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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

MOHAMED MOHAMED NOOR,

Defendant.

STATE'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S REQUESTED JURY INSTRUCTIONS

MNCIS No: 27-CR-18-6859

TO: THE HONORABLE KATHRYN QUAINTANCE, HENNEPIN COUNTY DISTRICT COURT; COUNSEL FOR DEFENDANT; AND DEFENDANT.

INTRODUCTION

On February 15, 2019, the State filed its requested jury instructions. The State objects to any modifications proposed by the defendant to the following Minnesota jury instructions:

1. CRIMJIG 3.03 – PROOF BEYOND A REASONABLE DOUBT
2. CRIMJIG 11.38 – MURDER IN THE THIRD DEGREE – ELEMENTS
3. CRIMJIG 11.56 – MANSLAUGHTER IN THE SECOND DEGREE – ELEMENTS
4. CRIMJIG 7.11 – AUTHORIZED USE OF DEADLY FORCE BY PEACE OFFICERS.

The defendant has also requested the "ordinary" self-defense instruction and an instruction on justifiable taking of a life in addition to his proposed sweeping modification to the pattern jury instruction for authorized use of deadly force by peace officers. The State opposes the court giving these instructions because these defenses are not available to an on-duty police officer and the proposed modification is unsupported by Minnesota law.

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The State requests the following instructions:

7.11 AUTHORIZED USE OF DEADLY FORCE BY PEACE OFFICERS/REASONABLE USE OF FORCE

AUTHORIZED USE OF DEADLY FORCE BY PEACE OFFICERS

The statutes of Minnesota provide that no crime is committed, and a peace officer's actions are justified, only when the peace officer uses deadly force in the line of duty when necessary to:

[1] protect the peace officer or another from apparent death or great bodily harm.

[2] 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.

[3] 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 if the officer reasonably believes that the person will cause death or great bodily harm if the person's apprehension is delayed.

"Deadly force" means force which the peace officer uses with the purpose of causing, or which the peace officer should reasonably know creates a substantial risk of causing death or great bodily harm.

REASONABLE USE OF FORCE BY PEACE OFFICERS

As to each count or defense, the kind and degree of force a peace officer may lawfully use is limited by what a reasonable peace officer in the same situation would believe to be necessary. Any use of force beyond that is regarded by the law as excessive. To determine if the actions of the peace officer were reasonable, you must look at those facts known to the officer at the precise moment he acted with force.

The State has the burden of proving beyond a reasonable doubt that the defendant was not authorized to use deadly force.

ARGUMENT

I. THE COURT SHOULD DENY THE DEFENDANT'S REQUEST TO ASSERT ORDINARY SELF DEFENSE AND JUSTIFIABLE HOMICIDE BECAUSE THOSE DEFENSES DO NOT APPLY TO AN ON-DUTY POLICE OFFICER.

When the defendant shot and killed Justine Ruszczyk on July 15, 2017, he was in the act of responding to two 911 calls she had made minutes earlier. There is no question he was acting

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as a police officer and she was a civilian. Where a police officer uses force against a civilian, the jury instructions should acknowledge the defendant's status as a police officer. *Commonwealth v. Asher*, 31 N.E.3d 1055, 1062 (Mass. 2015). The instructions should explain that, "as a police officer, the defendant would have been justified in using force in connection with his official duties…as long as such force was necessary and reasonable." *Id.* A police officer has the right to use reasonable force. *Id.*

In an ordinary self-defense instruction, a defendant's use of force is limited to the force a reasonable *person* would use. Minnesota's ordinary self-defense instruction includes the duty to retreat and avoid danger if reasonably possible. *See* 10 *Minnesota Practice,* CRIMJIG 7.06 (6th ed.). The same limitations apply to justifiable taking of a life. *See* 10 *Minnesota Practice,* CRIMJIG 7.05 (6th ed.). A police officer, however, may not retreat from danger or find alternative ways of avoiding peril to others because he or she has an obligation to the public that ordinary citizens do not. "[R]etreat or escape is not a viable option for an on duty police officer faced with a potential threat of violence." *Asher*, 31 N.E.3d at 1062 (first citing *Reed v. Hoy,* 909 F.2d 324, 331 (9th Cir. 1989), *cert. denied*, 501 U.S. 1250 (1991), *recognized as overruled on other grounds*, then citing *Edgerly v. City & County of San Francisco,* 599 F.3d 946, 956 n. 14 (9th Cir. 2010) (duty to retreat before resorting to deadly force "may be inconsistent with police officers' duty to the public to pursue investigations of criminal activity" and should not apply absent clear authority)). "While it is appropriate to require a police officer to do "everything reasonable in the circumstances to avoid physical combat before resorting to force" against a civilian, the question must be whether the defendant *as a police officer* had reasonable options available other than to use force—not whether a similarly situated civilian would have had other options." *Asher,* 31 N.E.3d at 1062 (alteration in original); *see also People v. Doss*, 276 N.W.2d 9, 14 (Mich. 1979)

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("police officers making a lawful arrest may use that force which is reasonable under the circumstances in self-defense, and unlike the private citizen a police officer, by the necessity of his duties, is not required to retreat before a display of force by his adversary") (citing 40 Am. Jur. 2d Homicide § 137, at 427-428). In addition to having no duty to retreat, a police officer may be legally justified in using deadly force in a variety of situations that would not apply to an ordinary citizen seeking to claim self-defense. *State v. Mantelli*, 42 P.3d 272, 280 (N.M. Ct. App. 2002). Instructing the jury on ordinary self-defense will confuse the jury and misstate the law. The defendant has claimed all along that he acted as a fully-trained and competent police officer when he killed Ms. Ruszczyk on July 15, 2017. His attempt to assert the right of a private citizen to defend himself against imminent harm at this juncture is perplexing. The court should deny his requested instructions.

II. THE COURT SHOULD DENY THE DEFENDANT'S REQUEST TO MODIFY THE PATTERN JURY INSTRUCTION TO INCLUDE LANGUAGE ABOUT SUBJECTIVE BELIEFS AND 20/20 HINDSIGHT BECAUSE IT WILL MISLEAD THE JURY AND SUPPLANT THE COURT'S PREVIOUS INSTRUCTIONS.

The defendant has also proposed that the Court modify Minnesota's pattern jury instruction on the authorized use of deadly force by police officers (CRIM JIG 7.11) to include the following language:

> "Apparent" means "as perceived or believed *subjectively* by the officer."
> ...
> "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer at the moment he is on the scene, rather than with the 20/20 vision of hindsight."

Def. Noor's Proposed Jury Instr., at 9, Feb. 15, 2019.

The defendant cites *Schultz v. Long*, 44 F.3d 643 (8th Cir. 1995) for the proposition that the above language is appropriate. Their reliance on *Schultz* is mistaken. The *Schultz* court indeed

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quoted the "20/20 hindsight" language from *Graham*, but it did so in the context of upholding the district court's decision to exclude certain evidence, not giving a particular jury instruction. *Id.* at 648. Nor does *Schultz* stand for the proposition that "apparent death or great bodily harm" means harm "as perceived or believed *subjectively* by the officer." In fact, the word "subjective" is not found anywhere in the *Schultz* opinion. *Id.* Rather, the opinion repeatedly stresses the well-established concept that an officer's decision to use force must be based on an *objectively* reasonable belief. *Id.* at 649.

This court should not be under the impression that the Eighth Circuit requires that the 20/20 hindsight instruction be given. In fact, the model Eighth Circuit instruction on excessive force leaves it to the discretion of the trial judge on whether to include the language at issue. *See Billingsley v. City of Omaha*, 277 F.3D 990 (8th Cir. 2002) ("The objective reasonableness test … takes into account, albeit not as directly as [the 20/20 hindsight language], the demanding circumstances under which an officer is operating … [t]hus whether additional comment is required … beyond the factors set forth in *Garner* and *Graham* is a matter that lies within the discretion of the district court."); Model Civ. Jury Instr. 8th Cir. 4.40, n.7 (2018). What is absent from the defense proposal, conspicuously, is the language in the model Eighth Circuit instruction requiring that the police officer give a warning before using deadly force. If the Court is persuaded by the defendant's request to incorporate the 20/20 hindsight aspects of Eighth Circuit precedent, the State requests, and fairness dictates, that the warning requirement be included as well.

The "20/20 hindsight" quote from *Graham* is not included in Minnesota's applicable jury instruction. The jury does not need to hear it to engage in a meaningful analysis of the defendant's conduct and in fact, it would have the opposite effect. *Every* criminal trial is an exercise in hindsight. What stops that hindsight from being "20/20" are the burden of proof, the presumption

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of innocence, and the defendant's right to confront and cross examine witnesses. The phrase "20/20 hindsight," is actually a pejorative phrase for the evaluation of one's conduct after the fact. Importantly, its use by the Court will suggest to the jury that it should disregard any evidence that tends to convict the defendant. The jury has already been instructed to *question* such evidence—it has been told to presume the defendant innocent, wait until it hears all of the evidence, and only convict him of these crimes if they have no reasonable doubt he is guilty. The defendant is not entitled to a higher burden of proof than any other person on trial for a crime. For this reason, like Minnesota's, the model instructions from California, Michigan, New Jersey, Indiana, Massachusetts, and Arizona do not include language about "split second decisions" or "20/20 hindsight." *Judicial Council Of California Criminal Jury Instruction* 507 (2018); *Michigan Non-Standard Jury Instr. Criminal* § 13:10 (2018); *New Jersey Model Criminal Jury Charges,* (N.J.S.A. 2C:3-7a, 2C:3-7b) (1983); *Ind. Pattern Crim. Jury Inst.* 10.1200 (2016); *Massachusetts Superior Court Criminal Practice Jury Instructions*, CRMJ MA-CLE § 5.4.3(g) (2018); *Arizona Pattern Jury Instructions,* STCI 4.10 (3a), (3b), (4) (4th ed.).

This Court should apply the Eleventh Circuit's analysis in *Simmons v. Bradshaw*, 879 F.3d 1157 (11th Cir. 2018). There, during a routine traffic stop, a sheriff's deputy shot an unarmed bicyclist four times and rendered him a paraplegic. *Id.* at 1160. The bicyclist sued the deputy, making a 42 U.S.C. § 1983 claim, and the elected sheriff under a *Monell* claim.[1] The jury found in favor of the bicyclist and awarded him approximately $23,000,000. *Id.* This verdict was reversed on an unrelated qualified immunity issue, but relevant to this case, the Court held:

> [The defendant] also appeals the district court's denial of his request for a jury instruction that an officer's actions must be viewed

[1] A *Monell* claim is a federal constitutional claim asserted against a public entity arising out of actions that violate the constitution and require a showing that an entity's policy or custom violated the plaintiff's rights. *Monell v. Dep't of Soc. Servs. of N.Y.,* 436 U.S. 658, 694-95 (1978).

> from the perspective of a reasonable officer on the scene and not with 20/20 hindsight vision. The instruction given at trial stated that the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene. We find no merit in [the defendant's] argument that he was prejudiced because this instruction did not include the phrase "rather than with the vision of 20/20 hindsight.

Id. at 1161.

The language from *Graham* that the defendant seeks to incorporate into the instruction is dicta, usually cited by federal courts in § 1983 civil claims in the context of whether a police officer is entitled to qualified immunity. *See e.g.*, *Greene v. Bryan*, 15CV249-ARR-RER, 2018 WL 3539811, at *6 (E.D.N.Y. July 23, 2018) (recognizing certain language in *Graham* as dicta); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (stating qualified immunity shields police officers from "liability for civil damages if their conduct does not violate *clearly* established statutory or constitutional rights[.]"). This is a completely separate concept from what defenses are available for criminal liability and which instructions should be given to a jury in a very different kind of case.

More to the point, the Minnesota legislature creates crimes and defenses to those crimes. State v. Merrill, 450 N.W.2d 318, 321 (Minn. 1990); *Schumann v. McGinn*, 240 N.W.2d 525, 537 (Minn. 1976) (stating that the legislature has the legitimate authority to define crimes and defenses). What the legislature has enacted into law takes precedence over opinions written by federal courts in civil officer misconduct cases. The legislature has elected not to change or modify the language of CRIM JIG 7.11 and this court should not either.

Finally, precedent for giving Minn. CRIM JIG 7.11 as written exists in recent decisions of this Minnesota District Court. After fully litigating the same issue, the district court denied similar

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modifications to this instruction in *State of Minnesota v. Christopher Michael Reiter* (27-CR-17-6475) and *State of Minnesota v. Efrem Hamilton* (27-CR-17-2104).

CONCLUSION

The State of Minnesota objects to modification of any of the pattern Minnesota jury instructions requested by the defendant and enumerated in the introduction to this memorandum. Furthermore, the defendant was an on-duty Minneapolis Police officer at the time he killed Justine Ruszczyk, a status which bestowed on him both an obligation to protect the public with the use of justifiable deadly force when necessary and a significantly broader scope of permitted force than an ordinary citizen. Minnesota law provides the appropriate, applicable, and commonly-used jury instructions for this case. The court should deny the defendant's requests for these additional defenses and modifications to any instructions.

Dated: April 12, 2019

Respectfully submitted,

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