

STATE OF MINNESOTA  
COUNTY OF HENNEPIN

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DISTRICT COURT  
FOURTH JUDICIAL DISTRICT

State of Minnesota,

Court File No.: 27-CR-18-6859

Plaintiff,

v.

**REPLY TO STATE'S RESPONSE  
TO DEFENDANT'S MOTION TO  
DISMISS FOR LACK OF  
PROBABLE CAUSE**

Mohamed Mohamed Noor,

Defendant.

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Defendant, Mohamed Noor, by and through his attorneys, hereby replies to the State's Response to Defendant's Motion to Dismiss for Lack of Probable Cause. The State's response is gravely flawed in both law and fact. Their factual recitation fails to exercise candor to this tribunal through omission and error. The State's legal and factual flaws shall each be addressed in turn.

**I. Factual Misstatements and Mischaracterizations:**

As an initial matter, the defense disputes the admissibility of: the May 18, 2017 motor vehicle stop; the four referenced training days, and the misleading discussion of Officer Noor's MMPI-2-RF PCIR results. The defense asks that none of this information be considered by the Court for probable cause.

**a. Traffic Stop May 18, 2017**

The State's factual characterization of the May 18, 2017 traffic stop occurring at 6:03 PM is grossly misleading and factually incomplete. The State half-heartedly

concedes that there was a valid stop for a traffic violation. The State chooses to exclude important facts and mischaracterizes the facts they rely on. Review of the squad car video shows that the driver traveled nearly 2 city blocks before stopping after officers activated their red lights. Once stopped the driver made an exaggerated furtive movement leaning abruptly to his right. The State did not mention this in their reply. The State also failed to mention the officers discussion about this movement which they had during the course of the stop. The officer's discussed their suspicion that the driver hid contraband under the passenger seat which explains their actions. Both of these facts are important because a reasonable officer should be concerned when a subject unreasonably delays stopping their car and makes furtive movements possibly to hide contraband or perhaps retrieve a weapon.

The State inaccurately claims that the first thing Officer Noor did when he got to the side of the car was point his gun at the driver's head. This claim is not born out by the squad video. The video shows Officer Noor at the driver's side of the car with his gun in "low carry" pointing down between himself and the driver and appearing calm. The squad video shows that Officer Noor, having determined the driver was not a threat holstered his gun about 23 or 24 seconds after arriving at the side of the car. The State suggests that Officer Noor was aggressive compared to his partner by stating that his partner had his gun out, but not pointed at the driver. The State does not tell the Court that his partner was actively looking through the windows of the car to try to find the contraband which the officers believed had been hastily stashed by the driver during his exaggerated furtive movement to the right.

Next the State says Officer Noor did not appear in court for a hearing on the citation, thus suggesting he is irresponsible. The unreported truth is that he was not informed of the hearing date. The State knew the truth on this minor point because on December 28, 2017 the cited driver reported it to a BCA Agent who dutifully recorded and transcribed the interview. During the interview the subject explains that the prosecutor informed him that, "Officer Noor can't be here he's on leave so your case is dismissed." The subject's interview suggests Officer Noor was the less aggressive officer in this encounter. The subject notes that Officer Noor's partner was yelling and saying what are you doing and to shut up, while Officer Noor didn't say anything other than what are you doing with your hands. Interestingly the subject did not report that Officer Noor pointed a gun at his head. The subject agreed that the gun was drawn because the officers thought his initial movement was worrisome. The State makes much about the officers not writing a report, but Minneapolis Police are not required to write a report for minor traffic citations. Neither is there is a policy that requires a written report every time an officer removes their pistol from its holster. Finally the cited subject never reported his concerns about Officer Noor until he saw Mike Freeman on television, and thought Mr. Freeman needed his help. These lies by omission and clear misstatements of fact actively mislead the reader and obscure the truth. This portion of the State's Memorandum should be disregarded.

**b. Four Duty Days (ROPEs)**

The State points to four duty days during Officer Noor's field training period to support probable cause. The State references Recruit Officer Performance Evaluations

(ROPE forms) and other information gathered by their investigation to portray Officer Noor in a dim light, but fail to tell the Court the complete story. This is again a lie by omission.

All Minneapolis Police Recruits begin their careers working side by side with a Field Training Officer (FTO). The FTO prepares a ROPE form to evaluate the performance for that shift. Each ROPE has 26 individual performance categories. The ROPE also asks the FTO to comment on the recruits “Most Acceptable Performance of the Day” and “Least Acceptable Performance of the Day.” The ROPE also allows for additional comments about the training day. The ROPEs are numbered 0 through 85 with the first 3 to 5 shifts being 0 ROPEs. Each shift is 10 hours long so a Minneapolis Police Recruit has about 880 hours with an FTO which are documented in the ROPEs and 2 other forms. Some recruits receive more FTO time or are sent back to the academy due to training deficiencies. Officer Noor did not receive any extra training because he had no training deficiencies during his 880 hours. Officer Noor NEVER had an unsatisfactory day during his FTO time. The ROPE is designed to give both positive and negative feedback regarding each training day. Again at no time was Officer Noor ever found to be not acceptable on any task. He was not perfect. His most frequent criticism was geographic orientation which is very common. In addition to ROPEs a recruit receives a weekly Supervisor's Evaluation Report. This report is filled out by a Field Training Supervisor (FTS) and aggregates the weeks training. Each recruit has a monthly sit down meeting which is also documented. Minneapolis Police Training is rigorous and highly documented and Officer Noor was always satisfactory.

The State has selected 4 ROPEs (none of which show a “not acceptable” rating) to boot strap their argument for probable cause. This aspect of their memorandum lacks candor. Each training day must now be examined to bring a cleansing light to the State’s memorandum.

**i. April 8, 2016**

On April 8, 2016 (ROPE 83) Officer Noor worked with an FTO who noted as his least acceptable performance of the day that he did not want to take calls at times and drove around in circles ignoring calls when he could have self-assigned them. The State points to this and claims that Officer Noor did not act with care toward or concern for the safety of the public he served. (Response at Pg. 23) This claim is a disgraceful. A full and honest examination of ROPE 83 shows that Officer Noor received acceptable or better marks for his work in all 26 rated areas. This FTO commented that “Recruit did good with answering calls and assisting other Squads. A somewhat steady night of calls and recruit seemed to want to stay busy.” The FTO also qualified his comment by noting that Officer Noor was working as an “able” car meaning a car with 1 Officer which is not well suited for all calls, which puts some context on the reported failure to take some of the calls. Overall Officer Noor had a good day on April 8, 2016. This FTO simply pointed out something he thought could be done better. In fact when this FTO was later asked if this specific conduct was something that he was concerned about in a recruit’s last few days of training he said he did not know that it was a “concern” but it was just his observation for that particular night.

April 8, 2016 was part of Officer Noor's 10 day, which is the final week of an officer's FTO period. The 10 day is summed up in a report known as "Supervisor's Evaluation Report (10 day)." A Field Training Supervisor (FTS) completed this report. On April 12, 2016 Officer Noor's FTS wrote:

\*Strongest Area(s) of performance during the 10 Day Evaluation:

FTO Officer noted that Recruit has made great improvements from phase 3 to phase 5.

\*Weakest Areas of performance during the 10 Day Evaluation:

Nothing to note.

\*Is the Recruit ready to work outside the FTO program?:

Yes

**ii. March 31, 2016 (ROPE 79)**

The State references comments in ROPE 79 from March 31, 2016 and the FTO's testimony at a later proceeding regarding "tunnel vision" while driving in their memorandum. The State argues that one instance of tunnel vision shows that Officer Noor failed to look, scan, and observe in the manner required for a police officer to ensure personal and public safety on the evening Ms. Rusczyk was shot. (Reply at pg. 23) ROPE 79 actually says "Noor had some trouble with code 3 driving the second half. He got a little tunnel vision and I had to snap (yell) him out of it." What the State does not tell the Court is that ROPE 79 also says, "Noor had a slow first half of the shift. He kept busy taking calls out of sector and assisting other squads when he could. Noor and other recruits searched an open business and showed great teamwork." On training day

79 Officer Noor, in addition to showing acceptable or better work in all 26 rated categories, also displayed his ability to work well with other officers and his diligence even when things are slow by taking calls that were out of his sector. Importantly this FTO later testified that he recalled working as Officer Noor's FTO. He remembered Officer Noor as, "A kind gentleman. He was proficient at his job for being a beginner." The FTO further explained that Officer Noor was a very genial person, nice when he would interact with the public and an overall average recruit.

This FTO worked with Officer Noor several times. In ROPE 68 from March 12, 2016 he noted "Very busy night right from the start. Noor was call to call all the way up to OTL [out to lunch]. Handled everything very well." In ROPE 69 from March 15, 2016 he commented, "Very busy first half of the shift. He did a good job driving in the rain. Noor is making his on [sic] decisions and being more independent." On ROPE 71 from March 18, 2016 and ROPE 73 from March 21, 2016 Officer Noor's Least Acceptable Performance of the Day was, "Nothing to Report" according to this FTO. On March 30, 2016 Officers Noor's Field Training Supervisor (FTS) did a Supervisor's Evaluation Report (Weekly). The weekly report noted his "Weakest Area(s) of performance for this reporting period" as "Nothing noteworthy at this time." The same report also said the "Officer Noor is doing very well." The following week Officer Noor continued with the same FTO who characterized his "Most Acceptable Performance of the Day" as:

Noor is progressing well. Noor is always very eager to do police work and jumps on calls when he sees them come out. He always does a thorough job all calls no matter what they are. Today he showed great patience and professionalism during a door dinging incident and waited for one of the parties involved to provide proof of insurance. ROPE 74 March 22, 2016

On the same day Officer Noor's Least Acceptable Performance of the Day was "Nothing notable for this section." In ROPE 75 March 23, 2016 this FTO noted that Noor responded to an EDP (Emotionally Disturbed Person). While on scene Noor was able to gain a rapport with the party when others could not.

The State chose to ignore ROPE 84 from April 9, 2016 which is noteworthy as it rebuts the State's claim that Officer Noor has an indifference to human life, is dangerous and reckless as a police officer and has a disregard for citizens. In ROPE 84 this FTO noted:

\*Most Acceptable Performance of the Day:

Noor gave a mother and small baby a ride home to the north side.

\*Least Acceptable Performance of the Day:

nothing to note.

ROPE 85 April 10, 2016 is Officer Noor's Final Day with this FTO and his final day working under the supervisor of an FTO. On this day his FTO noted in additional comments:

Noor has built a strong foundation to begin his law enforcement career. His greatest assets are his eagerness to learn and enthusiasm. If he continues to come to work with the same enthusiasm and eagerness he will do very well at this job.

**iii. March 5, 2016 (ROPE 64)**

The State asks the Court to put focus on March 5, 2016 when an FTO filled out ROPE 64. (Reply at page 10). On that day Officer Noor met with a caller about a

suspicious person knocking on doors and claiming to be a Century Link employee. The State neglects to inform the Court that Officer Noor's FTO also wrote:

The recruit did a good job today. He took many calls out of the sector without prompt from the FTO. The recruit has excellent divided attention skills. He was able to run the MDC, radio and look up items with ease. The recruit is ready for his 8 and 10 day. FTO has confidence that recruit will do very well.

Focusing on this comment takes ROPE 64 out of context. The ROPE actually shows that Officer Noor's performance in all 26 areas of evaluation was acceptable on March 5, 2016.

Records show that Officer Noor was a diligent and dedicated public servant from his first day. On October 26, 2015 Officer Noor's FTO characterized his "Least Acceptable Performance" as "None. First day on street and seems very willing to learn." and made an Additional Comment "Recruit had a good attitude and is positive towards FTO feedback." On October 29, 2015 Officer Noor's FTO noted, "Looks good, great attitude, enjoyable to work with. He was looking for things to do. He asks questions and has a willingness to learn" and made the "Additional Comment", "Very smart recruit. He will do well. Hope I have an opportunity to work with him again." On November 26, 2015 Officer Noor received a Supervisor's Evaluation Report (Weekly). Officer Noor's FSO commented that:

Recruit Noor responded to a PERGUN [Person with a Gun] call at Lunds grocery store. [FTO] stated recruit used good officer safety while drawing his gun.

This comment is important as it shows Officer Noor practiced good gun safety from the early stages of his work as a Minneapolis Police Officer.

The State leaves out many other important observations of Officer Noor's work during his initial 850 plus hours of work. On January 1, 2016 in ROPE 30 Officer Noor's FTO wrote:

New Years Eve was hectic and stressful but Noor handled the stress appropriately. In one night it was his first time being involved in setting up a perimeter where the suspect was constantly on the move, being on a crime scene and canvassing the neighborhood, as well being one of the first squads to arrive on a shooting. **I never saw him freeze up and his first priority was officer safety at all times.**

Emphasis added

On January 31, 2016 Officer Noor's FTO's completed a Recruit Monthly Interview Form. Under the category "Control of Conflict: Voice Command and Physical Skill" the FTO noted "Does not hesitate to step in when needed. Doesn't freeze up. Very eager to do something on any call he is on." Under the category: "Overall Performance (Best quality, what needs improvement)" the FTO wrote "Super eager and enthusiastic. Always asking questions, great attitude. Work on orientation." Another example of Officer Noor's calm in the presence of danger is found in ROPE 59 from his shift on February 25, 2016 when his FTO wrote:

Recruit Noor's officer safety was spot on this evening. He searched several AP's thoroughly. One of the AP's had 4 pairs of pants on and Recruit Noor was able to find items concealed in the pants. Recruit Noor also had great officer safety when dealing with a sleeping suspect who had a shotgun within arms reach. Recruit Noor assisted officers in securing the shotgun and then taking AP into custody.

Officer Noor's ROPEs show his history of being a kind and gentle person. In addition to giving a mother and small baby a ride home to the North side on April 9, 2016 as noted in ROPE 84, on February 19, 2016 in ROPE 57 Officer Noor "Handled a DOA

call well showing empathy and sympathy to the family.” On January 16, 2016 in ROPE 39 the FTO documented that Officer Noor “[h]anded out some hand warmers to a few people that had no place to go after sending them from a restaurant. Noor is very accepting of criticism and is eager to learn the job.”

**iv. February 20, 2016 ROPE 58**

The State points to one call during a 10 hour shift where Officer Noor focused more on driving than radio traffic. Officer Noor did not receive any “not acceptable” ratings on this day, which is true for every single day and every single task of his entire 880 hour FTO period. This FTO testified at a later proceeding about Officer Noor’s day 58. The FTO testified that narrowly focusing and missing some information is not uncommon for a recruit. When this FTO was asked how Officer Noor was doing as a recruit he testified, “He was doing pretty well.” This FTO worked with Officer Noor several times during the FTO period and several times noted there were no “Least Acceptable Performance of the Day” items.

**c. MMPI-2-RF PCIR**

The State’s reliance on Officer Noor’s February 17, 2015 MMPI 2-RF is a breathtaking breach of their duty to exercise candor with the tribunal. (Reply at pg. 11 and 24) The State’s memorandum is misleading to the Court. The State knowingly asks this Court to accept uncorrelated test results which they know is not permitted by the test user manual and experts they interviewed and fails to disclose information they possessed showing a racial bias of 20 to 40% against the minority test takers. The State essentially asks the Court to find probable cause, based in part, on Officer Noor’s race and cultural

heritage by using a tool in a way that is expressly outside any acceptable method. The State's claim that the MMPI test illustrates his indifference for human life which led to his action on July 15, 2017 is asking to have Officer Noor convicted because of his race. (Reply at pg. 24).

As a matter of background the MMPI-2-RF relies on normative samples. A normative sample is a sample of test takers who are representative of the population for whom the test is intended. A normative group is supposed to stand for a hypothetical "typical" test taker, one who represents the group that's being tested. See DiMaria, Lauren, 'How a Normative Group Works in Psychology', *Very Well Mind* Updated July 02, 2018. The MMPI-2-RF normative sample and consists of 2,276 men and women between the ages 18 and 80 from several regions and diverse communities in the U.S. See Yossef S. Ben-Porath, PhD, Auke Tellegen, PhD, 'Minnesota Multiphasic Personality Inventory-2-Restructured Form®(MMPI-2-RF)' *Pearson Clinical*, 2018. The MMPI 2-RF has several sample groups beyond the general normative sample. This means a test taker can be compared to the general population or a specific subset of the general population. One of the sample groups is Police Candidate Interpretive Report (PCIR). The PCIR comparison group is made of Police Officers in North American Region. The region and gender of this sample group breaks down as follows:

North American Region	GENDER		TOTAL
	MALE	FEMALE	
<b>Pacific</b>	136	136	272
<b>West</b>	381	381	762
<b>Midwest</b>	131	131	262
<b>South</b>	224	224	448
<b>Northeast US and Canada</b>	165	165	330
<b>Total</b>	1037	1037	2074

See Yossef S. Ben-Porath, Kent State University, David M. Corey, Cory & Stewart (October 26, 2014) ‘The MMPI-2-RF Police Candidate Interpretive Report (PCIR)’ [PowerPoint] IACP Police Psychological Services Section Meeting, Orlando FL.

The racial makeup of the PCIR comparison group is: 92.3% Caucasian, 4.6% African American, 2.3% Hispanic, 0.8% Asian. id.

With this understanding of the foundations of the MMPI-2-RF and PCIR in place, it is clear that the State has engaged in, at best, willful ignorance in their reply and knowingly encourages this Court to rely on a racially questionable test interpretation – a serious claim to be sure.

Officer Noor took the MMPI-2-RF as part of his application process. His test was administered by Dr. Logel who is a Ph.D. psychologist. This was sent to Dr. Gratzner, a board certified psychiatrist M.D., to be correlated with clinical findings. This process of testing and correlation of results is crucial. The MMPI 2 RF and PCIR are not valid in the absence of a clinical interview and review of personal history. See MMPI-2-RF (Minnesota Multiphasic Personality Inventory-2-Restructured Form) ‘User’s Guide for

the Police Candidate Interpretive Report (PCIR)' at pg. 1 and 2. This test was scored against both the normative sample group and the PCIR. The State fails to disclose that Officer Noor's results against the normative group showed no deviations. The State relies on a blind interpretation of their own PCIR results to say Officer Noor is not fit to be a police officer. The user's manual and 2 separate medical providers told Ms. Sweasy that a blind interpretation of a test is calculated to give an inaccurate picture of a person. Ms. Sweasy interviewed the medical providers who informed her that historically the PCIR had resulted in a cultural bias toward minority test takers. She knew this and hid it from the Court.

Ms. Sweasy met with Dr. Gratzer on December 15, 2017 and Dr. Logel on January 26, 2018. Both tried to educate her on the need to correlate a test result through a clinical interview and background information. She was also informed that the MMPI-2-RF PCIR had historically shown a "blip" in 20 to 40 percent of minority test takers and the information reported by the PCIR was likely inaccurate in Officer Noor's case as it did not correlate with his background information and clinical interview. They tried to explain the PCIR results were likely a result of his race and cultural background and not a result of a personality disorder.

Dr. Gratzer explained that he did not see any reason to question Officer Noor's ability to perform as a police officer based on a properly administered and correlated MMPI-2-RF in this case. Dr. Gratzer told Ms. Sweasy: First, Officer Noor had no elevated scales in the normative group and second, the elevated scales in the PCIR group were not supported by an extensive background check and clinical interview. Dr. Gratzer

explained the foundational problems he had observed with the PCIR. He explained that the PCIR likely compares candidates to officers that are primarily white. Information on the PCIR sample group puts this at 92.3% Caucasian. Dr. Gratzner explained that he had spoken to the City of Minneapolis and “told them that the MMPI is fairly valid but the comparison to the other police officers, uh, is not as valid among other reasons for cultural issues.” The City instructed him to keep using the test. Dr. Gratzner explained to Ms. Sweasy that the PCIR elevations were not accurate as applied to Officer Noor. He told Ms. Sweasy that the suggestion that Officer Noor would become impatient with others over minor infractions was unsupportable. Dr. Gratzner explained that “[n]umber one, there’s absolutely no evidence to support any of these things. Either based on my interview, my interaction with him. The investigatory materials of the clinical interview. And secondly, I was, I also was aware of the fact that an explanation could be cultural.” Dr. Gratzner candidly explained that the PCIR could not by itself support her hope that Officer Noor had poor coping skills. On this point he explained that if you have poor coping skills:

You’re gonna have poor coping skills that cross a wide variety of areas. It’s very unlikely that someone’s poor coping skills is gonna have a perfect work history. Academic history. Credit history. And all of those other things, uh, so, the language [from the PCIR] is much stronger than anything that would suggest [Inaudible] clinical history. And it says specifically at the bottom of the testing, that the interpretation of the test should be used as an edge onto clinical evaluation.

Dr. Gratzner was very clear about his conclusions of Officer Noor based on the test and additional information used to correlate the test. He said:

[Y]ou just do not see someone with personality issues who has that solid a social history, work history, academic history, credit history, legal history. So, there was absolutely nothing to support that testing. Had there been something to support the testing, then I may well have failed him. If I saw any evidence of that in his history, I would've failed him, but this wasn't gray because the testing specifically says correlate it.

Dr. Logel further explained this to Ms. Sweasy during their meeting. He explained that while the MMPI-2-RF claimed to be geographically and culturally balanced, the manual did not specifically designate ethnic representation and confirmed for Ms. Sweasy that the manual she was relying on just made a general statement about diversity. Dr. Logel explained that if twenty to forty percent of the minority candidates are getting, elevated scores in the comparison group. It suggests that you have to modify the way you look at the comparison group. Ms. Sweasy pressed on arguing if the trait is there, if a trait is elevated, showing a person is incompatible or with public safety requirements, or may become impatient with others or can have difficulty confronting subjects in circumstances in which an officer would normally approach or intervene - how, can that be explained culturally? Dr. Logel told her this is easy, If Officer Noor's understanding of the item is different than a person with a normative background he's going to answer the question in ways that may not reflect what his actual behavior is. Dr. Logel's answer underscores the importance of correlating a test before drawing a conclusion.

Unsatiated by the truth, the State proceeded with a blind test reading of Officer Noor's test data and then placed portions of that blind reading in their memorandum. Blind readings of this test are inherently inaccurate. The State's evaluator carefully noted

that they had no information to correlate their blind reading. Blind readings were cautioned against in the MMPI-2-RF User's Guide for the Police Candidate Interpretive Report and by Dr. Gratzner and Dr. Logel. Ms. Sweasy was well informed about cultural concerns. She not only ignored this information, she failed to tell the Court about it when she presented her MMPI to the Court to support her claim that probable cause exists for a charge of Murder in the Third Degree. The State, knowing that this would be widely covered by media all over the world, failed to inform the Court of crucial information. We respectfully submit that it is improper for the Court to consider a blind reading of Officer Noor's MMPI-2-RF PCIR because the conclusions of the State's blind reading are based on cultural bias and make no reflection of Officer Noor as a person.

## **II. The Law:**

The State asks this Court to disregard established Minnesota case law and relies instead on a law school treatise and an unpublished case that self identifies as a legal outlier. The State's inability to cite to controlling law to support probable cause in and of itself demonstrates the fundamental defect of the complaint in this case. In this reply, Officer Noor addresses two of the State's most egregious assertions.

### **a. The State's interpretation of the danger to others requirement for third degree murder is wrong and not supported by the law.**

The State asserts that the element of third degree murder that Officer Noor's action not be directed at a specific person is met because Officer Harranty was in the squad and a bicyclist was in the area when Officer Noor fired the single shot from his firearm at a specific person. (Response at p. 17). The State offers no evidence that Officer Harranty

was in actual danger as a result of Officer Noor's actions. In fact to the contrary Officer Harrity has never expressed any concern for his safety from Officer Noor's actions. Similarly, the State has not offered any specific evidence that the bicyclist was in any actual danger and in fact the bicyclist reported that he was not traumatized by the situation. Instead the evidence suggests that the bicyclist was not concerned for his safety because his response was to retrieve his cell phone and begin a digital recording.

While the State spends a good deal of time arguing that Officer Noor's decision to fire one shot created danger to others sufficient to meet the elements of third degree murder is State v. Lowe, 68 N.W. 1094, 1095 (Minn. 1896). The State's Response misrepresents the holding in Lowe and ignores the next 100 years of Minnesota case law on the subject. The State writes, "Officer Harrity was clearly in danger, and was therefore a person "in the way at the time of the act" as described in State v. Lowe, 68 N.W. 1094, 1095 (Minn. 1896)." (Response at p. 17). The State makes a similar misrepresentation of Lowe, in relation to the bicyclist. (Response at p. 17). Lowe, is about a person who agreed to help deliver a child, but failed to provide adequate medical care to a Clara Bergh the mother, whom Lowe was engage to care for. In determining Lowe's failure to provide care to Bergh was incompatible with the elements of third degree murder the supreme court stated,

It is, however, necessary that the act was committed without special design upon the particular person or persons with whose murder the accused is charged. The acts and omissions here in question are not of that character. They had special reference to Clara Bergh. It was not a case where the act or omission did or could affect any person or persons who happened to come along, or be in the way, at the time of the act or omission.

Lowe, 68 N.W. at 1095.

Contrary to the State's misleading use of Lowe, the supreme court's language does not represent a well analyzed framework of what constitutes actions directed at a specific person for third degree murder.

The reason the State cannot cite to any law to support the assertion that Officer Noor's action was not directed at a specific person is because the supreme court has found on a number of occasions that actions like Officer Noor's, while done in close proximity to others, does not meet the standard. As cited in Officer Noor's Motion to Dismiss, in State v. Fox, 340 N.W.2d 332, 334 (Minn. 1983), the supreme court examined a fact pattern where Fox held at gunpoint in a kitchen his aunt and his young son. When a deputy arrived to negotiate, Fox directed his aunt to move to the other side of the refrigerator in the kitchen with his son. Fox, 340 N.W.2d at 334. He then ordered the deputy to lay on the floor. Fox, 340 N.W.2d at 334. After counting to three he fired a single bullet into the head of the deputy. Fox, 340 N.W.2d at 334. On appeal Fox claimed the trial court erred by not instructing the jury on third degree murder. Fox, 340 N.W.2d at 335. The supreme court disagreed with Fox, stating,

Defendant's contention that the evidence supports a conviction of third-degree murder is without merit. The facts in the instant case support the trial court's refusal to submit a third-degree murder instruction. All of defendant's acts were directed against Lawson. Defendant knew he was shooting Lawson when he fired one shot into the back of Lawson's head. No other bullets were fired at the scene. There were only two others in the room at the time of the shooting-defendant's aunt and son. Both of them went behind the refrigerator when defendant shot Lawson. Defendant's aunt testified that she took Andy behind the refrigerator and covered his ears, because she did not want him to see or hear the shooting. There was no

testimony that she was afraid for her own life.

A depraved mind instruction would therefore have been inappropriate, since the depraved mind statute “was intended to cover cases where the reckless or wanton acts of the accused were committed without special regard to their effect on any particular person or persons; the act must be committed without a special design upon the particular person or persons with whose murder the accused is charged.” State v. Carlson, 328 N.W.2d at 694.

Fox, 340 N.W.2d at 335.

Like Fox, Officer Noor's actions were directed a specific person. Officer Noor aimed and fired once at the specific person standing in the squad window. Officer Harrity has never indicated he was afraid of Officer Noor's actions. Nor has the State offered any evidence that Officer Harrity was in danger from Officer Noor's actions. Fox, is not the only case that supports a finding that there is insufficient evidence to establish probable cause for third degree murder in this case.

In State v. Hanson, 176 N.W.2d 607, 612-15 (Minn. 1970), the supreme court found that the "essential element" of the third degree murder that the death be caused by an act dangerous to others was not present where a defendant shoots an individual with a single shot in the presence of another. Similarly in State v. Zumberge, 888 N.W.2d 688, 698 (Minn. 2017), the supreme court found that even when a second person is in the way and shot, if the shooting was directed at a specific person, third degree murder is precluded.

- b. The State’s reliance on Officer Noor’s police training records and past policing practices are not relevant to the elements of third degree murder and grossly misrepresent the facts.**

The State argues that a defendant's prior bad acts can be used to prove the

defendant's state of mind in relation to third degree murder. (Response at p. 16). In support the State relies on a single unpublished case. This Court is fully aware, "unpublished opinions of the Court of Appeals are not precedential". MINN.STAT. §480A.08, subd. 3. The non precedential value of State v. Padden, is particularly true in this case, because as the Padden, court noted in the context of third degree murder analysis Padden is "an atypical case." 2000 WL 54240 at p. 3.

On behalf of Officer Noor we respectfully request this Court dismiss Counts 1 and 2.

Respectfully submitted,

Dated: September 12, 2018

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