IN THE SUPREME COURT OF OHIO
2023

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| STATE OF OHIO,<br><br>Plaintiff-Appellee,<br><br>-vs-<br><br>DARNELLE HURT,<br><br>Defendant-Appellant. | Case No. 22-1037<br><br>On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District<br><br>Court of Appeals No. 110732 |

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

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## STATEMENT OF AMICUS INTEREST

The Ohio Prosecuting Attorneys Association (OPAA) is a private, non-profit trade organization that supports the state's 88 elected county prosecutors. Its mission includes assisting county prosecutors to pursue truth and justice as well as to promote public safety and to secure justice for crime victims. OPAA sponsors CLE programs and facilitates access to best practices in law enforcement and community safety.

In light of these considerations, OPAA has a strong interest in urging that this Court dismiss the present appeal as improvidently allowed. The defendant has already received the legally-incorrect windfall of a new trial on counts two through five, and the State is not appealing that order of a new trial. Even so, the defendant is seeking an advisory opinion on whether a new trial should have been ordered on the other grounds raised in his first and second propositions of law. But the question of whether the trial court erred in failing to give a no-duty-to-retreat instruction in the first trial under the new Stand Your Ground (SYG) law, and the question of whether the court erred in failing to instruct on self-defense under count five, are both moot. The convictions under counts two through five stand vacated, and it would be advisory to review other questions merely to determine whether they would have provided more grounds for the same relief.

There is no certainty that a second trial will involve the exact same evidence as before. There is particularly no telling whether the defendant would testify in the new trial, which could substantially change the dynamics of the legal questions, since the defendant did not testify in the first trial. Indeed, the case may not even reach the trial stage again if the parties reach a plea agreement on remand.

Beyond the advisory nature of the ruling sought on the first two propositions,

some more-basic problems emerge upon review. The issue of the retroactivity of the SYG law is problematic because, even under the new SYG "no retreat" standard, the defendant can only assert that he has no duty to retreat if he is in a place he has a right to be at the time. But victim T.D. had ordered the defendant to leave before her father M.D. arrived to defend her from the defendant's aggression. The defendant had no right to remain in T.D.'s home, and, as a result, he *still* would have had a duty to retreat under the new SYG law Applying the new law to the defendant's acts would make no difference.

Another problem weighs against advisory-opinion review of the question of SYG retroactivity. The trial court's instructions on the duty to retreat were flawed *in the defendant's favor* by instructing the jury that he had no duty to retreat if he had a reasonable and honest belief that he was in immediate or imminent danger of death or great bodily harm. (Tr. 715-16) While the court's instructions nominally referenced a duty to retreat, those instructions in the end negated the duty to retreat if the State failed to prove beyond a reasonable doubt that the second prong was inapplicable.

In rejecting self-defense as to counts two through four, the jury found the defendant guilty despite these instructions, which leads to the conclusion that the jury found that the first and/or second prongs were not satisfied, either because he was at fault for the affray and/or because the jury rejected the notion that he had a reasonable and honest belief. The Eighth District noted that there was sufficient evidence to conclude that the defendant did not use reasonable force in shooting M.D. at least eight times. Opinion, ¶ 79. In regard to the issue of reasonable and honest belief, the defense did not provide evidence accounting for each of the shots, including when the defendant deployed execution-style kill shots to M.D.'s head. In the absence of any testimony from

the defendant, the evidence of justification at the time of these shots was simply lacking.

In any event, under the court's instructions on duty to retreat, if the jury accepted the second prong as to reasonable and honest belief, then they also would have concluded that the defendant had no duty to retreat under the third prong, and this would mean that the jury still found that he was at fault for the affray, thereby negating self-defense anyway. Given the court's instructions on self-defense as a whole, the issue of the retroactivity of the SYG law would have made no material difference to the first trial.

The defendant is also seeking review on the issue of the court's refusal to instruct on self-defense as to count five, the felonious assault against T.D. for the shot that whizzed by her. But, again, this issue at most would result in a new trial, and the defendant has already received new-trial relief from the Eighth District.

The issue would still be advisory in nature even if this Court would undertake a review of the issue on the present appellate record. The defendant posits that there is a "transferred intent" form of self-defense that follows the shot, so that, if the shot was justified as self-defense in rebuffing M.D., then it was also justified as to the felonious assault as to T.D. But this argument assumes that the shot that whizzed by T.D. was dependent on a "transferred intent" theory to begin with, since, of course, the defendant cannot justify a crime against non-aggressor T.D. otherwise. Having menaced T.D. with a gun, and with other evidence showing his antipathy toward her throughout the entire incident, the defendant had a clear motive to harm T.D. for having reported him to her father M.D. and for having informed her father of what he had done. The jury could find from all of the evidence that the defendant acted knowingly as to the felonious assault against T.D., shooting at *both* M.D. and T.D. The second proposition of law is also

problematic because *no "transferred intent" instruction was given* as to count five, and so there would have been no need to instruct on "transferred" self-defense either.

The defendant also seeks review of his third proposition of law, raising double-jeopardy and collateral-estoppel challenges to the remand for a new trial. On the felony murder charge under count two, and under the felonious assault charges under counts four and five, the defendant contends that the guilty verdict on voluntary manslaughter under count three should dictate that the retrial under counts two, four, and five would be limited to involuntary manslaughter and aggravated assault. But this issue would be unlikely to result in a legal resolution that would be of statewide interest and helpful to the bench and bar.

The case arises out of a peculiar procedural posture. The jury was instructed under count three as if the State bore the burden to proving the passion-rage mitigator beyond a reasonable doubt. This was erroneous under Ohio law, which places the burden on the defense to prove the existence of the passion-rage mitigator by a preponderance. Indeed, it was legal error even to refer to the mitigator at all under the instructions on a freestanding direct charge of voluntary manslaughter. Given this anachronistic context, reviewing the third proposition would constitute only potential error correction.

Adding to the anachronistic nature of this case is the fact that the Eighth District vacated even the guilty verdict on the count five felonious assault committed against T.D. This was a highly-improvident order of reversal. The Eighth District claimed that "[t]he evidence of Hurt's sudden passion or rage and [M.D.]'s provocation was the same, regardless of to which count it applied." Opinion, ¶ 38. But the victim under count three was M.D., *not* T.D., who was the victim under count five. For a defendant to invoke the

passion-rage mitigator, there must have been a serious provocation, and the provocation must have been "occasioned by the victim", and T.D. had done nothing to provoke the defendant. She had only sought the protection of others from the defendant's aggression, and seeking help cannot be deemed provocative or sufficient to provoke deadly force. The jury's verdict under count three as to victim M.D. could not create any inconsistency on the passion-rage mitigator that would affect count five as to victim T.D., and the guilty verdict under count five should have survived the claim of "inconsistency". The defendant has already been unjustly enriched with new-trial relief as to count five, and it is fair to question whether, in fairness and justice, he should receive any more relief here.

Adding to the improvident nature of the issue is the plain-error standard that applies, as conceded by the Eighth District, but which that court failed to fully apply.

For purposes of count three voluntary manslaughter, the parties had no reason to give much if any attention to the passion-rage mitigator. Neither side objected when the court's instructions incorrectly placed the burden of persuasion on the State beyond a reasonable doubt. It is plain that the defense welcomed a guilty verdict thereunder if the jury was otherwise rejecting self-defense under that count. Moreover, the State could concede the existence of the passion-rage mitigator for purposes of that count because the court was *also* instructing the jury that each count *must* be considered *separately* without regard to the verdicts on the other counts. (Tr. 703-704) The defense did *not* object to this instruction, and it did not request an instruction that would have required that the jury extend its resolution of the passion-rage mitigator under count three to other counts.

The Eighth District's superficial approach to plain-error review failed to take into account what the respective positions of the parties would have been if the court would

have been proposing to instruct on the passion-rage mitigator under counts two, four, and five. The State very likely would have opposed such instructions given that the defendant *did not testify* to actually being under the influence of passion or rage, and given that the defendant himself was the provocateur who occasioned the incident by threatening T.D. with a gun. A substantial body of case law also weighs against any instruction on the passion-rage mitigator when the defendant is claiming self-defense.

Even if an instruction on the passion-rage mitigator were going to be given, the State very well could have pressed additional legal points. The defense would have had the burden of proving the mitigator by a preponderance, and the defendant had not testified in support of the mitigator. And the State very well would have seen that no instruction should be given at all on the mitigator under count three. The legal posture of the case, and the positions of the parties, would have been significantly different if the court had been proposing to instruct on the mitigator under counts two, four, and five.

The reversal for "plain error" was even more inappropriate in light of the Eighth District's concession that the State's evidence was sufficient to disprove self-defense beyond a reasonable doubt. The Eighth District credited the State's arguments that the evidence was sufficient on self-defense because "[t]he State produced evidence that Hurt (1) created the situation that gave rise to [M.D.]'s murder when he pulled his gun on [T.D.] * * *." Opinion, ¶ 79. The "at fault" prong of self-defense echoes the "serious provocation" and "occasioned by the victim" components of the passion-rage mitigator. The defendant cannot engage in his own provocative behavior and then claim he was "provoked" by the victim or others who were responding. Given that the State provided sufficient evidence to prove beyond a reasonable doubt that the defendant was at fault for

the affray, it follows that the defendant would have had significant difficulty in proving by a preponderance that there was serious provocation occasioned by victim M.D. when the defendant himself was the provocateur who occasioned the incident. There was no showing of outcome determination if the parties had pressed their positions under counts two and four and certainly no showing of a different outcome as to count five.

All of the foregoing weighs in favor of dismissing the defendant's present appeal as improvidently allowed. The defendant has already been unjustly enriched with new-trial relief, and Ohio's system of criminal justice has no reason to compound the error.

Nevertheless, if this Court would reach the merits of the three propositions of law, the defendant's appeal should fail in all respects. The new SYG law does not retroactively apply to pre-effective date crimes. Self-defense does not "transfer" merely because the transferred-intent doctrine applies to the mens rea for the offense. And only an acquittal on an issue essential to the judgment can create a collateral-estoppel bar, and the defendant received no acquittal under count three, and the passion-rage mitigator was a non-essential matter under that count.

In the interest of aiding this Court's review herein, OPAA offers the present amicus brief supporting the appellee and opposing any further relief for the defendant.

## STATEMENT OF FACTS

Amicus OPAA adopts by reference the procedural and factual history set forth in the State's brief and in paragraphs two through twelve of the Eighth District's decision, but with one exception. The Eighth District asserted that, according to T.D.'s testimony, the defendant "turned the couch over looking for the car keys, which she had hidden from him." Opinion, ¶ 4. This is not a fair reading of her testimony. T.D. testified that

the defendant was looking for "his keys", but the "car keys" she hid were the keys to her own car. (Tr. 348-49, 350, 376, 380: "told him to get his keys"; "he was looking for his keys"; "my car"; "hidden those car keys from him")

Whether the defendant was actually looking for "his keys" is doubtful, as he appeared to be toying with T.D. to delay his departure. Flipping over a couch in a purported search for "his keys", (Tr. 355), and not returning the couch to an upright position, (Tr. 365-66), reveals a desire to annoy rather than cooperate with her demand that he leave. Her testimony showed he had little real interest in actually finding "his keys", given that he initially detoured into arguing with her and threatening her with his gun. (Tr. 349) "Before he looked for his keys we were arguing and he put his gun on me." (Tr. 379) This was par for the course for this defendant, as this "wasn't the first time that a gun was pulled on me by Darnelle". (Tr. 383)

## ARGUMENT

> **Amicus First Proposition of Law**: When the claimed retroactive applicability of a new law would make no difference to the outcome of the particular defendant's case, the case provides an improper vehicle for the review of the retroactivity question.

For reasons already stated, the claimed retroactive applicability of the new SYG law would make no difference to the defendant's case. Moreover, it would be advisory to opine on the applicability of instructions on the new SYG law when a second trial may not occur and when the evidence might end up not supporting self-defense anyway.

Even if the merits were reached here, this Court should reject the attempt to apply the new SYG law to offenses occurring before the April 6, 2021, effective date. Applying the new law to pre-effective date crimes would amount to an improper

retroactive substantive expansion of the defense as to events that already occurred.

A.

The law existing at the time of the offenses in April 2020 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 necessary, 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 case law, 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 from those places. 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.

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.

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. 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) applies the no-duty-to-retreat principle to the issue of whether the person using force reasonably believed the use of force was necessary, thereby precluding the trier of fact from considering possible retreat in relation to the issue of such reasonable belief.

In effect, the bill operated to create a new defense to the extent that it allows 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.

The defendant's reliance on the new SYG law initially fails because, even if applicable, he would have been unable to take advantage of it. Amended paragraph (B) only makes the duty to retreat irrelevant when the person "is in a place in which the person lawfully has a right to be." If the person is trespassing, the duty to retreat would still apply (and, in many cases, a trespasser would be considered to be "at fault" anyway).

This lawful-presence requirement also brings to mind the concept of revoked privilege. Even when the person is initially given permission to enter, the permission is considered revoked when the person undertakes a violent attack against a resident therein. *State v. Steffen*, 31 Ohio St.3d 111, 115 (1987); see, also, *State v. Shipley*, 10th

Dist. No. 12AP-948, 2013-Ohio-4055, ¶ 36 (trespass by deception). Questions of whether the person is "lawfully" present and has a "right" to be there would be in doubt when the person is present on someone else's property and when that person has acted contrary to the privilege by reason of engaging in illegal or other unwelcome activity on that property. The express or implied privilege to be on property can be viewed narrowly in particular situations, see, e.g., *State v. Sparent*, 8th Dist. No. 96710, 2012-Ohio-586, ¶ 9, and so the "right" to be "lawfully" present invites close scrutiny of the circumstances.

There is no need to guess here about whether the defendant had any right to be present. Although initially invited to T.D.'s residence to help her take care of their children, they began arguing, and at that point the victim T.D. expressly demanded that he leave, and *he failed to do so*. Whatever temporary privilege he enjoyed from the invitation had been expressly revoked, and under no view of the facts can it be said that the defendant had a "right" to be lawfully "present". Even an "implied" privilege would have been deemed revoked when the defendant began brandishing a gun and pointing it at victim T.D. The only evidence on this point was T.D.'s testimony; the defendant did not testify and did not claim any "right" to be "lawfully" present.

Even though the defense was seeking to apply the new SYG law, the defense's proposed instructions did not mention the issue of lawful presence that applies under the new law. As a result, the proposed instructions were properly rejected.

D.

In any event, the court's instructions on the duty to retreat erred in the defendant's favor. The instructions conflated a part of the second prong as to reasonable and honest belief with the third prong as to duty to retreat. As defined, the jury could conclude that

the duty to retreat was satisfied merely if there was a reasonable and honest belief:

> Duty to retreat. The defendant had a duty to retreat if he, A, was at fault in creating the situation giving rise to the death of Melvin Dobson; and B, did not have reasonable – or B, did not have reasonable grounds to believe or an honest belief that he was in imminent or immediate danger of death or great bodily harm.
>
> No duty to retreat, generally. The defendant does not have or did not have a duty to retreat if, 1, he retreated from the situation and no longer participated in it;
>
> Or – and 2, he had a reasonable – he had reasonable grounds to believe and an honest belief that he was in immediate or imminent danger of death or great bodily harm.
>
> Or, 3, the only reasonable means of escape from that danger was by the use of deadly force even though he was mistaken as to the existence of that danger.

(Tr. 715-16) The repeated use of the word "or" in listing the ways of overcoming and negating the duty to retreat in this passage would have led many to conclude that it is enough to negate the duty to retreat if the defendant had a reasonable and honest belief as to the immediate or imminent danger of death or great bodily harm.

Given the court's instructions, the defendant did not face an independent "duty to retreat" prong, and the court's instructions were circular, allowing the third prong as to the duty to retreat to be negated merely by showing a reasonable and honest belief that he was in immediate or imminent danger of death or great bodily harm under the second prong. Under this instruction, "there *never* will be a duty to retreat" because "[a] jury's findings on parts (a) and (b) of the self-defense instruction will determine the applicability of the defense." *State v. Barker*, 2022-Ohio-3756, 199 N.E.3d 626, ¶ 32 (2d Dist.), quoting *State v. Dale*, 2nd Dist. No. 2012 CA 20, 2013-Ohio-2229, ¶ 45 (Hall, J.,

concurring). This legally-incorrect instruction allowed the defendant to avoid the duty to retreat merely by satisfying a portion of the second prong of the test, which was a requirement of self-defense in any event. In short, the duty-to-retreat language of the instruction did not add anything to the requirements of a self-defense claim under prior law; as a result, the defendant could not have been prejudiced by the failure to instruct on the no-duty-to-retreat provision of the new SYG law.

E.

On the retroactivity question, the new SYG "no duty to retreat" provision does not apply to this defendant's acts occurring one year 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 this statutory change would not retroactively apply to pre-effective-date acts. 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 law at the time of his offenses, the defendant would be 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. In this case, defendant was not present in any such location, and so his criminal liability for his offenses accrued at that time if he failed to comply with the existing duty to retreat.

The new SYG amendments to R.C. 2901.09 do not "[a]ffect the prior operation of the statute", under which the defendant could only avoid having a duty to retreat if he were in a certain "Castle Doctrine" location. R.C. 1.58(A)(1).

The new SYG law does not "[a]ffect any * * * liability previously acquired, accrued, accorded, or incurred" under the then-existing Criminal Code, under which he was liable for his use of deadly force if he violated a duty to retreat. R.C. 1.58(A)(2).

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*." R.C. 1.58(A)(4) (emphasis added).

There is zero indication of any legislative intent to apply the new SYG changes to pre-effective-date offenses, 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.

F.

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 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 would alter 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. The end result of the statutory change 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").

G.

Substantive statutory changes cannot be retroactively applied under Article II, Section 28, of the Ohio Constitution. *Smith v. Smith*, 109 Ohio St.3d 285, 2006-Ohio-2419, ¶ 6 ("statute that applies retroactively and that is substantive violates Section 28").

Eliminating one of 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 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 impermissibly "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.

H.

This Court recently concluded that the 2019 burden shift as to self-defense applies to post-amendment trials of pre-amendment crimes. *State v. Brooks*, ___ Ohio St.3d ___, 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.

The defense and its amici attempt to 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. Since this language is referring to what a trier of fact would or would not consider at a future trial, the defense argues that the removal of the duty to retreat is just as much "procedural" and "prospective" as the burden change discussed in *Brooks*. But, as *Brooks* also notes, even so-called "procedural" matters can have "substantive effects", see *Brooks*, ¶16, and the substantive effects are obvious here. Under the amending language, the "trier of fact" is *precluded* from considering the possibility of retreat. This language substantively eliminates an element of the defense and is not merely a "procedural" adjustment as to the consideration of the defense. 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* 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 was thus viewing 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 regard to 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 conceded 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 already-committed offenses. 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.

The defense amici rely heavily on the language in paragraph (C) that precludes

the "trier of fact" from considering the availability of retreat, contending 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 prong of the test, precluding the prosecutor, court, and jury from importing retreat concepts into an assessment of defensive necessity under that prong. The provisions address parallel legal points in working toward the same goal of eliminating retreat concepts in such cases. 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).

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 *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, ¶¶ 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. Paragraph (C)'s use of past-tense verbiage does not clearly proclaim a legislative intent to apply the new law to acts occurring before the effective date. *Hyle*, ¶¶ 13-21.

I.

Finally, there was no constitutional requirement that the General Assembly apply the new SYG law retroactively to previously-committed offenses. "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).

The defense cites a case and claims that new substantive changes must be applied to prior conduct. Defendant's Brief, at 14, citing *Gilmore v. Taylor*, 508 U.S. 333, 345 (1993). But the cited line of cases is addressing the question of whether a new construction of a previously-existing statutory or constitutional provision will be applied on collateral attack in already-final cases. This body of case law does not purport to require that newly-*enacted* statutory or constitutional provisions be applied to conduct arising before their effective date. The defendant's cited case law is wholly inapt.

> **Amicus Second Proposition of Law**: The self-defense justification does not "transfer" merely because the doctrine of transferred intent and transferred knowledge applies to the mens rea for the offense, and, in any event, would not "transfer" unless the jury is instructed on that doctrine.

For several reasons already mentioned, it would be advisory to address whether self-defense would "transfer" to create a justification for harms caused or attempted to innocent bystanders. The propriety of the instructions in the first trial no longer matters; the case might not reach trial again; and there is no telling exactly how the evidentiary presentations of the parties will play out in a retrial.

The defendant's arguments presuppose the existence of a "transferred intent"

theory as to the count five felonious assault committed against T.D. "[U]nder the doctrine of transferred intent, an offender who intentionally acts to harm someone but ends up accidentally harming another is criminally liable as if the offender had intended to harm the actual victim." *In re T.K.*, 109 Ohio St.3d 512, 2006-Ohio-3056, ¶ 15. "The doctrine of transferred intent is firmly rooted in Ohio law." *State v. Wilks*, 154 Ohio St.3d 359, 2018-Ohio-1562, ¶ 113, quoting *State v. Sowell*, 39 Ohio St.3d 322, 332 (1988); *Bradshaw v. Richey*, 546 U.S. 74, 76-77 (2005). The transferred-intent doctrine applies to homicide *and* attempted homicide offenses. *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, ¶¶ 142-47. The doctrine applies to crimes that have a knowingly mens rea, including felonious assault. *T.K.*, ¶ 17 (complicity in felonious assault); *State v. Okey*, 5th Dist. No. 21 CA 0025, 2022-Ohio-1541, ¶¶ 15-16; *State v. Free*, 2nd Dist. No. 15901, 1998 Ohio App. LEXIS 454, at *29 (1998).

But this is a doctrine addressing the mens rea for the offense, and the gist of the doctrine is that the identity of the victim who was actually or almost harmed is not an element of the mens rea. What matters is whether the offender was acting purposely or knowingly to harm *another*. "There [is] no reason to read 'another' (countertextually) as meaning only 'the actual victim,' since the doctrine of transferred intent [is] 'firmly rooted in Ohio law.'" *Bradshaw*, 546 U.S. at 77.

This doctrine could potentially be applied in a case in which the defendant is claiming self-defense as a justification for taking the shot. When the person takes a shot at an alleged attacker, the mens rea would follow the shot even when the shot misses the attacker and inadvertently harms a third party having no role in the attack. But while the doctrine *could* apply, the issue of mens rea is nevertheless a question that is legally

distinct from self-defense. Mens rea is an element of the offense, while self-defense is an affirmative defense that serves as a justification for the offense. *State v. Messenger*, ___ Ohio St.3d ___, 2022-Ohio-4562, ¶ 24; *Martin v. Ohio*, 480 U.S. 228, 233-34 (1987). Putting the burden of persuasion on the State does not convert self-defense into an "element". *Messenger*, ¶ 24; *Engle v. Isaac*, 456 U.S. 107, 120-21 (1982).

The decision in *State v. Clifton*, 32 Ohio App.2d 284 (1st Dist.1972), commits the basic error of conflating the mens rea element with the distinct question of whether the affirmative defense should be extended to conduct affecting bystanders. The application of the transferred-intent doctrine would not control whether the self-defense justification would apply when an innocent bystander is injured.

In any event, there is no indication that the transferred-intent doctrine actually was applied in the first trial here. The jury received no instruction on transferred intent or transferred knowledge under the count five felonious assault as to victim T.D. In addition, the defendant never testified and therefore provided no evidence that every shot was taken solely in claimed self-defense against M.D. In the close confines in which the defendant was taking these shots, it would have been hard to miss M.D. "accidentally", and, given the other evidence supporting the defendant's animus against T.D., the jury could reach the conclusion he was acting knowingly in the attempt to harm T.D., as to whom he had no plausible self-defense claim at all. The defendant seeks an advisory opinion on a claim of "transferred" self-defense that would not even apply in his case. And, in this case, the jury rejected self-defense even as to the crimes committed against the "intended" target M.D., thereby rendering harmless any purported error in failing to instruct on self-defense as to the felonious assault committed against victim T.D.

On the merits of the question, the defendant's proposition of law is simply incorrect in contending that the affirmative defense of self-defense would "transfer" every time the prosecutor would seek to "transfer" the mens rea. The affirmative defense should extend no further than justifying the use of force against the claimed aggressor. The new SYG law actually confirms this point, emphasizing that the force used must be "in self-defense" and that the person using force must have "reasonably believed that the force was *necessary* to *prevent* injury, loss, or risk to life or safety." R.C. 2901.09(B) & (C) (emphasis added). This language allows force to be used against aggressor(s) "in self-defense", since using such force could "prevent" the injury or loss. But it would not authorize force to be used against others posing no such danger. The justification extends to using force against aggressor(s), when *necessary*, but not any further than necessary, and therefore does not excuse harms and crimes against innocent bystanders.

As this language also indicates, any use of force must be reasonable, and so the person using force can still be held accountable when the nature and amount of force is excessive or careless as to the safety of innocent third parties and thereby results in an offense. Such careless use of force amounts to negligence and would deprive the person of the justification for such force in regard to the innocent third parties. The person using force owes a duty of care to bystanders, and even with the extenuating circumstance of an ongoing attack, the defendant can still be held criminally responsible if his actions were reckless or criminally negligent vis-à-vis the safety of innocent bystanders. See *McDaniel v. State*, 2011 Alas. App. LEXIS 157, at *2 (Alaska App. 2011); *Styles v. State*, 2019 Md. App. LEXIS 665, at *22 (2019); *Howard v. State*, 307 Ga. 12, 23, 834 S.E.2d 11 (2019) (justification inapplicable if the defendant shot carelessly or recklessly).

Even if self-defense might extend to excuse crimes against innocent bystanders, it would be accompanied by requirements that the use of force was neither careless nor reckless in that regard. The defendant's proposed automatic application of the self-defense justification to bystanders based solely on "transferred intent" must be rejected.

> **Amicus Third Proposition of Law**: A guilty verdict on the direct charge of voluntary manslaughter under one count does not result in any double-jeopardy or collateral-estoppel bar to retrial of felony murder or felonious assault under other counts, even if the court erred as a matter of law in unnecessarily including the passion-rage mitigator as an element of the count alleging the direct charge of voluntary manslaughter.

As already indicated, the peculiar posture underlying the defendant's third proposition of law would support the dismissal of this proposition as improvidently allowed. The defendant's double-jeopardy and collateral-estoppel claims fail anyway.

A.

The passion-rage mitigator is set forth in the statutes defining the crimes of voluntary manslaughter and aggravated assault. Under R.C. 2903.03(A), the crime of voluntary manslaughter is defined, as follows:

> 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 cause the death of another or the unlawful termination of another's pregnancy.

(Emphasis added) Under R.C. 2903.12(A), the crime of aggravated assault is defined:

> (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.

(Emphasis added)

Although the "sudden passion" and "sudden fit of rage" language is situated in the middle of these statutes, the case law has concluded that "sudden passion" and "sudden fit of rage" are *not* elements. Instead, they are "mitigating circumstances" akin to affirmative defenses on which the defense bears the burden of going forward and the burden of persuasion by a preponderance of the evidence. *State v. Rhodes*, 63 Ohio St.3d 613 (1992), syllabus; id. at 617 (plurality); id. at 621-23 (Resnick, J., concurring) (passion-rage is treated as affirmative defense).

As stated in the *Rhodes* syllabus, which was supported by four justices:

> A defendant on trial for murder or aggravated murder bears the burden of persuading the fact finder, by a preponderance of the evidence, that he or she acted under the influence of sudden passion or in a sudden fit of rage, either of which was brought on by serious provocation occasioned by the victim that was reasonably sufficient to incite the defendant into using deadly force, R.C. 2903.03(A), in order for the defendant to be convicted of voluntary manslaughter rather than murder or aggravated murder. (*State v. Muscatello* [1978], 55 Ohio St.2d 201, 9 O.O.3d 148, 378 N.E.2d 738, construed and modified.)

As the accompanying *Rhodes* three-justice plurality opinion further stated, "we thus continue to view the law regarding affirmative defenses to be applicable to the proof of mitigation to reduce a charge of murder to manslaughter." *Rhodes*, 63 Ohio St.3d at 619.

> R.C. 2903.03 defines voluntary manslaughter as a single offense that, under certain circumstances, permits a

> defendant to mitigate a charge of murder to manslaughter. The crime comprises elements that must be proven by the prosecution and mitigating circumstances that must be established by the defendant.[footnote omitted] Under the statute, the jury must find a defendant guilty of voluntary manslaughter rather than murder if the prosecution has proven, beyond a reasonable doubt, that the defendant knowingly caused the victim's death, and if the defendant has established by a preponderance of the evidence the existence of one or both of the mitigating circumstances.

*Rhodes*, 63 Ohio St.3d at 617 (plurality). This discussion in *Rhodes* is consistent with the earlier holding in *Muscatello*, which stated that the "extreme emotional stress" mitigator in the earlier version of the voluntary manslaughter statute was "not an element of the crime of voluntary manslaughter", but, rather, was a "circumstance" mitigating the offender's culpability. *Muscatello*, 55 Ohio St.2d at 203.

The fourth justice in *Rhodes* concurred in the syllabus, agreeing with its placement of the burden of persuasion on the defense and concluding that the passion-rage mitigator is an affirmative defense. *Rhodes*, 63 Ohio St.3d at 621-23 (Resnick, J., concurring). Passion-rage amounts to an "affirmative defense" under the definition of that term, even though it "functions as an attempt to reduce the degree of the crime, rather than as a complete defense". Id. at 621.

This Court continues to follow *Rhodes* in placing the burden on the defense by a preponderance. *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, ¶ 153; *State v. Benge*, 75 Ohio St.3d 136, 140 (1996) ("if the defendant establishes"). As the First District has explained, "[a]cting under a sudden passion or fit of rage is not an element of voluntary manslaughter that the state must prove; it is a mitigating circumstance that a defendant must prove by a preponderance of the evidence if he is also on trial for murder

or aggravated murder." *State v. Rhymer*, 1st Dist. No. C-200164, 2021-Ohio-2908, ¶ 24.

B.

The non-element nature of the passion/rage mitigator is confirmed by the narrow purpose served by these provisions. When proven, the passion-rage issue mitigates the degree of the offense for homicide and felonious assault, reducing a purposeful murder down to voluntary manslaughter, and reducing felonious assault to aggravated assault.

The passion-rage reduction from felonious assault to aggravated assault can serve toreduce felony murder too. Felonious assault is a second-degree felony offense of violence and therefore can serve as the predicate offense for felony murder under R.C. 2903.02(B). But if the felonious assault is accompanied by preponderating proof of the passion-rage mitigator, then the predicate is reduced to aggravated assault, a fourth-degree felony, which cannot serve as a predicate for felony murder. This results in a reduction down to involuntary manslaughter, a first-degree felony.

The sole office of the passion-rage issue is to act as a mitigator of a higher-degree offense in these ways. The passion-rage mitigator serves no other purpose, and it is not an element of voluntary manslaughter.

C.

The passion-rage mitigator can be broken down into six parts:

(1) "while under the influence of"

(2) "sudden passion" or "in a sudden fit of rage"

(3) "brought on by"

(4) "serious provocation"

(5) "occasioned by the victim"

(6) "reasonably sufficient to incite the person into using deadly force"

The first and third elements emphasize that the defendant must have been under the *influence* of passion-rage, which was *brought on by* the victim's provocation. The passion-rage must be traceable to, and attributable to, the victim's provocation.

While the sixth element refers to "reasonably sufficient", it is not enough that the victim's provocation might have been sufficient enough to trigger passion-rage in a reasonable person. Due to the "influence" and "brought on" elements, the defendant himself must have been subjectively experiencing the passion-rage at the time.

Accordingly, the passion-rage mitigator has objective *and* subjective components. As stated in *State v. Mack*, 82 Ohio St.3d 198, 200-201 (1998):

> In *State v. Shane* (1992), 63 Ohio St.3d 630, 590 N.E.2d 272, we elaborated on what constitutes "reasonably sufficient" provocation in the context of voluntary manslaughter. First, an objective standard must be applied to determine whether the alleged provocation is reasonably sufficient to bring on a sudden passion or fit of rage. That is, the provocation must be "sufficient to arouse the passions of an ordinary person beyond the power of his or her control." If this objective standard is met, the inquiry shifts to a subjective standard, to determine whether the defendant in the particular case "actually was under the influence of sudden passion or in a sudden fit of rage." *Shane*, 63 Ohio St.3d at 634-635, 590 N.E.2d at 276. We also held in *Shane* that words alone will not constitute reasonably sufficient provocation to incite the use of deadly force in most situations. *Id*., paragraph two of the syllabus.

Thus, "[t]here are four obstacles for the defendant to overcome before he can have his intentional killing reduced from murder to voluntary manslaughter: (1) There must have been a reasonable provocation. (2) The defendant must have been in fact provoked. (3) A reasonable man so provoked would not have cooled off in the interval of time between

the provocation and the delivery of the fatal blow. And (4), the defendant must not in fact have cooled off during that interval." *Shane*, 63 Ohio St.3d at 630 n. 1 (quoting treatise). "Factors (1) and (3) are objective; factors (2) and (4) are subjective." Id.; see, also, *State v. Deem*, 40 Ohio St.3d 205 (1988), paragraph five of the syllabus.

These subjective and objective components all must coexist for the passion-rage mitigator to apply. "Our criminal law recognizes that the provoked defendant is less worthy of blame than the unprovoked defendant, but the law is unwilling to allow the provoked defendant to totally escape punishment." *Shane*, 63 Ohio St.3d at 635.

D.

For the passion-rage mitigator to apply, the defense must be able to point to a "serious provocation" inciting a passion-rage that was "sudden" at the time the defendant was acting. Moreover, as this Court has emphasized, "[w]ords alone will not constitute reasonably sufficient provocation to incite the use of deadly force in most situations." *Shane*, paragraph two of the syllabus; *Thompson*, ¶¶ 152-159.

Importantly, the particular "provocation must be *occasioned by the victim*". *Shane*, 63 Ohio St.3d at 637 (emphasis sic). "Even assuming that [the defendant] subjectively could be easily provoked to act under the influence of a sudden passion or in a sudden fit of rage, there still must be *serious provocation occasioned by the victim*." *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, ¶ 72 (emphasis sic).

The "occasioned by the victim" component prevents the defendant from using the passion-rage mitigator to reduce an offense committed against someone other than the person who provoked the defendant. A defendant's passion-rage occasioned by victim A's serious provocation will *not* mitigate a murder or felonious assault against victim B.

This principle was recognized in *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, in which one of the victims had done nothing to "provoke" the defendant.

> {¶131} In this case, the deceased victim, Gervais, did nothing to provoke Conway. Under R.C. 2903.03(A), the provocation must be "occasioned by the victim." The voluntary-manslaughter statute was amended in 1982 to include the phrase "occasioned by the victim," which forecloses application of the statute to situations, as here, where the provocation came from someone other than the person killed. Am.Sub.H.B. No. 103, 139 Ohio Laws, Part I, 1761, 1763. See, also, 2 LaFave & Scott, Substantive Criminal Law (2003) 510-511, Section 15.2(g). Thus, we find that the trial court did not commit error in refusing to instruct the jury on voluntary manslaughter.

*Conway*, ¶ 131; see, also, *State v. Miller*, 10th Dist. No. 89AP-1347, 1990 Ohio App. LEXIS 3860, at *12-13 (Aug. 30, 1990) (no serious provocation by particular victim).

E.

Like the "at fault" element of self-defense, the element of "occasioned by the victim" also operates to exclude first aggressors and other provocateurs from receiving the benefit of a reduction based on the passion-rage mitigator. When the defendant was actually the first aggressor or otherwise started a provocation, he cannot claim to have been provoked by the victim when the victim or someone else responds to the defendant's provocation. In that instance, the incident is occasioned by the defendant, not the victim, who was merely responding. See, e.g., *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶¶ 83-84 ("Elmore broke into her house before confronting her"; "no evidence that Annarino was the aggressor. Rather, Elmore broke into Annarino's home, waited for her to arrive home from her son's wedding, and then attacked and killed her."). The word "occasioned" connotes "who started it", and when the defendant

"started it," he cannot claim the incident was "occasioned by the victim".

F.

When voluntary manslaughter and aggravated assault are charged directly, the plurality in *Rhodes* characterized the passion-rage mitigator as being "presumed", and "neither party" is required to establish the mitigator. *Rhodes*, 63 Ohio St.3d at 618 (plurality); see, also, id. at 621-23 (Resnick, J., concurring) (treating passion-rage mitigator as affirmative defense). The Tenth District has summarized the state of the law in this regard, quoting *Rhodes* in the process:

> {¶14} * * * Appellant's underlying premise is that provocation is an element of voluntary manslaughter; thus, a finding of sufficient evidence of voluntary manslaughter also includes a finding of sufficient evidence for provocation. However, courts have held that serious provocation, as contemplated in R.C. 2903.03, is not an element of the crime of voluntary manslaughter, but is rather a circumstance, the establishment of which mitigates a defendant's criminal culpability. *See, e.g., State v. Wallace*, 1st Dist. No. C-950465, 1996 Ohio App. LEXIS 5877 (Dec. 31, 1996), citing *Shane* at 638; *State v. Heaston*, 9th Dist. No. 15138, 1992 Ohio App. LEXIS 381 (Jan. 29, 1992) (finding "[p]rovocation is not an element of the crime of voluntary manslaughter"). In *State v. Rhodes*, 63 Ohio St.3d 613, 618, 590 N.E.2d 261 (1992), the Supreme Court of Ohio found that if a defendant:
>
> [I]s on trial for voluntary manslaughter, neither party is required to establish either of the mitigating circumstances. Rather, the court presumes (to the benefit of the defendant) the existence of one or both of the mitigating circumstances as a result of the prosecutor's decision to try the defendant on the charge of voluntary manslaughter rather than murder. In that situation, the prosecution needs to prove, beyond a reasonable doubt, only that the defendant knowingly caused the death of another, and it is not a defense to voluntary manslaughter that neither party is able to demonstrate the existence of a mitigating circumstance.

> {¶15} Applying *Rhodes* to the case before us, because the state was not required to prove provocation as an element of voluntary manslaughter, the trial court's finding that there was sufficient evidence to find appellant guilty of voluntary manslaughter did not implicitly include a finding that there was sufficient evidence to support provocation, and the trial court was free to find the victim did not provoke appellant in analyzing the sentencing factors.

*State v. Gore*, 10th Dist. No. 15AP-686, 2016-Ohio-7667, ¶¶ 14-15.

In *State v. Ramirez*, 6th Dist. No. L-17-1076, 2020-Ohio-3905, ¶¶ 16-26, the Sixth District agreed that the passion-rage mitigator is not an element of these offenses when directly charged. "Notably, the state is not required to prove that a defendant acted under a sudden passion or fit of rage, brought about by serious provocation, in order to prove murder. Thus, the state is not be (sic) required to establish sudden passion or fit of rage to prove voluntary manslaughter." *Ramirez,* ¶ 21. The passion-rage mitigator "is not an element of voluntary manslaughter", "the state did not need to prove it at trial", and therefore the trial court "erroneously conclude[ed] that the state's evidence was insufficient on the mitigating element of sudden passion or fit of rage." Id. ¶¶ 26, 28.

When these offenses are directly charged, the count need not even mention the passion-rage mitigator. The charge is sufficient if it gives notice of the *elements* of the offense charged. *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, ¶¶ 8-9. There would be no need to allege non-elements or to negate matters that are defensive in nature. *United States v. Sisson*, 399 U.S. 267, 288 (1970) ("It has never been thought that an indictment, in order to be sufficient, need anticipate affirmative defenses * * *."). The mitigator is not a "defense" to the charge of voluntary manslaughter anyway.

Unadorned of the passion-rage mitigator, the direct charge of voluntary

manslaughter should simply allege that the defendant knowingly caused the death of another or knowingly caused the unlawful termination of another's pregnancy. When voluntary manslaughter and aggravated assault are charged directly, then it becomes a non-sequitur to prove – or instruct on – the mitigator under that count. The mitigator is not an element, and it would not lead to any reduction of the direct charge.

G.

Against this backdrop, three basic observations come to the forefront. First, the jury should not have been instructed on the passion-rage mitigator for purposes of the direct charge of count three voluntary manslaughter. The passion-rage mitigator was not an element, and it could not reduce the charged offense. It was mere surplusage and a legal irrelevancy in the context of that direct charge.

Second, it was inapposite to reverse the guilty verdict as to the count five felonious assault on T.D. The Eighth District relied on the "inconsistency" created by a passion-rage finding under count three, but count three addressed the killing of M.D., a different victim than victim T.D. under count five. The victim T.D. did nothing that would qualify as serious provocation, and, as between the defendant and T.D., the defendant was the one who occasioned the incident. As to count five and victim T.D., there was no evidence to support an instruction on the passion-rage mitigator, and there was no basis to find the guilty verdict on count five to be "inconsistent" with count three.

Third, even as to victim M.D., the evidence was legally insufficient to support the passion-rage mitigator under counts two and four. Victim M.D. was responding to the defendant's own provocative acts of brandishing his gun against T.D., pointing it at her, and threatening to kill her. T.D. sought help, and the responder who was able to reach

her first was her father M.D., whose actions were wholly in line with meeting the deadly threat posed by the gun-wielding defendant. For purposes of self-defense, the defendant was at fault for the affray, and Ohio law governing the defense of others authorized M.D. to come to the aid of his daughter. When he arrived, he stood in the shoes of his daughter, who was facing a continuing danger from the defendant, who had wielded a gun against her and threatened her and who continued to remain at the location and continued to be armed, despite a demand that he leave. *State v. Wenger*, 58 Ohio St.2d 336, 340 (1979) ("stands in the shoes of the person whom he is aiding").

Just as the defendant was at fault for creating the affray, he was equally responsible for having provoked these events and "occasioned" them. In this instance, victim M.D. did not "occasion" a provocation; he was *responding* to a provocation.

In addition, the case law points away from instructing the jury on both self-defense and the passion-rage mitigator. There is a strong demarcation between the passion-rage mitigator that might result in a reduction of an offense and the fear-based notion of self-defense that would amount to a complete defense. As this Court itself has stated: "Fear alone is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or fit of rage." *Mack*, 82 Ohio St.3d at 201; *Thompson*, ¶ 157. In general, "fear" results in a self-defense instruction, but that same fear will not justify an instruction on passion-rage. The Tenth District has provided this summary:

> {¶38} Ferrell maintained throughout the trial that he acted in self-defense. This court has observed that "'"[e]vidence supporting the privilege of self-defense, i.e., that the defendant feared for his own personal safety, does not constitute sudden passion or fit of rage."'" *State v. Collins*, 10th Dist. No. 19AP-373, 2020-Ohio-3126, ¶ 51, quoting *State v. Harding*, 2d Dist. No. 24062, 2011-Ohio-2823, ¶

> 43, quoting *State v. Stewart*, 10th Dist. No. 10AP-526, 2011-Ohio-466, ¶ 13. Moreover, having explained in our resolution of Ferrell's first assignment of error that the video evidence was clear that Ferrell was the initial aggressor in the affray and did not make a good faith effort to withdraw, Ferrell cannot show the evidence would support a finding that he acted under serious provocation occasioned by the victim. *See State v. Marcum*, 7th Dist. No. 04 CO 66, 2006-Ohio-7068, ¶ 51 (defendant's account of events that he either fired warning shots or fired in self-defense is not consistent with sudden rage or sudden passion brought on by serious provocation); *see also State v. Bouie*, 8th Dist. No. 108095, 2019-Ohio-4579, ¶ 47 ("it has been held that in most cases, jury instructions on both self-defense and serious provocation are inconsistent" because "the mental states of fear as required for self-defense and rage as required for aggravated assault are incompatible"); *State v. Caldwell*, 10th Dist. No. 98AP-165, 1998 Ohio App. LEXIS 6220 (Dec. 17, 1998) ("the difficulty in attempting to argue both provocation, as is necessary for voluntary manslaughter, and self-defense is that to an extent those defenses are inconsistent"). Ferrell repeatedly testified he was afraid of DiPenti and feared for his safety during the final encounter with him on May 2, 2018, but "'[f]ear alone is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or fit of rage.'" *Collins* at ¶ 52, quoting *State v. Mack*, 82 Ohio St.3d 198, 201, 1998- Ohio 375, 694 N.E.2d 1328 (1998).

*State v. Ferrell*, 2020-Ohio-6879, 165 N.E.3d 743, ¶ 38 (10th Dist.); see, also, *State v. Sanders*, 5th Dist. No. 2018 CA 00004, 2019-Ohio-30, ¶ 42. At the very least, this dichotomy between self-defense and the passion-rage mitigator would have made it difficult for the defense to prove the passion-rage mitigator by a preponderance, when its very own assertion of self-defense undercut that assertion.

Given the defendant's role as provocateur, and given the substantial inconsistency between self-defense and the passion-rage mitigator, the trial court had substantial reasons *not* to instruct on the passion-rage mitigator under counts two and four.

H.

The defense has relied on a series of cases holding that it is inherently inconsistent for the defendant to be found guilty of both murder and voluntary manslaughter. The leading case in this genre contended that "[a] person cannot be convicted of both murder and voluntary manslaughter for the same killing." *State v. Duncan*, 154 Ohio App.3d 254, 2003-Ohio-4695, ¶ 24 (1st Dist.). The analysis in *Duncan* hinged on the view that there is a necessary conflict between a guilty verdict on voluntary manslaughter and a guilty verdict on murder and that this conflict is attributable to the passion-rage mitigator which, when applied, reduces murder to voluntary manslaughter as a matter of law. *Duncan*, ¶¶ 27-30. Other decisions, including the Eighth District's decision below, have followed the basic premise of *Duncan* that murder and voluntary manslaughter are mutually-exclusive, "either-or" offenses.

Notably, *Duncan*'s citations to *Rhodes* on this either-or dichotomy were referencing the discussion in *Rhodes* in which the jury would be instructed on the passion-rage mitigator in relation to a murder count being reduced to voluntary manslaughter. In a subsequent paragraph, the *Rhodes* plurality emphasized that voluntary manslaughter can be directly charged and that the State's only burden would be to show that the defendant knowingly caused the death of another.

*Duncan* and its progeny wrongly assume that the jury itself must elect between homicide counts. In fact, juries are not required to "elect", and the jury can properly find the defendant guilty on a freestanding direct charge of voluntary manslaughter *in addition to* purposeful murder and felony murder charges. Ohio law expressly provides that "[a]n indictment or information may charge two or more different offenses

connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes or offenses, under separate counts * * *." R.C. 2941.04. The jury may then find the defendant guilty of all such offenses: "The prosecution is *not required to elect* between the different offenses or counts set forth in the indictment or information, but the defendant *may be convicted of any number of the offenses charged*, and each offense upon which the defendant is convicted must be stated in the verdict." Id. (emphasis added).

In addition, when the jury instructions comply with *Rhodes*, there would be no "inconsistency" when a jury would convict on direct charges of murder and voluntary manslaughter. On the direct charge of voluntary manslaughter, there would be no jury instruction at all on the passion-rage mitigator, which is not an element or a defense under that count. If the evidence would support an instruction on the mitigator under the murder count(s), the court would so instruct. If the jury ended up reducing a purposeful murder to voluntary manslaughter under that count, the reduction would show that the jury either found the mitigator to apply or that the jury concluded that defendant did not act purposely but did act knowingly to support guilt for voluntary manslaughter. This would be consistent with the guilty verdict under the freestanding direct charge of voluntary manslaughter, and the counts would merge for sentencing purposes.

It is also true, though, that a guilty verdict on the direct charge of voluntary manslaughter for knowingly causing the death of another would be entirely consistent with the jury also finding that the defendant purposely caused the death of another and finding that the defendant knowingly caused serious physical harm for purposes of the felonious assault predicate for felony murder. A guilty verdict on a direct charge of

voluntary manslaughter does not inherently include a finding of the passion-rage mitigator, and therefore finding the defendant guilty of accompanying counts of purposeful murder or felony murder can be entirely consistent.

The decision in *State v. Griffin*, 175 Ohio App.3d 325, 2008-Ohio-702 (1st Dist.), is especially problematic in this regard. The defendant therein faced felony murder and voluntary manslaughter counts. The First District relied on *Duncan* to find a purported either-or inconsistency between the guilty verdicts on the two counts. Even so, the court conceded that the jury had *not* been instructed on the passion-rage mitigator at all under the voluntary manslaughter count. Given the lack of instruction, there would be no conflict between the guilty verdicts. Knowingly causing the death of the victim is *consistent* with committing a felonious assault (and felony murder) against him too. But, in conflict with *Rhodes*, the *Griffin* court nevertheless contended that the jury must be instructed on the passion-rage mitigator under the voluntary manslaughter count.

As *Rhodes* confirms in multiple ways, the passion-rage mitigator is *not* an element. In many cases, the evidence will not be sufficient to even warrant an instruction on the passion-rage mitigator. As *Rhodes* also confirms, a charge of voluntary manslaughter may be brought directly, and, in that instance, the passion-rage mitigator is *still* not an element. The State need only prove that the defendant knowingly caused the death of another, and the defendant will be guilty of voluntary manslaughter even in the complete absence of proof of the passion-rage mitigator. Since a guilty verdict under a direct charge of voluntary manslaughter does not necessarily or always reflect a finding of the passion-rage mitigator, it is simply not true that such a guilty verdict creates an "inconsistency" with guilty verdicts for purposeful murder and felony murder.

There is ample opportunity in such cases for the passion-rage mitigator to be given its proper operative effect in a prosecution for crimes including purposeful murder and/or felony murder and felonious assault. It is open to the defense to endeavor to prove the mitigator in regard to the killing; the burden of going forward and the burden of persuasion are both on the defense. If sufficient evidence of the mitigator is presented, the jury should be instructed on the mitigator under the purposeful murder count so that the jury can acquit of purposeful murder and find the defendant guilty of voluntary manslaughter under that count based on the mitigator. Likewise, the jury would be instructed on involuntary manslaughter under the felony murder count because of the possibility that the passion-rage mitigator would reduce the felonious assault predicate to aggravated assault. When the evidence is sufficient to support the mitigator by a preponderance, the jury will be instructed accordingly under the murder counts and the felonious assault count. There is no need to strain to insert the non-element mitigator into the voluntary manslaughter count too, where the mitigator would have no operative effect and there is no need on the part of the State to allege or prove the mitigator.

Another basic problem undercuts cases like *Duncan* and *Griffin*, which conceded, as they must, that the passion-rage mitigator will only be operative if the defense proves it by a preponderance. *Rhodes* clearly reached that holding.

Given that preponderance burden, there often would be no "inconsistency" between the guilty verdict on a freestanding count of voluntary manslaughter and guilty verdicts on purposeful murder and felony murder. This is because a properly-instructed jury could conclude that the defense did not prove the mitigator by a preponderance and yet could still find the defendant guilty of voluntary manslaughter because he knowingly

caused the death of the victim. It bears repeating that the absence of the mitigator is *not* a defense to the direct charge of voluntary manslaughter. As a result, in many cases, the guilty verdict would merely reflect that the jury found that the defendant knowingly caused the death of another. It would not necessarily reflect that the jury found the mitigator by a preponderance too.

I.

Beyond the basic problem of whether an inconsistency exists, the general rule is that inconsistent verdicts on different counts provide no basis for reversal. "[W]e have long held that counts of an indictment are not interdependent and that consistency between verdicts on multiple counts of an indictment is unnecessary." *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, ¶ 27; see, also, *State v. Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, ¶ 347; *State v. Adams*, 53 Ohio St.2d 223 (1978), paragraph two of the syllabus, vacated on other grounds, 439 U.S. 811. Inconsistent verdicts on different counts of a multi-count indictment do not justify overturning a guilty verdict. *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, ¶ 138 (collecting cases). This bar on reversal applies even when the jury's instructions drew some legal connection between the two counts that create the purported inconsistency. *United States v. Powell*, 469 U.S. 57, 68-69 (1984). The doctrine barring reversal even applies when the purported inconsistency existed under the same count when the jury acquitted the defendant of a specification but still found the defendant guilty of the underlying count. *State v. Perryman*, 49 Ohio St.2d 14 (1976), paragraph three of the syllabus, vacated on other grounds, 438 U.S. 911 (1978).

In *Hurt*, the Eighth District contended that the doctrine prohibiting reversal based

on inconsistent verdicts only applies when the jury is finding the defendant guilty on one count but completely acquitting the defendant of another charge. According to *Hurt*, when the inconsistency exists between a guilty verdict on one offense and another guilty verdict reflecting a reduced offense, the doctrine barring reversal based on inconsistent verdicts will not apply. *Hurt*, ¶¶ 20-21. But there is no such distinction in the inconsistent-verdict doctrine, as the prohibition on reversal would apply regardless of whether the verdicts that create the inconsistency are based on a full acquittal or partial acquittal or reduced verdict of guilty. The doctrine applies to "verdicts" generally.

This proposed distinction makes no sense. If a defendant claiming a complete defense cannot obtain reversal when the jury fully acquits him on one count but inconsistently finds him guilty on another count, it makes no sense to allow a defendant claiming only a partial defense like the passion-rage mitigator to obtain a reversal based on a purported inconsistency. The jury's purported inconsistency in applying a passion-rage reduction to one count and not another would raise all of the same concerns of mistake, compromise, and lenity that weigh against reversal based on inconsistency when a complete acquittal is involved. This is especially true when the "inconsistency" only would arise if the passion-rage mitigator is artificially inserted into the instructions on the freestanding direct charge of voluntary manslaughter.

At least one Ohio appellate court has rejected a proposed distinction that would only apply the no-reversal rule when a complete acquittal on one of the counts is creating the "inconsistency". "We view this as a distinction without substance, * * * and can perceive no logical reason that the same [no-reversal] principle would not apply" to a case involving an "inconsistent" conviction for a lesser offense. *State v. Collins*, 4th Dist.

No. 94CA1639, 1995 Ohio App. LEXIS 4409, at *13 (1995).

J.

In the present case, the passion-rage mitigator was artificially inserted into the instruction on the direct charge of voluntary manslaughter. The defendant points to the inconsistency of the jury finding the passion-rage mitigator as to that count while also finding the defendant guilty of felony murder and felonious assault without any reduction based on the mitigator. But the jury was *not* instructed on the mitigator under those counts and therefore the jury had no basis to reduce those verdicts; the jury was expressly told to decide the counts independently of each other. This circumstance does not create an "inconsistency" between verdicts, but, rather, an "inconsistency" in the trial court's choice to include the artificially-inserted instruction of the passion-rage mitigator under count three while not including it under courts two and four.

The Eighth District concluded that, because the mitigator was included in the instructions under count three, then it must be included under counts two and four. But this was exactly backwards as a matter of law. The trial court erred in inserting a needless instruction on the passion-rage mitigator under count three, and the Eighth District's logic compounded that error. The basic question should have been whether there was evidence warranting the instruction on the mitigator under counts two and four under the appropriate preponderance burden. The Eighth District refused to address that question, even though it is central to whether error occurred under those counts. As stated earlier, the defendant's status as the provocateur and his claim of self-defense gave the court substantial grounds for refusing to instruct on the mitigator under those counts.

K.

Notwithstanding these issues, the defendant is attempting to turn the finding on the passion-rage mitigator under count three into a preclusive matter, requiring that he face retrial only on involuntary manslaughter under count two and aggravated assault under counts four and five. As indicated, though, there could be no preclusion as to count five, since that count involved a different victim than count three, and therefore the finding under count three would not require that any court recognize a passion-rage mitigator as to victim T.D. In fact, as a matter of law, the evidence was insufficient to support any passion-rage mitigator as to the crime against victim T.D.

Several matters also lead to the rejection of the defendant's preclusion arguments as to counts two and four. Although those counts involved the same victim as count three, there would still be no preclusion from a finding of the passion-rage mitigator under count three.

1.

An initial problem is that, legally, the finding no longer exists. A vacated judgment would not have any preclusive effect at this point. *Langley v. Prince*, 926 F.3d 145, 164, 167 (5th Cir.2019) (once vacated on appeal, judgment is no longer valid "and retains *zero* preclusive effect"; "no preclusion as to matters vacated or reversed"); *Romano v. Gibson*, 239 F.3d 1156, 1179 (10th Cir.2001) ("no preclusive effect" if "vacated, reversed or set aside").

Although it appears that the defendant did not seek the vacating of the voluntary manslaughter verdict on the basis of inconsistency in the court of appeals, the defendant here does *not* seek the reinstatement of that verdict for purposes of relying on it for

collateral-estoppel purposes. He contends the verdict would still need to be reversed because of the failure to instruct on the new SYG law. This Court would need to reinstate the count three guilty verdict in order to give it the preclusive effect the defendant requests, but the State has not appealed to seek that result, and the defendant is not seeking the reinstatement of the verdict in his own right. The defendant's claim of collateral estoppel necessarily fails as a result.

Moreover, as discussed by the Eighth District below, a reversal for "inconsistent" verdicts in this context results in a reversal of all of the verdicts affected by the "inconsistency". Under the flawed *Duncan* logic, the jury must be put to its choice of electing between the counts based on its assessment of the passion-rage mitigator in relation to those counts. The jury must be given the chance to make its choice, and, in the end, under instructions on its either-or choice, the jury could return guilty verdicts as to felony murder and felonious assault instead of voluntary manslaughter.

2.

Since inconsistent verdicts on different counts provide no basis for reversal, it follows that an inconsistent verdict favorable to the defendant under one count cannot be given a preclusive effect against the other "inconsistent" counts. *Bravo-Fernandez v. United States*, 580 U.S. 5, 13 (2016) (citing *Powell*). Indeed, the collateral estoppel doctrine only arises in *successive*-prosecution cases; it does not arise out of a single prosecution of a multi-count indictment in which the prosecutor has not set out to try the offenses in a seriatim fashion. *Nesbitt v. Hopkins*, 86 F.3d 118, 120-21 (8th Cir.1996); *State v. Smith*, 10th Dist. No. 14AP-33, 2014-Ohio-5443, ¶ 22 (following *Nesbitt*); see, also, *Ohio v. Johnson*, 467 U.S. 493, 500 n. 9 (1984) ("where the State has made no

effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable.").

3.

In addition, the collateral-estoppel doctrine only would apply if the defendant was relying on an acquittal as a basis for the collateral-estoppel bar. *Currier v. Virginia*, 138 S.Ct. 2144, 2150-51 (2018) ("*Ashe*'s protections apply only to trials following acquittals"); *Langley*, 926 F.3d at 159. There was no acquittal under count three; the defendant was found guilty as charged.

4.

Collateral estoppel also would be inapplicable here because the finding of the passion-rage mitigator under count three was not "essential to the judgment". *Bobby v. Bies*, 556 U.S. 825, 829, 834 (2009). "A determination ranks as necessary or essential only when the final outcome hinges on it." Id. at 835. As already discussed, the passion-rage mitigator was not an element of the direct charge of voluntary manslaughter and constituted no defense to that charge. It was a legal non-sequitur under that count and should have no preclusive effect as a result.

5.

The defendant's double-jeopardy claim also fails. "[T]he United States Supreme Court has long recognized that double jeopardy will not bar retrial of a defendant who successfully overturns his conviction on the basis of trial error, through either direct appeal or collateral attack." *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, ¶ 16.

Defendant errs in arguing that the guilty verdict on voluntary manslaughter amounts to a finding that the evidence was "insufficient" such that double jeopardy

would bar a retrial on the passion-rage mitigator. Sufficiency review does not even extend to non-element affirmative defenses like this mitigator. *Messenger*, supra.

Moreover, a jury's verdict is not indicative of any "insufficiency" finding so as to bar retrial. The sufficiency standard construes the evidence in the light most favorable to the prosecution. But, in returning its verdicts, the jury is exercising its plenary fact-finding authority and is not required to construe the evidence in the light most favorable to the prosecution. The sufficiency standard determines whether the case should have gone to the jury in the first place. Deliberations on guilt or innocence, and verdicts rendered thereafter, are entirely *consistent* with the evidence having been "sufficient" to warrant such deliberations. Sufficiency review is simply different than "inconsistency" review. *Jackson v. Virginia*, 443 U.S. 307, 319 n. 13 (1979); *Powell*, 469 U.S. at 67.

In this case, the evidence was insufficient to support a finding on the passion-rage mitigator. But the mitigator is a non-element as to count three and therefore such insufficiency makes no difference to the ability to retry that count. The evidence *was* sufficient on the elements of knowingly causing death for purposes of count three, and that would allow a retrial on voluntary manslaughter. The defendant's arguments regarding the passion-rage mitigator have zero effect on the sufficiency of the evidence supporting the elements of counts two, four, and five, and retrial would be allowed on those counts as well.

## CONCLUSION

For the foregoing reasons, amicus curiae OPAA respectfully urges that this Court dismiss the present appeal as improvidently allowed. In the alternative, this Court should affirm the judgment 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 March 29, 2023, to the following counsel of record: Eric M. Levy, Law Office of Schlachet and Levy, 55 Public Square, Suite 1600, Cleveland, Ohio 44113, law@getlevy.com, counsel for defendant-appellant; John T. Martin, Assistant Public Defender, 310 Lakeside Avenue, Suite 200, Cleveland Ohio 44113, jmartin@cuyahogacounty.us, counsel for amicus curiae Cuyahoga County Public Defender; Russell Bensing, 1360 East Ninth Street, Suite 600 Cleveland, Ohio 44114, rbensing@ameritech.net, counsel for amicus curiae Ohio Association Of Criminal Defense Lawyers; and 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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