IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF OHIO
CUYAHOGA COUNTY

CASE NO. 103081

STATE OF OHIO	**)**	
Plaintiff-Appellant	**)**	
-vs-	**)**	**STATE OF OHIO'S MOTION FOR LEAVE TO APPEAL PURSUANT TO *BISTRICKY***
MICHAEL BRELO	**)**	
Defendant-Appellee	**)**	

Now comes Cuyahoga County Prosecutor Timothy J. McGinty and his undersigned assistants respectfully requesting leave to appeal pursuant to App. R. 5(C)[1], R.C. §2505.02, R.C. §2945.67(A), and *State v. Bistricky,* 51 Ohio St.3d 157, 555 N.E.2d 644 (1990) from Judge John P. O'Donnell's judgment entry journalized May 23, 2015, finding Defendant-Appellee Michael Brelo not guilty on two counts of Voluntary Manslaughter because there are substantive issues of law in error in the verdict.

Such errors are so egregious this Court must grant leave and accept the appeal in order to correct the errors of law so that these errors do not contaminate future rulings in the trial court and the entire Court of Common Pleas as these errors contradict binding precedent from the Ohio Supreme Court and act to defeat the pursuit of justice in this County. For these reasons, the State

[1] Given that the support in the record relied upon by the State in this motion is voluminous, the State only attaches the trial court's judgment entry and opinion of the verdict to electronically filed motion for leave. Contemporaneously to this filing, the State has filed a paper version of its appendix with the Clerk of Court for the Eight District Court of Appeals. The State's appendix has been served to the parties accordingly.

of Ohio respectfully seeks leave to appeal from the trial court's judgment entry following a bench trial, journalized May 23, 2015.

INTRODUCTION

At trial, Appellee, Cleveland Police Officer Michael Brelo, was charged with two counts of Voluntary Manslaughter of Timothy Russell and Malissa Williams. The charges stem from his actions in the now infamous Cleveland Police Chase of November 29, 2012 in which 62 police cars and more than 100 police officers and chased Russell more than 20 minutes and 20 miles through the streets of Cleveland and East Cleveland, ending with 137 shots fired at Russell and his passenger Williams. They were shot 47 times, with the final 15 shots being fired by Brelo after he climbed on the hood of Russell's dilapidated 1979 Chevy Malibu. Brelo fired three magazines and reloaded his weapon the second time from the hood of Russell's car before bending over, gripping his gun with two hands, and firing at the unarmed Russell and Williams from point-blank range.

In its verdict, the trial court erred in three main areas of law. First, it changed the law of causation in criminal cases where there are multiple actors each resulting in the death of another; it changed the law and standard of determining whether a police officer's use of force was justified; and it changed the analysis a court or jury is to apply when considering lesser offenses of the charges. These changes to Ohio law in the trial court's verdict are capable of repetition and will impact the administration of justice in future cases, as acknowledged by the trial court in its verdict. And, this Court must return the case with the corrections of law to the trial court with instructions to deliberate and reach a verdict with the correct application of the law of causation, and if necessary, a correct determination of the legally permissible lesser offenses of Voluntary Manslaughter—Attempted Voluntary Manslaughter or Aggravated Assault.

The trial court journalized a written Verdict in which it made definitive, but erroneous statements of law. The State cannot and does not contest the entry of acquittal on the charges of Voluntary Manslaughter, nor does it challenge the findings of fact made by the trial court in this motion for leave to appeal. Rather, the State seeks leave to correct the errant pronouncements of law by the trial court where these statements have been journalized in this case which received national attention, where the legal conclusions of law have been widely reported. Because of this, the incorrect law pronounced by the trial court in multiple-actor causation cases and the justification defense in excessive use of force cases will have a detrimental effect on the operation of the courts and will impair the administration of justice in the future. This is especially so in cases where police officers may be subject to prosecution for excessive use of force. Further, it must be shown that the Court deliberated on the *wrong* lesser offense; Felonious Assault is not a lesser offense of Voluntary Manslaughter.

As to the specific errors of law, and throughout the verdict, the trial court ignored binding precedent and chose to employ a novel and unique statement on the law of causation. This error must be corrected as the trial court's statement of law - that the State must prove only one actor, here Brelo, was the sole cause of death - is egregious. If allowed to stand, forever before the trial court, the State will be precluded from holding any defendants who each independently act to cause the death of another from any criminal liability.

Further, the trial court's error in changing causation law is readily apparent on the face of the verdict. In its desperate search for a case that could be stretched to support his unique and imaginative theory[2] that the State has to prove which of Brelo's bullets actually killed the unarmed

[2] And, a theory of law which would create a poor policy of encouraging overkill by criminals who could cite the verdict after a Bonnie and Clyde style killing and demand to walk out of jail free as a bird. The Courts should not create such a rule that could create disastrous consequences.

victims when they were shot 47 times, the trial court sought refuge and support in a heroin overdose case in which the deceased victim had consumed five different kinds of drugs prior to his death, and no expert could say that the heroin sold to him by the defendant would have caused the death of the victim alone.

To illustrate the error in the verdict, the trial court found that this case involves at least fifteen downward, point-blank shots fired by Brelo that are definitely not the "non-dispositive home run[s]" in a 5-2 baseball ball game. *Verdict*, at fn. 63, citing *United States v. Burrage*, ____ U.S. ____ , 134 S. Ct. 881, 888, 187 L. Ed. 2d 715, 723-24 (2014). The Heritage Middle School playground and Parking lot in East Cleveland was not an afternoon event of America's national pastime, a baseball game. Instead it was an unprecedented attack by a sworn police officer abandoning any civilian police training and engaging in military tactics which encourage killing as many enemy combatants as possible. It was anything but the required de-escalation and minimal killing of civilians by civilian police officers as expected in this nation. Never in the history of American policing has a police officer left cover to attack a stopped, trapped, and incapacitated car, by jumping on to the hood, reloading his weapon, and firing fifteen more shots downward into the unarmed occupants' chests at point blank range and then have it declined "reasonable" by a count of law.

The second errant statement of law in the verdict involves the trial court's statement of law of justification by peace officers who face criminal charges for the use of force against this State's citizens. That police must use reasonable force in employing their sworn duties to protect or serve is not at issue in this appeal. But the constitutional law that provides the parameters as to when an officer's use of force becomes criminal has been well defined. The trial court's verdict now

provides that valid limits placed by courts on the use of deadly force and the manner in which that force is employed are no longer applicable to police officers in Cuyahoga County.

In short, the law as stated in the verdict places no restraint on the tactics civilian police officers are to use, finding the use of any tactics to be justifiable so long as the officer perceives a subjective fear of his or her life. Such statement of the law must be corrected. The United States Constitution does not provide cover for those officers who abandon all cover and place themselves and other officers in danger, using deadly force not as a last resort but, like Brelo did, in a manner inconsistent with reason, inconsistent with training, and inconsistent with established federal law.

The trial court's verdict sets forth errant statements of law in the analysis by a trier-of-fact when considering lesser included and inferior offenses. In the verdict, the trial court did not consider the first lesser included offense of Attempt, and it erred by finding that Felonious Assault is a lesser included offense of Voluntary Manslaughter. This finding will lead in the future to unconstitutional convictions by juries or jurists who would adopt the theories of law underpinning the verdict.

This error also reveals the flaws of a defendant's alleged constitutional "right to a jury waiver"[3] in Ohio and the manifest injustice that can result from a bench trial. Moreover, the case relied upon by the trial court, *Burrage*, *supra*, was never cited by either party, or the trial court, in any proceeding or motion practice during pendency of this case. If the case was mentioned and addressed by the parties and the trial court before it issued its verdict, then State could have prevented the trial judge's misinterpretation and misunderstanding and prevented its subsequent error of law. And, since the trial court did not let anyone know its intention to consider Felonious

[3] A criminal defendant has a constitutional right to a trial by jury, not a constitutional right to deprive the equal party in the lawsuit, the party that represents the people, an equal say.

Assault as a lesser included of Voluntary Manslaughter no one could correct this additional error by the trial judge[4]. If the verdict had been different and Brelo was convicted of the newly categorized "lesser" offense of Felonious Assault, then the conviction would surely be reversed on appeal due to the trial court's obvious mistake.

Given these legal mistakes, the trial court should be mandated to correct and reissue the verdict in consideration of the correct law of causation and lesser offenses. This is part of the expectation of the jury waiver. If this case were determined by a jury, we would know the charge and could correct it in a timely matter before the need to appeal. For these reasons, leave must be given the State to appeal the following issues and the law corrected by this Court before the highly publicized verdict creates precedent in the minds of the citizens of Cuyahoga County and its errant legal statements become precedent in the Court of Common Pleas:

- The Verdict must be corrected where it changed the law of causation. The trial court's verdict requires acquittal in cases where multiple shots are fired because, as the trial court stated, it must prove a sole cause of death. No court in Ohio has employed this law of causation to cases in which multiple actors each cause death.

- The Verdict changed the law as to the affirmative defense of justification where police use of force is at issue. In future cases, the trial court will not consider evidence that a police officer who recklessly puts himself in harm's way, violates police training and tactics, and unnecessarily kills unarmed citizens in the circumstances is committing a violation of the Fourth Amendment. Because the verdict does not recognize and contradicts established law, police who use dangerous tactics – illegal in other jurisdictions in Ohio - will not be held criminally liable in Cuyahoga County[5].

[4] The State in multiple briefs fully informed the trial court that Attempted Voluntary Manslaughter and Aggravated Assault are the correct lesser offenses to Voluntary Manslaughter. See, *State's Notice of Proposed Jury Instructions*, docketed at 3/11/2015 and *State's Supplemental Trial Brief*, docketed at 5/1/2015. Additionally, the neither defense counsel nor the trial court (until its verdict) ever contested that Attempted Voluntary Manslaughter and Aggravated Assault were lesser offenses. (i.e. failure to have a turn signal on E. 18th Street)

[5] The "comply or die" mentality of the police can take hold in chases, as the police make claims that a car's occupants are dangerous because they are fleeing and will not stop. This escalates the

- The Verdict changed the law in which a jury or jurist is to consider lesser included offenses. Now, a jury in this trial court will be instructed in the future on offenses that are not lesser included or inferior offenses, and no longer will the court consider the lesser included offense of Attempt in its instructions to a jury or when sitting as the finder of fact.

THIS COURT HAS JURISDICTION AND SHOULD GRANT LEAVE TO CORRECT ERROR IN THE LAW

R.C. 2945.67(A) states that "[a] prosecuting attorney . . . may appeal by leave of the court to which the appeal is taken any other decision, except the final verdict, of the trial court in a criminal case." Pursuant to R.C. 2945.67(A) the Supreme Court of Ohio has held that "a court of appeals has discretionary authority . . . to decide whether to review substantive law rulings made in a criminal case which results in a judgment of acquittal so long as the verdict itself is not appealed." *State v. Bistricky*, 51 Ohio St.3d 157, 159, 555 N.E.2d 644 (1990.)

The Supreme Court of Ohio has reasoned that since the doctrine of "double jeopardy" precludes a retrial of acquitted defendants, ordinarily it would render any appeal to the appellate court moot, therefore leaving substantive legal issues at the trial level capable of evading any appellate review. Therefore, the Supreme Court of Ohio set forth the standard that "there will be no appellate review unless the underlying legal question is capable of repetition yet evading review." *Id.* at 158 (Emphasis added) citing *Storer v. Brown*, 415 U.S. 724, 94 S.Ct 1274 (1974) and *In re Protest Filed by Citizens for the Merit Selection of Judges, Inc.*, 49 Ohio St.3d 102, 551 N.E.2d 150 (1990.)

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chase, causing police and the subject vehicle to reach dangerous speeds allowing officers to subjectively perceive a fear for their lives. This subjective fear will be used justify the eventual deaths of the fleeing subjects—even of the passengers who are in essence the trapped and innocent, kidnap victims of the driver, powerless to stop the panicked driver fleeing what would otherwise be a minor traffic offense.

The Supreme Court of Ohio held that a *Bistricky* appeal is not merely an advisory opinion, "[o]rdinarily when there is no case in controversy or any ruling by an appellate court that result in an advisory opinion, there will be no appellate review *unless* the underlying legal question in capable of repetition yet evading review." (Emphasis added.) *Bistricky* at 158. This is exactly the type of review the State is seeking. As explained in this brief, each of the substantive legal rulings the State is asking this Honorable Court to review are issues that are "capable of repetition yet evading review," and falls within the Court's jurisdiction[6].

In this case, the Verdict issued has been widely circulated and highly publicized. Because of this, error in the verdict carries a greater risk of being relied upon by the trial court and throughout the Common Pleas Court. Further, the issues involved in this case are not sui generis or incapable of repetition – they are salient and, as recognized within the verdict, are not singular, as there are other publicized cases where police may be investigated for the use of excessive force. The verdict itself recognized the rash of national news stories involving a police officer's use of force which have resulted in the death of unarmed citizens. *See, Judge's Opinion*, at pg. 1. These incidents include the recent police shootings that have occurred in Ferguson, Missouri and North Charleston, South Carolina, as well as the deaths of unarmed citizens at the hands of police in New York City and Baltimore, Maryland. The trial court specifically noted the recent police shooting

[6] This Court consistently rejects arguments include in motions to dismiss the State's *Bistricky* appeals based upon the notion that an opinion by this Court will not be viable because any decision would merely constitute an "advisory" opinion and that an appeal under *Bistricky* would not otherwise fall under the appellate court's power to, "review and affirm, modify, or reverse judgments or final orders of the courts of records inferior to the court of appeals within the district…" under Ohio Constitution, Article IV, Section 3(B)(2), when the substantive legal issues are capable of repletion yet evading review. See, *State v. Knox,* 8th Dist. Cuyahoga No. 98027, 2012-Ohio-3821 (denying motion to dismiss on March 22, 2012, Vol. 749, Pg. 969 and issuing decision), *State v. Vertock,* 8th Dist. Cuyahoga No. 97888, 2012-Ohio-4283, *State v. United,* 8th Dist. Cuyahoga No. 100880, 2014-Ohio-3920 (rendering decision pursuant to *Bistricky*).

in Cleveland, Ohio, where a 12-year-old boy was shot and killed by a police officer. Because of this, this Court should grant leave to correct error in the law as written in the verdict and to ensure that justice is applied equally throughout the Common Pleas Court.

OHIO CAUSATION LAW DOES NOT REQUIRE THE STATE TO PROVE THE IMPOSSIBLE TO HOLD CRIMINAL ACTORS LIABLE

Ohio law does not require the State to prove a sole cause of death where multiple actors each inflict mortal wounds. As such, the trial court misapplied Justice Scalia's legal analysis from *U.S. v. Burrage*, 134 S. Ct. 881 (2014) in finding Appellee not guilty of Voluntary Manslaughter. The trial court stated within the verdict that, "despite not being convinced of which shot it was, I have found beyond a reasonable doubt that Brelo fired a shot that by itself would have caused Russell's death. But proof of voluntary manslaughter requires a finding, beyond a reasonable doubt, either that his shot alone actually caused the death or was the straw that broke the camel's back." *Verdict*, at 20.

The court further explains in its verdict that, "Brelo's deadly shot would have caused the cessation of life if none of the other three were fired, but they were and that fact precludes finding beyond a reasonable doubt that Russell would have lived "but for" Brelo's single lethal shot." *Id.*, at 20-21. The court relies on the same logic in analyzing the death of Williams. As to Malissa Williams, the verdict concludes that, "Brelo caused at least one fatal wound to William's chest." *Id.* at 25. Under Ohio and federal causation law, the finding that "a" shot fired by Michael Brelo beyond a reasonable doubt caused the deaths of Timothy Russell and Malissa Williams should have resulted in Brelo being found to have committed Voluntary Manslaughter on both counts. However, errant application of law precluded such result and will preclude other just results in the future.

In the verdict, an erroneous causation analysis was applied as the trial court relied only on one part of Justice Scalia's opinion in *Burrage*—the theory of proximate 'but for' causation. It was as if the trial court stopped reading *Burrage* once it found the causation language that supported its newly minted rule. If the trial court kept reading, the court would have read the part of Scalia's opinion discussing multiple actor causation, which could be found in paragraphs of the opinion immediately following the 'but for' causation discussion.

In *Burrage*, the defendant sold heroin to the victim. The victim used the heroin in combination with other drugs and died the following day. During trial, expert witnesses testified that it was impossible to determine if the decedent died from the heroin use alone.

> Dr. Eugene Schwilke, a forensic toxicologist, determined that multiple drugs were present in Banka's system at the time of his death, including heroin metabolites, codeine, alprazolam, clonazepam metabolites, and oxycodone…Dr. Schwilke could not say whether Banka would have lived had he not taken the heroin. Dr. Schwilke nonetheless concluded that heroin "was a contributing factor" in Banka's death, since it interacted with the other drugs to cause "respiratory or central nervous system depression." The heroin, in other words, contributed on an overall effect that caused Banka to stop breathing.

Id. at 885.

Based upon the flawed application of the 'but for' proximate causation analysis in *Burrage*, in this case, the court required the State to prove that Brelo fired "the" first fatal shot rather than "a" fatal shot within the group of fatal shots. The flaw in application of the 'but for' causation for proximate cause heroin overdose involuntary manslaughter cases standard from *Burrage*, is that now, an additional burden requires the State to prove which of Brelo's shots *alone* caused the cessation of life. This is egregious because the trial court ignored the United States Supreme Court's explicit statement in *Burrage* that cases like Brelo's are the exception to 'but for' causation.

In criminal cases that involve multiple actors capable of being a contributing or substantial factor in the death of a victim, Justice Scalia wrote that:

> "the undoubted reality [is] that courts have not *always* required strict but-for causality, even where criminal liability is at issue. The most common (though still rare) instance of this occurs when multiple sufficient causes independently, but concurrently, produce a result. See *Nassar*, *supra*, at ___ 133 S. Ct. 2517, 186 L. Ed. 2d 503 at 513; see also LaFave 467 (describing these cases as "unusual" and "numerically in the minority"). To illustrate, if "A stabs B, inflicting a fatal wound; while at the same moment X, acting independently, shoots B in the head . . . also inflicting [a fatal] wound; and B dies from the combined effects of the two wounds," A will generally be liable for homicide even though his conduct was not a but-for cause of B's death (since B would have died from X's actions in any event). *Id*., at 468 (italics omitted). We need not accept or reject the special rule developed for these cases, since there was no evidence here that Banka's heroin use was an independently sufficient cause of his death. No expert was prepared to say that Banka would have died from the heroin use alone."
>
> Thus, the Government must appeal to a second, less demanding (but also less well established) line of authority, under which an act or omission is considered a cause-in-fact if it was a "substantial" or "contributing" factor in producing a given result. Several state courts have adopted such a rule, see *State* v. *Christman*, 160 Wash. App. 741, 745, 249 P. 3d 680, 687 (2011); *People* v. *Jennings*, 50 Cal. 4th 616, 643, 114 Cal. Rptr. 3d 133, 237 P. 3d 474, 496 (2010); *People* v. *Bailey*, 451 Mich. 657, 676-678, 549 N. W. 2d 325, 334-336 (1996); *Commonwealth* v. *Osachuk*, 43 Mass. App. 71, 72-73, 681 N. E. 2d 292, 294 (1997), but the American Law Institute declined to do so in its Model Penal Code, see ALI, 39th Annual Meeting Proceedings 135-141 (1962); see also Model Penal Code §2.03(1)(a). One prominent authority on tort law asserts that "a broader rule . . . has found general acceptance: The defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts §41, p. 267 (5th ed. 1984) (footnote omitted). But the authors of that treatise acknowledge that, even in the tort context, "[e]xcept in the classes of cases indicated" (an apparent reference to the situation where each of two causes is independently effective) "no case has been found where the defendant's act could be called a substantial factor when the event would have occurred without it." *Id.,* at 268. The authors go on to offer an alternative rule — functionally identical to the one the Government argues here— that "[w]hen the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event." *Ibid.* Yet, as of 1984, "no judicial opinion ha[d] approved th[at] formulation." [891] *Ibid.*, n. 40. The "death results" enhancement became law just two years later.

Burrage, at 890-91.

During Brelo's trial, all the medical experts, including the defense experts, concluded that Brelo fired fatal shots that alone would have caused the deaths of Russell and Williams, even though other fatal, pre-mortem wounds sustained from at least one other Cleveland Police shooter existed and were present in the victims. Although the trial court decided to overrule the pathologists' opinions, the trial court did eventually state that Brelo did in fact fire fatal shots into both Russell and Williams. Thus, Brelo's case is different from *Burrage* given the multiple actors involved.

Consequently, the State provided evidence, and the trial court so found, that a shot attributed to Brelo would have caused the deaths of Russell and Williams beyond a reasonable doubt. See, *Verdict*, at 20, 25. With that finding, the court could have found Brelo guilty of the two counts of Voluntary Manslaughter as Ohio law only requires the State to prove that one of Brelo's shots was a substantial factor in the death. See *State v. Banks*, 8th Dist. Cuyahoga No. 76271, 2000 Ohio App. LEXIS 2630 at *20 (June 15, 2000), quoting *State v. Beaver*, 119 Ohio App. 3d 385, 695 N.E.2d 332 (1997) (emphasis added).

In contrast to the verdict, Ohio law is clear. A defendant does not escape his own criminal actions because of concurrent action of another. And that law was changed within the verdict. Under that Voluntary Manslaughter charge, the State was required to show that Brelo's actions caused Timothy and Malissa to die.

> Cause is an act or failure to act which in the natural and continuous sequence directly produces the physical harm and without which it would not have occurred. Cause occurs when the physical harm is the natural and foreseeable result of the act or failure to act. There may be more than one cause. The defendant is responsible for the natural consequences of the defendant's unlawful act or failure to act, even though physical harm to person and property was also caused by the intervening act or failure to act of another person. If the defendant's act or failure to act was one cause, the existence of other causes is not a defense in this case.

OJI 417.23; 417.25

> The defendant's responsibility is not limited to the immediate or most obvious result of the defendant's act or failure to act. The defendant is also responsible for the natural and foreseeable consequences that follow, in the ordinary course of events, from the act or failure to act.

OJI 417.23

> Where the statute involves a specified result that is caused by conduct, it must be shown, as a minimal requirement, that the accused's conduct was an antecedent 'but for' which the result in question would not have occurred. This means that a defendant's conduct must at least be a physical cause of the harmful result. But mere physical causation is not always enough; a particular physical cause is enough only when it is a cause of which the law will take cognizance. This idea has been implemented by requiring that the harmful result in question be the natural and probable consequence of the conduct; if the physical causation is too remote, the law will not take cognizance of it.

State v. Beaver, 119 Ohio App.3d 385, 392, 695 N.E.2d 332 (1997), quoting 1 Torcia, Wharton's Criminal Law (15 Ed. 1993) 146-48, Section 26.

Where a police officer shoots his handgun 32 times from an elevated, exposed, reckless, and stationary position - reloading and firing the last 15 shots on the hood of the victims' car into unarmed and trapped individuals - and does not prove his actions justifiable under any standard of law or reason, the standards and elements of Voluntary Manslaughter, as well as its included lesser and inferior offenses, are satisfied. In this case, the State proved beyond a reasonable doubt that Brelo committed those acts and fired fatal shots into Timothy Russell and Malissa Williams.

A defendant may be criminally liable for "proximate consequences of his activities […]." *See State v. Chambers*, 53 Ohio App.2d 266, 268, 373 N.E.2d 393 (9th Dist.1977), citing *State v. Burton*, 130 N.J. Super. 174, 325 A.2d 856 (NJ. Super. Ct. Law Div. 1974); *See*, OJI 417.23, supra. In *Chambers*, the defendant was convicted of involuntary manslaughter for the death of his accomplice. *Chambers*, 53 Ohio App.2d at 266. A homeowner confronted the

defendant and accomplice as they broke into his home; the accomplice rushed the homeowner, knocking him aside, and then fired his revolver mortally wounding the accomplice. *Id*. at 266-67. On appeal, the defendant in *Chambers* challenged the sufficiency of the evidence supporting the element of causation. The Ninth District Court of Appeals affirmed the conviction.

The *Chambers* court recognized that the "wording of the [involuntary manslaughter statute] indicates an intent to adopt the proximate cause standard." *Chambers*, 53 Ohio App.2d at 269. The *Chambers* court also found that, "the legislature intended to follow the theory of proximate cause rather than the theory of agency as the underlying basis of criminal responsibility under that statute." *Id*. at 269. Ohio therefore does not follow the agency theory of liability, which would "hold a defendant responsible when the act of killing is either that of defendant or someone acting in concert with him." *Chambers*, 53 Ohio App.2d at 268, citing *Burton*, 130 N.J. Super. at 177.

Ohio has long applied the proximate cause theory of liability in criminal cases. In *State v. Ross*, 1961 Ohio Misc. LEXIS 302 at *6, 176 N.E.2d 746 (C.P.1961), the court recognized that involuntary manslaughter requires proof "beyond a reasonable doubt that the unlawful acts, if any, relied on were the *direct* and *proximate* cause of death." "The unlawful acts must be such that would be reasonably anticipated by an ordinary prudent person as likely to result in such killing." *Ross*, 1961 Ohio Misc. LEXIS 302 at *6 (Emphasis added.)

Thus, causation requires a showing that death was a natural and probable consequence of the defendant's act. *State v. Beaver*, 119 Ohio App.3d 385, 695 N.E.2d 332 (11th Dist.1997). The defendant in *Beaver* was convicted of murder and the Eleventh District relied on secondary sources to describe the causation sufficient to justify a murder conviction: "but mere physical causation is not always enough; a particular physical cause is enough only when it is a cause of which the law

will take cognizance. This idea has been implemented by requiring that the harmful result in question be the natural and probable consequences of the accused's conduct." *Beaver*, 119 Ohio App.3d at 392, citing 1 Torcia, Wharton's Criminal Law (15 Ed. 1993) 146-48, Section 26.

In a criminal case, causation does not mean the 'only' cause. "The injuries inflicted by the defendant need not be the sole cause of death, as long as they constitute a **substantial factor** in the death." *State v. Banks*, 8th Dist. Cuyahoga No. 76271, 2000 Ohio App. LEXIS 2630 at *20 (June 15, 2000), quoting *State v. Beaver*, 119 Ohio App. 3d 385, 695 N.E.2d 332 (1997) (Emphasis added.) In *Banks*, this Court recognized that where the defendant stabbed the victim with a knife the defendant caused the victim's death even though the victim died from pneumonia days later. *Id.* at 21 ("[M]edical treatment for homicide victims is not an intervening cause of death.").

Similarly, in holding a defendant responsible for his own actions, despite the actions of other actors, the Supreme Court of Ohio held that there is no requirement in proving aggravated murder that the State show the bullet fired by the defendant was the *only* cause of death. *State v. Keene*, 81 Ohio St.3d 646, 655, 693 N.E.2d 246 (1998) "Appellant appears to assume that the state had to prove appellant's bullet was the sole cause of death. We disagree." Id.

In *Keene*, the Supreme Court recognized that the coroner testified that the victim "died of multiple gunshot wounds and that appellant's shot to [the victim's] heart would by itself have killed" the victim. *Id.* at 655. "Thus, the fact that [the defendant] finished [the victim] off does not alter [the defendant's] role as a principal offender." *Id.*

In this case, the fatal wounds fired by Brelo are no different. He cannot escape liability for his actions by arguing that others may have also caused, inflicted mortal wounds, or otherwise hastened Russell's and Williams's deaths. The *Keene* Court explained that an individual remains liable for his own conduct, despite the actions of others:

> Appellant contends that he was not proven to be the principal offender in this murder because the coroner did not testify that his bullet caused Wilkerson's death. Appellant appears to assume that the state had to prove appellant's bullet was the sole cause of death. We disagree. We have said that "principal offender" means "the actual killer." *State v. Penix* (1987), 32 Ohio St. 3d 369, 371, 513 N.E.2d 744, 746. However, we have never held that it means "the *sole* offender." **There can be more than one actual killer -- and thus more than one principal offender -- in an aggravated murder. See *State v. Joseph* (1995), 73 Ohio St. 3d 450, 469, 653 N.E.2d 285, 300 (Moyer, C.J., dissenting in part and concurring in part). The coroner testified that Wilkerson died of multiple gunshot wounds and that appellant's shot to Wilkerson's heart would by itself have killed Wilkerson. Thus, the fact that Taylor finished Wilkerson off does not alter appellant's role as a principal offender.**

State v. Keene, 81 Ohio St. 3d 646, 693 N.E.2d 246, 1998-Ohio-342 (Emphasis added.)

Prior to that definitive statement that multiple fatal wounds on a victim do not shield individual defendants from criminal liability for their own actions, the Supreme Court of Ohio held that a defendant hastening another's death is similarly not excused from criminal liability:

> Evans was convicted of involuntary manslaughter predicated on child endangering, in that she recklessly failed to seek medical attention for her daughter's injuries between January 16 and January 18, 1993. *State v. Evans, supra,* 93 Ohio App. 3d 121, 637 N.E.2d 969. **The evidence in the instant action clearly demonstrates that appellant hastened Sheila's death. Having done so, appellant cannot escape criminal liability by arguing that Sheila was going to die anyway.** See 1 LaFave & Scott, Substantive Criminal Law (1986) 395, Section 3.12(b).

State v. Phillips, 74 Ohio St. 3d 72, 80, 656 N.E.2d 643, 655, 1995-Ohio-171 (Emphasis added.)

This Court followed the Supreme Court of Ohio's standard of holding defendants accountable for their actions in *State v. Banks*, supra. In *Banks*, this Court wrote:

> **The injuries need not be the sole cause of death as long as they constitute a substantial factor for the death.** *State v. Beaver* (1997), 119 Ohio App. 3d 385, 695 N.E.2d 332, citing *State v. Johnson* (1977), 60 Ohio App. 2d 45, 52, 395 N.E.2d 368. Only gross or willful maltreatment will relieve the defendant from culpability. *Id.* After all, medical treatment for homicide victims is not an intervening cause of death. *State v. Carter* (1992), 64 Ohio St. 3d 218, 594 N.E.2d 595.

Banks at *20.

In light of the evidence at trial that it was Brelo that fired fatal bullets into Timothy Russell and Malissa Williams, and under binding precedent from the Ohio Supreme Court and this Court, it is clear that the strained application of *Burrage* was a clear error of law.

In summary, the verdict contains misapplication of law and creates an additional burden on the State to not only prove a defendant's bullet was "a" cause of death, but that the bullet Brelo's was "the" first bullet to cause death. There is not a single case nor jury instruction in American law that requires this burden be placed on the government, and such was evident in Justice Scalia's opinion when he explained there is a line of authority "under which an act or omission is considered a cause-in-fact if it was a "substantial" or "contributing" factor in producing a given result." *Burrage* at 890. And, "no judicial opinion ha[d] approved th[at]" "the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event." *Id*. at 890-891.

The trial court "found beyond a reasonable doubt that Brelo fired a shot that by itself would have caused Russell's death." *Verdict,* at 20. That finding alone is a 'substantial' and 'contributing' factor that caused the deaths of both victims and Brelo could have been found guilty of Voluntary Manslaughter as the causation element was proven beyond a reasonable doubt. But instead, the verdict contains legal error and prevented any outcome other than acquittal. Because of this, this Court should grant leave and determine whether or not this erroneous application of law in the future would serve to frustrate the criminal justice system and allow defendants to evade criminal responsibility for their actions.

THE VERDICT DOES NOT RECOGNIZE ESTABLISHED LAW THAT REQUIRES THE COURT TO USE A SUBJECTIVE TEST TO DETERMINE WHETHER A POLCIE OFFICER REASONABLY USES FORCE

In its verdict, the Court relied upon Brelo's subjective beliefs to find the use of force reasonable. The verdict thus contradicts and changes law long established and binding upon the trial court. A police officer who acts unreasonably in the use of deadly force is to answer for his crimes. In determining whether the defendant had reasonable cause to believe that Timothy Russell and Malissa Williams presented an immediate threat to the defendant or other police officers *or* that Timothy Russell and Malissa Williams were fleeing and their escape would result in a serious threat of injury to other persons, the trier of fact was to examine the evidence regarding Brelo's knowledge, or lack of knowledge, and under the circumstances and conditions that surrounded him at that time he fired the fatal shots into Timothy Russell and Malissa Williams.

Under Ohio and Federal law, the court's inquiry in determining whether or not Brelo was reasonable in his use of deadly force, must consider the conduct of the other persons involved and determine whether their acts and words and all the surrounding circumstances would have caused a police officer of ordinary prudence and care to believe that Timothy Russell and Malissa Williams presented an immediate threat to Brelo or other police officers *or* that Timothy Russell and Malissa Williams were fleeing and their escape would result in a serious threat of injury to other persons. OJI 417.37; *Graham v. Connor*, 490 U.S. 386, 395-397 (1989).

In short, reasonableness must be judged from the perspective of a *reasonable* police officer in light of all the facts and circumstances confronting the officer at the time and in the moments before the use of deadly force rather than with 20/20 vision of hindsight. *State v. White*, 2015-Ohio-492, at ¶ 22-23, citing *Graham v. Connor*, 490 U.S. 386, 395-397 (1989)).

In *Tenn. v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), the United States Supreme Court imposed special circumstances or conditions that limit an officer's authority to use gunfire to affect a seizure, namely a suspect's conduct that threatens the officer at a level of serious physical harm or death. It requires asking whether the officer could reasonably have had "probable cause to believe that the suspect pose[d] a threat of serious physical harm, either to the officer or to others." *Garner,* 471 U.S. at 11; *Williams v. City of Grosse Pointe Park,* 496 F.3d 482, 487–488 (6th Cir. 2007). A serious and imminent threat to the officer's safety will permit him to respond with gunfire. *Garner,* 471 U.S. at 11–12. Thus, reasonable threat perception is the "minimum requirement" before deadly force may be used. *Untalan v. City of Lorain,* 430 F.3d 312, 314 (6th Cir. 2008). Whether the officer reasonably perceived a threat must be assessed objectively. The focus is specifically on the moment he used his weapon and on the moments directly preceding it. *Livermore ex rel. Rohm v. Lubelan,* 476 F.3d 397, 406–407 (6th Cir. 2007) ("focus on the 'split-second judgments' made immediately before the officer [fired]").

In *Graham,* the United States Supreme Court identified several contextual considerations, some drawn from *Garner,* for evaluating whether a particular use of deadly or non-deadly force was objectively reasonable under the applicable standard. These include "the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham,* 490 U.S. at 396, citing *Garner,* 471 U.S. at 8–9. The so-called *Graham* factors, however, are not a judicially imposed checklist the officer must run down before employing force. Rather, they are simply examples to assist the trier-of-fact in assessing the reasonableness of force under particular circumstances. They present a "non-exhaustive list" in the analysis of what is reasonable.

Bouggess, 482 F.3d at 889. *Graham* explicitly cautions deference to the law enforcement perspective:

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

Graham, 490 U.S. at 396–397.

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

> [W]e must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

Smith v. Freland, 954 F.2d 343, 347 (6th Cir. 1992).

In evaluating reasonableness, some leeway must be given the officer for on-scene judgments made during the uncertainty of a confrontational encounter. The key to determining when reasonable force becomes unreasonable in context is to examine the reasons for the use of deadly force. In this case, the perceived threat came from the Malibu and the mistaken belief that Russell and or Williams was firing at Brelo or other officers. As determined though, there was no firing from the Malibu – the Cleveland Police Department officers fired at each other. Further, Officer Flanagan testified that he heard the call for a cease fire – while shooting remained ongoing. And the audio experts called to testify concur that 15 of 18 gunshot sounds came from one gun, one location, and one direction. That source being only Brelo on the hood; as testified to and demonstrated in court by Officer Sabolik. Officer Sabolik explained he ceased fire when the

Defendant was on the center of the Malibu's hood firing straight down into the Malibu where Timothy Russell and Malissa Williams sat only a few feet away.

Lt. Kutz testified that Cleveland Police officers are discouraged from rushing a suspect and are not taught to do so. Brelo's actions as testified to by others were not objectively reasonable in light of the training he received and the actions of the other officers on scene. Lt. Kutz further stated that his officers are taught to avoid crossfire, and it is always preferable to be in a position of cover. Moreover, he has heard of tactically moving across the hood on your stomach for a better vantage point, but has never heard of the tactic of jumping on a hood, leaving the officer exposed to shooting. As he testified, such a tactic "would be memorable." Lt. Kutz further stated that prior to his actions, Brelo was given additional training on these topics due to another incident where he reached into a car and his partner fired.

The Supreme Court of the United States pronounced the limits on police officers and the use of deadly force in *Plumhoff v. Rickard*, ____ S.Ct. ___, 2014 WL 2178335 (May 27, 2014), when the court found police officers justified in shooting at a motor vehicle that sped away and continued to pose a clear and present danger to the public and police. The United States Supreme Court noted that its holding was limited to the facts of that case – deadly force was justified to the extent the suspect posed an ongoing danger. The continued firing was justified as the suspect car, after colliding with police, was still operable and was still being operated. However, in a somewhat prescient note considering the facts presented in this case, the United States Supreme Court pronounced:

> This would be a different case if petitioners had initiated a second round of shots after an initial round had clearly incapacitated Rickard and had ended any threat of continued flight, or if Rickard had clearly given himself up. But that is not what happened.

It is what happened here. In this case the evidence shows that the Malibu was immobilized before Brelo was on top of the hood shooting his final shots at point blank range. Brelo had been trained in proper tactics, but employed the most unreasonable of tactics – jumping onto the hood of an immobilized car from which he stated he believed shots were coming. This same vehicle that he says just seconds before he was afraid might drive into him as he was in front of the bumper. Memorable, yes, as testified by Lt. Kuntz, and certainly sufficient to determine the actions were not reasonable and thus criminal. No other police officer rushed the immobilized Malibu and shot point-blank and downward into its occupants from atop zone car 238 and again from the hood of the Malibu. No police officer was trained to do so.

As with all Fourth Amendment analysis, the standard for determining probable cause is an objective one based upon the reasonableness of the totality of the circumstances. Deadly force by a police officer is constitutional under the Fourth Amendment to the Constitution of the United States only to the extent and under conditions, "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Garner, supra*, at 11-12. There are limits to that use of force.

Under Ohio law, a police officer may use deadly force "'[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.'" *White* at ¶ 21, quoting *Garner*. The *White* court further followed the Supreme Court of the United States and noted two examples of the constitutional use of deadly force: "[i]f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may

be used if necessary to prevent escape, and if, where feasible, some warning has been given." *White* at ¶ 19-21, citing *Garner* at 11-12.

In *Graham v. Connor*, 490 U.S. 386 (1989), a case that involved the use of excessive, non-deadly force by police officers during the course of an investigatory stop, the U.S. Supreme Court held that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." (Emphasis sic.) *Id*. at 395.

A police officer may use deadly force against a suspect under the Fourth Amendment only if the probable cause that would allow it is objectively reasonable based upon the totality of the circumstances. But, in the verdict, the trial court cited to Brelo's observations and beliefs, not those of the objective police officer, thus abandoning the law as stated by both the United States and Ohio Supreme Courts. This misapplication of the law is highlighted in the verdict in the following passages:

> *Brelo was also aware* of the length - in both distance and time – of the chase. Although he was driving one of the cars nearest to the Malibu he likely knew that many other cars were in pursuit, yet Russell still would not stop. He knew Russell had gone over 100 miles per hour and ignored dozens of traffic controls.
>
> All of this would make him wonder why the people in the car were so desperate to escape.

Judge's Opinion at 27 (*Emphasis added*).

> Under the totality of these circumstances *he [Brelo] perceived* an imminent threat of death or great bodily harm to himself and other officers and decided to use deadly force to seize the Malibu's occupants.

Judge's Opinion at 28 (*Emphasis added*).

> It is Brelo's perception of threat that matters.

Judge's Opinion at 28.

In addition to employing an analysis that relied upon and condoned the subjective impressions and thus confirmed Brelo's actions as legal**,** the trial court found that the tactics employed by Brelo were not grounds upon which it could find Brelo was unjustified in his use of deadly force. No expert at trial condoned Brelo's actions in leaving cover in the firefight in which Brelo could believe Russell and/or Williams posed a threat. In reality, any shots fired at Brelo were by other officers. But yet, in the face of this friendly fire, Brelo left a position of cover, placed himself and his fellow officers at risk, and jumped into the line of fire – firing 15 rounds just feet away from Russell and Williams from his position standing on the hood of Russell's car. The verdict defended the use of tactics decried by the experts at trial by ignoring established case which provide that police who use force are not always justified.

The Supreme Court stated that:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failure to apprehend him does not justify the use of deadly force to do so . . . . A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead. . . .

Garner, 471 U.S. at 11-12; *see also Sample v. Bailey*, 409 F.3d 689, 697 (6th Cir. 2005) (stating that "only in rare instances may an officer seize a suspect by use of deadly force.") (citation omitted).

In *Sigley v. City of Parma Heights*, 437 F.3d 527, 534-536 (6th Cir.2006), the Sixth Circuit recognized that tactics employed by police officers are a basis upon which to find an officer's use of force unreasonable. In that case, a driver was apprehended by gunfire when he did not stop at the order of police. The plaintiff alleged that the driver did not pose an immediate threat to the officers and thus their tactics and positions could be used to nullify a claim of justification. In

denying summary judgment to the police officers, and after reviewing the plaintiffs factual claims, the Sixth Circuit opinion noted that in *Estate of Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993), police tactics cannot create a situation to justify the use of force:

> In *Enyart*, the Seventh Circuit held that the use of deadly force is constitutionally impermissible where the officer in question unreasonably creates the encounter that ostensibly permits its use. *Id.* In *Enyart*, the officer stepped in front of the car leaving the decedent no time to brake. The court stated that determining whether the officer placed himself in danger is a factual inquiry that should be resolved by the factfinder.

Id, at 534-35.

In contrast to this statement of law, the verdict decries any analysis or resolution of the use of the tactics by simply finding that the tactics were not the issue, rather the subjective impressions of Brelo were.

THE VERDICT DOES NOT RECOGNIZE THE APPROPRIATE LESSER OFFENSE OF VOLUNTARY MANSLAUGHTER; FELONIOUS ASSAULT IS A SUPERIOR OFFENSE

Additionally, assuming *arguendo* that the trial court was unable to find beyond a reasonable doubt that Brelo caused the death of Timothy Russell and Malissa Williams, it could not simply find that Felonious Assault to be a lesser-included offense of Voluntary Manslaughter. The trial court was required to first address Attempted Voluntary Manslaughter and, if not available as a lesser, it could conclude beyond a reasonable doubt that Brelo committed two counts of Aggravated Assault.

Brelo, by his actions, and by the court's ruling, intended to knowingly cause death the death of Timothy Russell and Malissa Williams. *See Judge Opinion* at 16. Ohio case law has clarified that an attempt to commit a charged offense is a lesser offense of the charged offense for purposes of Crim.R. 31(C) and R.C. 2945.74. *See State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974; *State v. Deem*, 40 Ohio St.3d 205 (1988). "It is not necessary for the prosecution or the trial court

to formally charge a defendant with an attempt to commit an offense because an offense, properly charged, charges an attempt along with any lesser included offenses by implication." *State v. Gilliam*, 2nd Dist. Clark App. No. 09CA0075, 2013-Ohio-834, at ¶ 24, citing *State v. Russell*, 2nd Dist. Montgomery App. Nos. 18155, 18194, 2000 WL 1547085 (Oct. 20, 2000), at * 5; *See*, *also*, *State v. Aponte*, 8th Dist. Cuyahoga App. No. 89727, 2008-Ohio-1264 (attempt is an inferior degree offense).

In the State's Supplemental Trial Brief filed May 1, 2015, the State asked the court to consider the lesser offenses of Attempted Voluntary Manslaughter[7] and Aggravated Assault[8] if the court found that the state could not prove the causation element of Voluntary Manslaughter beyond a reasonable doubt. Thus, if the trial court had reasonable doubt that the victims were dead at the time Brelo was shooting, he should have found Brelo guilty of Attempted Voluntary Manslaughter as he knowingly intended to kill Russell and Williams, as impossibility is not a defense to an attempt crime in Ohio.

R.C. 2923.02 states:

> (A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.
>
> (B) It is no defense to a charge under this section that, in retrospect, commission of the offense that was the object of the attempt was either factually or legally impossible under the attendant circumstances, if that offense could have been committed had the attendant circumstances been as the actor believed them to be.

[7] There have been four (4) jury verdicts in the State of Ohio for Attempted Voluntary Manslaughter. See *State v. Russ*, 2006-Ohio-6824; *State v. Wiley*, No. 43915, 1982 WL 5332 (Ohio Ct. App. Apr. 29, 1982); *State v. Smith*, No. 88AP-1081, 1989 WL 73886 (Ohio Ct. App. July 6, 1989); *State v. Castro*, No. 94APA09-1331, 1995 WL 347871 (Ohio Ct. App. June 6, 1995).

[8] While never conclusively determined to be a lesser-included offense of Voluntary Manslaughter by an Ohio appellate court, as discussed *infra*, Aggravated Assault does meet the *Deem* and *Evans* test to be a lesser-included offense.

The attempt statute provides that factual or legal impossibility is not a defense to a charge of attempt if the "offense could have been committed had the attendant circumstances been as the actor believed them to be." *State v. Bartrum*, 121 Ohio St.3d 148, 2009-Ohio-355, 902 N.E.2d 961, ¶ 12, citing R.C. 2923.02(B); *see, also, State v. Cunninham*, 156 Ohio App.3d 714, 2004-Ohio-1935, 808 N.E.2d 488, ¶ 58 (2d Dist.), citing *State v. Robins*, 253 Wis.2d 298, 313-316, 2002 WI 65, 646 N.W.2d 287 and *State v. Kordas*, 191 Wis.2d 124, 129-130, 528 N.W.2d 483 (App.1995); *People v. Thousand*, 465 Mich. 149, 631 N.W.2d 694 (Mich. 2001)**;** *People v Jones*, 46 Mich 441; 9 NW 486 (1881).

Brelo shot with the intent to kill and he believed he was shooting at a living Russell and Williams. If they were actually dead, he was not aware of it; under Ohio law that mistake of fact does not negate his intent to kill. This is evidenced by his decision to climb onto the hood of the victim's car and fire at least fifteen shots downward and through the windshield to "eliminate the threat." If the facts were as he believed them to be, he was shooting at live persons, and impossibility of fact is not a defense to Attempted Voluntary Manslaughter. As such, if the causation element of Voluntary Manslaughter were not met, then the trial court should have been found guilty of Attempted Voluntary Manslaughter. However, the verdict does not even contemplate the include offense of attempt – the verdict thus omits any analysis and provides a future framework within the trial court that attempt, included in all indictments, need not be considered.

Outside of Attempted Voluntary Manslaughter the only other legally permissible lesser offense of Voluntary Manslaughter is the lesser-included offense of Aggravated Assault under R.C. 2903.13. Such offense was not considered by the trial court in its Verdict. The offense of Aggravated Assault is distinguished from Voluntary Manslaughter by the absence or failure to

prove that Brelo caused the death of, rather than merely serious physical harm to, Timothy Russell and Malissa Williams. R.C. 2903.12 provides:

> (A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly:
>
> (1) Cause serious physical harm to another or to another's unborn;
>
> (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code.

In order to prove beyond a reasonable doubt that Brelo committed Aggravated Assault the trial court needed evidence Brelo knowingly caused serious physical harm to Timothy Russell and Malissa Williams, or caused or attempted to cause physical harm to Timothy Russell and Malissa Williams by means of a deadly weapon. "This section (R.C. 2903.12) complements the offense of voluntary manslaughter[;]" "This section is also a lesser included offense to . . . attempted voluntary manslaughter." R.C. 2903.12, 1974 Committee Comment to H 511.

In *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, the Ohio Supreme Court of Ohio clarified the test for determining lesser-included offenses from *State v. Deem*, 40 Ohio St.3d 205, 533 N.E. 2d 294 (1988), thus allowing for the legal analysis to determine that Aggravated Assault is a lesser inferior offense of Voluntary Manslaughter:

> In determining whether an offense is a lesser included offense of another, a court shall consider whether one offense carries a greater penalty than the other, whether some element of the greater offense is not required to prove commission of the lesser offense, and whether the greater offense as statutorily defined cannot be committed without the lesser offense as statutorily defined also being committed.

Evans, syllabus.

Here, Voluntary Manslaughter carries a greater penalty than Aggravated Assault. Further, Voluntary Manslaughter requires the State to prove Brelo "knowingly caused the death of

another," whereas Aggravated Assault only requires the State to prove Brelo "[c]ause[d] serious physical harm to another" or "[c]ause[d] or attempt[ed] to cause physical harm to another or to another's unborn by means of a deadly weapon." Finally, Voluntary Manslaughter cannot be committed without Aggravated Assault also being committed. Every time a defendant knowingly kills an individual "while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force," that defendant will have knowingly caused physical harm to an individual while under that same influence of sudden passion or rage. Compare R.C. 2903.03(A) and R.C. 2903.12(A)(1),(2).

But instead of applying the law as stated by the Ohio Supreme Court, the trial court determined Felonious Assault to be a lesser-included offense of Voluntary Manslaughter. This is an affront to the *Deems* and *Evans* test for lesser included offenses and, by law Felonious Assault is a superior offense to Voluntary Manslaughter if anything. And superior offenses cannot be charged absent a re-indictment in which the Grand Jury finds probable cause for the greater charge. This conclusion of law in the verdict must be corrected and the trial court must not be able to compound its error in the future – such error could lead to unconstitutional convictions by juries.

CONCLUSION

As it stands, the trial court's verdict will endanger the public, allow for one of multiple actors to escape culpability, and lead to more unnecessary deaths by police-created crossfire situations. Police vehicle pursuits already contribute to approximately one death per day, in America and when an officer fires at a moving vehicle the intended target is rarely hit with the probability of collateral damage high. This is a verdict issued in a matter of significant interest in our county, in our state, and throughout our nation. Because the verdict itself contains errors in

law, errors in analysis, and misstatements of clearly established law, this Court should grant leave. If the errors in the verdict's legal statements and reasoning are left uncorrected, the future administration of justice in this County is compromised: Criminal actors will evade responsibility for their actions, jurists and juries could enter unconstitutional verdicts, and police officers in Cuyahoga County will have defenses to their actions in use of force cases that are not recognized by established law. For these reasons, this Court should grant this Motion for Leave, accept this appeal, and ensure that the law in future cases in Cuyahoga County is consistent with Ohio law on causation, consistent with law on the use of force by police, and consistent with logic and reason in evaluation of lesser-included and inferior offenses by jurists and juries alike.

These are important issues of law, worthy of your time and consideration. The State will appreciate the clarification and guidance this Honorable Court can provide.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Leave to Appeal has been sent by regular U.S. mail or email this 29th day of May, 2015, to Robert Tobik, Cuyahoga County Public Defender, 310 Lakeside Ave., Ste. 400, Cleveland, Ohio 44113 , Patrick A. D'Angelo at PDAngelo02@aol.com, Fernando O. Mack at losmacks@msn.com, and Thomas E. Shaughnessy at teshaugh@aol.com

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