, 34, 43, 48.

ARGUMENT

RESPONSE TO THE STATE'S PROPOSITIONS OF LAW

**First-Proposition-of-Law Response:
The gun-specification penalty enhancement is
unconstitutional when applied to police shootings.**

This Court has detailed the General Assembly's intent that the gun-specification enhancement was enacted to punish a person for voluntarily using a gun while committing a crime. *State v. Murphy*, 49 Ohio St.3d 206, 208, 551 N.E.2d 932 (1990); *State v. Powell*, 59 Ohio St.3d 62, 63, 571 N.E.2d 125 (1991). Consequently, applying that enhancement to police efforts is unreasonable and arbitrary, even if the enhancement has a real and substantial relation to public safety. *See Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 49; *see also Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); *Tennessee v. Garner*, 471 U.S. 1, 8-9, 11, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985); *Murphy* at 208; *Powell* at 63. It is, therefore, unconstitutional as applied to such shootings. *Id.*

In interpreting a statute, a court's paramount concern is legislative intent. *State ex rel. United States Steel Corp. v. Zaleski*, 98 Ohio St.3d 395, 2003-Ohio-1630, 786 N.E.2d 39, ¶ 12. And in a due-process analysis of a statute's constitutionality, unless a fundamental right is involved, courts employ a rational-basis review. *Reno v. Flores*, 507 U.S. 292, 301-302, 309, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993); *Arbino* at ¶ 49. Under that review, a statute will be upheld if it (1) bears a real and substantial relation to the public health, safety, morals, or general welfare, and (2) is not unreasonable or arbitrary. *Arbino* at ¶ 49.

The gun-specification penalty enhancement has a real and substantial relation to public health and safety. *White* at ¶ 154. Accordingly, the as-applied constitutional challenge for police shootings turns on whether the statute is unreasonable or arbitrary in such applications. *Id.* at ¶ 166-172; *see also Arbino* at ¶ 49. But the State and its amicus ignore this second prong of the analysis. In doing so, they disagree with the decision below and request error correction, but applying the full analysis demonstrates that the decision below is correct.

As the court below held, this Court has analyzed the plain words of the statute and determined that the Ohio General Assembly intended that the three-year penalty enhancement for the gun specification:² (1) inform the *criminal* world that the use of a gun while committing a crime will result in three extra years in prison; (2) punish the use and possession of guns by people who commit crimes because a *criminal* with a gun is both more dangerous and harder to apprehend; and (3) curb the drastic rise in violent crimes involving the use of firearms. *Murphy* at 208; *Powell* at 63; *see also State v. Gaines*, 46 Ohio St.3d 65, 71, 545 N.E.2d 68 (1989) (Resnick, J., dissenting) (that dissenting view was endorsed by the majority in *Murphy*).

To determine whether the statute is unreasonable or arbitrary as applied to police shootings, the General Assembly's intent must be considered in light of the Fourth Amendment's objective-reasonableness standard. The Fourth Amendment

² This Court's decisions explaining the General Assembly's intent for the gun-specification statute at issue, R.C. 2941.145, involved a former version that is indistinguishable. *See White* at ¶ 166 ("Today, the legislative purpose behind R.C. 2941.145 remains unchanged from its predecessor and is just as unequivocal.").

permits criminal culpability for such a shooting only if it involves an unreasonable split-second decision. *Graham* at 395-396; *Garner* at 11; *Scott v. Harris*, 550 U.S. 372, 378, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007); *Saucier v. Katz*, 533 U.S. 194, 201, 205, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Thus, the lynchpin of liability is unreasonable judgment, not criminal intent. *Id.* This is underscored by the fact that 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* at 396. Moreover, police officers cannot retreat while on duty and often face volatile, dangerous conditions when performing their duties. See Amicus Curiae The National Fraternal Order of Police Brief, at 2-6. Those underlying concepts, combined with the General Assembly's intent for the penalty enhancement, frames the constitutional analysis of this issue.

Accordingly, there is a fundamental difference between criminally-motivated conduct and a state actor's objectively-unreasonable-split-second decision aimed to protect society. See *Murphy* at 208; *Powell* at 63; see also *Gaines* at 71 (Resnick, J., dissenting). The State and its amicus ignore the difference, yet it exists. And it guides this Court's decision on whether the public-health-and-safety rational basis for the penalty enhancement is unreasonable or arbitrary when applied to police shootings.

There is no deterrent effect, or safety impact, by enhancing punishment for what is ultimately determined to be an unreasonable split-second judgment in the execution of difficult and dangerous duties aimed at protecting society. See generally *Saucier* at 205; *Graham* at 396-397; *Davenport v. Causey*, 521 F.3d 544, 551-552 (6th Cir.2008); see also

Amicus Curiae The National Fraternal Order of Police Brief, at 2-6. In tandem, this Court's expression of the General Assembly's intent for the gun-specification penalty enhancement, and the Fourth Amendment's governance of state-actor actions, demand that the decision below stand.

The State and its amicus rely heavily on the jury's verdict to avoid the analysis above, criticize the court of appeals' proper conclusion, and label Officer White no different than any other convicted criminal who used a gun to commit a crime, or police officer who committed crimes through rogue conduct. In doing so, they ignore that the jury did not determine objective-reasonableness in a constitutionally-permissible manner. *White* at ¶ 52-78, 93-129; *see also* Response to State's Third, Fourth, and Fifth Propositions of Law, below. Accordingly, the State and its amicus err in their reliance on the jury's verdict as a legitimate finding of criminal culpability. *Id.*

Further, each attempt by the State and its amicus to discredit the decision below is inapt. First, none of the gun crimes identified by this Court in *State v. Steele*, Slip Opinion No. 2013-Ohio-2470, implicate the Fourth Amendment's objective-reasonableness standard or this Court's description of the General Assembly's intent for the gun-specification penalty enhancement at issue. Moreover, all are substantive offenses rather than penalty enhancements, and all involve possessing a gun in a particular locale or specific manner rather than use of a gun while the police officer is performing legitimate law-enforcement duties. *Id.* at ¶ 20.

Second, the federal cases cited by the State all involved cover-ups and corruption and what can be fairly characterized as rogue conduct. Moreover, none occurred in

jurisdictions where the highest court had determined that the legislative intent of the penalty enhancement at issue inherently contradicted the application of that enhancement to police efforts. *United States v. Ramos*, 537 F.3d 439, 442-443 (5th Cir.2008); *United States v. Bowen*, E.D.La. No. 10-204 Section "N" (1), 2012 U.S. Dist. LEXIS 50670 (Apr. 11, 2012), *61; *United States v. Warren*, E.D.La. No. 10-154 Section "I", 2010 U.S. Dist. LEXIS 124063 (Nov. 4, 2010), *2 (setting forth the factual background of the later decision cited by the State, *United States v. Warren*, E.D.La. No. 10-154 Section "I", 2013 U.S. Dist. LEXIS 57260 (Apr. 22, 2013)).

Third, *People v. Khoury*, 131 Mich.App. 320, 327-328, 448 N.W.2d 846 (1989) and *People v. Khoury*, 437 Mich. 954, 467 N.W.2d 810 (1991) are inapposite because, unlike here, the Supreme Court of Michigan had never determined that the legislative intent of the penalty enhancement at issue inherently contradicted the application of that enhancement to police efforts. *See Murphy* at 208; *Powell* at 63; *see also Gaines* at 71 (Resnick, J., dissenting).

Finally, the court below properly applied this Court's precedent and App.R. 12(A)(2) and elected to exercise its discretion to decide the as-applied constitutional challenge briefed on appeal. *See State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 170, 522 N.E.2d 524 (1988); *Hill v. Urbana*, 79 Ohio St.3d 130, 133-134, 679 N.E.2d 1109 (1997); *State v. Peagler*, 76 Ohio St.3d 496, 499, 668 N.E.2d 489 (1996).

Accordingly, the trial court's application of the enhancement in this case is unreasonable and arbitrary because it contradicts the Fourth-Amendment jurisprudence governing police efforts and the actual purpose of the gun-specification penalty

enhancement. *Arbino* at ¶ 49; *Murphy* at 208; *Powell* at 63; *Graham* at 396-397; *Garner* at 11; see also *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002); Crim.R. 52(B).

Second-Proposition-of-Law Response:

There is no holding on qualified immunity in the decision below.

The State's qualified-immunity challenge attacks dicta in the decision below that suggested Ohio's General Assembly should consider a statutory mechanism to allow for pre-trial, court-conducted, qualified-immunity inquiries in criminal prosecutions of police acts. *White* at ¶ 87. The court below wrote: "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." *Id.* Neither the State nor its amicus acknowledge that clear declaration. Accordingly, they ignore that there is no holding on this issue. *Id.* at ¶ 81-87.

The qualified-immunity discussion is a mere invitation to the General Assembly to enact legislation. *Id.* at ¶ 87. Nothing in that discussion constitutes binding authority. *Id.* Indeed, the opinion makes clear that the court is proposing that the General Assembly address this issue. *Id.* Thus, at best, the State is asking for an advisory opinion. But this Court has a well-settled precedent against issuing advisory opinions. *State ex rel. Gill v. School Emps. Retirement Sys.*, 121 Ohio St.3d 567, 2009-Ohio-1358, 906 N.E.2d 415, ¶ 32, citing *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 120 Ohio St.3d 386, 2008-Ohio-6254, 899 N.E.2d 975, ¶ 43.

If this Court deems it necessary to address this issue, an invitation to the General Assembly, like that in the decision below, is most appropriate because the Supreme

Court of the United States has explained that the objective-reasonableness determination is a pure question of law. *Scott* at 381, fn. 8; *see also White* at ¶ 87. And at least one state, Georgia, offers a generally-applicable statutory mechanism that creates a pre-trial, court-conducted, qualified-immunity inquiry. *See State v. Bunn*, 288 Ga. 20, 20-21, 701 S.E.2d 138 (2010); Ga.Code Ann. 16-3-24.2.

**Third-Fourth-and-Fifth-Propositions-of-Law Response:
The trial court's statement of law directing the jury's
objective-reasonableness determination was unconstitutional.**

The State's three propositions of law impacting the jury's objective-reasonableness determination are interrelated, and are all incompatible with the constitutional principles that govern that determination. The State requests error correction, but the only errors in this case occurred during trial. In short, the State's attempts to redeem the trial court's plain errors fail.

**I. The trial court's statement of law directing the jury's
objective-reasonableness determination was imprecise and misleading.**

There is no "easy-to-apply legal test in the Fourth Amendment context," and a factfinder must "slosh [its] way through the factbound morass of 'reasonableness.'" *Scott* at 383. Perhaps due to this reality, the State argues that the trial court's statement of the objective-reasonableness standard to the jury was close enough to result in a constitutional verdict. But that assertion is not true because it relies on a misreading of *Scott*, and ignores the constitutionally-imposed parameters of the objective-reasonableness determination. *White* at ¶ 52-78, 93-129; *see also* Parts II and III, below.

In *Scott*, the Court commented 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." (Citation omitted.) *Scott* at 382. The Court went on to explain that, "[w]hatever *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." (Emphasis sic.) *Id.* at 383.

Here, the *Garner* threat-of-serious-physical-harm consideration is not only directly applicable, it controls the "fundamental predicate question on which guilt or innocence turns: Could [Officer] White, in the moments before he fired, have *reasonably perceived* an *imminent threat* to his or [Officer] Sargent's safety from [Mr.] McCloskey's turning/reaching motions, i.e., as if 'he was pulling a weapon'?" (Emphasis sic.) *White* at ¶ 110. Accordingly, that consideration had to be properly applied to "(1) the segment of the videotape in the moments preceding the gunfire * * * and (2) [Officer] White's testimony detailing *his* pre-shooting perceptions of [Mr.] McCloskey's movements from his angle." (Emphasis sic.) *Id.*

In conducting that consideration, the jury had to: (1) assume the perspective of a reasonable officer on the scene at the moment Officer White fired, rather than with the 20/20 vision of hindsight; (2) give deference to Officer White's on-the-spot judgment with that deference being greater because the circumstances were tense, uncertain, rapidly evolving, and happening very quickly; and (3) base the determination upon the information that Officer White had at the split-second moment he fired. See *Davenport* at 552; *Graham* at 396. That degree of specificity was the only way to give the jury an

opportunity to constitutionally “slosh * * * through” the Fourth Amendment’s “factbound morass of ‘reasonableness.’” *Scott* at 378; *White* at ¶ 110-111.

But the jury was not presented that specific question and was not instructed to apply *Garner’s* threat-of-serious-physical-harm consideration in that precise manner. *See White* at ¶ 52-78, 93-129. Accordingly, the trial court’s statement of law directing the jury’s objective-reasonableness determination did not satisfy the constitutional principles governing such a determination and was inadequate to guide the jury’s deliberations. *See United States v. Park*, 421 U.S. 658, 675, 95 S.Ct. 1903, 44 L.Ed.2d 489 (1975). Instead, as the court below found, it was plain error. *Barnes* at 27; Crim.R. 52(B).

The error was exacerbated by the form of the evidence. First, Mr. McCloskey and Mr. Snyder were allowed to provide “unimpeded testimony” to the jury characterizing their actions and motivations as innocent. *White* at ¶ 126. While that testimony was not necessarily improper, the trial court’s failure to give a limiting instruction that the testimony could not be considered in the objective-reasonableness inquiry eliminated any chance that the inquiry would comply with mandatory constitutional principles. *See Davenport* at 552; *Graham* at 396 (explaining that 20/20 hindsight is prohibited, deference to the officer is required and is greater when the events are tense and rapidly-evolving, and that the determination is based solely on the information available to the officer at the split-second moment that force was used); *see also* Part II, below (explaining that an objectively-reasonable belief can also be mistaken); Part III, below (explaining that the objective-reasonableness determination is a threshold inquiry).

Second, the court did not allow Officer White to explain to the jury the crime that he perceived Mr. McCloskey had committed. But the degree of criminal culpability that Officer White perceived was crucial to the jury's evaluation of the objective-reasonableness of his belief that Mr. McCloskey was pulling a weapon. *White* at ¶ 125-129.

Again, only Officer White's perceptions are relevant to the objective-reasonableness inquiry. *Graham* at 396; *Brosseau v. Haugen*, 543 U.S. 194, 197, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004); *see also Davenport* at 552. While Officer White's perceptions are crucial to the objective-reasonableness determination, Mr. McCloskey's and Mr. Snyder's testimony is not relevant to that determination. *Graham* at 396; *Brosseau* at 197; *see also Davenport* at 552. Indeed, the Fourth Amendment demands that their testimony is only relevant if the jury first determined that Officer White's genuine belief was unreasonable. *Id.* Accordingly, a limiting instruction was imperative to ensure that the jury did not consider their testimony in its objective-reasonableness determination.

Finally, contrary to the State's assertion, the trial court's inadequate statement of law to the jury was not invited error. The statement came mostly from the State's proposal. The defense objected to many aspects of that proposal, specifically the excessive-force instruction, but it was provided to the jury anyway. *White* at ¶ 96; *see also Court's Exhibit 2, 3, 4, 5; Tr. 1103-1120.* Only one paragraph of the court's statement of law was proposed by the defense. *Id.* And the court included additional language on its own. *Id.* Nothing included in the statement of law provided to the jury and proposed by the defense, on its own, contributed to the errors that occurred.

II. A belief can be both mistaken and objectively reasonable.

The jury did not know that Officer White's belief that Mr. McCloskey was pulling a gun could be both mistaken and objectively reasonable. *Saucier* at 205; *see also Davenport* at 552. The fact that Officer White's belief turned out to be mistaken does not undermine its reasonableness. *Id.* The State attempts to reduce this plain error to a state-law issue that was somehow satisfied through the definition of "knowingly." But the Supreme Court of the United States has unequivocally determined that an objectively-reasonable belief can include a mistaken belief. *Id.* Of course that fact must be explicitly provided to the jury in a criminal case. The mistaken belief is a criteria that must be factored into the objective-reasonableness determination. *Id.* Without it, a jury's objective-reasonableness determination does not satisfy the constitutional principles that guide the determination. *Id.*; *see also White* at ¶ 116, fn. 24 ("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.'").

As the court below found, "the state presented *no* evidence—*none*—that [Officer] White shot [Mr.] McCloskey for any reason other than from an instantaneous inference that the 'reaching movement' of [Mr.] McCloskey's right arm signaled the drawing of a weapon." (Emphasis sic.) *White* at ¶ 122. Further, the state has never suggested that Officer White's belief "was not honestly held." *Id.* Perhaps, the mistaken-belief-can-be-objectively-reasonable consideration demands a finding of not guilty in this case. The

court below cited many federal cases establishing that an officer's objectively-reasonable perceptions that a suspect was pulling a weapon, even when those perceptions were ultimately wrong, prohibits officer liability for the use of force. *Id.* at ¶ 63-67. Regardless, the trial court's failure to make the jury aware of that consideration was plain error. *Id.* at ¶ 122; *see also Saucier* at 205; *Davenport* at 552; Crim.R. 52(B).

III. In criminal prosecutions of police shootings, the Fourth Amendment's objective-reasonableness determination is a threshold inquiry.

Implicit in the decision below is that the Fourth Amendment's objective-reasonableness determination is a threshold inquiry. *White* at ¶ 57; *United States v. Reese*, 2 F.3d 870, 884 (9th Cir.1993); *see also Saucier* at 201; *Scott* at 376-377. Again, a state actor is not exposed to criminal or civil liability for force used during a seizure of a person if the actor did not violate the person's Fourth Amendment right to be free from unreasonable seizures. *Graham* at 395. The Fourth-Amendment-reasonableness inquiry in a criminal case is the equivalent of the first prong of the qualified-immunity inquiry in a civil case. *Id.*; *see also Saucier* at 201; *Scott* at 376-377. The threshold question, then, is whether the charged state actor violated the constitutional rights of the individual that they seized. *Graham* at 395; *Saucier* at 201; *Scott* at 376-377; *Reese* at 884; *see also United States v. Bigham*, 812 F.2d 943, 948 (5th Cir.1987); *United States v. Schatzle*, 901 F.2d 252, 254 (2d Cir.1990). But nothing in the trial court's statement of law explained this hierarchy to the jury. That failure was plain error. *Id.*; Crim.R. 52(B).

Further, adding that failure to the other errors in this case—the trial court's misleading statement of law directing the jury's objective-reasonableness

determination, and its failure to inform the jury that a mistaken belief can be an objectively-reasonable one—magnified the prejudicial impact against Officer White. *Reese* at 884; *Bigham* at 948; *Schatzle* at 254; *see also Saucier* at 201, 205; *Davenport* at 552; *Graham* at 395; *Scott* at 376-377. Accordingly, the trial court’s plain errors prevented the jury from reaching a constitutional verdict. *Id.*

CONCLUSION

The gun-specification penalty enhancement was enacted to punish a person for voluntarily using a gun while committing a crime. Accordingly, applying that enhancement to police shootings is unreasonable and arbitrary, even if the enhancement has a real and substantial relation to public safety. And, at least three plain errors permeated Officer White’s trial and prevented the jury from conducting an accurate, constitutionally-guided, objective-reasonableness determination. Cumulatively, the errors created a synergistic, prejudicial impact against Officer White. The court below corrected the plain, constitutional errors that occurred during Officer White’s trial and sentencing, and its decision must stand. Consequently, this case should be dismissed as improvidently accepted or the decision below affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing **Appellee Thomas White's Merit Brief** was sent by regular U.S. Mail, postage prepaid to Evy Jarrett, Lucas County Prosecutor's Office, Lucas County Courthouse, 700 Adams Street, Toledo, Ohio 43624; Matthew Kern, Medina County Prosecutor's Office, 72 Public Square, Medina, Ohio 44256; Larry James, Crabbe, Brown, & James, LLP, 500 South Front Street, Suite 1200, Columbus, Ohio 43215; and Paul Cox, Fraternal Order of Police of Ohio, Inc., 222 East Town Street, Columbus, Ohio 43215, on this 30th day of September, 2013.



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