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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

Mohamed Mohamed Noor,

Defendant.

Case No.: 27-CR-18-6859

MEMORANDUM IN SUPPORT OF DEFENDANT NOOR'S PROPOSED JURY INSTRUCTIONS

Defendant, Mohamed M. Noor, by and through his attorneys, submits the following Memorandum in Support of his previously submitted Proposed Jury Instructions. Specifically, Defendant addresses proposed modifications to CRIMJIG 3.03, CRIMJIG 11.38, and CRIMJIG 11.56. Defendant also addresses CRIMJIG 7.11, CRIMJIG 705, and CRIMJIG 7.06. Defendant also requests additional language addressing unconscious bias be added to CRIMJIG 3.01.

1. CRIMJIG 3.03

Defendant requests the addition of a single sentence to the proof beyond a reasonable doubt CRIMJIG. CRIMJIG 3.03 reads,

> Proof beyond a reasonable doubt is such proof as ordinarily prudent men and women would act upon in their most important affairs. A reasonable doubt is a doubt based upon reason and common sense. It does not mean a fanciful or capricious doubt, nor does it mean beyond all possibility of doubt.

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Defendant requests the following language be added to the end of CRIMJIG 3.03, "*If the jury views the evidence in the case as reasonably permitting either of two conclusions—one of innocence, the other of guilt—the jury must, of course adopt the conclusion of innocence.*" Defendant submits the proposed language aids the jury because it helps synthesize the intersection between proof beyond a reasonable doubt and the presumption of innocence.

The proposed language is entirely consistent with the law, adopted directly from 1A Fed. Jury Prac. & Instr. § 12:10 (6th ed.), which is a JIG on the presumption of innocence, burden of proof, and reasonable doubt. The idea is also endorsed by the Minnesota Supreme Court. In State v. Al-Naseer, 788 N.W.2d 469, 473 (Minn. 2010), the supreme court in outlining the standard of review in a circumstantial evidence recognized this fundamental bedrock of the criminal justice system stating, "if any one or more circumstances found proved are inconsistent with guilt, or consistent with innocence, then a reasonable doubt as to guilt arises." Al-Naseer, 788 N.W.2d at 474 (also noting that the standard is not limited to cases based entirely on circumstantial evidence). Defendant submits that in this case the additional language is consistent with the law and will aid the jury in understanding the application of both the presumption of innocence and proof beyond a reasonable doubt.

2. CRIMJIG 11.38

Defendant also requests the addition of a single sentence to the end of the third element of the murder in the third degree CRIMJIG. The third element of CRIMJIG 11.38 reads,

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> Third, the defendant's intentional act, which caused the death of Justine Ruszczyk, was eminently dangerous to human beings and was performed without regard for human life. Such an act may not be specifically intended to cause death, and may not be specifically directed at the particular person whose death occurred, but it is committed in a reckless or wanton manner with the knowledge that someone may be killed and with a heedless disregard of that happening.

Defendant proposes adding the following language to the end of the third element of CRIMJIG 11.38, "*Murder in the third degree cannot occur where the defendant's actions were focused on a specific person.*" The additional language is drawn directly from the State v. Barnes, 713 N.W.2d 325, 331 (Minn. 2006).

The importance of adding the additional clarifying language is to ensure the jury understands the fundamental limitation of the application of third degree murder when a defendant's actions are directed at a specific person. A limitation that has been repeatedly addressed in appellate review. See State v. Wahlberg, 296 N.W.2d 408, 417 (Minn. 1980) (holding, that an instruction on murder in the third degree is inappropriate where the evidence suggested all of the blows were directed at the victim.); State v. Hanson, 176 N.W.2d 607, 614-15 (Minn. 1970) (holding, "the act must be committed without a special design upon the particular person or persons with whose murder the accused is charged."); State v. Harris, 713 N.W.2d 844, 850 (Minn. 2006) (stating, "Here where it was undisputed that Harris intentionally directed one shot at close range toward Greenwood, no third-degree murder instruction was required."); State v. Fox, 340 N.W.2d 332, 335 (Minn. 1983) (confirming the district court's refusal to submit a third-degree murder instruction when the evidence demonstrated that the defendant fired one

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shot at a specific individual.). The additional proposed language is consistent with the law and will help clarify the complex third element of the third degree murder statute.

3. CRIMJIG 11.56

In relation to CRIMJIG 11.56, Defendant requests additional language to aid the definition of culpable negligence. The second element of CRIMJIG 11.56 reads,

> Second, the defendant caused the death of Justine Ruszczyk by culpable negligence, whereby the defendant created an unreasonable risk and consciously took a chance of causing death or great bodily harm. "Culpable negligence" is intentional conduct that the defendant may not have intended to be harmful, but that an ordinary and reasonably prudent person would recognize as involving a strong probability of injury to others.

Defendant requests the addition of the following language at the end of the above paragraph,

> Culpable negligence is more than ordinary negligence. It is more than gross negligence. It is gross negligence coupled with an element of recklessness. It is a conscious disregarding of a substantial and unjustifiable risk of which one actually is aware, and not a disregarding of a risk of which one should be aware.

The proposed language comes from the supreme court's holdings in State v. Frost, 342 N.W.2d 317, 320 (Minn. 1983) and State v. Back, 775 N.W.2d 866, 869 (Minn. 2009). In Back, the supreme court explained that a defendant can only be guilty of manslaughter based on culpable negligence if the defendant,

> "causes the death of another ... (1) by the person's culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another." MINN.STAT. § 609.205(1). "Culpable negligence" is "more than ordinary negligence" and "more than gross negligence." State v. Beilke, 267 Minn. 526, 534, 127

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> N.W.2d 516, 521 (1964). It is "gross negligence coupled with the element of recklessness." Id.; see State v. Grover, 437 N.W.2d 60, 63 (Minn. 1989) (explaining that criminal negligence requires more than the negligence giving rise to a civil cause of action).

Back, 775 N.W.2d at 869. The additional language aids the jury in understanding these complex legal standards. Without instructing the jury on the proper legal definition of culpable negligence, there is a substantial risk the jury will not apply the proper legal standard. The risk is especially problematic if the jury were to equate culpable negligence to gross negligence—a result the supreme court specifically forbids. The proposed language prevents the jury from applying the incorrect standard.

4. CRIMJIG 7.11

Defendant provided notice of the defense of authorized use of force and submits the jury must be instructed on authorized use of force by peace officers pursuant to Minnesota Statute section 609.066, subdivision 2(1). Section 609.066, subdivision 2(1) states,

> Subd. 2. Use of deadly force. Notwithstanding the provisions of section 609.06 or 609.065, the use of deadly force by a peace officer in the line of duty is justified only when necessary:
>
> (1) to protect the peace officer or another from apparent death or great bodily harm;

Section 609.06 is the codification of the Supreme Court's holding in Graham v. Connor, where the Supreme Court instructed,

> 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.... With respect to a claim of excessive force, the [ ] standard of reasonableness *at the moment* applies: 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's

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> chambers,' violates the Fourth Amendment. 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.

490 U.S. 386, 396-97 (1989). The Supreme Court's instruction along with Minnesota Statute section 609.06 has been newly translated into CRIMJIG 7.11, which reads as follows,

> 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 protect the peace officer or another from apparent death or great bodily harm.
>
> "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.
>
> 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.

In this case the instruction is required because the evidence establishes that when Defendant fired his weapon he was acting in the line of duty. He was also acting to protect himself and his partner from an "apparent threat" of death or great bodily harm.

While the plain meaning of "apparent threat" is not complicated, the appellate courts have of course added additional layers of meaning to this term of art. Additional layers that Defendant submits requires additional instruction to the jury beyond those

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contained in CRIMJIG 7.11. The Eighth Circuit has instructed that the "apparent threat" must be determined from the information that the officer possessed at the time of his decision to use deadly force. See Schultz v. Long, 44 F.3d 643, 648 (8th Cir. 1995). This is essentially the officer's subjective view of the information he possessed at that time he made the decision to use force. As the appellate courts have instructed, it does not matter if the officer was ultimately mistaken as to his apparent belief, the fact that he may have been mistaken is of no consequence, so long as he perceived that a danger of death or great bodily harm existed at the time of his actions. Schultz, 44 F.3d at 648-49; Baker v. Chaplin, 517 N.W.2d 911, 916 (Minn. 1994). In order to clarify this important element of the use of force instruction Defendant requests the following additional language be added be added to the end of CRIMJIG 7.11,

> "Apparent" means "as perceived or believed subjectively by the officer." For purposes of authorized use of force, if an officer is ultimately mistaken as to his apparent belief, the fact that he may have been mistaken is of no consequence, so long as the officer perceived that a danger of death or great bodily harm existed at the time of his actions.

Additionally, Defendant submits the newly drafted CRIMJIG 7.11 does not adequately instruct on the definition of reasonableness as defined by Graham v. Connor. Defendant requests the following additional language on reasonableness also be added to CRIMJIG 7.11,

> 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. The reasonableness inquiry extends only to those facts known to the officer at the precise moment the officer acted with force. The determination of reasonableness must allow for the fact that police officers are often forced to make split-second

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> judgments about the amount of force that is necessary in a particular situation under circumstances that are tense, uncertain, and rapidly evolving.

Both the requested language defining apparent threat and reasonableness communicates the appellate courts' instructions on the evaluation of reasonableness and provides clear understandable language to assist the jury in making that determination.

5. CRIMJIG 7.05 and 7.06

Defendant provided notice of self-defense and defense of others and submits the jury must be instructed on self-defense and defense of others. While there are many similarities between use of force and self-defense there are differences that require the jury be instructed on both. While authorized use of force relies more heavily on an objective standard, self-defense has a clear subjective element. In State v. Johnson, 719 N.W.2d 619, 630 (Minn. 2006), he supreme court stated,

> The second element of a self-defense claim is that the defendant has an actual and honest belief that he or she was in imminent danger of death or great bodily harm. Although no Minnesota case appears to explicitly state so, it is self-evident that this element of the self-defense claim is subjective and depends upon the defendant's state of mind.

In this case, Defendant had an actual and honest subjective belief that he was in imminent danger of death or great bodily harm. This evidence in this case requires the jury to hear evidence related to Defendant's belief that he needed to act in self-defense and to judge that evidence in relation a self-defense and defense of others instruction.

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6. CRIMJIG 3.01

CRIMJIG 3.01 addresses duties of jurors. Defendant requests the following language be added after the third paragraph of CRIMJIG 3.01,

> You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.

The additional language addresses the unconscious bias concerns Defendant raised in his First Motions in Limine. Given the results of research on bias in the courtroom, Defendant submits the instruction is necessary to properly instruct the jury. See *Implicit Bias in the Courtroom*, 59 UCLA L.Rev. 1124 (2012).

Defendant continues to reserve his right to request additional instructions and supplement his argument for his requested instructions as the evidence is received.

Respectfully submitted,

Dated: April 12, 2019.

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