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STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT
Court File 27-CR-21-7460

State of Minnesota,

Plaintiff,

vs.

Kimberly Ann Potter,

Defendant.

DEFENDANT'S MOTION TO DISMISS COUNT I OF THE AMENDED COMPLAINT

The Defendant, Kimberly Ann Potter, through and by her lawyers, Earl Gray and Paul Engh, and in accordance with Rule 11.04, Minn.R.Crim.P., and State v. Florence, 2349 N.W. 2d 892 (Minn. 1976), moves the Court for an Order dismissing Count I of the Amended Complaint. Our grounds are these:

1. On September 2, 2021, the State added the charge of "First-Degree Manslaughter Predicated on Reckless Use/Handling of a Firearm," in violation of Minn. Stat. 609.20(2), suggesting a mandatory three-year prison term in "reference to [Minn. Stat.] 609.11.5(a)."

2. This Motion is timely filed. See Order dated September 3, 2021.

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3. Manslaughter in the First Degree prohibits causing "the death of another . . . in committing or attempting to commit a misdemeanor . . . offense with such force and violence that death or great bodily harm to any person was reasonably foreseeable, and murder in the first or second degree was not committed thereby." (Emphasis added).

4. The misdemeanor predicate of First Degree Manslaughter here is found in Minn. Stat. 609.66, subd. 1 (1) and (2), which provides "(a) Whoever . . . recklessly handles or uses a gun or other dangerous weapon . . . so as to endanger the safety of another . . . " may be subject "to imprisonment of not more than 90 days or to payment of a fine of not more than $1,000, or both." (Emphasis added).

5. The facts in this case are frozen in time and frame. For this Court's review, we submit the body camera video and transcript, Exhs. A and B, under separate cover.

6. On April 11, 2021, Mr. Daunte Wright drove a vehicle with expired plates, and with an object hanging from the rear view mirror. The State's Complaint does not suggest the stop was pre-textual. The car was not Mr. Wright's. There was a warrant for his arrest authorized by the Hennepin County District Court, as well as a Harassment/Restraining Order prohibiting him from contact with a female. The training Officer in charge of the scene, Anthony

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Luckey, made the correct decision to arrest Mr. Wright, and at the same time determine if the passenger was named in the Order for Protection.

7. The text of the Complaint under-plays Mr. Wright's conduct. When about to be handcuffed, ignored the lawful orders to comply, resisted arrest, evinced contempt for this Court's warrant, and decided to drive away. All of this he had no right to do, forcing the officers on the scene to stop him. By attempting to flee, Mr. Wright committed what was, by Supreme Court opinion, a dangerous crime, a Minnesota felony no less. See Minn. Stat. 609.487, Subd. 3; Sykes v. United States, 564 U.S. 1 (2011).

8. Officer Potter told Mr. Wright "I'll tase ya," and within seconds shouted out, quite loudly, "Taser, Taser, Taser." Upon hearing the "Taser, Taser, Taser," the two officers stepped away, so as to not be accidentally shot. Having heard the triage, Mr. Wright continued on with his dysphoria.

9. There is no suggestion in the complaint that Officer Potter consciously believed that the object in her hand was a gun, or that she knew she was about to shoot a bullet. Officer Potter's reaction to the accidental and mistaken discharge was to say, as the Complaint notes, "Shit," and "I grabbed the wrong fucking gun," and acknowledged, "I shot him." Remorse for her mistake is evident.

10. The question for this Court, on these undisputed facts, is whether

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Officer Potter acted "recklessly" as that word has been defined in, among other cases, State v. Engle, 743 N.W.2d 592 (Minn. 2008). Recklessly, our High Court initially noted, "is an ambiguous term," then and still " not defined in the Minnesota criminal code." Id. at 594. Thus the meaning of "recklessly" was explained.

Engle ruled that under Minn. Stat. 609.066 Subd. 1 "a person acts 'recklessly' when [s]he consciously disregards a substantial and unjustifiable risk that the element of an offense exists or will result from [her] conduct . . . [Both the reckless actor and the intentional] actor [creates] a risk of harm. The reckless actor is aware of the risk and disregards it." Id. at 594 (emphasis in original) (quoting State v. Coles, 542 N.W.2d 43, 51-52 (Minn. 1996)). The definition is clarified later in the Engle opinion. To satisfy its burden, the State must prove that the defendant "commits a conscious or intentional act in connection with the discharge of a firearm that creates a substantial and unjustifiable risk that [s]he is aware of and disregards." Id. at 596.

By this definition and in that tragic instant, Officer Potter had to have "created a substantial and unjustifiable risk that [s]he was aware of and disregarded." Id. Engle remains good law. See e.g., State v. Vang, 847 N.W.2d 248, 259 (Minn. 2014)(acknowledging the "consciously disregards a substantial

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and unjustifiable risk" definition).

11. The question raised in a motion to dismiss like this one is whether there is an adequate "justification for trial on the merits," that is to say sufficient facts to "require the defendant to stand trial." Florence, 239 N.W.2d at 902. Whether Officer Potter consciously knew she was about to fire her "gun" so as to "endanger the safety of another," and, at that very same moment, consciously disregarded a risk she was unaware of.

The intense shouts of "I'll tase you," and "Taser, Taser, Taser," have only one meaning as a matter of law. "Excited utterances" are deemed reliable as a matter of law. See Rule 803 (2), Minn. R.Evid. The rationale for the excited utterance exception stems from "the belief that the excitement caused by the event eliminates the possibility of conscious fabrication and insures the trustworthiness of the statement." Committee Comment, Rule 803 (2) (emphasis added). The State does claim Officer Potters statements of her consciousness were false. Rule 803 (2) assumes they were true.

When Officer Potter shouts out, "I grabbed the wrong fucking gun," what she means to say she was not conscious of the fact that what was in her hand wasn't a Taser. Her consciousness was consistent throughout. By yelling "I'll tase ya," and "Taser, Taser, Taser" Officer Potter believed she was holding a

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Taser, not a gun.

12. The Complaint ignores the case law definition of recklessly. Officer Potter had to have been aware of that risk that her Taser was a gun, and then "disregarded" it. Engle, 743 N.W.2d at 596. Put another way, she had to have known, when shouting "Taser, Taser, Taser," she was really talking about a firearm. And knew (was aware) she had an actual gun in her hand. She did not.

13. The Amended Complaint has alleged, instead, is that Officer Potter had been instructed on the use of a Taser and how "[c]onfusing a handgun with a CEW [Taser] could result in death or serious injury." She had been taught that there are "risks of drawing a handgun instead of a Taser." Complaint at p. 3.

The probable cause section can only suggest, and only by way of argument, that Officer Potter, at that precise moment, was consciously aware of the risks of confusion between a gun and Taser. But there is no factual claim, nor can there ever be one, that she was aware, in that second, of the confusion she had been taught about. The last thing Officer Potter wanted to do was shoot Mr. Wright. That wasn't her conscious intention. She sought a lesser harm, as she was also trained to do. Nothing in the Complaint suggests she could not have consciously fired her Taser in order to prevent Mr. Wright's unlawful and improvident flight.

Setting aside thoughts of conscious recklessness, the reasonable use of force

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statute, Minn. Stat. 609.066 (enacted March 1, 2021), also affords Officer Potter a complete defense. Mr. Wright, whose own intentions were far from innocent, or heroic as some have claimed, sought to drag two officers along with him while both were holding onto the car that wasn't his. He could have killed Officer Luckey and Sgt. Mike Johnson, easily. Officer Potter sought, as the use of force statute permits, "to effect the arrest or capture, or prevent the escape, of a person whom the peace officer knows or has reasonable grounds to believe has committed or attempted to commit a felony." There was a concomitant need "to protect the peace officer or another from great bodily harm." The threat of Mr. Wright's possible escape was "articulated" by shouting out "Taser, Taser, Taser." Her use of force, albeit mistaken, was accomplished "without unreasonable delay." See Minn. Stat. 609.066, Subd. 2 (1) and (2).

The version of Minn. Stat. 609.066 in effect on April 11, 2021 no longer provides the standard, however. On September 13, 2021, Ramsey County District Court Judge Leonardo Castro granted a motion for injunctive relief filed by, among others, the Minnesota Police and Peace Officers Association, an organization which represents Officer Potter's interests. Judge Castro found that the amendments to Minn. Stat. 609.066, effective March 1, 2021, were likely unconstitutional, ruling that "the Revised Statute shall be stayed and Minn. Stat.

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Sec. 609.066 as it existed prior to the adoption of the amendment shall remain in force." Order and Memorandum, submitted to the Court as Exh. C, at p. 3.

Before the March 1, 2021 amendments, Minn. Stat. 609.066 had long governed the authorized use of force by law enforcement. Under Subd. 1 of that statute, an officer's use of "deadly force," i.e., force "which the actor should reasonably know creates a substantial risk of causing death or great bodily harm" was justified:

> (1) to protect the peace officer or another from apparent death or great bodily harm;
>
> (2) to effect the arrest or capture, or prevent the escape, of a person whom the peace officer knows or has reasonable grounds to believe has committed or attempted to commit a felony involving the use or threatened use of deadly force; or
>
> (3) to effect the arrest or capture or prevent the escape of a person whom the officer knows or has reasonable grounds to believe has committed or attempted to commit a felony if the officer reasonable believes that the person will cause death or great bodily harm if the person's apprehension is delayed. (Emphasis added).

The old statute is applicable. Mr. Wright's "apparent" threat is visible on the body camera footage. His want was to drive away with one or two officers possibly clinging to his car. Officer Potter had good reason to believe Mr. Wright was about to commit a violent felony, namely fleeing a police officer in a motor vehicle. He was a public safety risk. The arrest could not be delayed.

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The Complaint's factual basis is, in the end, hindsight driven. Officer Potter should have done this, she should have thought that. Which has never been the standard to be used when evaluating a police officer's use of force. Graham v. Connor, 490 U.S. 386 (1989). Mr. Wright created a scene frenetic and dangerous. Officer Potter had act. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." Id. at 396-97. She believed the use of a Taser was appropriate when she saw Mr. Wright's abject denial of his lawful arrest coupled with his attempted flight. She could have shot him.

Dated: September 15, 2021

Respectfully submitted,

/s/ Paul Engh

PAUL ENGH #134685
Suite 260, 650 South Sixth Avenue
Minneapolis, MN 55402
612.252.1100

EARL GRAY #37072
Suite 1600W
First National Bank Building
332 Minnesota Street
St. Paul, MN 55101
651.223.5175

Lawyers for Officer Potter