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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 SUPPORT OF MOTION TO EXCLUDE OR LIMIT THE TESTIMONY OF EMANUEL KAPELSOHN

MNCIS No: 27-CR-18-6859

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

The State moves the court to order that defense witness Emanuel Kapelsohn's testimony be excluded from trial on the grounds that Mr. Kapelsohn, who has never been a police officer, is insufficiently qualified to opine on what degree and kind of force a reasonable peace officer in the same situation would believe to be necessary, which is an objective standard. If Mr. Kapelsohn is permitted to testify as an expert, the State moves and requests that Mr. Kapelsohn's testimony be limited to conform to Minnesota law and the rules of evidence.

ARGUMENT

I. MR. KAPELSOHN'S EXPERIENCE DOES NOT INCLUDE WORKING AS A POLICE OFFICER AND THEREFORE HE IS NOT QUALIFIED TO OPINE ON THE PERSPECTIVE OF THE REASONABLE PEACE OFFICER.

The defense has retained Emanuel Kapelsohn to render an expert opinion on the question of whether the defendant's use of deadly force was reasonable and, therefore, not excessive. Applying the language of the applicable Minnesota jury instruction, Mr. Kapelsohn would be offering an opinion as to whether the kind and degree of force the defendant used in shooting and

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killing Ms. Ruszczyk was "what a reasonable peace officer in the same situation would believe to be necessary." 10 Minn. Prac. Jury Instr. Guides—Criminal CRIM JIG 7.11 (6th ed.).

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may offer an opinion on a matter in issue if scientific, technical, or other specialized knowledge will assist the trier of fact. Minn. R. Evid. 702. To determine the competency of an expert witness, a trial court should examine two things: the witness's technical knowledge and the witness's practical experience with the subject matter. *Fiedler v. Spoelhof*, 483 N.W.2d 486, 489 (Minn. 1992) (citation omitted). "Theoretical expertise is not sufficient." *Id.* (citation omitted). An expert witness must possess some practical knowledge or experience in the area of his or her testimony. *Id.*; *see also Noske v. Friedberg*, 713 N.W.2d 866, 871-72 (Minn. Ct. App. 2006) (holding that because "experts should have *practical experience* in the particular matter at issue" a law professor who had never practiced criminal law was unqualified to opine on the duties of a criminal defense attorney) (emphasis added); *Hartmon v. National Heater Co.*, 60 N.W.2d 804, 813 (Minn. 1953) (holding electrician could not testify to practices of gas burner manufacturing where he had only observed those practices "*incident [to] his employment* as an electrician") (emphasis added).

The court must decide not whether the expert is qualified in the abstract, but whether the witness's qualifications provide a foundation for the witness to give an opinion on a specific question. *Lippe v. Howard*, 287 F. Supp. 3d 1271, 1279 (W.D. Okla. 2018) (citations omitted). An expert may be qualified to testify about one thing, but may have insufficient knowledge or practical experience to testify about another. *Id.* Experienced criminal investigators are qualified to express opinions on the significance of facts in officer-involved shootings. *Cole v. Hunter*, 68 F. Supp. 3d 628, 638 (N.D. Texas 2014).

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In *Lippe*, a 42 U.S.C. §1983 excessive use of force case, a defendant police officer and defendant Oklahoma City objected to the testimony of the plaintiff's two expert witnesses retained to testify to police policies, practices, and use of force. 287 F. Supp. 3d at 1275. One expert was a former 22-year Attorney General's Office detective with statewide police and special deputy sheriff powers who only served as a uniformed police officer for two years, wrote no peer-reviewed literature relating to the use of force, and had special expertise in a different area of law enforcement (alcoholic beverage regulations). *Id.* The expert also conducted more than 50 police training courses and was a certified firearms instructor. *Id.* The second expert had been a corporal detective in a sheriff's office for 15 years, investigated administrative and criminal allegations involving law enforcement personnel, assisted in the development of his department's policy and procedure manual, and had expertise in inmate phone recording systems at the jail. *Id.* at 1276–77. Like the first expert, he had not authored peer-reviewed literature in the area of police use of force. *Id.* Neither expert had testified as a use of force expert before. *Id.*

Based on this, the federal district court ruled that neither expert was sufficiently qualified to give expert testimony on police use of force. *Id.* at 1278–81. In the case of the first expert, while the court found he was qualified to testify about matters in his particular area of expertise (alcoholic beverage regulations), it also found that did not qualify him to testify about police use of force. *Id.* In the case of the second expert, the court noted that, among other things, the expert's resume did not show that he had ever been a patrol officer and his primary area of expertise was in the jail communication system. *Id.* Accordingly, it also found that the second expert was unqualified to opine on use of force. *Id.*

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Mr. Kapelsohn's admittedly impressive resume shows that he is an attorney who practices in the areas of civil litigation and general practice. He is the president of a corporation that trains police and civilians in the use of firearms. He has attended well over one hundred trainings and classes, the vast majority of them relating to firearms. He is the author of many firearms-related publications. He has been training members of law enforcement agencies, mostly in the use of various firearms, since the 1980s. There is no question Mr. Kapelsohn knows guns, how they work, how to use them, and knows how to teach others to use them safely and appropriately. Also, in the 1980s, Mr. Kapelsohn worked in private security and as a private detective. His resume states further that he spent "hundreds of hours accompanying police and security officers and/or participating in patrol and enforcement activities throughout the United States and several foreign countries," including traffic enforcement, vehicle and foot pursuit, searches, arrests, and other varied police activity. He has, however, never worked as an actual police officer. For this reason, he lacks sufficient subject matter expertise to give an opinion as to who the "reasonable peace officer" is, how that reasonable officer would have reacted to the events on July 15, 2017, and what degree of force the reasonable officer would have believed to be necessary, if any, when he encountered the unarmed 911 caller who came to his car.

More specifically, Mr. Kapelsohn has never had the responsibility the defendant or the reasonable police officer have had to a community. He has never been a full-time peace officer sworn to protect the public and the Constitution. While he may have accompanied peace officers on their shifts, he has never been personally responsible for responding to 911 calls, investigating citizen complaints, making traffic stops, using a police officer's vast discretion, or employing an appropriate, and legal, use of force against an armed or unarmed citizen. He has never had the police officer's experience of encountering a citizen on the street who wanted to report a crime

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or ask for help. Mr. Kapelsohn has never been asked to investigate goings-on in a residential neighborhood at night. He has not served as a supervisor responsible for overseeing an officer and his or her use of force. He has not investigated officer-involved shooting cases or any other type of crime. *See Berry v. City of Detroit*, 25 F.3d 1342, 1348-53 (6th Cir. 1994) (finding expert in a 42 U.S.C. § 1983 case unqualified to testify as expert regarding policies of the Detroit Police Department where witness, a sociologist, took criminal justice courses and was appointed as a deputy sheriff despite having no qualifications and no formal police training; witness "simply started and worked with more experienced officers," and court stated, "when a sociologist cum sheriff is allowed to testify as to all manners of police practices, the slopes become slippery indeed.").

Accompanying police officers as they do their job is not the same as the experience of doing the job oneself. Knowing, even on a very sophisticated level, what police officers do and why they do it is not the same as walking in those important shoes. Even teaching police how to do a portion of their job is not a substitute for actually doing the work and understanding, from an actual police officer's point of view, what a reasonable police officer should or would do in a given situation. Mr. Kapelsohn's area of expertise is firearms. This case does not involve firearms in the sense that expert testimony would be necessary or even helpful. The defendant intentionally fired his perfectly-working 9mm handgun one time, and its bullet hit its intended and unarmed target with deadly precision; no expert's testimony is needed to explain that. The court should find that Mr. Kapelsohn's lack of experience as a police officer precludes him from rendering an expert opinion regarding the amount and degree of force a reasonable peace officer in the same situation as the defendant would have used on July 15, 2017.

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II. MR. KAPELSOHN FAILS TO ARTICULATE OR APPLY THE PROPER LEGAL STANDARD WHICH SERVES AS A BASIS BOTH TO DISQUALIFY HIM AND LIMIT HIS TESTIMONY.

Equally concerning is the fact that Mr. Kapelsohn rests his opinion on an inapplicable subjective standard, claiming that the degree and type of force the defendant used was reasonable because *the defendant* believed Ms. Ruszczyk posed a threat of apparent death or great bodily harm to him or anyone else. The applicable standard is objective, not subjective. Mr. Kapelsohn's inability to discern and apply the appropriate standard is further reason to disqualify him from giving his opinion at trial. If the court allows Mr. Kapelsohn to testify as an expert, the court should limit his testimony to an opinion on the proper degree and kind of force necessary from the perspective of the reasonable peace officer in the same situation.

Mr. Kapelsohn's report contains repeated references to what either the defendant or Officer Harrity believed at the time the defendant shot and killed Ms. Ruszczyk. He states, for example, that the standard is whether it "reasonably *appeared* to Officer Noor, under the totality of these circumstances, that there was a threat of death or great bodily harm which he could only stop by firing his service pistol" (emphasis in Mr. Kapelsohn's report). The standard is not how the events appeared to the defendant, but how they appeared to the reasonable police officer. Mr. Kapelsohn also writes, "[O]ne can understand Officer Noor's alarm, and his belief that his life and the life of Officer Harrity, were in danger, as Officer Harrity himself felt." The question for the jury in this case is not whether it can understand the defendant or Officer Harrity's *feelings* at the time, but whether the defendant's *actions* were what the reasonable police officer in the same situation would believe to be necessary. Repetition of the defendant's and Harrity's beliefs does not convert the standard from an objective one to a subjective one, nor does it make either officer reasonable. Mr. Kapelsohn also proposes a demonstration at trial with "finger guns" to "help [the jury] understand the degree of threat Officer Noor knew." Again, the expert

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testimony from this witness, if permitted, should be limited to the application of the facts of the case and the reasonable officer standard. It is not for Mr. Kapelsohn to explain or demonstrate to the jury what this particular officer did or did not know.[1]

If Mr. Kapelsohn is permitted to testify, the court should order that his testimony be limited to opinion about what the reasonable police officer in the same circumstances would have done in the alley on July 15, 2017. Mr. Kapelsohn should not be able to confuse the legal issues, and the jury, by giving an opinion that because the defendant believed his life was in danger, that belief was therefore reasonable or that he did what any other reasonable officer would have done.

III. MR. KAPELSOHN MAY NOT READ TO, OR INSTRUCT THE JURY ON, THE LAW IN ANY WAY BEYOND THAT CONTAINED IN THE COURT'S JURY INSTRUCTIONS.

The court should limit Mr. Kapelsohn's testimony on the law that applies to this case to the laws of the State of Minnesota and the jury instructions the court intends to give. While these issues are yet to be decided, there are concerning statements in Mr. Kapelsohn's report that suggest he intends to stretch the legal standard or read into it words or concepts that are not there.

An expert may not attempt to define the legal parameters within which the jury must exercise the fact-finding function. *Zuchel v. City and County of Denver, Colo.*, 997 F.2d 730, 742 (10th Cir. 1993) (citations omitted). A court should take special care where an expert witness is an attorney because "[t]here is a significant difference between an attorney who states his belief of what law should govern the case and any other expert witness." *Id.* (*citing Sprecht v. Jensen*, 853 F.2d 805, 808 (10th Cir. 1988) (en banc), *cert. denied*, 488 U.S. 1008 (1989)).

[1] This admissibility of this type of hearsay testimony for the purposes of offering the defendant's version of events is discussed in a separate motion and memorandum.

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While Mr. Kapelsohn accurately cites Minnesota Statutes section 609.066 as the statute that applies in this case, he does not apply the proper legal standard regarding police use of force. Rather, Mr. Kapelsohn articulates a standard neither encompassed in Minnesota statutes nor given as an instruction in past Hennepin County cases where reasonable use of force by a police officer is a defense. Specifically, he asserts that the standard is that "the totality of the circumstances" are to be judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," citing *Graham v. Connor*, 490 U.S. 386 (1989). This language is not contained in the model jury instruction, which is the State's proposed jury instruction on the issue. *See* Minn. Prac.—Criminal CRIM JIG 7.11. Mr. Kapelsohn goes further stating, "The issue in this case is whether, under the totality of the circumstances that existed in the seconds before Officer Noor fired, a 'reasonable officer on the scene' would have believed themselves to be in deadly danger, as Officer Noor did." This is incorrect and does not state the law as provided in the jury instruction. In an important and serious case such as this, the exact words that constitute this affirmative defense matter, and Mr. Kapelsohn cannot change or expand them.

Mr. Kapelsohn also puts forth an additional legal argument to explain the defendant's behavior on July 15, 2017, that Kapelsohn extracted from *Brown v. United States*, 256 U.S. 335 (1921). He writes that the defendant was in a situation which was the equivalent of being in the presence of an "uplifted knife," like in *Brown*. 256 U.S. at 343 ("Detached reflection cannot be demanded in the presence of an uplifted knife."). The nearly 100-year old *Brown* case has nothing to do with police use of force; it concerns general murder and self-defense concepts which are inapplicable here. It also, obviously, involves a situation where the victim was armed with a knife, which is a key distinction from the facts of this case.

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What the jury must decide in this case is: 1) whether the evidence proves beyond a reasonable doubt that the defendant is guilty of any or all of the charged homicide crimes, and 2) whether the State proves beyond a reasonable doubt that the defendant was not authorized to use deadly force. The jury must make those decisions based on the instructions in Minnesota law it receives from the court, not the standards created by Mr. Kapelsohn. There is a danger that the jury could give weight to the inaccurate legal standards espoused by this attorney-witness and find them in conflict with the court's instructions. The court should prohibit this witness from misstating the law and instructing on it.

IV. THE WITNESS MAY NOT OPINE AS TO THE DEFENDANT'S GUILT OR NON-GUILT AS TO ANY CHARGES.

Finally, the court should prohibit Mr. Kapelsohn from expressing opinions on the defendant's guilt or non-guilt, whether the evidence proves a certain charge, and whether certain offenses should or should not have been charged. In expressing such opinions, Mr. Kapelsohn steps alarmingly far outside the role of an expert giving testimony on whether the reasonable police officer would have used the same type and degree of force the defendant did. Never having practiced criminal law, Mr. Kapelsohn nonetheless opines on "the theory on which the Third Degree Murder charge appears to have been brought." He suggests that the State should not have brought this charge for which probable cause has been found. He also goes so far as to give an opinion as to what a particular jury verdict in this case would mean and whether it should stand.

That Mr. Kapelsohn would even offer such opinion is a clear warning of the danger expressed in section III above. That is, this non-peace officer witness sees himself not only as a use of force expert, but as an expert in the law that applies to this case and an authority on what verdict the jury should return. If this is not cause for excluding this witness's testimony in its

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entirety, the court should address this concern by explicitly and significantly limiting Mr. Kapelsohn's testimony.

CONCLUSION

Emanuel Kapelsohn has never been a police officer and is insufficiently qualified to opine on what degree and kind of force a reasonable peace officer in the same situation as the defendant would believe to be necessary. Mr. Kapelsohn also rests his opinion on an inaccurate standard, attempts to instruct on the law, and aims to express an opinion as to the defendant's guilt or non-guilt. If Mr. Kapelsohn is permitted to testify as an expert, the State requests that the court limit his testimony as requested above.

Respectfully submitted,

MICHAEL O. FREEMAN
Hennepin County Attorney

By: _____
AMY E. SWEASY (26104X)
Assistant County Attorney
C-2100 Government Center
Minneapolis, MN 55487
Telephone: (612) 348-5561

By: _____
PATRICK R. LOFTON (0393237)
Assistant County Attorney
C-2100 Government Center
Minneapolis, MN 55487
Telephone: (612) 348-5561

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