IN THE SUPREME COURT OF OHIO
2024

STATE OF OHIO, Plaintiff-Appellee, -vs- JAIDEE MIREE (No. 22-1449) & DESMOND DUNCAN (No. 22-1458), Defendant-Appellants.	Case Nos. 22-1449 & 22-1458 On Consolidated Appeals from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Nos. 110749 & 110784

BRIEF OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF APPELLEE

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STATEMENT OF AMICUS INTEREST

Founded in 1937, the Ohio Prosecuting Attorneys Association is a private, non-profit trade organization that supports Ohio's 88 elected county prosecutors. OPAA assists county prosecuting attorneys to pursue truth and justice as well as promote public safety, and OPAA advocates for public policies that strengthen prosecuting attorneys' ability to secure justice for crime victims.

In the present cases, the standards governing self-defense and the potential retroactivity of changes to those standards are matters of great importance to the county prosecutors of this state, who prosecute the charges arising out of the use of deadly force and who are on the front lines of enforcing Ohio's criminal laws against the unjustified use of such force.

This amicus brief addresses consolidated appeals by jointly-tried defendants, Miree (No. 22-1449) and Duncan (No. 22-1458). The appeals present the same legal question, and that question has much significance – whether the "Stand Your Ground" (SYG) statutory amendments removing the duty to retreat in most situations apply to trials addressing uses of deadly force that occurred before the April 6, 2021, effective date of those amendments. The joint trial here occurred after the effective date of those amendments, but the use of force being litigated in that trial occurred roughly 22 months before the effective date.

At the time these defendants used force, they were subject to a duty to retreat and would be subject to prosecution and punishment for deadly-force crimes committed in violation of that duty to retreat. But the defendants posit that the General Assembly decided to reach back to such prior crimes and prior uses of force and to excuse

violations of the duty to retreat.

Nullifying criminal liability and punishment for already-committed crimes would be a remarkable and extraordinary legislative step, and such a step would implicate substantial interests, including the sovereign's interest in the prosecution and punishment of those offenses. As a matter of separation of powers, the prosecution of criminal cases "has long been regarded as the special province of the Executive Branch * * *." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). Prosecution is a "core executive constitutional function." *United States v. Armstrong*, 517 U.S. 456, 465 (1996). "In the ordinary case, 'so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'" Id. at 464, quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). "A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution." *United States v. Goodwin*, 457 U.S. 368, 382 (1982).

"The General Assembly has implemented an adversarial system of criminal justice in which the parties to a case contest the issues before a court of law, and it has vested county prosecuting attorneys with the authority to represent the state in those proceedings." *State v. Heinz*, 146 Ohio St.3d 374, 2016-Ohio-2814, ¶ 23. "R.C. 309.08(A) expressly grants the county prosecuting attorney the authority to 'prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party.'" Id. at ¶ 16; *State ex rel. McGinn v. Walker*, 151 Ohio St.3d 199, 2017-Ohio-7714, ¶ 18. "[A]s the chief prosecuting officer, [the county prosecutor] [is] charged with the duty of enforcing laws in the county and, as such, he should take notice of alleged

violations therein." *State ex rel. Finley v. Lodwich*, 137 Ohio St. 329, 331 (1940). Being a party includes the right to appeal, the right to adduce evidence, and the right to "maintain[] an interest in ensuring that the proper sentence is imposed to punish and rehabilitate the offender while protecting the safety of the public". *Heinz*, ¶¶ 2, 17. This Court recently emphasized that prosecutors perform a "unique function" "in representing the interests, and in exercising the sovereign power, of the state." *Disciplinary Counsel v. Bell*, ___ Ohio St.3d ___, 2024-Ohio-876, ¶ 23 (quoting another case). There are plainly weighty and important interests and prerogatives at stake when it is contended that the legislature has decided to nullify already-committed crimes.

Such after-the-fact nullification of crimes implicates the victim's interests as well. A civil cause of action would have arisen for the victim when the defendant criminally used deadly force in violation of a duty to retreat. Moreover, the victim would have a substantive constitutional right to mandatory restitution under Marsy's Law arising from the commission of that crime. And yet, under the logic of the defense argument here, the General Assembly intended to reach back to nullify the victim's already-accrued cause of action and the victim's constitutional right to restitution under Marsy's Law.

With all of these implications, if the General Assembly was seeking to nullify already-completed crimes, the law requires an unmistakable and unambiguous statement of legislative intent in that regard. But there is zero indication of any such legislative intent, and, in fact, under R.C. 1.58(A)(1) through (A)(4), the General Assembly has provided that statutory amendments will *not* reach back in this way.

In the interest of aiding this Court's review herein, OPAA offers the present amicus brief supporting the appellee. Upon such review, this Court should reject the

defendants' propositions of law. The new SYG law does not retroactively apply to pre-effective date crimes, and post-amendment trials are governed by the elements of self-defense that were in effect at the time of those crimes.

STATEMENT OF FACTS

Amicus OPAA adopts by reference the procedural and factual history set forth in the State's brief.

ARGUMENT

> **Amicus Proposition of Law**: The claim of retroactivity as to the "Stand Your Ground" statutory amendments fails for several reasons, including the provisions in R.C. 1.58(A) and the absence of any statutory language clearly proclaiming that the amendments apply to pre-amendment uses of deadly force.

This Court should reject the attempt to apply the new SYG law to uses of deadly force occurring before the April 6, 2021, effective date. The General Assembly did not provide that the new SYG law would apply to pre-effective-date uses of force, and applying the new law to previously-committed acts would amount to an improper retroactive substantive expansion of self-defense as to events that already occurred.

A.

The law existing at the time of the offenses in June 2019 provided a three-part test for the use of deadly force in self-defense. "[T]he following elements must be shown: (1) the slayer was not at fault in creating the situation giving rise to the affray; (2) the slayer has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force;

and (3) the slayer must not have violated any duty to retreat or avoid the danger." *State v. Robbins*, 58 Ohio St.2d 74 (1979), paragraph two of the syllabus. The second prong also included a reasonableness component, requiring that the actor not only have a belief that deadly force was imminent, but also that the belief was a reasonable one. *Marts v. State*, 26 Ohio St. 162 (1875) ("bona fide believes, and has reasonable ground to believe"). "[T]he second element of self-defense is a combined subjective and objective test". *State v. Thomas*, 77 Ohio St.3d 323, 330 (1997).

While not entirely displacing the three-prong test, the General Assembly has stepped in to change aspects of these defenses. Effective September 9, 2008, the General Assembly expanded the operation of the "Castle Doctrine" beyond homes and businesses to include vehicles so as not to require retreat when the person was in the person's own vehicle or in the vehicle of the person's immediate family member. Former R.C. 2901.09(B). This legislation also created a presumption of lawful self-defense or defense of another in certain circumstances involving the use of deadly force to repel an intruder of a residence or vehicle. R.C. 2901.05(B)(2). The defendants here could not claim the benefit of these 2008 statutory changes since the vehicle was not their own vehicle and was not the vehicle of a family member, and there was no presumption of self-defense since the person against whom force was used was not an intruder into the vehicle.

Effective on March 28, 2019, the General Assembly changed the burden of persuasion as to self-defense, defense of another, and defense of a residence. Under this change, those matters remain affirmative defenses, but if the evidence at trial "tends to support" them, then the prosecution has the burden of disproving the applicability of those defenses beyond a reasonable doubt. R.C. 2901.05(B)(1).

B.

Effective April 6, 2021, the General Assembly again addressed the affirmative defenses of self-defense, defense of another, and defense of a residence. Under this new legislation, colloquially referred to as "Stand Your Ground", a person who is lawfully present in a location has no duty to retreat before using deadly force. Even before this change, there would have been no duty to retreat before using non-deadly force in self-defense, see *State v. Brown*, 2017-Ohio-7424, 96 N.E.3d 1128, ¶ 25 (2d Dist.), but the General Assembly's new language does not distinguish between deadly force and non-deadly force in terms of providing that there is no duty to retreat.

The preamble to the legislation indicated the General Assembly's intent "to expand the locations at which a person has no duty to retreat before using force under both civil and criminal law." In regard to criminal law, the bill amended R.C. 2901.09:

> (A) As used in this section, "residence" ~~and "vehicle" have~~has the same ~~meanings~~ meaning as in section 2901.05 of the Revised Code.
>
> (B) For purposes of any section of the Revised Code that sets forth a criminal offense, a person ~~who lawfully is in that person's residence~~ has no duty to retreat before using force in self-defense, defense of another, or defense of that person's residence~~, and a person who lawfully is an occupant of that person's vehicle or who lawfully is an occupant in a vehicle owned by an immediate family member of the person has no duty to retreat before using force in self-defense or defense of another~~ if that person is in a place in which the person lawfully has a right to be.
>
> (C) A trier of fact shall not consider the possibility of retreat as a factor in determining whether or not a person who used force in self-defense, defense of another, or defense of that person's residence reasonably believed that the force was necessary to prevent injury, loss, or risk to life or safety.

As can be seen, before April 6, 2021, paragraph (B) limited its no-duty-to-retreat provision to those lawfully occupying their home or vehicle or the vehicle of an immediate family member. But, as of April 6, 2021, these limitations are removed, and the no-duty-to-retreat provision generally will apply to anyone who is in a place in which the person lawfully has a right to be.

New paragraph (C) pertains to the second half of the second prong of self-defense, which requires that the person acted with a reasonable and honest belief "that his only means of escape from such danger was in the use of such force * * *." *Robbins*, supra. New paragraph (C) applies the no-duty-to-retreat principle to that issue and requires that the question of whether force was reasonably necessary must be assessed without regard to the person's ability to retreat or escape.

In effect, these changes operate to create a new defense to the extent that they allow a person to use deadly force without regard to any duty to retreat on his part when the person otherwise is acting in self-defense, defense of another, or defense of a residence.

C.

On the retroactivity question, the new SYG "no duty to retreat" provisions do not apply to the defendants' acts occurring almost two years before the effective date.

An initial presumption exists under R.C. 1.48 that statutory changes will have only prospective application. *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, ¶ 7. "In order to overcome the presumption that a statute applies prospectively, a statute must 'clearly proclaim' its retroactive application." Id. ¶ 10. "Text that supports a mere

inference of retroactivity is not sufficient to satisfy this standard; we cannot infer retroactivity from suggestive language." Id. "[A]mbiguous language is not sufficient to overcome the presumption of prospective application." Id. ¶ 13. In this instance, there is no provision in the new SYG law making it retroactive.

Additionally, R.C. 1.58(A)(1) to (A)(4) provide in various respects that these statutory changes will not retroactively apply to pre-effective-date conduct. A statutory amendment does not "[a]ffect the prior operation of the statute"; does not "[a]ffect any * * * liability previously acquired, accrued, accorded, or incurred thereunder"; does not "[a]ffect any violation thereof or penalty, forfeiture, or punishment incurred in respect thereto, prior to the amendment or repeal"; and does not "[a]ffect any investigation, proceeding, or remedy in respect of any such privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed or amended." R.C. 1.58(A)(1) to (A)(4).

Under existing statutory law at the time of these offenses, the defendants would be criminally liable for using deadly force in violation of a duty to retreat. The law that existed at the time of the offenses eliminated the duty to retreat only in "Castle Doctrine" situations, i.e., when the person was acting in defense in his home or business or vehicle or his immediate family member's vehicle. The defendants here were not present in any such location, and so their criminal liability for these offenses accrued at that time if they failed to comply with the existing duty to retreat.

Under R.C. 1.58(A)(1), the new SYG amendments to R.C. 2901.09 do not "[a]ffect the prior operation of the statute", under which the defendants could only avoid

having a duty to retreat if they were in a certain "Castle Doctrine" location.

Under R.C. 1.58(A)(2), the new SYG law does not "[a]ffect any * * * liability previously acquired, accrued, accorded, or incurred" under the then-existing Criminal Code, under which the defendants were liable for the use of deadly force if they violated a duty to retreat. It is significant here to note that the SYG amendments were adjusting the scope of criminal liability "[f]or purposes of any section of the Revised Code that sets forth a criminal offense * * *", see R.C. 2901.09(B), and the amendments were expanding what had heretofore been a limited no-duty-to-retreat "Castle Doctrine" concept into a broader no-duty-to-retreat concept related to the person's lawful presence in a location. All told, the SYG amendments were making Criminal-Code-wide changes to criminal liability, but R.C. 1.58(A)(2) also provided that such changes would *not* affect any liability previously accrued or incurred under the prior Criminal Code.

Under R.C. 1.58(A)(4), the new SYG law likewise does not "[a]ffect any investigation, proceeding, or remedy in respect of any such privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding, or remedy *may be* instituted, *continued*, or enforced, and the penalty, forfeiture, or punishment imposed, *as if the statute had not been repealed or amended*." (Emphasis added).

There is zero indication of any legislative intent to apply the new SYG changes to pre-effective-date uses of force, and the already-existing provisions in R.C. 1.58(A)(1) through (A)(4) lead to the rejection of any application of the changes to such offenses. As a codified general saving statute, R.C. 1.58(A) "saves" the prior operation of the criminal law as it existed at the time of the pre-amendment use of force, and, as such, R.C. 1.58(A) is construed to be a part of all new amending and repealing legislation

unless the new legislation specifically provides otherwise. *Summit Beach, Inc. v. Glander*, 153 Ohio St. 147, 151 (1950); *Woodward v. Eberly*, 167 Ohio St. 177 (1958), paragraph one of the syllabus. In this instance, the SYG amendments "reveal[] no intention of the General Assembly that [they] should apply any way other than prospectively, and R. C. 1.58 specifically requires prospective application." *Nokes v. Nokes*, 47 Ohio St.2d 1, 9 (1976).

D.

Any effort to rely on R.C. 1.58(B) should fail. R.C. 1.58(B) provides, as follows:

> If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.

On its face, this provision only applies to amendments or reenactments that pertain to the penalty for an offense and reduce it, thereby allowing the reduced penalty to be applied for the still-existing offense in cases in which the penalty has not yet been imposed. "[T]o determine if R.C. 1.58(B) applies, a court must consider whether (1) the penalty, forfeiture, or punishment has already been imposed, (2) the offense of which the defendant was convicted was the same offense both before and after the adoption of the amendments, and (3) the penalty, forfeiture, or punishment for the offense was reduced by the amendments." *In re Forfeiture of Property of Astin*, 2018-Ohio-1723, 111 N.E.3d 894, ¶ 19 (2d Dist.) (quoting another case).

The amendment must still leave an offense against which a reduced penalty could be imposed. See, e.g., *State v. Limoli*, 140 Ohio St.3d 188, 2014-Ohio-3072, ¶ 11 ("Crack cocaine still exists, and * * * it is still illegal to possess it. There is no reason to

believe that the legislature intended to legalize its possession."). R.C. 1.58(B) does not apply if the statutory change alters the nature of the offense, see *State v. Kaplowitz*, 100 Ohio St.3d 205, 2003-Ohio-5602, syllabus, or if it eliminates criminal liability altogether. *State v. Luqman*, 1st Dist. No. C-110784, 2012-Ohio-5057, ¶ 13 (R.C. 1.58(B) inapplicable when the "behavior is no longer criminalized"). If the elimination of criminal liability qualified as a "reduction" of the "penalty" under R.C. 1.58(B), that provision would swallow up paragraph (A) of the same statute and render paragraph (A) a nullity. *Rodgers v. Commonwealth*, 285 S.W.3d 740, 751-52 (Ky.2009).

The new SYG changes do not address the penalty for an offense and would not leave an offense against which a reduced penalty could be imposed. Instead, they delete one of the elements of the affirmative defense in instances of lawful presence, and they modify the second half of the second prong of self-defense in such instances. The end result of the statutory changes is to create an altered complete defense to an offense, which, if applicable in a particular case, would leave no remaining "offense" against which a "reduced" penalty could be applied. *State v. Williams*, 929 N.W.2d 621, 637 (Iowa 2019) (SYG amendment "did not alter the punishment for murder; at most, it expanded the scope of a potential defense").

E.

The substantive nature of the SYG amendments is significant. These changes were not confined to modifying a mere matter of procedure governing a future trial. Eliminating and modifying the elements of an affirmative defense is substantive because it changes the material elements of the affirmative defense. In addition, the change would necessarily be "retroactive" if applied to prior offenses because doing so would

amount to an attempt to regulate the use of deadly force vis-à-vis entirely-past events, thereby changing the substantive law that regulated the use of such force at the time. Changing the substantive elements of a criminal defense necessarily relates to the date of the alleged crime and would be "retroactive" as applied to prior crimes. See *State v. Luff*, 85 Ohio App.3d 785, 793 (6th Dist. 1993).

Courts of other states addressing similar changes in the standards for self-defense have recognized that the elimination of the duty to retreat is a substantive change that will not be applied to prior acts unless there is a clear indication of legislative intent to that effect. As recognized by the Michigan Court of Appeals in regard to Michigan's "stand your ground" statutory change, "the statute altered the common law of self-defense concerning the duty to retreat. Therefore, even if the SDA perhaps could be characterized as partly remedial, it nevertheless created a new substantive right, i.e., the right to stand one's ground and not retreat before using deadly force in certain circumstances in which a duty to retreat would have existed at common law. Thus, it does not apply retroactively absent an indication that such was the intention of the Legislature in passing the statute." *People v. Conyer*, 281 Mich.App. 526, 530, 762 N.W.2d 198 (2008). By removing the duty to retreat before using deadly force, "Section 2 of the SDA thus constitutes a substantive change to the right of self-defense." Id. Such a change "affects substantive rights and, as such, cannot be classified as a remedial statute." Id.; see, also, *People v. Dupree*, 486 Mich. 693, 708, 788 N.W.2d 399 (2010) ("SDA does not retroactively apply to conduct that occurred before its effective date").

The Florida Supreme Court likewise has held that the elimination of the duty to retreat is substantive and would not be applied to acts occurring before its effective date.

"This legislation clearly constitutes a substantive change in the law, rather than a procedural/remedial change in the law, because it alters the circumstances in which it is considered a criminal act to use deadly force without first needing to retreat." *Smiley v. State*, 966 So.2d 330, 335 (Fla.2007). Just as the elimination of an affirmative defense qualifies as a substantive change in law, the expansion of such a defense equally qualifies as a substantive change: "Whether a statute creates or abrogates an affirmative defense, both statutes significantly change the affirmative defenses available to defendants" and therefore qualify as "a substantive change in the statutory law." Id. at 336.

Other states have reached similar conclusions. *White v. State*, 992 So.2d 783, 785 (Ala.Crim.App.2007) ("clearly substantive, not remedial"); *Williams*, 929 N.W.2d at 637 ("change in substantive law, and it was the legislature's prerogative not to make that change effective until July 1."); *State v. Barber*, 928 N.W.2d 134 (Iowa App.2019) ("substantive in nature, redefining, among other things, 'reasonable force' and 'deadly force.' Since the justification defense, as amended, did not exist in the Iowa Code at the time of the shooting, Barber was not entitled to argue or have the court instruct the jury based upon the amended code."); *Rodgers*, 285 S.W.3d at 751 ("new amendments alter[ing] the circumstances constituting self-defense" "are amendments to the substantive law."); *State v. Mahler*, 157 So.3d 626, 631 (La. App. 2013) (amendment "substantive in nature. As such, the 2006 amendment can only be applied prospectively."); *Blalock v. State*, 452 P.3d 675, 686 (Alaska App.2019) (collecting cases: "other jurisdictions have concluded that similar amendments to their self-defense statutes were substantive changes to the law and that the presumption of prospective application applied in the absence of legislative intent to the contrary.").

An Ohio appellate court similarly recognized that the 2008 amendment expanding the Castle Doctrine to vehicles did not apply to a defendant's 2004 murder offense. "The enactment of R.C. 2901.09(B), an expansion of Ohio's Castle Doctrine by removing a duty to retreat from one's automobile from the affirmative defense of self-defense, has no retroactive application, and there is no indication that the legislature intended the law to apply retroactively." *State v. Yates*, 8th Dist. No. 105427, 2017-Ohio-8321, ¶ 7; see, also, *State v. Johnson*, 8th Dist. No. 92310, 2010-Ohio-145, ¶ 20.

F.

This Court concluded that the 2019 burden shift as to self-defense applies to post-amendment trials of pre-amendment crimes. *State v. Brooks*, 170 Ohio St.3d 1, 2022-Ohio-2478. In the process, this Court indicated that the burden change "applies prospectively" because it merely regulates procedure at a future trial. Id. ¶¶ 14, 15, 19. "The only thing that the amendments to R.C. 2901.05 changed is which party has the burden of proving or disproving a self-defense claim at trial." Id. ¶ 15.

Both defendants here invoke the "procedural" and "prospective" holding of *Brooks* by citing the new language in R.C. 2901.09(C), which bars the "trier of fact" from "consider[ing]" the possibility of retreat as to the issue of defensive necessity under the second half of the second prong of self-defense. Since this language is referring to what a trier of fact would or would not consider at a future trial, the defendants argue that the removal of the duty to retreat is just as much "procedural" and "prospective" as the burden change discussed in *Brooks*.

An initial response here is that such reliance on paragraph (C) is only half an argument. It is paragraph (B) of R.C. 2901.09 that eliminates the duty to retreat

depending on the lawful-presence concept created by that paragraph, and paragraph (B) uses present-tense verbiage. "A statute, employing operative language in the present tense, does not purport to cover past events of a similar nature." *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, ¶ 17 (quoting another case). Moreover, paragraph (C) is limited to addressing whether retreat concepts would play a role in assessing defensive necessity. Paragraph (C) implicates the second half of the second prong, but it does *not* eliminate the third prong's duty-to-retreat concept. Paragraph (C) is not enough by itself to support the defendants' argument that the SYG amendments negated the duty to retreat, and paragraph (C) would not be wrenched out of its context and treated, on its own, as imposing a retroactive elimination of the third substantive element of self-defense. "In reviewing a statute, a court cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting body." *State v. Wilson*, 77 Ohio St.3d 334, 336 (1997). Provisions must be construed together as an interrelated body of law. *State v. Moaning*, 76 Ohio St.3d 126, 128 (1996).

In any event, as *Brooks* itself notes, even so-called "procedural" matters can have "substantive effects". *Brooks*, ¶16. Even if paragraph (C) were judged in isolation, it would still be treated as being substantive in nature here. Under the amending language, the "trier of fact" would be *precluded* from considering the possibility of retreat in assessing necessity under the second half of the second prong. This language substantively modifies the second prong of the defense and is not a mere "procedural" adjustment. As this Court has noted in another context, a provision can be "substantive" even if "packaged in procedural wrapping". *Havel v. Villa St. Joseph*, 131 Ohio St.3d

235, 2012-Ohio-552, ¶¶ 28-29.

Brooks also emphasized that the burden change did not "provide[] nor take[] away any substantive right. That is, even under the former version of R.C. 2901.05, Brooks still had the right to make a self-defense claim." *Brooks*, ¶ 15. The Court thus viewed the ability to claim self-defense as a "right" under substantive law, which must be distinguished from a "procedural" change as to the burden of persuasion. "[L]aws affecting rights, which may be protected by procedure, are substantive in nature." *Brooks*, ¶ 10. In sharp contrast, under the new SYG law, "[t]he change did more than just alter a procedure; it expanded the law, creating a new right – the right to stand one's ground." *State v. Degahson*, 2nd Dist. No. 2021-CA-35, 2022-Ohio-2972, ¶ 19.

Nothing in *Brooks* would support a retroactive substantive change to the material elements of an affirmative defense. *Brooks* even contended that "if the law is substantive, then its retroactive application would be unconstitutional." *Brooks*, ¶ 10. It would be plainly "retroactive" to change the substantive elements governing the claim of an affirmative defense and then to attempt to apply those elements to pre-effective-date uses of deadly force. Notably, a pre-*Brooks* appellate decision saying that the burden shift can be applied to future trials of pre-amendment crimes *also* recognized that changing the elements of the defense and applying them to prior offenses would be a bridge too far. See *State v. Pitts*, 1st Dist. No. C-190418, 2020-Ohio-5494, ¶ 21 (emphasizing that the burden shift "does not create nor dismantle the affirmative defense of defense of another, *nor does it change the elements of proving defense of another*"; emphasis added).

The duty-to-retreat element regulated when deadly force could be used, which is

an act that is necessarily in the past. Eliminating an element in regard to that pre-effective-date use of force would be "retroactive" in all respects, and there would be nothing "prospective" in reaching back to eliminate the then-existing duty to retreat.

Defendant Duncan contends that paragraph (C) would become mere redundant surplusage if not applied in every trial following the effective date. But there is no redundancy. Paragraph (B) addresses the third prong of the self-defense test and removes the duty to retreat in places where the person using force is lawfully present. Paragraph (C) addresses the second half of the second prong of the test, precluding the prosecutor, court, and jury from importing retreat concepts into an assessment of defensive necessity under that aspect of the second prong. Creating overlapping provisions is "'not the same as surplusage'", see *City of Athens v. McClain*, 163 Ohio St.3d 61, 2020-Ohio-5146, ¶ 36, and the legislature is allowed to use a "belt and suspenders" approach through multiple provisions related to the same statutory purpose. *Atlantic Richfield Co. v. Christian*, 140 S.Ct. 1335, 1350 n 5 (2020). Paragraph (C) would not be "redundant" – it addresses the second prong, and paragraph (B) addresses the third prong.

In any event, this claim of surplusage or redundancy still would not answer the question of whether these new SYG provisions were clearly meant to apply to prior crimes. See *Consilio*, ¶¶ 21-24. If anything, the adoption of these provisions in the same legislation signals that they will operate in tandem in the same case(s), and that legislative purpose is accomplished by applying the new SYG law only to conduct occurring on or after the effective date. To be sure, paragraph (C) uses past-tense verbiage in referring to what the trier of fact cannot consider. R.C. 2901.09(C) ("person

who used force"; "reasonably believed"; "was necessary"). But this looking-to-the-past perspective is hardly surprising when discussing the trier of fact's considerations. Such past-tense verbiage merely reflects a basic fact of life, i.e., that any and all triers of fact will be making their determinations *after* the conduct using force has occurred. No one has a trial *while* the affray is occurring – the trial occurs later. This recognition that judges and jury decide things after the fact readily applies to uses of force that occur after the effective date of the SYG amendments. Such language does not, however, clearly proclaim a legislative intent to reach back even further to apply the new law to uses of force occurring even before the effective date. See *Hyle*, ¶¶ 13-21.

Finally, the defendants' reliance on the past-tense verbiage of paragraph (C) runs into insurmountable obstacles in R.C. 1.58(A)(1) through (A)(4), which negate any application of the SYG amendments to pre-effective-date uses of force, regardless of when the trial is held. The defendants notably fail to address the controlling provisions in R.C. 1.58(A)(1) through (A)(4).

G.

The defendants argue that, even if "retroactive", the retroactivity here would be a *permissible* retroactivity as a matter of constitutional law. According to this argument, the SYG amendments could create a new substantive right and, because there is no reciprocal burden or detriment owing to that change, the Ohio Constitution would allow such a retroactive change. The defendants rely, inter alia, on *Bielat v. Bielat*, 87 Ohio St.3d 350 (2000), as requiring this reciprocal connection.

Again, this argument initially fails because there is no clearly-proclaimed legislative intent to apply the SYG amendments to prior uses of deadly force, and R.C.

1.58(A)(1) through (A)(4) positively negate such notions of retroactivity anyway. Because the matter is resolved through statutory analysis, there is no need to reach the constitutional question. See *Hyle*, ¶ 9 ("We do not address the question of constitutional retroactivity unless and until we determine that the General Assembly expressly made the statute retroactive.").

Even so, the defendants' constitutional argument does not account for the fact that there *would* be identifiable detriments connected to retroactively expanding self-defense. In regard to pre-effective-date uses of deadly force, the victim or victim's estate would have had a civil cause of action for the criminal use of such force in violation of a then-existing duty to retreat. See R.C. 2307.60(A)(1). And while the General Assembly adopted identical SYG language in R.C. 2307.601(B) and (C) to address questions of civil liability, it is again significant that the General Assembly did not clearly proclaim a legislative intent to have the SYG amendments retroactively negate such already-accrued causes of action. Under the defense theory, however, the General Assembly was setting out to take away a victim-plaintiff's cause of action that had already accrued, which would be a clearly unconstitutional "retroactive" change in the substantive law if applied to impair the victim's otherwise-existing and already-accrued cause of action.

Since statutes are construed, if possible, to avoid constitutional problems, see *Desenco v. Akron*, 84 Ohio St.3d 535, 538 (1999), courts would interpret R.C. 2307.601(B) and (C) in a manner that shies away from retroactively negating the victim's already-accrued civil cause of action. Since the language in R.C. 2307.601(C) is identical to the language in R.C. 2901.09(C), the same reticence would apply to the interpretation of the same language in R.C. 2901.09(C).

Criminal courts would face the same problem if the language in R.C. 2901.09(C) were treated as retroactively negating the defendant's criminal liability and thereby retroactively negating the victim's substantive mandatory right to restitution under Marsy's Law. See Article I, Section 10a(A)(7), Ohio Constitution.

In short, there *are* reciprocal harms to victims or the victim's estate if the language in R.C. 2901.09(C) and R.C. 2307.601(C) is treated as retroactively negating the retreat concepts that applied to uses of deadly force at the time of the defendant's act.

The sovereign's right to enforce criminal law also would be reciprocally and substantively impaired by the retroactive creation of an expanded right to use self-defense as to already-past events in which the defendant violated a duty to retreat that was extant at the time of the offense. R.C. 2901.11(A)(1) provides that "[a] person is subject to criminal prosecution and punishment in this state if any of the following occur: (1) The person commits an offense under the laws of this state, any element of which takes place in this state." As already discussed, the prosecutor exercises the State's sovereign power and right to prosecute such offenses. See *Bell*, ¶ 23; *Heinz*, supra. Especially in light of R.C. 1.58(A)(1) through (A)(4), the sovereign's right to prosecute prior crimes would continue here.

To the extent such a retroactive change would impair the sovereign's power and right to pursue prosecution and punishment, there is case law recognizing that the General Assembly can "waive" the sovereign's interests on a retroactive basis. See *Toledo City School Dist. Bd. of Edn. v. State Bd. of Edn. of Ohio*, 146 Ohio St.3d 356, 2016-Ohio-2806, ¶¶ 36-37; *Johnston v. State*, 144 Ohio St.3d 311, 2015-Ohio-4437, ¶ 22 (substantive change can be applied retroactively if it "impairs only the rights of the

state"); *State v. Morris,* 55 Ohio St.2d 101, 113 (1978) (State can retroactively "divest" itself of its vested rights and "waive" them). But, as already indicated, more than just the sovereign's interests are at stake here, given the victim's already-accrued constitutional and pecuniary claims for relief based on a defendant's use of deadly force in violation of then-existing criminal laws and then-existing elements of self-defense imposing a duty to retreat.

Even when just the sovereign's interests are involved, those interests remain significant interests that should weigh heavily against any "interpretation" of a statutory provision as retroactively modifying or eliminating a defendant's criminal liability for crimes that already occurred. "While a statute which impairs only the rights of the state *may* constitutionally be given retroactive effect, such effect will not be given in the absence of a clear expression of legislative intention for retroactivity * * *." *State ex rel. Sweeney v. Donahue,* 12 Ohio St.2d 84, 87 (1967) (emphasis sic; citations omitted); *Johnston*, ¶ 22 (quoting *Sweeney*).

The SYG amendments fall far short of clearly expressing a legislative intent to modify, limit, or eliminate the State's sovereign right to prosecute use-of-deadly-force crimes that were committed in violation of the then-existing duty to retreat. There is no clear retroactivity language, and the General Assembly left undisturbed the language in R.C. 1.58(A)(1) through (A)(4), all of which signals a legislative intent to *allow* prior crimes to be prosecuted in on-going and future proceedings under the substantive law that existed at the time of the offense.

H.

There was no constitutional requirement that the General Assembly apply the new

SYG law retroactively to entirely-past uses of deadly force. "The 14th Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time." *State ex rel. Lemmon v. Ohio Adult Parole Auth.*, 78 Ohio St.3d 186, 188 (1997), quoting *Sperry & Hutchinson Co. v. Rhodes*, 220 U.S. 502, 505 (1911); *Califano v. Webster*, 430 U.S. 313, 320-21 (1977); see, also, *Messenger v. McQuiggin*, 2010 U.S. Dist. LEXIS 69871, at *14, adopted, 2010 U.S. Dist. LEXIS 69864, at *1 (E.D. Mich. 2010) (non-retroactivity of self-defense change does not raise federal constitutional claim).

I.

The defendant in *Miree* invokes this Court's recent decision in *State v. Palmer*, ___ Ohio St.3d ___, 2024-Ohio-539, as being dispositive. *Palmer* addressed the standard for giving instructions on self-defense and determined that there was sufficient evidence to instruct on self-defense in that case. In the process, the *Palmer* majority referred to R.C. 2901.09(B) and its current provision indicating that there is no duty to retreat when the person using force is in a location in which he is lawfully present. *Palmer*, ¶ 23. But the parties had not briefed the issue of SYG retroactivity, and the retroactivity issue was insignificant because, even at the time of the offense, the defendant in *Palmer* had no duty to retreat under former R.C. 2901.09(B) because he was a cab driver seated in his own vehicle when he used deadly force.

Under these circumstances, the reference in *Palmer* to the current version of R.C. 2901.09(B) is not precedential. At best, it would have been dicta to decide the issue of SYG retroactivity in a case in which the defendant had no duty to retreat under the prior version of R.C. 2901.09(B) anyway.

In any event, a decision does not constitute firm precedent on a particular issue unless it "squarely addresses" that issue. See *Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993); *Hauser v. Dayton Police Dept.*, 140 Ohio St.3d 268, 2014-Ohio-3636, ¶ 17 (plurality – "because *Genaro* did not squarely address the immunity question at issue here, it is not binding authority").

This Court has specifically rejected the concept of "implicit" precedent. *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225, ¶ 31. Mere implicit assumptions are not binding precedent. *Toledo City School Dist.*, ¶ 39. The "perceived implications" of an earlier decision are not precedential when the decision in question did not "definitively resolve" the issue that is now directly presented in a later case. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶¶ 10-12; *State ex rel. Gordon v. Rhodes*, 158 Ohio St. 129 (1952), paragraph one of the syllabus. "A reported decision, although in a case where the question might have been raised, is entitled to no consideration whatever as settling, by judicial determination, a question not passed upon at the time of the adjudication." *B.F. Goodrich v. Peck*, 161 Ohio St. 202 (1954), paragraph four of the syllabus. Indeed, even when language in an earlier decision seems to expressly address a particular legal point, such language will not be considered controlling if the earlier decision "never addressed the discrete issue presented here * * *." *In re Bruce S.*, 134 Ohio St.3d 477, 2012-Ohio-5696, ¶ 6.

Palmer did not definitively resolve the discrete issue of SYG retroactivity, and, as a result, it provides no precedent on the issue of SYG retroactivity that is now before the Court in *Duncan* and *Miree*.

Insofar as what was actually decided in *Palmer*, there were some problematic

statements in *Palmer* regarding the standard for giving an instruction on self-defense. While the present appeals do not involve that issue, those problematic statements would warrant reexamination in future case(s).

In the problematic statements, the *Palmer* majority inexplicably seemed to place the burden of persuasion on the defendant. In paragraph 21 of *Palmer*, the majority stated that "[t]he question is not whether the evidence should be believed but whether the evidence, *if believed*, could convince a trier of fact, beyond a reasonable doubt, that the defendant was acting in self-defense." (Emphasis sic) In paragraph 31, the majority stated that "it is the trial court's duty to decide whether the defendant presented *adequate* evidence to support the elements of self-defense – that is, evidence that *if believed*, could convince a trier of fact, beyond a reasonable doubt, that the defendant was acting in self-defense." (Emphasis sic)

It is understandable that the burden of persuasion would play some role in assessing whether the evidence is sufficient to support the giving of an instruction. The test on giving a requested instruction is whether reasonable minds might reach the conclusion sought by the instruction. *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, ¶ 240, citing *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 591 (1991). The concept of "reaching the conclusion sought by the instruction" would include a consideration of the burden of persuasion that pertains to the issue.

In the quoted sentences from paragraphs 21 and 31, however, the *Palmer* majority turned the burden of persuasion upside down on the issue of self-defense. It is simply inapposite to import a beyond-reasonable-doubt burden into the question of whether the defense has produced sufficient evidence to support the giving of the instruction. The

defense would *never* have a burden to convince the trier of fact of self-defense beyond a reasonable doubt. To be sure, the *Palmer* majority opinion elsewhere acknowledged that the statutory burden is ultimately on the State to demonstrate beyond a reasonable doubt that the defendant did not act in self-defense. *Palmer*, ¶ 17. The opinion also characterized the defendant's burden of production as "de minimis" and "not a heavy one". Id. ¶¶ 1, 20.

In light of the overall opinion, the references to the defendant's burden of production as having a beyond-reasonable-doubt component should not be viewed as controlling, and readers should be extremely wary of relying on the beyond-reasonable-doubt language in these particular sentences in paragraphs 21 and 31. The defendant's burden of production does *not* include a beyond-reasonable-doubt component.

In terms of the correct standard for giving a self-defense instruction, the majority opinion was correct in requiring sufficient evidence on each applicable element of self-defense. *Palmer*, ¶ 19. "[I]f the defendant's evidence and any reasonable inferences about that evidence would allow a rational trier of fact to find all the elements of a self-defense claim when viewed in the light most favorable to the defendant, then the defendant has satisfied the burden [of production]." *State v. Messenger*, 171 Ohio St.3d 227, 2022-Ohio-4562, ¶ 25. Under the "tends to support" standard in R.C. 2901.05(B)(1), "the defendant has the burden of producing legally sufficient evidence of self-defense to trigger the state's duty to overcome that evidence." *Messenger*, ¶¶ 19, 22. The *Palmer* dissent accurately sets forth the proper standard for assessing what constitutes sufficient evidence on all of the elements of self-defense so as to support instructing on that

defense. *Palmer*, ¶ 36 (DeWine, J., dissenting), quoting *State v. Melchior*, 56 Ohio St.2d 15, 20 (1978).

It is hoped that the confusing and problematic statements from paragraphs 21 and 31 of the *Palmer* decision will be corrected in due course.

CONCLUSION

For the foregoing reasons, amicus curiae OPAA respectfully urges that this Court affirm the judgments of the Eighth District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was e-mailed on May 6, 2024, to the following counsel of record: Russell Bensing, 1360 East Ninth Street, Suite 600 Cleveland, Ohio 44114, rbensing@ameritech.net, counsel for defendant Duncan; Timothy F. Sweeney, Law Office of Timothy F. Sweeney, The 820 Building, Suite 430, 820 West Superior Ave., Cleveland, Ohio 44113, tim@timsweeneylaw.com, counsel for defendant Miree; Daniel Van, Assistant Prosecuting Attorney, The Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, dvan@prosecutor.cuyahogacounty.us, counsel for State of Ohio.

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