NO. 72PA14 TWENTY-THIRD DISTRICT

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
Plaintiffs/Appellee	)	
v	)	
	)	
	)	From Wilkes County
CHARLES ANTHONY MCGRADY	)	
	)	
Defendant/Appellant	)	

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AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, THE SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION AND THE NORTH CAROLINA POLICE BENEVOLENT ASSOCIATION IN SUPPORT OF DEFENDANT/APPELLANT MCGRADY

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I. SUMMARY OF ARGUMENT

1. Rule 702 and decisional law has historically permitted the admissibility of qualified expert use of force testimony, which should be reaffirmed to continue to allow expert testimony to ensure fair trials for police officers and all other citizens.

2. Use of force testimony from qualified experts is necessary and admissible in use of force cases because, among other reasons, use of force cases often require technical or specialized knowledge of force principles.

3. The fundamental right of self defense includes the right to admit expert testimony addressing whether the force used was objectively reasonable or excessive.

II. INTEREST OF AMICI NAPO AND PBA

The National Association of Police Organizations (NAPO) is a coalition of police associations that seeks to protect the rights of law enforcement officers and to enhance public safety through legal advocacy, education and legislation. NAPO represents over one thousand law enforcement organizations, with over 238,000 sworn law enforcement officers. NAPO often appears as amicus curiae in appellate cases of special importance to the law enforcement community throughout America including before this Court.

The Southern States Police Benevolent Association (SSPBA) is an eleven state regional police association that promotes public safety, enhanced professional law enforcement and the rights of police officers. SSPBA works with and through its constituent organization, the North Carolina Police Benevolent Association (NCPBA), which has served the public and the North Carolina law enforcement community since the late 1980s.

NAPO, PBA and the police community throughout North Carolina will be substantially impacted by the decision below and its preclusion of traditionally accepted use of force testimony.

III. INTRODUCTION AND BACKGROUND

The decision below has enormous implications for the police community in North Carolina and throughout America. This case will decide whether police officers and citizens will continue to enjoy a critically necessary tool in fulfilling the right of self defense: a use of force expert to explain often highly technical and specialized force issues to the trier of fact.

North Carolina police officers have been subjected to charges of criminal assault for alleged excessive force at least since *State v. Stalcup,* 2 Ired. 50, 24 N.C. 50, 1841 WL 792 (N.C. 1841). For the right to self defense to be effective, those who use force are entitled to offer qualified expert witnesses so that lay jurors and other fact finders will understand often complex, technical and specialized force issues.

The United States Supreme Court has observed that there is often a "hazy border between excessive and acceptable force." *Saucier v. Katz,* 533 U.S. 194, 210 (2001), modified by *Pearson v. Callahan,* 555 U.S. 223 (2009). That *hazy border* fuels the need for use of force experts, so that juries and other tribunals are provided expert opinions addressing often highly technical and specialized areas of police operations including the use of force.

If this Court affirms the decision of the Court of Appeals, the law enforcement community will suffer an enormous loss of the ability to effectively support the defense of self defense. "The use of expert testimony regarding proper police practices is now regularly entertained by the courts." Avery, Rudovsky & Blum, *Police Misconduct Law and Litigation,* Section 11:15, Expert Testimony, page 626 (3rd ed. 2007-08). For law enforcement officers and citizens to enjoy fair trials and due process in legal disputes involving whether the force used is reasonable or excessive, the continued admissibility of expert use of force testimony is essential.

The Court of Appeals erred in limiting its analysis of use of force evidence on a scientific basis rather than finding that use of force analysis is predicated upon *technical or specialized knowledge* and therefore admissible in force litigation.

Whether use of force analysis is a science under *Daubert* is not the issue. The issue is whether a proper determination of the use of force, under the applicable law, involves either technical or specialized knowledge that may aid or be helpful to the trier of fact. The fundamental force principles are applicable regardless of the status, police officer or citizen, in virtually all force disputes.

At least since 1841, this Court has a rich history of decisions recognizing the safety and legal interests of police officers as vital public servants with dangerous and legally risky jobs.[1] Permitting qualified expert use of force testimony is necessary to effectuate the rights afforded by this Court's precedent. It seems that everyone has an opinion about the use of force but many such lay opinions are predicated on television shows or other fiction. Consequently, real use of force experts are necessary for the administration of justice.

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[1] E.g. *State v. Stalcup*, 2 Ired. 50, 24 N.C. 50, 1841 WL 792 (N.C. 1841)(recognizing reasonable belief standard for excessive force claims); *Debnam v. N.C. Department of Corrections*, 334 N.C. 380, 531 S.E.2d 245 (1993)(reaffirming officers' Garrity rights); *Newberne v. N.C. Department of Public Safety*, 359 N.C. 382, 618 S.E.2d 201 (2005)(recognizing officer's whistleblower claims); *Wind v. City of Gastonia*, 751 S.E.2d 611 (N.C. 2013)(officers entitled to obtain authorized portions of personnel file); *Parish v. Hill*, 350 N.C. 231, 513 S.E.2d 547, 550 (N.C. 1999); (gross negligence standard for police negligence claims); *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992) (recognizing State Constitution as enforceable with damage claims); *NCDENR v. Carroll,* 358 N.C. 649, 599 S.E.2d 888 (2004) (just cause standard for state officers).

IV. INCREASING VIOLENCE HAS GENERATED A PLETHORA OF USE OF FORCE DISPUTES IN CRIMINAL, CIVIL AND ADMINISTRATIVE FORUMS THAT OFTEN NECESSITATES EXPERT USE OF FORCE TESTIMONY TO AID THE TRIER OF FACT

In 1970, William Westley explained that "[t]he policeman's world is spawned of degradation, corruption and insecurity ... [H]e walks alone, like a pedestrian in Hell." William A. Westley, *Violence and the Police* (1970). Nearly forty five years later, that is still true in North Carolina and throughout America. Violence against law enforcement officers has exploded in recent years, especially in North Carolina.

The core mission of American policing requires law enforcement officers to physically encounter a broad range of suspects and others in the course of their ordinary duties. Judge Wilkinson of the Fourth Circuit, in a sentencing case, recently addressed the persistent problems of violence perpetrated against police officers:

> Decade upon decade of Maryland resisting arrest law paints a clear picture of violent force unleashed against arresting officers. Case after case recounts violent outbursts by defendants: fighting, pushing, and hitting an officer; biting an officer with sufficient force to break the skin; dragging an officer to the ground; swinging handcuffs at an officer; wielding a straight-edged razor against an officer and slashing his arm; driving a vehicle in an attempt to run an officer over; punching an officer repeatedly in the head; stabbing an officer with a ballpoint pen; tearing the badge off an officer's uniform and swinging at the officers with the badge's pin; kicking an officer in the groin; striking an officer in the stomach and chest. *See* Appendices I & II.
>
> It is always sad to say what should never need to be said: these street encounters are not tea and crumpets . . . law must also respect their [police officers] own need for personal safety and give them some small due. For law without law enforcement is impossible.

U.S. v. Aparico-Soria, 740 F.3d 152, 158-59 (4th Cir. 2014)(Wilkinson, J., dissenting). Judge Wilkinson's analysis was limited to the narrow area of misdemeanor resisting arrest cases in Maryland. Those often involve the more simple injuries to officers. National data demonstrates the tragedy of the mayhem and death inflicted on the American police community. See *National Law Enforcement Officer Memorial Fund*, which provides the current data demonstrating the violence against police officers. www.nleomf.org.[2] Officers "died in a variety of situations - arrests, traffic pursuits or stops, investigations of suspicious persons or circumstances, ambushes, tactical situations, disturbance calls, and more." *The Risks To The Thin Blue Line,* October 28, 2013; www.fbi.gov/news/stories/203/October.

This latest data demonstrates why the issue before this Court is so enormously important to the police community: the escalating violence against police officers has generated extensive use of force litigation and officers need triers of fact to hear expert testimony regarding technical and specialized issues in use of force disputes.

The daily work of police officers puts officers on the front line of danger, often requiring instantaneous responses to all types of unpredictable human behaviors. Officers are often put in harm's way, which frequently requires officers to use force to perform their duties and survive.

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[2] On average, over the last decade, there have been 58,261 assaults against police officers each year, and an average of one death every 58 hours. www.nleomf.org/facts/enforcement. In North Carolina, 473 officers have died in the line of duty. *Id.* There has been a 16% increase in line-of-duty deaths so far in 2014. *Id.*

This Court long ago recognized that police officers are "called on to deal with violators of the law, and not infrequently to act in the presence of conditions importing serious menace . . ." *State v. Dunning,* 177 N.C. 559, 98 S.E.2d 530, 531 (1919); accord *State v. Pugh,* 101 N.C. 737, 7 S.E. 757 (1888). In *State v. McMahan,* 103 N.C. 379, 9 S.E. 489 (N.C. 1889), this Court addressed a case where a law enforcement officer, a constable, was shot and killed by an arrestee. In 1871, this Court expressly recognized the need to protect "the safety of him [police officer]. . . *State v. Bryant,* 65 N.C. 327, 1871 WL 2196 (N.C. 1871).

Force issues arise frequently in criminal, civil and administrative litigation. Force issues often arise in investigative stops, detention, arrest, suspect transportation, pre-trial confinement, and other contexts. See, e.g. *Muehler v. Mena,* 544 U.S. 93 (2005); *Brown v. Gilmore,* 278 F.3d 362 (4th Cir. 2002).

The most common form of alleged police misconduct involve contentions of excessive force. See, e.g., Alexis Artwohl & Loren W. Christensen, *Deadly Force Encounters* (1997); Thomas Gillespie et al., *Police Use of Force* (1998). Alleged excessive force contentions may arise in virtually every aspect of policing including where handcuffs may be too tight; where hands-on force is used in suspect processing and transportation; where less-than-lethal devices are used such as tasers, pepper spray, and batons; where police canines are used; or where deadly weapons are used. Experts routinely testify in force disputes in these different contexts.

This Court has explained that "[p]olice officers have a duty to apprehend lawbreakers." *Parish v. Hill,* 350 N.C. 231, 513 S.E.2d 547, 550 (N.C. 1999); see

State v. McMahan, 103 N.C. 379, 9 S.E. 489 (1889). Apprehending criminals is often dangerous, and force must often be used. "Police must pursue crime and constrain violence, even if the undertaking itself causes violence from time to time." *Menuel v. City of Atlanta,* 25 F.3d 990, 997 (11th Cir. 1994). As Senior United States District Judge James Fox has eloquently explained:

> It is the duty of a law enforcement officer . . . to stand his ground, carry through on the performance of his duties, and meet force with force, so long as he acts in good faith and uses no more force than reasonably appears . . . necessary to effectuate his duties and save himself from harm. *Morrison v. Martin,* 755 F. Supp. 683, 692 (E.D.N.C. 1990), citing *State v. Ellis,* 241 N.C. 702, 86 S.E.2d 272, 274 (N.C. 1955).

In *State v. Fain*, 229 N.C. 644, 646, 50 S.E.2d 904, 905 (N.C. 1948), this Court articulated an insightful summary of the basic principles of the use of force and self-defense by police officers:

> An officer, where he acts in self-defense may, if necessary, kill an offender who endangers his life or safety, while attempting an arrest. If the officer is assaulted, he is not bound to fly to the wall, but if necessary to save his own life, or to guard his person from great bodily harm, he may even kill the offender; this rule applies, although the arrest is being made for a misdemeanor . . . . It is a principle very generally accepted that an officer, having the right to arrest an offender, may use such force as is necessary to effect his purpose, and to a great extent he is made the judge of the degree of force that may be properly exerted. Called on to deal with violators of the law, and not infrequently to act in the presence of conditions importing serious menace, his conduct in such circumstances is not to be harshly judged . . . .." (internal quotation marks and citations omitted).

These principles must be applied in light of rapidly changing police technology and equipment, changing promulgated rules of police behaviors, evolving accepted professional law enforcement standards - all of which have materially changed since 1948. Use of force experts are often critically needed so that juries can understand

what they really need to know to properly assess use of force.

Imagine a jury being saturated with typical evidence in a taser use of force case without being educated by an expert on taser operation, use, calibration, testing, technology, risks, training, police duties regarding tasers, objective reasonableness on the deployment of the taser on the facts, and other factors. Is the force reasonable or excessive in light of all of these technical aspects of electronic force? See *Myers v. Baltimore County,* 713 F.3d 723, 732 (4th Cir. 2013).

New technologies are raising all sorts of excessive force implications such as the Active Denial System (ADS), which involves a beam of electromagnetic waves. See Turner, *Cooking Protesters Alive: The Excessive Force Implications of the Active Denial System,* 11 Duke L. & Tech. Rev. 332 (2012). Experts continue to be needed to explain force variables in cases involving Oleoresin Capsicum, known as OC or pepper spray.

V. USE OF FORCE DISPUTES ARE OFTEN HEARD IN MULTIPLE FORUMS WHERE TECHNICAL EXPERTISE IS OFTEN CRITICALLY NECESSARY SO THAT THE TRIER OF FACT WILL UNDERSTAND OFTEN COMPLEX FORCE FACTORS AND PRINCIPLES

The use of police force often generates various types and layers of alleged excessive force litigation against law enforcement officers. Any time that an officer uses any force, a panoply of investigations begins. The State Bureau of Investigation will dispatch a "shooting team" of agents to swarm the scene and begin an immediate investigation.

The employing police agency begins an immediate investigation usually through the agency "internal affairs" or professional standards units. At the same time, the employer's Human Resource Department usually begins its inquiry. Internal and or external hearings are often held. The N.C. Criminal Justice or N.C. Sheriffs' Education and Training Standards Commissions usually begin an investigation, which often leads to an administrative probable cause hearing and later a certification hearing before the N.C. Office of Administrative Hearings. E.g., *Boone v. N.C. Sheriffs Commission*, 2013 WL 8116015 (May, ALJ, July 18, 2013); *Asion v. N.C. Department of Public Safety,* 2014 WL 3001920 (Overby, ALJ, May 9, 2014). Officers frequently have to defend their certifications, employment interests, civil and criminal interests, and use of force experts are often needed to address the force used.

Police officers are more frequently subjected to criminal investigations and prosecution because of political pressure by interest groups seeking to criminalize a use of force dispute. [cite] Officers are being more frequently indicted at both the state and federal levels for alleged excessive force. E.g., *U.S. v. Cobb,* 905 F.2d 784 (4th Cir. 1990); *U.S. v. Dean,* 722 F.2d 92, 94 (5th Cir. 1983)(excessive police force actionable under 18 U.S.C. 242); and other section 242 cases, *supra.*

The interest at stake "in criminal proceedings is a particularly compelling public policy concern." *State v. Cooper,* 747 S.E.2d 398, 404 (N.C. App. 2013). *Cooper* provides a wealth of authority explaining that constitutional rights are at stake when a defendant is denied the right to present a witness, as in this case.

After the administrative and criminal adjudications, then comes the civil litigation in state[3] or federal court where the use of experts by both plaintiffs and defendants is virtually routine because, *inter alia*, analysis of non-frivolous use of force disputes is usually far beyond the knowledge of lay jurors.

In this morass of seemingly never ending litigation, perhaps the most necessary tool for legal survival is a use of force expert. Officers often need use of force experts in internal proceedings, in civil service hearings, in unemployment compensation hearings, in certification and occupational licensing hearings, and certainly for criminal defense and for civil defense. In a single use of force dispute, an officer may need a use of force expert in as many as a half dozen different forums.

If the decision of the Court of Appeals below is affirmed, the police community will suffer a substantial limitation on on the rights of officers to protect their own liberty and careers in criminal and civil trials where fundamentals interests are at stake.

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1. Historically, most alleged excessive force claims were brought in federal court. However, those trends are changing resulting in our state courts hearing use of force claims against police officers with much greater frequency. E.g., *Wilkerson v. Duke University;* 748 S.E.2d 154 (N.C. App. 2013); *Debraun v. Kuszai,* 749 S.E.2d 110 (2013) (Dave Cloutier as expert witness; objective reasonableness standard applied to excessive force claim); *Prior v. Pruett,* 143 N.C. App. 612, 550 S.E.2d 166 (2001) (objective reasonableness test "for the jury to decide."); *Glenn-Robinson v. Acker,* 140 N.C. App. 606, 538 S.E.2d 601, 610, 613-14 (2000) (objective reasonableness standard applied to excessive force claim); *Davis v. Town of Southern Pines,* 116 N.C. App. 663, 449 S.E.2d 240 (1994) (objective reasonableness standard applied to excessive force claim); *Turner v. City of Greenville,* 197 N.C. App. 562, 677 S.E.2d 480 (2009).

VI. USE OF FORCE DETERMINATIONS REQUIRE AN OBJECTIVE REASONABLENESS STANDARD, WHICH NECESSITATES EXPERT TESTIMONY TO ADDRESS HOW A REASONABLE PERSON OR OFFICER WOULD HAVE ACTED

The central issue in most use of force litigation is whether an objectively reasonable officer *could have reasonably believed* that the force employed was appropriate under the circumstances. See N.C.G.S. 15A-401(d) and the interpreting decisional law. E.g., *Turner v. City of Greenville,* 197 N.C. App. 562, 677 S.E.2d 480 (2009) (justification for force depends upon based what the officer "reasonably believes . . ."); *Hunter v. Bryant,* 502 U.S. 224, 227 (1991) (could have believed standard); *Prior v. Pruett,* 550 S.E.2d 166, 168 (N.C. App. 2001)("could have believed" standard); *Pittman v. Nelms,* 87 F.3d 116, 120 (4th Cir. 1996)(could have believed standard).

The "could have reasonably believed" standard necessarily calls for a use of force expert to opine to the trier of fact about how a reasonable officer would have reacted in the situation before the court. That is the core of a use of force trial.

The evaluation of use of force involves an *objective* standard. *Scott v. Harris,* 550 U.S. 372, 381 (2007) ("The question we need to answer is whether Scott's actions were objectively reasonable."); *Graham v. Connor,* 490 U.S. 386, 396 (1989) ("The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."); *Henry v. Purnell,* 652 F.3d 524, 532 (4th Cir. 2011) (en banc); *Ayala v. Wolfe,* 546 Fed. Appx. 197 (4th Cir. 2013) (objective reasonableness standard applies to use of force; reasonableness judged by perspective of "a reasonable officer on the scene . .

."; opinion by Wynn, J.).[4]

North Carolina clearly applies this same objective reasonableness test. E.g., *Debraun v. Kuszai,* 749 S.E.2d 110 (2013); *Prior v. Pruett,* 143 N.C. App. 612, 550 S.E.2d 166 (2001) and other cases cited in note 2, *supra.*

The fundamental question is "whether a reasonable officer in the same circumstances would have concluded that a threat existed justifying the particular use of force." *Elliot v. Leavitt,* 99 F.3d 640, 642 (4th Cir. 1996), quoted in *Streater v. Wilson,* 2014 WL 1345879 (4th Cir. 2014). A use of force expert is necessary to address this issue.

The "first step is for the Court to determine whether the [d]efendant['s] 'actions were objectively reasonable. *Marvin v. City of Taylor,* 509 F.3d 234, 245 (6th Cir. 2007), citing *Scott v. Harris,* 550 U.S. 372, 380 (2007). "To gauge objective reasonableness, a court examines only the actions at issue and measures them against what a reasonable police officer would do under the circumstances." *Rowland v. Perry,* 41 F.3d 167, 172 (4th Cir. 1994). This reasonableness test is a classic model for experts to opine regarding the reasonableness of the force used.

Virtually all police encounters with force used are subject to complete *reconstructions* of the use of force. This is typically done by the use of force expert, and sometimes further aided by other technical experts as well. See, e.g., Wecht,

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[4] A number of decisions provide other parameters to the objective reasonableness standard for the typical use of force case. See *Saucier v. Katz,* 533 U.S. 194, 210 (2001), modified by *Pearson v. Callahan,* 129 S.Ct. 808 (2009); *Graham v. Connor,* 490 U.S. 386, 397 (1989); *Tennessee v. Garner,* 471 U.S. 1, 3 (1985); *Clem v. Corbeau,* 284 F.3d 543, 550 (4th Cir. 2002).

Lee, Van Blaricom and Tucker: *Investigation and Prevention of Officer Involved Shootings* (2011 CRC Press); Hueske, *Practical Analysis and Reconstruction of Shooting Incidents,*(2006 CRC).

Force reconstructions typically involve the assessment of many technical and specialized functions: the lag time phenomenon, biomechanics, reaction times, incident scene factors, blood spatter, bullet trajectory, propriety of the type of weapons used, the availability of alternative means of force, knowledge of the force instruments by the user, environmental factors, apparent danger and other force principles. These principles are relevant to police and citizen use of force.

There are generally three categories of components to a use of force inquiry: 1) fact witnesses or lack thereof; 2) hard science (autopsy; DNA; other science testing); and 3) technical or specialized knowledge. This crucial third component often serves to fill the gaps and explain the principles of force to the trier of fact.

Many tretises explain various analytical models and tools of force analysis used by police use of force experts. E.g., Felter, *Police Defensive Handgun Use and Encounter Tactics* (1991). This and other similar treatises explain many standards used in the force analysis including threat assessment process including time factors (*id.* at 178-205), low light, dark and partial light conditions (*id.* at 239-249); Hueske, *supra;* Hatch, *Officer Involved Shootings and Use of Force (*2003 CRC).

Use of force claims involve assessment of a variety of factors for citizens and officers including the magnitude and nature of the threat, the imminence of the threat, the nature of weapons used, whether there was an apparent weapon when there was

no actual weapon, bullet trajectory, distances between the participants, environmental conditions, weather conditions, lighting, visibility, the sequence of events, weapons ejection patterns, calculation of impact angles, shot patterns, wound characteristics, gunshot residue, analysis, timing, the terrain including elevation and slope, physical or mental disabilities, whether there was pre-attack cues, whether there were exigent circumstances, the functioning of pertinent police equipment, the relevant training of the officers involved, suicide-by-cop analysis, and whether a reasonable officer or citizen under those particular circumstances could have reasonably believed that the level of force used was apparently justified. It usually takes an expert.

Dave Cloutier's testimony in this case explored many of the traditional force concepts such as reaction time and force variables (T pp 1135-36), pre-attack cues and perceptual narrowing. (T p 1132)

Applying overlapping use of force doctrines is often not so simple. Professor John Rubin of the Institute of Government at the University of North Carolina has observed that:

> "despite its place in North Carolina jurisprudence, . . . the excessive force element has been difficult to apply. The principle difficulty has been with distinguishing the requirement that the Defendant's force not be excessive, or unreasonable, from the reasonable belief requirement embodied" in the law. John Rubin, *The Law of Self-Defense in North Carolina* 75 (UNC 1996).

North Carolina cases demonstrate the application of the doctrine of self defense in the law enforcement use of force environment. In a leading case, our Court of Appeals explained that "[a]n officer of the law has the right to use such force as he may reasonably believe necessary in the proper discharge of his duties to effect an

arrest ... the officer is properly left with the discretion to determine the amount of force required under the circumstances as they appear to him at the time of the arrest." *State v. Anderson*, 40 N.C. App. 318, 321, 253 S.E.2d 248 (1979).

An officer "has discretion to determine the amount of force required under the circumstances as they appear to him at the time he acted." *Todd v Creech*, 23 N.C. App. 537, 209 S.E.2d 293, (1974); see *Myrick v. Cooley*, 91 N.C. App. 209, 371 S.E.2d 492 (1988). Despite these standards, plaintiffs often develop various theories of "excessive force" based upon a myriad of nuances in police behaviors.

The danger necessary for self defense must be only *apparent* danger, such that would cause a *reasonable person* to believe that he was in danger of death or great bodily harm. *E.g., State v. Goode*, 249 N.C. 632 (1959). A force expert to address what a reasonable person would have done is much like a medical expert who opines what a reasonable physician would have done under the medical circumstances. Questions regarding apparent danger often present issues where use of force expertise is needed. The "could have reasonably believed" standard necessitates an expert on use of force to determine what level of force was appropriate for a reasonable person under the particular circumstances.

VII. LEADING CASES DEMONSTRATE THE ADMISSIBILITY STANDARDS OF EXPERT USE OF FORCE TESTIMONY

When the United States prosecutes police officers for excessive force, the government usually offers expert use of force testimony to aid the trier of fact. E.g. *U.S. v. Perkins,* 470 F.3d 150 (4th Cir. 2006) (18 U.S.C. 242 excessive force prosecution; expert testimony admitted regarding the reasonableness of the force

used); *U.S. v. Mohr,* 318 F.3d 613 (4th Cir. 2003)(18 U.S.C. 242 use of force prosecution; admitting use of force expert testimony). Federal prosecutors are sometimes quick to pull the prosecutorial trigger in force disputes, and courts are quick to admit use of force testimony in use of force prosecutions under 18 U.S.C. 242.

Police officers and citizens like Mr. McGrady should enjoy the same ability to admit use of force evidence from qualified experts because "the jury must judge the reasonableness of the grounds upon which the officer acted." *State v. McNich,* 90 N.C. 695, 1884 WL 19036 (N.C. 1884). Whether force is reasonable or excessive depends upon numerous considerations.

In *Gray v. Board of County Commissioners,* 551 Fed. Appx. 666, 671 (4th Cir. 2014), the Fourth Circuit addressed alleged excessive force by taser. There, the Fourth Circuit reviewed and relied upon expert testimony regarding "law enforcement practices and procedures." The expert opined that a second deployment of the taser was "reasonable and consistent with good law enforcement practices." *Id.* Plaintiff also offered expert use of force testimony that the force was "inappropriate, excessive and objectively unreasonable." *Id.* at n.6.

In *Kopf v. Skyrm*, 993 F.2d 374 (4th Cir. 1993), a leading case addressing expert evidentiary standards in law enforcement use of force cases, the Fourth Circuit held that the proper training of a police dog is a proper subject of expert testimony. The Court held that a law enforcement expert is permitted to testify as to the prevailing standard of conduct with respect to use of force by a slapjack. The expert

evidence involved testimony from a former chief of police and a police trainer regarding "accepted police practices."

In *Zuchel v. City,* 997 F.2d 730 (10th Cir. 1993), a use of force expert was permitted to testify that the officer's use of deadly force was inappropriate under the circumstances. In *Zuchel,* the criminal justice professor was permitted to give expert opinion testimony regarding "police tactics, the use of force, administration, supervision, and training." 997 F.2d at 738. The expert properly testified about police training, tactics and options available to police in situations where bodily injury is threatened.

Zuchel held that expert testimony is admissible to address whether the practices followed or fell below accepted law enforcement standards. *Id.* at 739. Expert testimony involved "generally accepted police custom and practice at the time." *Id.* at 739. The professor was an expert in "police training, tactics, and the use of deadly force." Courts generally allow experts to state an opinion on "whether the conduct in issue fell below accepted standards in the field of law enforcement." *Id.* at 742.

In *Samples v. City of Atlanta,* 916 F.2d 1548 (11th Cir. 1990), the Court held that there was no error in permitting an expert on the use of force to testify as to whether it was reasonable for the officer to discharge his firearm when the victim charged him with a knife. The expert was allowed to testify as to whether the shooting "was justified." *Id.* at 1552.

In *McEwen v. City of Norman,* 826 F.2d 1593 (10th Cir. 1991), expert use of force testimony was permitted on the issue of reasonableness of force. There, a

professor testified as to the propriety of the police pursuit, the review procedures of the police chief, the use of roadblocks, the method of arrest, and the overall handling of the incident.

The conduct of law enforcement officers has been the subject of expert testimony in various types of cases where the appropriateness of the officer's behavior is in issue. See *Webb v. City of Chester*, 813 F.2d 824, 832-33 (7th Cir. 1987), where a law enforcement professor testified "as to the appropriateness" of actions in each of the six incidents. . . ." The forgoing are representative cases from a long settled line of cases permitting use of force testimony.

While some of these cases address force issues in narrow police contexts, such as taser use, the most traditional use of force disputes involves questions of whether the use of a deadly weapon was appropriate. In this most common context of force by a firearm, the right to self defense or defense of others is the same whether for a citizen like Mr. McGrady or a police officer.

The long line of North Carolina self defense and use of force cases involving citizens' encounters identifies the same basic force issues of apparent danger and objective reasonableness of the force used. E.g. John Rubin, *The Law of Self Defense,* Section 2.2 at pages 21-27, citing many cases including *State v. Jones,* 299 N.C. 103, 107, 261 S.E.2d 1, 5 (1980) (citizen has right to use deadly force where the defendant *reasonably apprehends* that he/she may suffer death or great bodily injury from an assailant); *State v. Spaulding,* 298 N.C. 149, 156-57, 257 S.E.2d 391, 395-96 (1979) (critical issue was reasonableness of the defendant's apprehension). See other

cases in *Rubin* at page 21, n.20, and *State v. Norris,* 303 N.C. 526, 279 S.E.2d 580 (1981), where this Court enunciated various elements including whether the belief was reasonable, "in the mind of a person of ordinary firmness," and whether there was excessive force. *Norris* has a long following. Thus, several elements in non-police cases also warrant expert opinion under this Court's precedent.

The foregoing and other cases cited herein demonstrate that use of force in non-police environments also warrants expert use of force testimony. While police cases are sometimes more technical, the *reasonable belief* standard, and other issues and components, are the same.

Use of expert testimony on law enforcement issues including the use of force is also frequently admitted in criminal cases by the prosecution. Scores of cases have long held that experts are permitted to testify in a broad range of force, criminal and other police related cases. In *United States v. Roldan Zapata*, 916 F.2d 795, 805 (2d Cir. 1990), the Court held that it was proper to admit testimony from an expert witness regarding police surveillance and record keeping procedures.

In *United States v. Alonso*, 48 F.3d 1536, 1541 (9th Cir. 1995), the Court held that there was no error in permitting undercover agents conducting a sting to characterize a defendant's counter-surveillance behavior as *consistent* with someone being involved in a criminal activity. A law enforcement expert may testify as to police "techniques and methods" used. *Id.*

In *United States v. Williams*, 980 F.2d 1463 (D.C. Cir. 1992), a prosecution expert in a drug case was allowed to testify that more than 100 zip lock bags

concerning small amounts of drugs "were meant to be distributed at street level."

In *United States v. Gastiaburo*, 16 F.3d 582, 587-89 (4th Cir. 1994), the Court held that there was no error in admitting testimony from police officers about *methods* of drug dealers. The court explained how expert testimony as to the "modus operandi" is "commonly admitted...." *Id.* at 589.

In *United States v. Phillips*, 593 F.2d 553, 558 (4th Cir. 1978), the Court held that there was no error in admitting testimony in a narcotics case interpreting code language in intercepted telephone conversations. In *United States v. Lawson*, 780 F.2d 535 (6th Cir. 1985), the Court upheld the admission of a police officer's testimony concerning the meaning of certain terms used in drug trafficking.

VIII. EXPERT TESTIMONY REGARDING USE OF FORCE IS ADMISSIBLE BECAUSE IT WILL AID THE TRIER OF FACT

North Carolina has a rich history of permitting expert testimony from qualified experts. See *State v. Cooper,* 747 S.E.2d 398, 405 (2013)(credentials based on "practical experience" is sufficient for expert qualifications). Expert testimony has been admissible when such testimony may assist the jury to draw inferences from facts because the expert is better qualified on the issues than are lay persons. *State v. Bullard*, 312 N.C. 129, 139, 322 S.E.2d 370 (1984). The Court of Appeals below implicitly rejected these time honored principles. Amended Rule 702 cannot be interpreted to fundamentally rewrite the basic principles of expert testimony.

The test for admissibility of expert testimony has been whether the jury can receive help from the expert witness. *State v. Knox*, 78 N.C. App. 493, 495, 337 S.E.2d 154 (1985); Wigmore, *Evidence*, Section 1923. A leading North Carolina

evidence treatise provided that:

> "Under Rule 702, once expertise is demonstrated, the test of admissibility is helpfulness. A witness who is better qualified than the jury to form a particular opinion may satisfy the rule..." Brandis and Broun, *North Carolina Evidence* (4th Ed. 1993), Section 184 at 640 [omitting footnotes].

To qualify, an expert need not have had experience in the subject at issue; it is sufficient that "through study or experience," the expert is better qualified than the jury to render an opinion regarding the particular subject. *State v. Howard*, 78 N.C. App. 262, 270, 337 S.E.2d 598 (1985).

Dave Cloutier has been long recognized as a leading use of force expert based upon his vast specific experience in force derived from his teaching, his education and training, his qualifying as an expert in numerous cases, and his actual experience and practice. (T pp 1129-1134). Mr. Clouter testified as an expert in eighteen criminal trials retarding the use of force by a private citizen. *Id.* Dave Cloutier's exceptional use of force expertise and testimony would have undoubtedly helped and aided the jury understand force factors in this case.

IX. THE COURT OF APPEALS ERRED IN ANALYZING THE USE OF FORCE EVIDENCE ON A SCIENTIFIC BASIS RATHER THAN THE OTHER PRONGS OF RULE 702 WHICH ALLOWS EXPERT TESTIMONY TO ADDRESS MATTERS OF TECHNICAL OR OTHER SPECIALIZED KNOWLEDGE

Use of force expert testimony does not involve any new or novel "scientific" evidence as was addressed in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). Therefore, the *Daubert* analysis is inapplicable. While many believe that the use of force involves a science (e.g., *www.forcescience.org),* the more

accurate position is that the use of force analysis is predicated upon technical or specialized knowledge.

The Court of Appeals erred by not determining that a proper use of force analysis involves technical or specialized knowledge under Rule 702. Use of force analysis involves the determination and balancing of several unique factors. For example, this includes a complete assessment of whether there was sufficient *apparent* danger to an objective person. The *reactionary gap* analysis involves an assessment of human behaviors and law enforcement standards, which are applied in force analysis. The same is true of the *lag time* phenomenon, pre-attack cues and other force factors addressed *supra.*

In *State v. Goode,* 341 N.C. 513, 461 S.E.2d 631, 640-41 (1995), this Court explained:

> The next level of inquiry is whether the witness testifying at the trial is qualified as an expert to apply this method to the specific facts of the case. N.C.G.S. Section 8C-1, Rule 702. "It is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession."*[omitting case citations]* "It is enough that the expert witness 'because of his expertise is in a better position to have an opinion on the subject that is the trier of fact.
>
> Finally, once qualified, the expert's testimony is still governed by the principles of relevancy. As previously stated, relevant evidence is defined as evidence having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. Section 8C-1, Rule 401. Further, in judging relevancy, it should be noted that expert testimony is properly admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified than the jury to draw such inferences. *Bullard*, 312 N.C. at 139, 322 S.E.2d at 376. (omitting internal quotations).

X. POLICE OFFICERS AND ALL CITIZENS ENJOY A FUNDAMENTAL INHERENT RIGHT OF SELF DEFENSE AND THE RIGHT TO SUPPORT SELF DEFENSE WITH EXPERT TESTIMONY REGARDING AREAS OF TECHNICAL AND SPECIALIZED KNOWLEDGE REGARDING FORCE USED

The law and necessity of self defense is one of the foremost principles in American jurisprudence. "The right of self defense is deeply rooted in the history of Anglo-American jurisprudence." Urey W. Patrick & John C. Hall, *In Defense of Self & Others: Issues, Facts and Fallacies - The Realities of Law Enforcement's Use of Deadly Force* 15 (2005). See *New Orleans & Ne. R.R. Col. v. Jopes*, 142 U.S. 18, 23 (1891) (reviewing self defense principles).

North Carolina cases recognizing self defense date back to 1859 in *State v. Davis, 7 Jones* 52, 1859 WL 2136, 52 N.C. 52 (1859), referring to self defense as a "natural right." In an 1877 case, this Court observed how the right to self defense involves "the very instinct and constitution of his being." *State v. Turpin*, 77 N.C. 473, 477 (1877).

In 1927, this Court pronounced that "[t]he first law of nature is that of self defense." *State v. Holland,* 193 N.C. 713, 718, 138 S.E.2d 8, 10 (1927). This Court recently relied upon *Holland* in *State v. Moore,* 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010) and other cases.

Holland explained that self defense is an "inherent right" of all human beings. 193 N.C. at 718, 138 S.E.2d at 10. See *State v. Norman,* 324 N.C. 253, 259, 378 S.E.2d 8, 12 (1989)(reaffirming *Holland*). The right to self defense has been long recognized as a "fundamental right." *Taylor v. Withrow*, 288 F.3d 846, 851 (6th Cir.

2002). Blackstone referred to self defense as the "primary law of nature," and claimed that "it is not, neither can it be in fact, taken away by the law of society." *Taylor*, 288 F.3d at 852. Accord *Sloan v. Gramley*, 215 F.3d 1330 (7th Cir. 2000).

Cases have long emphatically reaffirmed the constitutional right of self defense. E.g., *State v. Hardy*, 397 N.E.2d 773 (Ohio 1978)(constitutional right of self defense grounded in both Federal and Ohio Constitutions). "The right to self defense is deeply rooted in our traditions." *Taylor,* 288 F.3d at 852, citing *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996).

Therefore, this historic inherent and constitutional right of self defense should not be easily trumped by an interpretation of Rule 702 from the Court of Appeals below that is inconsistent with the "inherent right" of self defense that this Court has recognized since 1927 in *Holland.*

"Few rights are more fundamental than that of an accused to present witnesses in his own defense[.] Indeed this right is an essential attribute of the adversary system itself." *State v. Cooper,* 747 S.E2d 398, 406 (N.C. App. 2013), quoting *Taylor v. Illinois,* 484 U.S. 400, 408-09 (1988). An accused "has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process law." *Id. Cooper* demonstrated the magnitude of harm from precluding the admission of expert testimony.

XI. CONCLUSION

The Court of Appeals below erred in affirming the preclusion of the expert use of force evidence offered. Rule 702 should not be so restrictively interpreted as to limit the inherent and constitutional right to self defense by precluding testimony necessary for due process and fair trials for citizens and police officers. The decision below is a sharp departure from a body of law that has afforded fair trials to police officers and citizens alike when issues of use of force arise. For the reasons stated herein and in Appellant's brief, this Court should reverse the decision below.

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XII. CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing ***AMICUS CURIAE BRIEF*** has been served this day by depositing a copy thereof in a depository under the exclusive care and custody of the United States Postal Service in first-class postage-prepaid envelope properly addressed as follows and by email:

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This 25th day of day of August, 2014.

/s/ J. Michael McGuinness
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