ORIGINAL

IN THE SUPREME COURT OF OHIO

NATASHA TOWNSEND	)	CASE NO. 14-0381
Appellant,	)	
v.	)	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
CITY OF CLEVELAND,	)	
Appellee.	)	Court of Appeals Case No.: CA 099256

APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Natasha Townsend went to the Cleveland Hopkins International Airport to pick up her relatives. She encountered a City of Cleveland police officer directing traffic. After this encounter, she disobeyed his direct lawful orders; thereupon, he issued her a parking ticket. Furious with the parking ticket, Ms. Townsend became loud, defiant, uncooperative, non-compliant, and even more disobedient to this officer. She was so disorderly, the officer had to call backup for help. Her behavior was so combative, demonstrative, and such an egregious act; it took three male officers to effect arrest, to the point of almost breaking her arm and tasing her, in the middle of the roadway of the baggage claim area.

The airport is run by the City of Cleveland. All officers involved had statements; as well as concrete, undisputed evidentiary videotape surveillance to support their arrest. Therefore, Ms. Townsend could not rebut or challenge the substance of the allegations. The arresting officer cited her with a failure to display license charge. Subsequently, he filed failure to comply and resisting arrest charges. Neither the police officers involved in the arrest, nor the City secured or preserved the video surveillance.

Amendment V of the United States Constitution has had to accommodate all manners of double jeopardy. With that, the courts have tackled double jeopardy in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); United States v. Halper, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 48 (1989); and, North Carolina v. Pearce, 395 U.S. 711, 717 [89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656, 664-664] (1969). The Fifth Amendment was expanded in Ashe V. Swenson, 397 U.S. 436, 445-446, 90 S. Ct. 1189, 1195, 25 L. Ed. 2d 469, 476-477 (1970), to: encourage well-prepared prosecutions; have all charges arising from a single

transaction joined at one trial; lessen the chances of a vexatious succession of trials; as well as, protect defendants from multiple trials. This protection, the collateral estoppel doctrine, precludes the state from repeated attempts to convict an individual for an alleged offense. Green v. United States, 355 U.S. 184 (1957).

This Court confronted the same issue in State v. Thomas, 61 Ohio St. 2d 254, (1980), "***[A] subsequent prosecution would require the relitigation of factual issues already resolved in the earlier trial, and the state would, by the holdings in Ashe v. Swenson and Harris v. Oklahoma *supra*, be barred from later prosecuting the second offense."

Inasmuch, there are situations where dismissal of a case is warranted either as a discovery violation or a due process violation. This is the case.

Based on principles of "fundamental fairness," Amendment XIV Section I of The United States Constitution due process clause is broken down into two categories—procedural due process and substantive due process. A timely, formal evidence request is well within an accused rights under due process. Moreover, a request to preserve evidence should elicit a response. "We find that fundamental fairness, implicit in the federal guarantee of due process, requires, at a minimum, that the state respond to defense requests to preserve evidence." City of Columbus v. Forest, 36 Ohio App. 3d 169 (1987). As one court observed,

> By asking the state to produce the evidence, appellant implicitly asked the state to preserve it until it was produced. Whether a defendant files a motion to preserve or a discovery request, he is in both cases putting the state on notice that he wishes to examine the evidence. Once the state has such knowledge, if it fails in good faith to preserve or produce the evidence, the appropriate remedy is to require the state to prove that the evidence that it destroyed was not exculpatory.

State v. Benton, 136 Ohio App. 3d 801 (2000).

Historically, all of the protections guaranteed by the Sixth Amendment of The United States Constitution have been made applicable to the state governments. These rights extend to

protect an accused and eliminate any confusion as to the basis of a particular verdict, thereby decreasing the chances that a defendant will be tried later for the same offense in violation of Double Jeopardy protections.

> The constitutional right to be informed of the nature and cause of the accusation entitles the defendant to insist that the indictment apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution on the same charge. United States v. Cruikshank, 92 U.S. 542, 544, 558 (1876); United States v. Simmons, 96 U.S. 360 (1878); Bartell v. United States, 227 U.S. 427 (1913); Burton v. United States, 202 U.S. 344 (1906).

However, in Ohio, unanimity is required by court rule, not by the Constitution. Crim.R. 31(A).

As will be demonstrated below, the double jeopardy protections and due process rights violations raises substantial issues as to the denial of both motions to dismiss, motion to preserve and motion in limine. Failing to "have all charges arising from a single transaction joined at one trial," failing to "respond to defense requests to preserve evidence," "repeated attempts to convict an individual for an alleged offense," and failing to "eliminate any confusion as to the basis of a particular verdict," is exactly what our Constitution Framers intended to prohibit.

This Court's focus in Thomas was the proper one. The Double Jeopardy Clause insures that the accused will not be unduly harassed by being forced to "run the gauntlet" more times than necessary.

This case offers this Court the opportunity to correct the obvious error below in denying both motions to dismiss, the motion to preserve and the motion in limine; but to address the double jeopardy clause in what it did in Thomas. View the parameters of the Fifth, and Fourteenth Amendments, specifically with regards to double jeopardy protections, collateral estoppel, and due process rights, and give the Amendments continued vitality in that context.

Therefore, the Appellant prays this Honorable Court accept jurisdiction, and allow the Appellant to fully and accurately brief its argument.

STATEMENT OF THE CASE AND FACTS

On Saturday, June 2, 2012, Cleveland police officer Robert Zubek #1391, was directing traffic at the Cleveland Hopkins International Airport in the baggage claim area, when Natasha Townsend approached him in a minivan. Officer Zubek testified Ms. Townsend approached him "around 3:00, 4:30" (T.p. 45). The traffic was congested thereby; she sought his assistance in finding her relatives who were arriving from United. He told her to park in the garage if she needed to go inside. (T.p. 45). When he noticed the minivan parked in the baggage claim area, he pulled his zone car around and issued a parking ticket. (T.p. 46, 51). He called for the owner of the vehicle on the overhead system; yet, no one came forward. When he turned on the zone car overhead lights, preparing to have the vehicle towed, Ms. Townsend approached his vehicle yelling. (T.p. 54, 56).

Ms. Townsend's testimony divaricates from Officer Zubek's. She accounts her arrival to the airport at 3:35 p.m. She approached Officer Zubek for assistance in seeking her sister, Monica Bourn, and nephew at the Southwest terminal. He ordered her to drive around the terminal and park by the United sign at the far end of the baggage claim area due to the heavy traffic. She did what she was told, drove around, parked and left the minivan to find her relatives. When she saw that their flight was delayed, she returned to the vehicle. Upon returning, she saw a parking ticket and Officer Zubek with a white sheet in his hand standing by the minivan.

At this point, the situation escalated precipitously. Officer Zubek knew the City's policy, "if the owner returns to the vehicle, that we have to release the vehicle and not tow it." (T.p. 43). Admitting he left his "zone sore", he insisted to have the vehicle towed. (T.p. 56, 177). He

detained her and refused to let her leave; although, she was not under arrest. He demanded Ms. Townsend's license with the *intent* on charging her with Failure to Comply with his previous order (T.p. 56). He never told her the purpose of needing her license or the crime she committed. She refused because at this point he was screaming at her; and she was afraid. He placed her under arrest by reaching in the minivan, grabbed her by the back of her neck, dragged her out, while he screamed, "I'm sick of you stupid bitches". (T.p. 179).

At 6'1", 220 lbs, large and athletic, Officer Zubek was hit and knocked backwards into the zone car by Ms. Townsend, who is a foot shorter and one hundred pounds lighter (T.p. 59, 99). Officer Downing #0677 (who was not present at trial) arrived and grabbed Ms. Townsend by one of her arms. Officer McClure #1836 (who was not present at trial) arrived, and grabbed her by the other arm. The officers slammed her face forward on the ground, and lay on top of her while she was handcuffed. Officer Zubek, along with another officer (who were still laying on top of her) threatened to tase her with 50,000 volts of electricity. There was no dispute to the amount of force, the attempt to tase, or her repeated screams for someone to tape this incident. Officer Zubek testified he read Ms. Townsend her *Miranda* rights. Ms. Townsend testified she was not read her *Miranda* rights.

Ms. Bourn testified that she and her son noticed flashing lights and began to run towards her minivan. Arriving at the vehicle, she saw Officer Zubek grab her sister out of the minivan towards the zone car. She then saw two other officers jump her sister while she cried out, "What are you arresting me for?" No one answered her. Two officers laid on top of her sister, demanded her to get up and stop resisting. However, Ms. Bourn told the officers that her sister could not get up because they were lying on top of her. (T.p. 159.) While her sister was handcuffed, lying on the ground, the officers were going to tase her. (T.p. 160, 162.)

Only two people know how the initial situation occurred—Ms. Townsend and Officer Zubek. By the time Officer Marcia Figueroa #0364 arrived on scene, Ms. Townsend was in the police car. After multiple requests by Ms. Townsend, she was transported by ambulance to Southwest General Hospital. Dr. Elizabeth Ferguson, a physician at the emergency room testified that Ms. Townsend was "reasonably cooperative", and was diagnosed with acute bilateral knee contusion, acute left knee sprain, and acute neck sprain. (T.p. 145). Given Ibuprofen for pain and an ice pack to reduce the pain in her neck, she was then transported to the Cleveland City Jail.

On Monday, June 4, 2012, Ms. Townsend bonded out of the Cleveland City Jail for Cleveland Municipal Code 435.06: Failure to Display License: Refusal. The next day, trial was held in Case No. 2012 TRC 033289 in the Cleveland Municipal Court. Upon review of BMV records, the trial court found her license valid, entered a plea of no contest–not guilty, dismissed. Hours later, she was subsequently charged in Case No. 2012 CRB 018014 for failure to comply and resisting arrest. (T.d. 06/05/12:7,8).

Ms. Townsend filed a Motion to Dismiss on June 19, 2012, on the basis of Double Jeopardy and collateral estoppel. (T.d. 12). The next day, she demanded Discovery of "statements and recordings" and "Brady" materials. On July 10, 2012, she filed a Motion to Preserve "any and all videotapes", in which the City failed to respond. (T.d. 21). A week later, a hearing was held on the motion to dismiss. On July 17, 2012, a hearing was held on the Motion to Dismiss. The City stated that the failure to display license charge has nothing to do with failing to comply with a resisting arrest. The trial court agreed and denied the motion. (T.d. 22). A jury demand was filed later that day. (T.d. 23).

The Motion to Preserve was discussed at a pretrial hearing on September 11, 2012, where the City indicated that any video was no longer available. The Trial Court denied the motion. On

October 2, 2012, a Motion to Dismiss and Motion in Limine were filed, seeking to preclude the City from introducing evidence concerning the failure to display license, since she had been acquitted of that charge. (T.d. 36, 37).

These matters were addressed before trial on October 18, 2012. The City argued that the failure to comply charge is where defendant, "failed to comply both with their request for her to present a license and with the moving of the vehicle. (T.p. 8). The Trial Court denied both motions. (T.p. 10). A trial by jury was had. The City presented testimony of four witnesses, after which, the Defense made a Rule 29 judgment of acquittal, which was denied. (T.p. 149). Ms. Townsend testified in her own defense, and presented the testimony of another witness as well. After argument, the case was submitted to the jury, which returned a verdict of guilty on both counts. (T.p. 250, 251). On November 5, 2012, the Trial Court sentenced Ms. Townsend to 180 days in jail on the failure to comply charge, and fined her $750.00 on the resisting arrest charge, suspended all of the jail time and $500.00 of the fine, and ordered her to do 75 hours of community work service.

Ms. Townsend timely appealed to the Eighth District Court of Appeals, Cuyahoga County, Ohio on December 3, 2012. A divided panel affirmed the conviction; one judge dissenting on the basis that the second motion to dismiss was dispositive of this case. The appellate court did find that neither the police nor the City attempts to secure the videotaped footage prior to Ms. Townsend filing a motion to preserve was troubling. Ms. Townsend's assignment of error regarding vindictive prosecution was without merit.

LAW AND ARGUMENT

APPELLANT'S PROPOSITION OF LAW NO. 1: A trial court's denial of a motion to dismiss and motion in limine based on the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution following an acquittal is a violation of a defendant's rights.

Mandamus does not afford a prosecutor a remedy where the outcome of the hearing on a no contest plea is allegedly erroneous. Since jeopardy attaches when the court accepts the plea, granting the writ would be a vain act, as the defendant could not subsequently be found guilty. State, ex rel. Sawyer, v. O'Connor, 54 Ohio St. 2d 380 (1978). Also see State, ex rel. Leis, v. Gusweiler, 65 Ohio St. 2d 58(1981).

Although the City stated the trial court's below final order of not guilty-dismissed was erroneous, the City *did not* seek a writ of mandamus as a remedy, because it would have been an argument not well taken. "Jeopardy, based on having undergone an initial criminal trial attaches after acquittal or conviction". Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187, 194 (1977).

The Courts below found that: failure to comply with a resisting arrest had nothing to do with the failure to display license charge; and, the jury verdict indicates that the jury found Ms. Townsend guilty of failure to comply as charged in the complaint.

There were two significant problems with the courts below conclusion. The first problem is that all events arose out of the same transaction. The officers involved knew that charges were placed concerning this incident the moment it happened. Is the City allowed to prosecute an accused multiple times when it erred to bring all charges simultaneously? Obviously it is.

The City prosecuted Ms. Townsend for the same offense after acquittal arguing she failed to comply *** with their request for her to present a license. This Court held in State v. Gustafson, 76 Ohio St. 3d 425, 432, 1996 Ohio 299, 688 N.E.2d. 435 (1996), "The Double Jeopardy Clause precludes successive criminal prosecutions, the proscription is against a *second criminal trial* after jeopardy has attached in a *first criminal trial.*" The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal. It protects against

multiple punishments for the same offense." Simply put, the Double Jeopardy clause is not such a fragile guarantee the prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units. (cf. Braverman V. United States, 317 U.S. 49, 52 (1942)).

This brings us to the second problem with the conclusion of the courts below. The City presented this case as a multiple acts case. It presented two potential orders: the order not to park in the baggage claim area, and the order to produce her license. The charge to the jury did not specify or give a description of the order that the jury would unanimously have to find Ms. Townsend failed to comply with, to convict her with that charge. To be sure of the failure to comply charge and to preserve Ms. Townsend's rights against double jeopardy, *limine* was sought because the failure to display license issue was not relevant to the failure to comply charge. However, the charge to the jury did not afford the basis on which order she failed to comply with.

This Court noted in State v. Gardner, 118 Ohio St.3d 420, 2008-Ohio-2787,

> " ' "In multiple acts cases, ***, several acts are alleged and any one of them could constitute the crime charged. In these cases, the jury must be unanimous as to which act or incident constitutes the crime. To ensure jury unanimity in multiple acts cases, we require that either the State elect the particular criminal act upon which it will rely for conviction, or that the trial court instruct the jury that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt." ' " (Footnote omitted.) State v. Jones, 96 Hawai`i 161, 170, 29 P.3d 351 (2001), quoting State v. Timley, 255 Kan. 286, 289 290, 875 P.2d 242 (1994), quoting State v. Kitchen, 110 Wash.2d 403, 410, 756 P.2d 105 (1988).

APPELLANT'S PROPOSITION OF LAW NO. 2: A trial court's denial of a motion to dismiss based on the due process rights of the Fourteenth Amendment to the United States Constitution following a failure to preserve evidence is a violation of a defendant's rights.

Ms. Townsend's Discovery demand specifically put the City on notice of "any books, papers, documents, photographs, recordings, tangible objects, or copies thereof available to or in

the possession, custody or control of the State and which are material to the preparation of the defense..." and "All evidence known, or which may become known to the Prosecuting attorney, favorable to the Defendant or discrediting to the State's case ("Brady" materials).... The resulting request produced no videotapes, and only one of the officer's statements. Subsequently she timely filed a motion to preserve, which the City did not respond. Courts have found that a Demand for Discovery motion is sufficient to constitute a motion to preserve the evidence when considering a shift of burden. Benton, *supra.*

At trial, Officer Zubek testified that to his knowledge there is no video of this incident. "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." Arizona v. Youngblood, 488 U.S. 51 (1998). "Under this definition, no police action amounting to destruction of evidence is in bad faith unless the police know the evidence is exculpatory and they purposely destroy it." Karen Carlson Paul, Note, *Destruction of Exculpatory Evidence: Bad Faith Standards Erodes Due Process Right*, Arizona v. Youngblood.

As the dissenting judge in the court below noted, "Incredulously, it is the position of the city, and its witness testified, that any cameras at the airport are not stationary, *may not have recorded this incident* and that such recordings are retained for only 17 days. That position is beyond the pale. To suggest that the Cleveland Hopkins International Airport, the Department of Homeland Security or the Transportation Security Administration do not have security cameras that cover every square inch of airport property, its ingress and egress and further, that the video recording generated by these cameras is destroyed or taped over every 17 days is preposterous, particularly when there has been an incident, injury and subsequent arrest." ¶34, 35. Preposterous indeed. According to the policy of the City of Cleveland, who made the arrest at the airport, all

tapes must be stored for a minimum of thirty days. If there is an arrest, injury, or incident, before erasure of a tape, the officer must ensure that all court proceedings are complete. At the time the tape is erased, the officer also is to complete a Certificate of Records Disposal.

Because Ms. Townsend testified that she disputes much of the testimony that Officer Zubek gave at trial, the tape would have provided the only possible objective evidence of the events as they happened on the day of the incident. Accordingly, Ms. Townsend's due process rights were violated when the city destroyed the evidence that she specifically requested. *** We also note that appellant specifically requested discovery of the tape, and the state did not in good faith respond to that request. Applying Forest, 36 Ohio App. 3d 169; 522 N.E.2d 52; 1987 Ohio App. LEXIS 8868, we therefore hold that the state has the burden of showing that the tape was not exculpatory. The state has not met this burden. *** Benton, *supra.* The suppression of evidence by the state violates a defendant's rights to due process. State v. Geeslin, 116 Ohio St. 3d at 253, 2007 Ohio 5239 P 2, 878 N.E.2d at 2 *Id.* at 254, 2007 Ohio 5239 P 7, 878 N.E.2d at 3, citing Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

"Extending *Brady's* prohibition against an intentional suppression of requested evidence, the Supreme Court, in United States v. Agurs, announced a constitutional duty to disclose exculpatory evidence in the *absence* of a request. This duty does not distinguish between intentional and unintentional denial of evidence to the defendant. Therefore, whether intentional or not and requested or not, action by the state that limits access to material evidence that prejudices the defendant violates the Due Process Clause." Ohio Northern University Law Review, 34 Ohio N.U.L. Rev. 953 (2008).

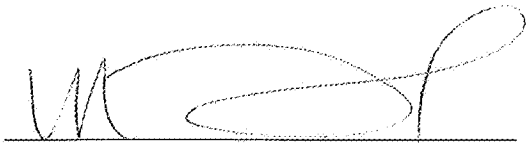
Moreover, the state is prohibited from providing less protection for a right conferred by Amendment VI, than is provided under the federal Constitution. The suppression of evidence by the state violates a defendant's rights to due process. State v. Geeslin, *supra*.

There was no such protection here. Nothing prohibited the City from having a single alleged criminal transaction bifurcated into two trials. There was nothing to preclude repeated attempts for a conviction for an alleged offense. No punitive consequences for failing to respond to defense requests to preserve evidence. And, there was nothing to eliminate any confusion as to the basis of a particular verdict. This was nothing more than the total obliteration and defilement of double jeopardy protections and due process rights at the hands of the City, which violates the Fifth and Fourteenth Amendments.

CONCLUSION

For the aforementioned reasons, this case involves matters of public and great general interest and substantial Constitutional questions with regards to the issues raised in the Appeal. Appellant prays that this Court accept jurisdiction of Appellant's Propositions of law so that the important issues presented will be reviewed on the merits.

Respectfully Submitted,



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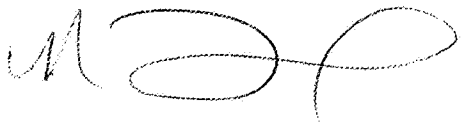
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail, to counsel for the Appellee, Barbara A. Langhenry, Director of Law, 1200 Ontario Street-8th Floor, Cleveland, Ohio 44113, this 12th day of March 2014.



DEC 12 2013

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 99256

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

NATASHA TOWNSEND

DEFENDANT-APPELLANT

CA12099256
82240599

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2012 CRB 018014

BEFORE: McCormack, J., E.A. Gallagher, P.J., and Kilbane, J.

RELEASED AND JOURNALIZED: December 12, 2013

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DEC 12 2013

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TIM McCORMACK, J.:

{¶1} Defendant-appellant, Natasha Townsend, appeals her convictions in the Cleveland Municipal Court. For the following reasons, we affirm.

Procedural History and Substantive Facts

{¶2} On June 5, 2012, a complaint was filed against Townsend in the Cleveland Municipal Court, charging her with failure to comply in violation of R.C. 2921.331 and resisting arrest in violation of Cleveland Codified Ordinances 615.08. Townsend pleaded not guilty to the charges, and the case proceeded to a jury trial.

{¶3} The facts presented at trial were as follows: On June 2, 2012, Cleveland police officer Robert Zubek was directing traffic at Cleveland Hopkins International Airport on the lower baggage claim roadway when he encountered Townsend driving a minivan. Townsend arrived at the airport to pick up her sister. Officer Zubek and Townsend spoke. Officer Zubek testified that he informed Townsend that she could not leave her vehicle unattended outside the baggage claim area and that she needed to park in the parking garage if she intended to go inside the airport. Pursuant to Transportation Security Administration ("TSA") safety regulations and mandates, no vehicles are permitted to be stopped or unattended near the terminal. Signs informing drivers of this mandate were posted throughout the area. Townsend testified

that Officer Zubek instructed her to park outside the baggage claim area in contravention of the mandate.

{¶4} The baggage claim area was congested during this time, and Officer Zubek continued to direct traffic. Shortly after speaking with Townsend, Zubek observed a minivan parked and unattended at the curb. No one nearby claimed the vehicle. Officer Zubek issued a parking ticket and proceeded to have the owner of the vehicle paged by airport personnel. Officer Zubek waited ten minutes before beginning the procedure to tow the vehicle. He pulled his zone car up next to the minivan and turned on the overhead lights. At that point, a female exited the airport yelling, "What are you doing to my van?" Officer Zubek recognized the female as Townsend, from their earlier conversation.

{¶5} Officer Zubek informed Townsend that he intended to cite her for failure to comply with his earlier parking instructions. To this end, Officer Zubek demanded her driver's license. Townsend refused to provide her license, and she entered the minivan, despite Officer Zubek informing her that he would arrest her if she refused his request. After three requests for Townsend's license, Officer Zubek called for backup. Townsend attempted to close the minivan door, but Zubek physically stopped her. As backup arrived on the scene, Officer Zubek informed Townsend that she was under arrest, and he ordered her to step out of the vehicle. Townsend refused and had to be forcefully removed. In the process of effecting the arrest, Townsend smacked Officer

Zubek's arm away and shoved him back against his car. Townsend attempted to flee but was taken to the ground by Officer Zubek and another officer. Townsend struggled with the officers, preventing them from handcuffing her on the ground. Only upon threat of being subdued by a taser did Townsend submit to arrest.

{¶6} At the conclusion of trial, the jury found Townsend guilty of both charges. At sentencing, the trial court imposed a fine of $1,000 and a jail term of 180 days for failure to comply and a fine of $750 and a jail term of 90 days for resisting arrest. The trial court suspended both jail terms and all but $250.00 of the fines. Townsend timely appealed, presenting three assignments of error.

Assignments of Error

I. The trial court erred, in derogation of defendant's right to due process of law, as guaranteed by the 14th Amendment to the Constitution of the United States, in denying defendant's motion to dismiss for vindictive prosecution.

II. The trial court committed plain error in instructing the jury on the charge of failure to comply, in that the jury was permitted to base its conviction on the failure of defendant to comply with one of two acts, one of which she had been acquitted of, in violation of defendant's right against double jeopardy, as guaranteed by the 5th Amendment to the Constitution of the United States.

III. The trial court erred, in derogation of Defendant's right to due process of law, as guaranteed by the 14th Amendment to the Constitution of the United States, in denying Defendant's motion to dismiss for failure to preserve evidence.

Vindictive Prosecution

{¶7} In her first assignment of error, Townsend argues that the trial court erred in denying her motion to dismiss for vindictive prosecution. The record does not reflect that Townsend filed such a motion. On June 19, 2012, Townsend filed a motion to dismiss based on double jeopardy and collateral estoppel, which was denied. On October 2, 2012, Townsend filed a second motion to dismiss, asserting that the city had destroyed "materially exculpatory" evidence. This motion was also denied. Townsend failed to raise the issue of vindictive prosecution before the trial court, and she now asks this court to find that the trial court erred by not, sua sponte, raising this argument for her and dismissing the case. We decline to do so.

{¶8} Defects in the institution of the prosecution and/or in the indictment must be raised before trial or they are waived. Crim.R. 12(C), (H). "As a general rule, an appellate court will not consider an alleged error that the complaining party did not bring to the trial court's attention at the time the alleged error is said to have occurred." *State v. Petkovic*, 8th Dist. Cuyahoga No. 97548, 2012-Ohio-4050, ¶ 54, quoting *State v. Slagle*, 65 Ohio St.3d 597, 604, 605 N.E.2d 916 (1992).

{¶9} Townsend's argument under this assignment of error is based upon a separate Cleveland Municipal Court case that stemmed from the same incident of June 2, 2012, wherein she was charged with failure to display her driver's

license, in violation of Cleveland Codified Ordinances 435.06. Townsend pleaded no contest to the charge, but upon presenting her driver's license at arraignment, the court found her not guilty and dismissed that case. The complaint in the present case was filed the same day.

{¶10} Having failed to either file a pretrial motion to dismiss on the grounds of vindictive prosecution by the city for Townsend's successful defense of the display of license refusal charge, or otherwise raise that issue in the trial court, Townsend has not preserved the issue for appellate review, and we will not consider that issue for the first time on direct appeal. *State v. Cline*, 2d Dist. Champaign No. 07CA02, 2008-Ohio-1866, ¶ 18.

{¶11} Even were we to assume for the sake of argument that Townsend had properly raised this issue before the trial court, we note that the timeline does not suggest vindictiveness on the part of the city. Townsend's parking incident occurred on Saturday June 2, 2012, at which point she was not only issued a ticket for her refusal to produce her driver's license pursuant to Cleveland Codified Ordinances 435.06, but she was arrested in connection with the charges in this case. A mere three days later, on Tuesday June 5, 2012, Townsend was found not guilty of the display of license charge and she was charged with the crimes in this case. We cannot find a vindictive purpose in this series of events. Townsend's argument would impose a presumption of

vindictiveness on the prosecutor if he was unable to have his charges prepared on Sunday and filed on Monday.[1]

{¶12} Townsend's first assignment of error is without merit.

Jury Instructions on Failure to Comply

{¶13} As discussed above, in addition to the charges in the present case, Townsend was charged with failure to display her license in the separate case to which we refer in the first assignment of error. Although she pleaded no contest in that case, she was found not guilty and the case was dismissed. Townsend now argues that the trial court erred by not including a jury instruction clarifying that she could not be found guilty of the failure to comply charge based upon her refusal to provide Officer Zubek with her driver's license.

{¶14} Because Townsend did not object to the jury instructions, we review this claim for plain error. *State v. Leonard*, 8th Dist. Cuyahoga No. 98626, 2013-Ohio-1446, ¶ 32; Crim.R. 30(A). Under Crim.R. 52(B), a plain error affecting a substantial right may be noticed by an appellate court even though it was not brought to the attention of the trial court. An error rises to the level of plain error only if, but for the error, the outcome of the proceedings would have been different. *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, 912

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[1]Although the city presents an argument on appeal attempting to rebut any presumption of vindictiveness, we note that such evidence is not part of the record before us due to Townsend's failure to raise this issue at the trial court. This is an instructive example of the necessity of complying with Crim.R. 12(C), (H) and the holding in *Cline*.

N.E.2d 1106, ¶ 61; *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978). Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice." *Id.*

{¶15} Townsend bases her argument on this court's decision in *State v. Jackson*, 8th Dist. Cuyahoga No. 95920, 2011-Ohio-5920. The defendant in *Jackson* was charged with felonious assault, domestic violence, and endangering children. Jackson argued that his due process rights were violated because the indictment failed to specify which of four instances of alleged abuse of Jackson's son (punching him, beating him with a belt, burning him with a fork, and pushing him out of the car) constituted the bases of the charges.

{¶16} This court noted that pursuant to Crim.R. 31(A), a criminal defendant is entitled to a unanimous jury verdict. *Id.* at ¶ 21. "If two distinct offenses are presented in a single charge, however, unanimity may be compromised. That is, if two offenses are joined in a single count, while the jury may agree that the defendant is guilty of that count, they may have not unanimously decided which set of facts resulted in the offense." *Id.* at ¶ 21, citing *State v. Ward*, 9th Dist. Lorain No. 90CA009720, 2011-Ohio-518, ¶ 5.

{¶17} In *Jackson*, we noted that it was impossible to determine if the jury convicted the defendant of child endangering based on punching his son in the stomach or burning him, or if some of the jurors convicted based upon one incident and other jurors convicted him based on another. *Id.* at ¶ 45. We

concluded that each member of the jury may not have based his or her decision on the same facts, thereby denying Jackson his right to a unanimous verdict. We also noted that the indictment failed to protect Jackson against double jeopardy in that it did not apprise Jackson of what occurrences formed the basis of the charges he faced, and the jury had no idea which charge referred to which act. *Id.* at ¶ 46-47.

{¶18} The present case differs from *Jackson* in an important respect. The failure to comply charge in the complaint against Townsend specifically contains a "to wit" clause, alleging that Townsend failed to comply in that she "left van unattended and refused to move van 30 minutes at airport." In contrast, Townsend's failure to provide her license is not charged in the complaint. Furthermore, the testimony elicited at trial pertained to Officer Zubek's authority to direct and regulate traffic. There was no testimony offered regarding his lawful authority to demand Townsend's driver's license. Consistent with this, the trial court's jury instructions on the failure to comply charge included an instruction regarding the officer's authority to direct and regulate traffic. There was no instruction provided regarding the officer's lawful authority to demand Townsend's license. Finally, the jury verdict indicates that the jury found Townsend guilty of failure to comply "as charged in the complaint." In light of these facts, we cannot say the trial court's jury instructions resulted in plain error.

{¶19} Townsend's second assignment of error is overruled.

Failure to Preserve Evidence

{¶20} On July 10, 2012, Townsend filed a motion to preserve evidence, requesting the city preserve "any and all videotapes, audiotapes, DVD that may not have been used in charging the defendant." Prior to trial, Townsend moved the court to dismiss the case, arguing that the city had destroyed materially exculpatory evidence, and in the alternative, that the city had, in bad faith, destroyed potentially useful evidence. Townsend's argument concerns video surveillance evidence made by Cleveland Hopkins Airport that would have recorded Townsend's interactions with Officer Zubek on June 2, 2012.

{¶21} The suppression of materially exculpatory evidence violates a defendant's due process rights, regardless of whether the state acted in good or bad faith. *State v. Geeslin*, 116 Ohio St.3d 252, 254, 2007-Ohio-5239, 878 N.E.2d 1, citing *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). To be materially exculpatory, "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). "Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt." *Id.* at 485.

{¶22} This court has previously held that the possibility that evidentiary material could have exculpated the defendant if preserved or tested is not enough to satisfy the standard of constitutional materiality. *State v. Durham*, 8th Dist. Cuyahoga No. 92681, 2010-Ohio-1416, ¶ 12, citing *Arizona v. Youngblood*, 488 U.S. 51, 56, 109 S. Ct. 333, 102 L.Ed.2d 281 (1988). "A clear distinction is drawn by *Youngblood* between materially exculpatory evidence and potentially useful evidence. If the evidence in question is not materially exculpatory, but only potentially useful, the defendant must show bad faith on the part of the state in order to demonstrate a due process violation." *Geeslin* at 254. Therefore, when evidence is only potentially useful, its destruction does not violate due process unless the police acted in bad faith when destroying the evidence. *State v. Miller*, 161 Ohio App.3d 145, 2005-Ohio-2516, 829 N.E.2d 751 (2d Dist.).

{¶23} The term "bad faith" generally implies something more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive, or ill will partaking of the nature of the fraud. It also embraces actual intent to mislead or deceive another. *Durham* at ¶ 13, citing *State v. Smith*, 2d Dist. Montgomery No. 20247, 2005-Ohio-1374, ¶ 7.

{¶24} In *Durham*, this court examined a situation where an alleged criminal incident was caught on videotape but no one viewed the videotape

before it was erased. We noted that the videotape evidence might have been inculpatory or exculpatory or a combination of the two. We, therefore, held that the defendant was unable to demonstrate that the evidence was materially exculpatory, and we treated the erased video as only potentially useful.

{¶25} The holding in *Durham*, 8th Dist. Cuyahoga No. 92681, 2010-Ohio-1416, controls in this case as well. None of the parties viewed the video evidence prior to Cleveland Hopkins Airport erasing or recording over the incident. Furthermore, Officer Zubek testified that the cameras outside the airport are not fixed on one location and, as such, may not have recorded the incident at all. Pursuant to *Durham*, we cannot treat the missing video as materially exculpatory.

{¶26} Because the video does not qualify as materially exculpatory evidence, our inquiry turns to whether it would be potentially useful and whether the video was destroyed in bad faith. Although there is no question in this instance that the video would have been potentially useful to the extent that it might have recorded all or at least a portion of Townsend's encounter with Officer Zubek, there is no evidence in the present case that the video was destroyed in bad faith. Officer Zubek testified that Cleveland Hopkins Airport retains video surveillance for 17 days before the video is either deleted through their system or copied over digitally. Townsend did not file her motion to preserve evidence until 38 days after the incident, well after the airport

destroyed the video. At a hearing on this motion, the city prosecutor indicated that he had requested the video from Cleveland Hopkins Airport and that the airport reported that no video was available.

{¶27} Although we find it troubling that neither the police nor the city bothered to make an earlier effort to inquire into the existence of potential video evidence prior to Townsend filing a motion to preserve evidence, we cannot say the facts of this case demonstrate a dishonest purpose, moral obliquity, or conscious wrongdoing on the part of the city such that bad faith is established. *See, e.g., State v. Gatliff,* 12th Dist. Clermont No. CA2012-06-045, 2013-Ohio-2862, superceded on other grounds (finding no bad faith where the state failed to preserve potentially useful video evidence that was destroyed by a restaurant in the ordinary course of business).

{¶28} Townsend's third assignment of error is overruled.

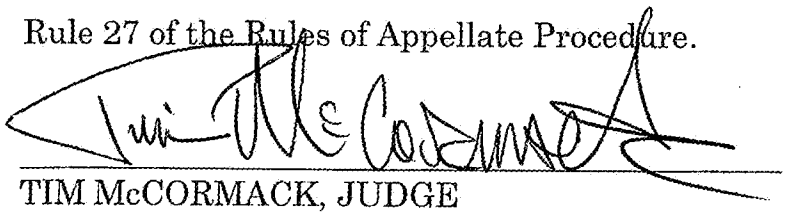
{¶29} The judgment of the trial court is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the municipal court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



TIM McCORMACK, JUDGE

MARY EILEEN KILBANE, J., CONCURS;
EILEEN A. GALLAGHER, P.J., DISSENTS (SEE ATTACHED DISSENTING OPINION).

EILEEN A. GALLAGHER, P.J., DISSENTING:

{¶30} I respectfully dissent from my learned colleagues. Because I find that the third assignment of error is dispositive of this case, it, alone, will be addressed.

{¶31} Appellant's third assignment of error states:

> The trial court erred, in derogation of Defendant's right to due process of law, as guaranteed by the 14th Amendment to the Constitution of the United States, in denying Defendant's motion to dismiss for failure to preserve evidence.

{¶32} On July 10, 2012, appellant filed a motion to preserve evidence requesting the city preserve "any and all videotapes, audiotapes, DVDs that may not have been used in charging the defendant." Prior to trial, appellant moved the court to dismiss the case, arguing that the city had destroyed materially exculpatory evidence and, in the alternative, that the city had, in bad faith, destroyed potentially useful evidence. Appellant's argument concerns alleged video surveillance evidence from the Cleveland Hopkins International Airport

that potentially could have recorded appellant's interactions with Officer Zubek on June 2, 2012.

{¶33} The suppression of materially exculpatory evidence violates a defendant's due process rights, regardless of whether the state acted in good or bad faith. *State v. Geeslin*, 116 Ohio St.3d 252, 254, 2007-Ohio-5239, 878 N.E.2d 1, citing *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). To be materially exculpatory, "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). "Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt." *Id.* at 485.

{¶34} Incredulously, it is the position of the city, and its witness testified, that any cameras at the airport are not stationary, *may not have recorded this incident* and that such recordings are retained for only 17 days.

{¶35} That position, and testimony, is beyond the pale. To suggest that the Cleveland Hopkins International Airport, the Department of Homeland Security or the Transportation Security Administration do not have security cameras that cover every square inch of airport property, its ingress and egress and further, that the video recording generated by these cameras is destroyed or

taped over every 17 days is preposterous, particularly when there has been an incident, injury and subsequent arrest.

{¶36} Officer Zubek, who is somehow the city's expert on these matters, failed to secure and preserve recorded video evidence even though he was going to file criminal charges against appellant.

{¶37} In this case, the testimony of Officer Zubek and appellant are dichotomous and the surveillance video would have been the only unbiased evidence as to each of the interactions between the two. Therefore, a video recording of this incident was vital. However, we can never determine if the evidence was exculpatory because it allegedly had not been retained by the city.

{¶38} This court has previously held that the possibility that evidentiary material could have exculpated the defendant if preserved or tested is not enough to satisfy the standard of constitutional materiality. *State v. Durham*, 8th Dist. Cuyahoga No. 92681, 2010-Ohio-1416, ¶ 12, citing *Arizona v. Youngblood*, 488 U.S. 51, 56, 109 S.Ct. 333, 102 L.Ed. 2d 281 (1988).

> A clear distinction is drawn by *Youngblood* between materially exculpatory evidence and potentially useful evidence. If the evidence in question is not materially exculpatory, but only potentially useful, the defendant must show bad faith on the part of the state in order to demonstrate a due process violation.

Geeslin, 116 Ohio St.3d at 254, 2007-Ohio-5239, 878 N.E.2d 1.

{¶39} Therefore, when evidence is only potentially useful, its destruction does not violate due process unless the police acted in bad faith when destroying

the evidence. *State v. Miller*, 161 Ohio App.3d 145, 2005-Ohio-2516, 829 N.E.2d 751 (2d Dist.).

{¶40} The term "bad faith" generally implies something more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of the fraud. It also embraces actual intent to mislead or deceive another. *Durham* at ¶ 13, citing *State v. Smith*, 2d Dist. Montgomery No. 20247, 2005-Ohio-1374, at ¶ 7.

{¶41} In *Durham,* 8th Dist. Cuyahoga No. 92681, 2010-Ohio-1416, this court examined a situation where an alleged criminal incident was caught on videotape but no one viewed the videotape before it was erased. We noted that the videotape evidence might have been inculpatory or exculpatory or a combination of the two. Therefore, we held that the defendant was unable to demonstrate that the evidence was materially exculpatory and treated the erased video as only potentially useful.

{¶42} The holding in *Durham* controls in this case as well. Allegedly, none of the parties viewed the video evidence prior to Cleveland Hopkins Airport erasing or recording over the incident. Pursuant to *Durham,* we cannot treat the missing video as materially exculpatory.

{¶43} Because the video does not qualify as materially exculpatory evidence, our inquiry turns to whether it would be potentially useful and whether

the video was destroyed in bad faith. There is no dispute that the video qualifies as potentially useful because it could have provided the only objective view of the events in this case. I further find that the video was destroyed in bad faith.

{¶44} "In requiring the state to provide discovery of materials that are reasonably available to the state, Crim.R. 16(B) assumes that the state will procure possession of all materials of which the state knows that are relevant to the object of its criminal investigation." *State v. Ross*, 2d Dist. Greene No. 2012 CA 16, 2012-Ohio-4977, ¶ 27. That assumption flows from a due diligence obligation. *Id.* By allowing for discovery of such materials, Crim.R. 16(B) also creates a due process right in the defendant to have access to them when they are potentially useful to the defendant in preparing a defense. *Id.*

{¶45} In the present case, the arresting officer testified that he was aware of the surveillance cameras at the airport and that he knew the exact number of days that the airport would retain video evidence prior to its destruction. Despite this knowledge, the law enforcement officers involved in the case willfully ignored an opportunity to secure the best available evidence of the alleged crime. The city cannot possibly claim ignorance of surveillance video evidence of an incident in the middle of the roadway outside of Cleveland Hopkins Airport's baggage claim. Under these circumstances I would hold that the video evidence was destroyed in bad faith and appellant's due process rights

were violated when the city willfully chose not to secure the video evidence prior to its destruction.

CC 97 / 2783

The State of Ohio, Cuyahoga County. } ss.

I, ANDREA F. ROCCO, Clerk of the Court of Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be kept, hereby certify that the foregoing is taken and copied from the Journal entry dated on 12/12/13 CA 99256 of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal entry dated on 12/12/13 CA 99256 and that the same is correct transcript thereof.

In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 12 day of December A.D. 20 13

ANDREA F. ROCCO, Clerk of Courts

By _____ Deputy Clerk

2783

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

CITY OF CLEVELAND

Appellee

COA NO. 99256

LOWER COURT NO. 2012 CRB 018014

-vs-

NATASHA TOWNSEND

Appellant

MOTION NO. 470765

Date 01/13/14

Journal Entry

Motion by Appellant, pro se, for extension of time to file application for reconsideration is granted.

Application shall be due on January 21, 2014.

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Presiding Judge EILEEN A. GALLAGHER, Concurs

Judge MARY EILEEN KILBANE, Concurs

TIM MCCORMACK
Judge

Case: 99256
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IN THE EIC OF APPEALS
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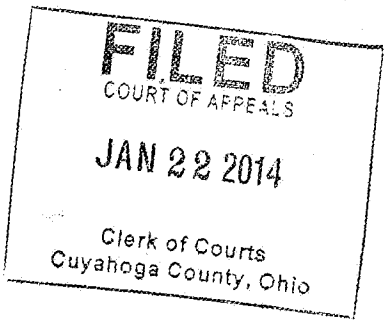
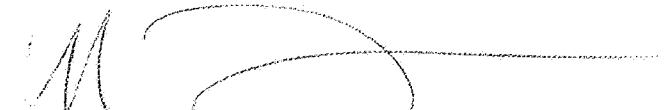
CITY OF CLEVELAND,	(	Criminal Appeal from the
	(	Cleveland Municipal Court
Plaintiff – Appellee,	(	Case No. 2012 CRB 018014
	(	
vs.	(	Case Number: CA 99256
	(	
NATASHA TOWNSEND	(	
	(	
Defendant – Appellant	(	**APPLICATION FOR RECONSIDERATION**

Now Comes Appellant – Defendant, Natasha Townsend, through this application to reconsider the issues contained through this appeal on its previous decision concerning double jeopardy, due process and excessive force reversible errors.

Wherefore, I hereby move this honorable Eighth Judicial District Appellate Court of Cuyahoga County, Ohio for an order granting reconsideration, of its previous decision, overturning the judgment of the Cleveland Municipal Court.

Respectfully submitted,





Natasha Townsend, Pro Se Appellant

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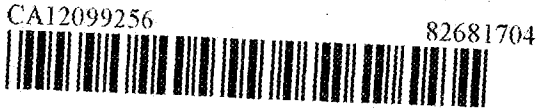

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LAW AND ARGUMENT

I. THE LAW IN RESPECT TO DOUBLE JEOPARDY AND ITS APPLICATION IN THE STATE OF OHIO

A. The Law of Double Jeopardy

All law is derived through the respective Constitutions and Double Jeopardy is established through the Constitution of the United States:

> This constitution, and the laws of the United States which shall be made in pursuance thereof...or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding. Article VI, U.S. Constitution.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. Amendment V, U.S. Constitution.

The Amendments to the Constitution is made applicable to the states through the 14th Amendment.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Amendment XIV, U.S. Constitution

Double jeopardy was adopted in the State of Ohio through its Constitution:

> No person shall be twice put in jeopardy for the same offense. Section 10, Article 1, Ohio Constitution.

B. Double Jeopardy's Application in the State of Ohio

Because, the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that "no person shall *** be subject for the same offense to be twice put in jeopardy of life or limb," and is applicable to the states through the Fourteenth Amendment. Benton v. Maryland (1969), 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707; State v. Tolbert (1991), 60 Ohio St. 3d 89, 90, 573 N.E.2d 617, 619; and similarly, Section 10, Article I of the Ohio Constitution provides that "no person shall be twice put in jeopardy for the same offense." Ohio courts have historically treated the protections afforded by the Double Jeopardy Clauses of the Ohio Constitution and the United States Constitution as co-extensive. State v. Gustafson (1996), 76 Ohio St.3d 425, 432, 1996 Ohio 299, 668 N.E.2d 435. See also State v. Konicek (1984), 16 Ohio App. 3d 17, 17-18, 16 Ohio B. Rep.18, 18-19, 474 N.E.2d 363, 364; State v. Moss (1982), 69 Ohio St. 2d 515, 517, 23 Ohio Op. 3d 447, 448, 433 N.E.2d 181, 184; State v. Royster (1982), 3 Ohio App. 3d 442, 443, 3 Ohio B. Rep. 521, 522, 446 N.E.2d 190, 192.

We therefore first proceed based on the premise that the Double Jeopardy Clause of each constitution prohibits (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. United States v. Halper (1989), 490 U.S. 435, 440, 109 S. Ct. 1892, 1897 104 L. Ed. 2d 487, 496, citing North Carolina v. Pearce (1969), 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656, 664-665.

Furthermore, the analysis then turns to the court decision of State v Thomas (1980), 61 Ohio St.2d 254 1, Syllabus Paragraphs two through four:

> 2. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution not only protects the accused from multiple prosecutions for the same offense, but also protects the accused from multiple punishments for the

same offense. (See North Carolina v. Pearce, 395 U.S. 711, and Brown v. Ohio, 432 U.S. 161.)

3. For purposes of the Double Jeopardy Clause, in deciding whether the same act or transaction constitutes a violation of two distinct statutory provisions or only one, a determination must be made as to whether each provision requires proof of a fact which the other does not. (See Blockburger v. United States, 284 U.S. 299.)

4. Even though the same act or transaction may constitute a violation of two distinct statutory provisions and would permit the imposition of multiple sentences, successive prosecutions will be barred in certain circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first. (See Ashe v. Swenson, 397 U.S. 436, and Nielsen, Petitioner, 131 U.S. 176.)

In Blockburger v. United States (1932), 284 U.S. 299, the United States Supreme Court set out the standard commonly referred to the elements test in which in the case of a single prosecution, multiple punishments are prohibited if one offense is a greater or lesser included offense of the other, unless the legislature clearly indicates an intention that the punishments are to be cumulative. Followed, in Missouri v. Hunter (1983), 459 U.S. 359; Harris v. Oklahoma (1977), 433 U.S. 682. Meaning to determine whether two offenses stand in the relation of greater to lesser included offenses, the statutory elements are compared, and

1. if one contains all of the elements of the other, plus additional elements, then it is the greater offense, and the other is the lesser included offense or,
2. if each offense, as defined by statute, contains an element which the other does not, the offenses are not related as greater or lesser included offenses.

Finally, the Legislature of Ohio codifed the intention of the Constitution of Ohio in Ohio Revised Code § 2941.25:

2941.25 Allied offenses of similar import - multiple counts.

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

Effective Date: 01-01-1974

C. The Law as applied to the case at bar

The City of Cleveland through the allegation of a violation of Cleveland Codified Ordinance § 435.06, sought to convict defendant for failing to a demand of a police officer, which was adjudicated in the Cleveland Municipal Court, with the finding of Not Guilty. Next, the prosecution again sought a second set of violations stemming from the same event or occurrence with the allegations of violations of RC 615.08 for recklessly or by force resisting a lawful arrest of herself or another (Bill of Particulars) and RC 2921.33 by failing to comply with a lawful order or direction of a police officer invested with authority to direct, control, or regulate traffic. (Bill of Particulars)

In short double jeopardy attached upon any view of the application of the law. The subsequent prosecution was barred at first instance because it was a second prosecution and second because the allegations are a relitigation of issues resolved by the first. Not only so, the second consideration of multiple punishments for the same offense stems from the fact that one cannot resist arrest without failing to comply, on the face of the provisions; which, makes one a lesser included offense of the other, and as such is constitutionally prohibited. Finally, the motion in limine which sought to exclude anymore mention in all fairness, which was denied deprived defendant of due process protections in variance to Evidence Rule 403.

exclude anymore mention in all fairness, which was denied deprived defendant of due process protections in variance to Evidence Rule 403.

The trial court erred, in derogation of Defendant's Fourth Amendment right of not instructing the jury on the affirmative defense of excessive and unnecessary force by a police officer.

Claims of excessive force in the course of a seizure/arrest of a person are analyzed under the Fourth Amendment's "reasonableness standard." Pray v. City of Sandusky, 49 F.3d 1154 (6th Cir1995). Under the Fourth Amendment, a person has a right not to be subject to excessive or unreasonable force by a police officer. Russo v. City of Cincinnati, 953 F.2d 1036, 1044 (6th Cir.1992). This includes a right against excessive force during an arrest. Martin v. Heideman, 106F.3d 1308, 1312 (6th Cir. 1997).

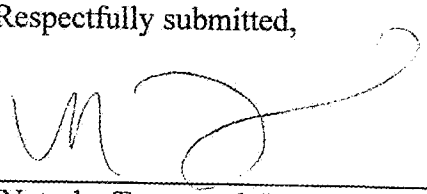
Under Ohio law, an affirmative defense is either "(a) A defense expressly designated as affirmative; [or] (b) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which the accused can fairly be required to adduce supporting evidence." R.C. 2901.05(D)(1).

At trial testimony was proffered on the conduct and attitude of the officer, which was heightened during the alleged events (T.p. 56). Both the defense and prosecution witnesses testified to the use of force (T.p. 158). The jury should have been instructed to determine whether the conduct constituted a defense to the allegations when the jury was charged for deliberation. Had the jury been instructed that the affirmative defense lie, the outcome would have been different. One may have found defendant not guilty based upon those facts.

Conclusion

For the aforementioned reasons, defendant appellant requests this court to review the applicable law and facts reconsidering its previous decision, granting the overturning of the conviction due to due process violation(s), upholding double jeopardy standards, and the defense of excessive force.

Respectfully submitted,



Natasha Townsend, Pro Se Appellant

CERTIFICATE OF SERVICE

The forgoing **APPLICATION FOR RECONSIDERATION**, was delivered to the clerk by electronic means and by electronic means to the Attorneys for Appellee, Barbara A Langhenry, City of Cleveland Law Director, Victor R. Perez, Chief City Prosecutor, Bidisha Bagchi, Assistant City Prosecutor, at Justice Center, 8th Floor, 1200 Ontario Street, Cleveland, Ohio 44113, on or about January 21, 2014.

Natasha Townsend, Pro Se Appellant

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

CITY OF CLEVELAND

Appellee

COA NO. 99256

LOWER COURT NO. 2012 CRB 018014

-vs-

NATASHA TOWNSEND

Appellant

MOTION NO. 471646

Date 01/30/14

Journal Entry

Application by Appellant, pro se, for reconsideration is denied.

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RECEIVED FOR FILING
JAN 30 2014
CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By _____ Deputy

PROCESSED
JAN 31 2014
CUYAHOGA COUNTY CLERK
OF COURTS
IMAGING DEPARTMENT

Presiding Judge EILEEN A. GALLAGHER, Concurs

Judge MARY EILEEN KILBANE, Concurs

TIM McCORMACK
Judge