COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

WILLIAM DARBY,	:	**Appeal from Madison Circuit**
	:	**Court Case No. CC18-3238**
APPELLANT,	:	
v.	:	
	:	
STATE OF ALABAMA,	:	
	:	
APPELLEE.	:	

AMICUS BRIEF OF NATIONAL FRATERNAL ORDER OF POLICE IN SUPPORT OF APPELLANT WILLIAM DARBY

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STATEMENT REGARDING ORAL ARGUMENT

Amicus curiae National Fraternal Order of Police incorporates the Statement Regarding Oral Argument in Appellant William Darby's brief to this Court.

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STATEMENT OF THE CASE

Amicus curiae National Fraternal Order of Police incorporates the Statement of the Case in Appellant William Darby's brief to this Court. For purposes of its Brief, the National Fraternal Order of Police ("FOP") submits that it was reversible error for the trial court to refuse to instruct the jury on the appropriate reasonableness standard pursuant to *Graham v. Connor* as requested in Officer William Darby's proposed jury instruction numbers 34 and 35. C. Doc. 137, 157.

Accordingly, the FOP, in support of its 356,000 members in more than 2,100 lodges across the United States, sought leave to file this Brief as amicus curiae in order to highlight the importance of properly instructing the jury. Jurors are to make a determination from the perspective of a reasonable police officer in the defendant officer's circumstances in criminal matters where the defendant officer's use of force is at issue.

SUMMARY OF THE ARGUMENT

As of November 2021, 314 law enforcement officers have been shot in the line of duty – 58 of whom were killed. Audrey Conklin, Police officers shot, killed in 2021 at all-time high: National Fraternal Order of Police, Yahoo News (Dec. 1, 2021), https://news.yahoo.com/police-officers-shot-killed-2021-211043596.html. More officers have died by gunfire in the line of duty in 2021 than they have in any other year. *Id.* .

Additionally, there have been 95 ambush-style attacks on officers so far this year – a 126% increase compared to 2020. *Id.* On December 1, 2021, two police officers were stabbed in an ambush-style attack in Indianapolis. Jesse Wells, 2 IMPD officers stabbed in attack on city's near north side; man shot and wounded by police, FOX 59 (Dec. 1, 2021, 2:33 AM), https://fox59.com/news/breaking-a-suspect-was-shot-and-2-impd-officers-injured-during-altercation-on-citys-near-north-side/. There is no dispute that violence aimed at law enforcement is at an all-time high.

Despite this rise in violent attacks on law enforcement, our communities still rely on these officers to keep them safe. Homicide rates are soaring in cities across the country. *See* Tyler Buchanan, Ohio's homicide rate highest in decades, Axios Columbus (Oct. 12, 2021),

https://www.axios.com/local/columbus/2021/10/12/ohios-homicide-rate-highest-decades; Kevin Rector, Richard Winton & Andrew J. Campa, Brutal, brazen crimes shake L.A., leaving city at a crossroads, Los Angeles Times (Dec. 4, 2021, 5:00 AM), https://www.latimes.com/california/story/2021-12-04/brutal-brazen-incidents-push-crime-into-focus-in-l-a. Thus, today's law enforcement officer is operating under extreme conditions. Officers know that they face an increased likelihood of violence aimed at them. The communities that those officers are sworn to protect and serve, however, turn to law enforcement to address rising levels of violent criminal activity.

The decision to use force—especially deadly force—is never black and white. "[P]olice officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the use of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). The officer is laser-focused on the immediate threat that the officer or another person is facing and the safety of other individuals in the immediate vicinity. We allow for this "calculus of reasonableness" to factor in to whether or not an officer will face civil liability in a constitutional rights case. *Id.*

It therefore makes sense that a jury should be instructed on the standards prescribed by *Graham v. Connor* and *Tennessee v. Garner* to act as the finder of fact in determining whether a law enforcement officer is *criminally* liable for using force. Indeed, several jurisdictions do so.

Officer William Darby requested – and the trial court refused – the following jury instructions related to his use of deadly force:

> *34. Escalation into deadly force is justified by a person's refusal to comply with officer's commands to drop his gun if the officers reasonable (sic) reacted to what they perceived as an imminent threat to themselves. An officer's use of deadly force must be objectively reasonable given the circumstances of a tense, uncertain and rapidly evolving crisis.*
>
> *35. The reasonableness of an officers actions in using deadly force must be objectively reasonable judged from the perspective of a reasonable officer on the scene, the fact that officers are forced to make split second decisions, a[n]d in light of the facts and circumstances confronting them at the the (sic) time.*

C. Doc. 137, 157. The trial court erred by refusing to give the jury these instructions and instead placing Officer Darby in the position of a civilian. The circumstances in which Officer Darby found himself – and

which provoked his shooting of Jeffrey Parker – were anything but circumstances experienced by civilians.

ARGUMENT

I. It is reversible error for a trial court not to instruct the jury on the proper use of force standard as set forth in *Graham v. Connor* and *Tennessee v. Garner* in a criminal trial for a police officer's use of force in the line of duty.

Graham v. Connor and *Tennessee v. Garner* provide the logical starting points to determine when a police officer's use of deadly force is justifiable and when it may properly be considered a homicide. In *Graham v. Connor*, the Supreme Court held that all claims that law enforcement officers have used excessive force—deadly or not—are governed by the Fourth Amendment's "reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 395-96 (1989). Under this test, courts are required to balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396.

Application of this test requires consideration of the totality of the circumstances in each case, including: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of

the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. *Id.* Further, the "reasonableness" of a particular use of force is objective and "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* Likewise, the officer's use of force must be considered "in light of the facts and circumstances confronting [the officers], without regard to their underlying intent or motivation." *Id.* at 397 (citations omitted). The Supreme Court has also noted that any reasonableness analysis "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

With regard to the constitutionality of the use of deadly force specifically, the Supreme Court has held that the use of deadly force is reasonable only if "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 12 (1985). Nothing in *Graham*

modifies the Court's holding and more stringent standard found in *Garner*.

The FOP acknowledges that state law governs criminal prosecutions and *Garner* and *Graham* involve an officer's civil liability for deprivation of constitutional rights. However, the FOP submits that it is equally germane, and important, that the trial court instruct the jury on the appropriate reasonableness standard set forth in *Garner* and *Graham* to determine an officer's criminal liability for using force. *Garner* and *Graham* provide the applicable reference points to articulate the circumstances in which a police officer—different than non-law enforcement—is permitted to use force. Alabama has never addressed this issue; however, several state and federal courts do apply *Garner* and *Graham* in reviewing criminal convictions arising from a police officer's use of deadly force. *See, e.g., United States v. Ramos,* 537 F.3d 439, 457 (5th Cir.2008); *State v. White*, 142 Ohio St.3d 277, 2015-Ohio-492, 29 N.E.3d 939, *cert. denied*, 577 U.S. 913, 136 S.Ct. 73 (Ohio 2015); *State v. Pagotto,* 361 Md. 528, 361 A.2d 97 (Md. 2000); *State v. Smith*, 73 Conn.App. 173, 807 A.2d 500 (Conn. App. Ct. 2002); *State v. Mantelli,* 131 N.M. 692, 2002–NMCA–033, 42 P.3d 272 (N.M. Ct.

App.); *People v. Martin,* 168 Cal.App.3d 1111, 1124, 214 Cal.Rptr. 873 (Cal. Ct. App. 1985).

A. Ohio

In *State v. White*, 2013-Ohio-51, 988 N.E.2d 595 (Ohio Ct. App.), the Ohio Sixth District Court of Appeals held that in a police *deadly* force case, it is reversible error to give the jury a *non-deadly* force instruction. 2013-Ohio-51, 988 N.E.2d 595, at ¶ 105. The Ohio Supreme Court agreed. *State v. White*, 142 Ohio St.3d 277, 2015-Ohio-492, 29 N.E.3d 939, at ¶¶ 48, 53-55, *cert. denied*, 577 U.S. 913, 136 S.Ct. 73 (2015).

While on patrol, defendant Officer Thomas White drove up behind two motorcyclists who were weaving while operating their motorcycles. *State v. White*, 2013-Ohio-51, 988 N.E.2d 595, at ¶¶ 4-5 (Ohio Ct. App.). Officer White observed the motorcyclist who was ultimately shot – Michael McCloskey – weaving across the road, making incomplete stops at stop signs, and driving over the speed limit. *Id.* at ¶ 5. Officer White called for backup and delayed pulling over the motorcyclists until backup arrived. *Id.* Both motorcyclists stopped at a stop sign with Officer White behind them. *Id.* at ¶ 6. They proceeded to speed away suddenly, so Officer White activated his overhead lights and siren and notified

dispatch of his pursuit. *Id.* at ¶ 7. One motorcyclist lost control, but McCloskey stopped and turned to face Officer White's cruiser. *Id.* The second officer arrived at that time. *Id.*

Officer White exited his vehicle with his firearm drawn, and he ordered McCloskey to put his hands up. *Id.* at ¶ 8. McCloskey, however, made a reaching motion with his right arm. *Id.* Believing that McCloskey was reaching for a weapon, Officer White feared for his life and that of the second responding officer. *Id.* In response, White fired and shot McCloskey once. *Id.* Only after McCloskey was shot and searched did the officers find that he was unarmed. *Id.* McCloskey was paralyzed from the waist down as a result of the gunshot wound. *Id.* at ¶ 2. Officer White was convicted for felonious assault and a firearm specification and sentenced to a ten-year prison term. *Id.* at ¶ 2.

The Court of Appeals stated that the trial court "should have instructed on the deadly-force standard just as *Garner* states it or in a substantially equivalent manner." *Id.* As the court explained, "[w]hile 'reasonableness' apples generally to both types of force [deadly and non-deadly], *Garner* established explicit restraints when police confront suspects with their firearms." *Id.* at ¶ 106. Instead of a deadly force

instruction, the trial court gave an excessive force instruction that provided the jury with the standard for non-deadly force. *Id.* at ¶ 105. However, as discussed, the case involved the officer's use of a .40-caliber Glock to shoot a suspected intoxicated driver. *Id.* The instruction given by the trial court, therefore, was "vague to the point of misdirection." *State v. White*, 142 Ohio St.3d 277, 2015-Ohio-492, 29 N.E.3d 939, at ¶ 49, *cert. denied*, 577 U.S. 913, 136 S.Ct. 73 (2015).

Here, the trial court gave <u>*no*</u> instruction on the reasonableness of a law enforcement officer's use of a force, which likewise misdirected the jury. The jury was not provided with any standard – let alone the appropriate one – to guide its deliberations as to whether Officer Darby's use of force was reasonable or not. It is not disputed that Officer Darby used deadly force in the line of duty. Like Officer White, Officer Darby feared for the life of his colleague. R. 907:10-14 ("The fear that I was about to watch something very bad happen to one of my officers that I work with….").

As recognized by the Ohio Supreme Court, "*Garner* defines the very circumstances to be considered in a deadly force case such as this; that is, when there is probable cause for a police officer to believe that the

suspect poses a threat of serious physical harm to the officer or others." *State v. White*, 142 Ohio St.3d 277, 2015-Ohio-492, 29 N.E.3d 939, ¶ 49, *cert. denied*, 577 U.S. 913, 136 S.Ct. 73 (Ohio 2015). The jury charge in Officer Darby's case therefore should have been tailored to instruct the jury on the circumstances in which a police officer is justified in using deadly force.

B. Maryland

In *State v. Pagotto*, 361 Md. 528, 361 A.2d 97 (Md. 2000), Sergeant Stephen Pagotto was convicted of involuntary manslaughter and reckless endangerment after a jury trial. 361 A.2d 97, 100. Sergeant Pagotto's criminal proceedings arose from an incident where a bullet from his handgun killed a motorist who was driving a vehicle that the sergeant was trying to stop. *Id.* at 101-102. His conviction was reversed by the Maryland Court of Appeals citing *Graham*. *Id.* at 112.

Sergeant Pagotto and his partner were assigned to an area with a high concentration of narcotics trafficking and gun-related violence on the night in question. *Id.* at 101. Both officers were dressed in plain clothes but driving a marked vehicle identifying them as police when they

stopped a white Subaru for improper display of its license for the purpose of looking for guns. *Id*.

As the officers were approaching the Subaru, Sergeant Pagotto's partner noticed that the three passengers were "'very excited and moving,'" and Sergeant Pagotto testified that he saw the driver "tilt his head back and drop his shoulder," which Sergeant Pagotto had been trained to recognize as consistent with picking up a weapon or placing one under the seat. *Id.* In response, Sergeant Pagotto drew his firearm as he approached the vehicle. *Id.*

The vehicle began to drift forward as the officers approached, and both officers yelled orders at the driver to stop the car. *Id.* at 102. The passengers and Sergeant Pagotto offered conflicting testimony of what happened once Sergeant Pagotto reached the driver-side door, but their testimony was consistent that the driver shifted from park to drive. *Id.* One of the passengers testified that once the driver shifted from park to drive, they heard a shot and saw the driver slump over. *Id.* Sergeant Pagotto testified that he struggled with the driver while the car was rolling forward, and the movement of the vehicle caused Pagotto to fall

to the ground and caused his gun to discharge. *Id.* The resulting shot killed the driver, Preston Barnes. *Id.*

The prosecution argued that Sergeant Pagotto was grossly negligent by (1) closing in on the driver with his gun drawn; (2) attempting to remove the driver from the vehicle with one hand with his gun in the other hand; and (3) placing his trigger finger on the slide of the gun rather than under the trigger guard as he approached the vehicle, all in violation of Baltimore City Police Department guidelines. *Id.* at 103.

The Court of Appeals held that Sergeant Pagotto's conduct could not, as a matter of law, rise to the level of gross negligence required to sustain convictions for involuntary manslaughter and reckless endangerment. *Id.* at 112. Relying upon the Supreme Court's decision in *Graham*, the Court of Appeals stated that the proper perspective from which we must view a police officer's use of force is "'from the perspective of a reasonable police officer on the scene'" and allow "'for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the

amount of force that is necessary in a particular situation.'" *Id., quoting Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

While *State v. Pagotto* did not directly address how the jury was instructed, the fact that the Maryland Court of Appeals relied upon *Graham* to overturn the sergeant's conviction is instructive in Officer Darby's case. Where the jury receives no instruction on the proper standard and/or perspective from which it must view a police officer's use of force, its decision as to the culpability of the officer's conduct is subject to reversal. Here, the trial court rejected Officer Darby's requested instructions that would have provided the jury with the correct standard by which they were to judge Officer Darby's actions. C. Doc. 157. Accordingly, like the jury in *State v. Pagotto*, the fact-finder in Officer Darby's criminal trial did not receive any instruction as to the proper perspective from which it must view Officer Darby's use of force. Such an omission is reversible error on appeal.

C. Connecticut

In *State v. Smith*, 73 Conn.App. 173, 807 A.2d 500 (Conn. App. Ct. 2002), Connecticut police officer Scott Smith was convicted after a jury trial of first degree manslaughter with a firearm under state law. 807

A.2d 500, 502. The Appellate Court of Connecticut reversed Officer Smith's conviction and ordered a new trial on the grounds that the trial court did not allow Officer Smith to put on evidence related to his police training on the use of deadly force that was crucial to his theory of self-defense. *Id.* at 517. Additionally, the Appellate Court addressed Officer Smith's assignment of error related to jury instructions. *Id.* at 518-19.

As part of the subjective-objective inquiry that the jury used to evaluate Officer Smith's belief that deadly force was necessary, Officer Smith requested that the jury be instructed that:

> The . . . test is an objective test – was the defendant's belief reasonable under all the circumstances? The second test requires you to consider what a reasonable police officer finding himself in the same situation as did the defendant would also conclude that defensive deadly physical force was necessary to defend himself against the use of offensive deadly physical force by his assailant.

Id. at 518. Further, tracking the language from *Graham*, Officer Smith also requested that the jury be instructed:

> [i]n determining whether the force exercised was reasonable, you should consider the facts and circumstances as you find them to be, including the severity of the crimes the officer was attempting to arrest the deceased for, whether the deceased posed an immediate threat to the safety of the police officer or others, and whether the deceased was actively resisting arrest at the time the force was used.

Id. at 518-19.

The Appellate Court of Connecticut agreed with Officer Smith that the instructions that the trial court gave the jury were appropriate under the ***civilian*** counterpart to the police officer self-defense statute from the perspective of a reasonable person. *Id.* at 519. Those instructions were ***not***, however, appropriate in Officer Smith's case where the jury was required to examine the circumstances from the perspective of a reasonable ***officer***. *Id.* (emphasis added). "With respect to the objective part of the test . . . the reasonableness is to be judged from the perspective of a reasonable police officer. Here, the court refused to so instruct." *Id.* Thus, on remand, the Appellate Court instructed the trial court to instruct the jury on self-defense consistent with the appropriate standard for a police officer. *Id.*

Here, the trial court – similar to the trial court in *State v. Smith* – refused to instruct the jury to judge Officer Darby's actions from the perspective of the "reasonable officer on the scene"—an objective standard tracking the language in *Graham*—despite Officer Darby's request for such an instruction. Accordingly, the trial court committed reversible error.

D. New Mexico

Finally, in *State v. Mantelli,* 131 N.M. 692, 2002–NMCA–033, 42 P.3d 272 (N.M. Ct. App.), police officer Joseph Mantelli was convicted after a jury trial of voluntary manslaughter, aggravated assault with a deadly weapon, and shooting at a motor vehicle resulting in injury. 2002–NMCA–033, ¶ 1, 42 P.3d 272. The Court of Appeals of New Mexico reversed and held, in part, that the officer was entitled to a jury instruction on justifiable homicide by police officer and failure to give justifiable homicide instruction warranted reversal. *Id.* at ¶ 2.

While on patrol with another officer, Officer Joseph Mantelli encountered a white truck operated by Abelino Montoya that the officers believed was the same vehicle that had nearly caused a collision with the second officer earlier in the evening. *Id.* at ¶ 3. The white truck had evaded the second officer in an earlier pursuit following the near collision. *Id.* Officer Mantelli activated the cruiser's overhead lights and pursued the vehicle. *Id.* at ¶ 4. During the pursuit, Montoya increased his speed in reaction to the lights and ran six or seven stop signs before he reached a dead-end. *Id.*

Officer Mantelli attempted to block the truck in the dead-end area so that it could not escape, but the truck reversed. *Id.* at ¶ 10. Officer Mantelli believed that the second officer had exited the police car and then had been knocked down and possibly run over by the truck. *Id.* As a result, Officer Mantelli fired one round from an arms-length distance from the truck because he believed that his partner was in danger. *Id.* Officer Mantelli then fired two more shots at the back of the truck because he thought that the truck was backing up a second time to ram them again rather than Montoya attempting to escape by maneuvering around the rock wall at the corner of the intersection. *Id.* The second officer also fired a single shot at the truck. *Id.*

The passenger in Montoya's truck testified that Montoya was trying to escape, but he did not think that he and Montoya put either officer's life in danger. *Id.* at ¶ 6. Montoya was shot in the back of the head and died as a result. *Id.* The truck lost control and wrecked into the side of a house as a result of the shots. *Id.*

New Mexico's justifiable homicide statute was codified in response to *Garner*. *Id.* at ¶ 23. In reviewing the statute – Section B to New Mexico Statute § 30-2-6 – *Graham*, and *Garner*, the Court of Appeals reasoned

that the law was intended to provide police officers with a wider scope of privilege than the general public with regard to the use of deadly force. *Id.* at ¶ 39. As the New Mexico Court of Appeals stated:

> In order to be entitled to a jury instruction on justifiable homicide, Defendant was required to introduce or identify evidence that would support an argument that he reasonably and objectively believed that Montoya threatened him or Sgt. Marquez with serious physical harm or deadly force. If such evidence was present ***it was for the jury to decide*** if Defendant's use of deadly force was reasonable, considering the totality of the circumstances, and therefore constituted justifiable homicide.

Id. at ¶ 31, *citing State v. Johnson*, 1998-NMCA-019, ¶ 16, 124 N.M. 647, 954 P.2d 79 (emphasis added).

Thus, the Court of Appeals of New Mexico held that the trial court's rejection of the justifiable homicide jury instruction stripped the officer of a defense that is uniquely applicable to police officers. *Id.* at ¶ 45. As a result, the jury made its determination of guilt viewing the officer as an "ordinary citizen" rather than a police officer. *Id.*

Here, the jury instruction requested by Officer Darby pursuant to *Graham v. Connor* is substantially equivalent to Alabama's justifiable homicide statute. The Alabama statute reads:

> *(b) A peace officer is* ***justified in using deadly physical force*** *upon another person when and to the extent that he reasonably believes it necessary in order:*
>
> *(1) To make an arrest for a felony or to prevent the escape from custody of a person arrested for a felony, unless the officer knows that the arrest is unauthorized; or*
>
> *(2) To* ***defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force****.*

Ala. Code § 13A-3-27 (emphasis added). Again, Officer Darby requested:

> *Escalation into* ***deadly force is justified*** *by a person's refusal to comply with officer's commands to drop his gun* ***if the officers reasonable reacted to what they perceived as an imminent threat to themselves****. An officer's use of deadly force must be objectively reasonable given the circumstances of a tense, uncertain and rapidly evolving crisis.*

C. Doc. 137, 157 (emphasis added). Thus, the same principles that the Court of Appeals of New Mexico applied to overturn Officer Mantelli's conviction in *State v. Mantelli* apply here.

During Officer Darby's criminal trial, ample evidence was introduced that would support an argument that Officer Darby reasonably believed that Jeffrey Parker presented an imminent threat of

deadly force to Officer Pegues. For example, Officer Darby testified that Officer Pegues was standing in the "fatal funnel" directly in front of a suspect with a gun. R. 907:15-18; 908:9-13. Officer Pegues knew she was in the "fatal funnel." R. 622:10-22. Moreover, contrary to training, Officer Pegues did not have her gun pointed at the suspect. R. 907:6-9; 908:5-13. In light of such evidence, it is for the jury to decide if Officer Darby's use of deadly force was reasonable given the totality of the circumstances. The jury needed to be instructed accordingly.

II. Failing to instruct the jury on the *Graham v. Connor* and/or *Tennessee v. Garner* standard(s) improperly eliminates any consideration of the perspective of the officer on the scene.

As the cases surveyed above demonstrate, a law enforcement officer's use of force should be judged from the perspective of a reasonable officer on the scene – rather than with the 20/20 vision of hindsight – to determine such an officer's liability in both civil ***and criminal*** matters. Officers are experiencing targeted violence at alarming rates. One reporter has observed that "[a]ccording to the FBI's Law Enforcement Officers Killed and Assaulted database (LEOKA), fatal felony attacks on officers spiked 31.6% in early 2021." Mark Maxwell, Violence against police rising nationwide, FBI data shows, WCIA.com (May 26, 2021, 8:17

PM), https://www.wcia.com/news/local-news/violence-against-police-rising-nationwide-fbi-data-shows/. Today, law enforcement officers are hyper-aware of the significant risk to their own lives that they may encounter on every call and they must take that into account when approaching a scene.

Additionally, officers are forced to make split-second decisions where their own safety or the safety of others (including fellow officers) may be at risk. The Supreme Court has recognized and repeatedly emphasized this context that is unique to law enforcement. *See Plumhoff v. Rickard*, 572 U.S. 765, 777-78 (2014), *citing Graham*, 490 U.S. at 369-97. ("[P]olice officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."). In making its determination as to the criminal culpability of an officer's conduct, a jury should at least be able weigh how any objectively reasonable police officer, not civilian, may have responded to the same scenario. Omitting this important instruction for a jury fails to impress upon the trier of fact the necessity of assessing whether the force

employed by the defendant officer was reasonable in light of the particular situation and dangers facing that officer.

Here, Officer Pegues – Officer Darby's fellow officer who was located inside the house with Mr. Parker when Officer Darby arrived – testified that she relayed that Mr. Parker was "strung out on drugs." R. 602:18-19. She further testified that Mr. Parker was holding a gun and that she walked into the "fatal funnel" with her gun down. R. 622:15-22; 623:8-14; 629:10-13. She understood the situation to be volatile. R. 610:3-9; 625:15-24. Officer Darby testified that Officer Pegues was "holding her weapon in her right hand pointed at the ground, which is not what we're trained to do." R. 907:7-9. Officer Darby further testified that he feared that he "was about to watch something very bad happen to one of [his] officers that [he] work[s] with . . . ." R. 907:9-14. As a result, Officer Darby moved into the house such that he was now in the "fatal funnel" and ordered the suspect – Mr. Parker – to drop the gun in his hands. R. 907:15-18; 910:3-912:1. Officer Darby testified that the suspect "shrugged his shoulders and shook his head, like he was calling a bluff, no emotion." R. 912:19-22.

All of these events occurred in a matter of seconds and are relevant to the reasonableness of Officer Darby's actions. Yet the jury was not instructed to weigh the reasonableness of Officer Darby's actions from the perspective of an officer. There was no instruction given that would allow for the jury to consider a reasonable officer's perspective in light of the circumstances described above. The self-defense instruction provided to the jury placed the officer in the shoes of a civilian. R. 1087:18-1088:15; 1088:23-1090:25. We call upon police officers to make split-second decisions in the face of imminent danger. The calculus that officers face in a given dangerous situation is not a shared experience with other civilians. The jury in a criminal trial of a police officer for using deadly force in the line of duty must therefore be instructed on how to assess the reasonableness of an officer's use of force from the *officer's* perspective. Not the perspective of a civilian.

Law enforcement officers are increasingly facing criminal indictments as a result of a use of force on duty. The trend moving forward is uncertain. There is no precedent in Alabama regarding the proper jury instruction in a criminal case involving a police officer use of force. This matter presents the Court with an opportunity to follow states

like Ohio, Maryland, Connecticut, and New Mexico and make clear that jurors are to be instructed on *Graham* and/or *Garner* in cases where an officer's use of force is at issue.

CONCLUSION

In light of the foregoing, the FOP respectfully requests that Officer Darby's conviction be reversed.

Respectfully submitted,

/s/ Larry H. James
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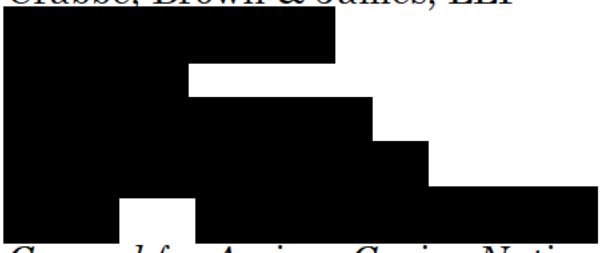
Counsel for Amicus Curiae National Fraternal Order of Police

CERTIFICATE OF COMPLIANCE

Pursuant to Alabama Rule of Appellate Procedure 32(d), I certify that this Brief of amicus curiae National Fraternal Order of Police in support of Appellant William Darby and reversal, complies with the type-volume limitation of Alabama Rule of Appellate Procedure 28(j)(1) because, excluding part of the document exempted by Rule 28(j)(1) it contains 4,915 words.

I further certify that this Brief complies with the typeface requirements of Alabama Rule of Appellate Procedure 28(a)(7) because this Brief has been prepared in a proportionally spaced typeface with 14-point Century Schoolbook font.

Respectfully submitted,

/s/ Larry H. James
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Counsel for Amicus Curiae National Fraternal Order of Police

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2021, I electronically filed the foregoing document with the Clerk of Court using the Court's electronic system which will send notification of such filing to all counsel of record.

Respectfully submitted,

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