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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Case Type: Criminal
Court File No. 27-CR-21-7460

State of Minnesota,

Plaintiff,

vs.

Kimberly Ann Potter,

Defendant.

STATE'S OBJECTIONS TO DEFENDANT'S REQUESTED JURY INSTRUCTIONS

TO: The Honorable Judge Chu, Judge of District Court, the above-named defendant and defendant's counsel, Earl Gray, 1st Bank Building, 332 Minnesota Street, Ste. W1610, St. Paul, MN 55101; Paul Engh, Ste. 2860, 150 South Fifth Street, Minneapolis, MN 55402.

INTRODUCTION

On November 12, 2021, the State and Defendant each filed proposed jury instructions with the Court. Both parties have proposed modifications to the Minnesota pattern jury instructions. The State objects to Defendant's proposed modifications to the following Minnesota pattern jury instructions:

1. CRIMJIG 3.01 – Duties of Judge and Jury
2. CRIMJIG 11.46 – Manslaughter in the First Degree—While Committing Misdemeanor or Gross Misdemeanor
3. CRIMJIG 32.02 with reference to CRIMJIG 32.10 – Use/Possession of Dangerous Weapon, Definition of Recklessly
4. CRIMJIG 11.56 – Manslaughter in the Second Degree
5. CRIMJIG 3.31 – Causation
6. CRIMJIG 7.18 – Authorized Use of Deadly Force by a Peace Officer

Defendant's proposed modifications materially misstate the law and are likely to confuse or mislead the jury. By contrast, where the State has proposed modifications to the Minnesota pattern jury instructions, the State's proposed modifications more accurately reflect and clarify

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governing legal standards and are less likely to cause jury confusion, unduly prejudice either party, or improperly present argument within an instruction.

The State also objects to the inclusion of the following blatantly argumentative nonpattern jury instructions requested by Defendant:

1. Reasonable Use of Force (Def. Requested Jury Instr. at 11-12).
2. Reasonableness Defined (Def. Requested Jury Instr. at 12).
3. The Collective Knowledge Doctrine (Def. Requested Jury Instr. at 13).
4. Arrest by Warrant (Def. Requested Jury Instr. at 13).
5. Negligence of Decedent (Def. Requested Jury Instr. at 13-14).
6. Forms of Mr. Wright's Negligence (Def. Requested Jury Instr. at 14).

None of these instructions is proper. Again, Defendant's proposed nonpattern instructions misstate the law, improperly inject argument disguised as instruction, are likely to confuse or mislead the jury, and would unduly prejudice the State. Accordingly, the Court should reject Defendant's instructions to the extent they differ from the Minnesota pattern jury instructions. The State also requests that the Court rule on these objections and the language of the final jury instructions before any stage of the trial begins so that the scope of the Court's instructions is known to all parties as they present their respective cases.

ARGUMENT

Jury instructions must accurately define the charged offenses and the elements of those offenses. *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007). They must also fairly and adequately explain the law governing the case. *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). "An instruction is in error," and therefore cannot be given to the jury, "if it materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001). Likewise, it is error to provide an instruction that "confuses" or "misleads" the jury. *State v. Larson*, 787 N.W.2d 592, 601 (Minn. 2010).

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I. THE COURT SHOULD DENY DEFENDANT'S REQUESTS TO MODIFY THE PATTERN JURY INSTRUCTIONS IDENTIFIED ABOVE.

A. The Court Should Instruct The Jury Not To Consider Potential Penalties.

Defendant's requests CRIMJIG 3.01, related to Duties of the Judge and Jury, but omits an important piece of the standard instruction: that the jury is not to consider the defendant's potential punishment. (Def.'s Requested Jury Instr. at 2). There is no good or proper reason to exclude this standard instruction. It is well settled that "[t]he responsibility of imposing punishment upon a defendant in a criminal case rests exclusively with the court." *State v. Finley*, 8 N.W.2d 217, 281 (Minn. 1943). As such, courts routinely instruct jurors that "their responsibilities as triers of fact do not extend to a consideration of punishment." *Id.* "It is proper in a criminal case to admonish the jury that the punishment is a subject with which they have nothing to do." *State v. Chambers*, 589 N.W.2d 466, 474 (Minn. 1999) (quoting *State v. Gensmer*, 51 N.W.2d 680, 685 (Minn. 1951)). Including this standard instruction will not prejudice Defendant. Instead, it will ensure that the jury performs only its proper role of factfinder.

B. The Court Must Include All Elements Of First-Degree Misdemeanor Manslaughter.

Defendant's requested jury instruction for first-degree manslaughter omits a key element. Defendant's requested instruction includes the required elements of proving Mr. Wright's death, that his death occurred in Hennepin County, and that Defendant caused Mr. Wright's death by committing misdemeanor reckless use or handling of a firearm. (Def.'s Requested Jury Instr. at 7). But Defendant's instruction combines the elements of causation and commission of a misdemeanor, while the pattern instruction lists these as two distinct elements. 10 Minn. Prac., Jury Instr. Guides – Criminal CRIMJIG 11.46. The pattern instruction is less likely to confuse the jury and should be used.

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Defendant's requested instruction also omits an element: that the misdemeanor was committed "with such force or violence that the death of another person or great bodily harm to another person was reasonably foreseeable." 10 Minn. Prac., Jury Instr. Guides – Criminal CRIMJIG 11.46; *see also* Minn. Stat. § 609.20(2). This offense requires not only proof that Defendant committed the misdemeanor of Reckless Use or Handling of a Firearm, but also that her commission of this offense was committed with a level of force or violence that made death or great bodily harm reasonably foreseeable. This element is required. Because the pattern instruction most clearly and correctly states the elements of first-degree misdemeanor manslaughter, the Court should deny Defendant's request and use the pattern instruction.

C. The Court Should Reject Defendant's Incorrect And Confusing Definition Of "Recklessly."

Both parties propose modifications to the pattern instruction's definition of "recklessly." (State's Proposed Jury Instr. at 4; Def.'s Requested Jury Instr. at 7). The State's minor proposed modification more accurately and clearly provides the legal definition of "recklessly" and, therefore, should be adopted into the Court's instructions to the jury.

The pattern instruction for Reckless Use or Handling of a firearm states that a person acts recklessly when "the person acts in willful or wanton disregard for the safety of others. This means a conscious and intentional act that the Defendant knew, or should have known, created an unreasonable risk of harm to others under the totality of the circumstances." 10 Minn. Prac., Jury Instr. Guides – Criminal CRIMJIG 32.02; *see also* 10 Minn. Prac., Jury Instr. Guides – Criminal CRIMJIG 32.10. It also states that "[t]he 'totality of the circumstances' includes what the Defendant knew and did not know concerning the circumstances of endangerment." *Id.* The State has proposed adding a single sentence stating that the totality of the circumstances "also includes the Defendant's prior knowledge, experience, and history." (State's Proposed Jury Instr. at 4

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(citing *State v. Coleman*, 957 N.W.2d 72, 74 (Minn. 2021); *State v. Rhodes*, 657 N.W.2d 823, 840 (Minn. 2003)). This Court has adopted these factors as relevant to the jury's determination of Defendant's state of mind. (Ord. Denying Def.'s Mot. To Dismiss Count I at 10).

Defendant's proposed instruction, in contrast, attempts to improperly redefine "recklessly," deviating both from the pattern instruction and from the case to which she cites. Defendant's proposed instruction states that to prove that Defendant acted recklessly, the State must prove "that she knew that she created an unreasonable risk of harm to Mr. Wright, and then, with an awareness of that risk disregarded it." (Def.'s Requested Jury Instr. at 7) (citing *State v. Engle*, 743 N.W.2d 592, 594 (Minn. 2008)). But *Engle* does not define recklessly in this manner. Instead, the Minnesota Supreme Court stated that proof of a reckless act "requires proof of a conscious or intentional *act* . . . that creates a substantial and unjustifiable risk that the actor is aware of and disregards." 743 N.W.2d at 593, 596 (emphasis added). Defendant's requested version of this instruction omits a critical point identified in both the pattern instruction and *Engle*: that the defendant must commit a conscious or intentional act, and that it is that conscious or intentional act that creates the risk which the defendant is aware of but disregards. Omitting this critical language from *Engle* that has been adopted by the pattern instruction risks confusing the jury by not fully informing it of the legal standard. As noted, *Engle* explains that the jury need not determine whether Defendant's disregard of the risk was conscious or intentional; instead, the jury must determine whether Defendant's *act* was conscious or intentional. The pattern instruction more accurately reflects the correct legal standard.

Defendant's proposed language concerning the awareness of the risk is also confusing and potentially misleading. Defendant requests that the jury be instructed that recklessness requires proof that Defendant "knew that she created an unreasonable risk of harm . . . and then, with an

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awareness of that risk, disregarded it." (Def.'s Requested Jury Instr. at 7). This language is problematic in that, by omitting the "or should have known" language from the patten instruction, it implies that Defendant had to be actively thinking that she was causing a risk and elected to do so anyway. In doing so, Defendant's proposed instruction implies a level of specific intent. But Minnesota courts have recognized that criminal "recklessness" does not require specific intent. *State v. Bjergum*, 771 N.W.2d 53, 57 (Minn. Ct. App. 2009) (citing *State v. Zupetz*, 322 N.W.2d 730, 734 (Minn. 1982)). Defendant attempts to change the law in her favor by tying the conscious-and-intentional language to the disregarding of a risk, which is not an accurate statement of the law. As is clear from the standard instruction and the case law, the conscious-and-intentional language refers to the performance of an act, not to the disregarding of the risk.

The pattern instruction more accurately captures the *mens rea* requirement for reckless crimes. In stating that the defendant "knew, or should have known," that her conscious or intentional act "created an unreasonable risk of harm to others under the totality of the circumstances," the pattern instruction recognizes that a "state of mind is generally proven circumstantially, by inference from the words or acts of the actor" *State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000), and that inferences are to be drawn from the totality of the circumstances, *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997). As the Court noted in its denial of Defendant's motion to dismiss, "[a] defendant's prior knowledge, experience, and history may give rise to reasonable inferences as to a defendant's state of mind" and what the defendant knew or should have known. (Ord. Denying Def.'s Mot. To Dismiss Count I at 10 (citing *Coleman*, 957 N.W.2d at 79)). Because Defendant's proposed modified instruction on the definition of "recklessly" incorrectly states the law and would confuse and mislead the jury into applying an

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incorrect legal standard, the Court should reject Defendant's proposal and instead provide the jury the State's proposed modified pattern instruction.

D. The Court Should Reject Defendant's Misleading Definition Of "Culpable Negligence" And Its Definition Of "Consciously" From The Second-Degree Manslaughter Instruction.

Defendant proposes additions to the definition of "culpable negligence" and adding an instruction on "consciously" within the second-degree manslaughter instruction. The Court should deny both proposals.

i. Defendant's definition of "culpable negligence" is misleading.

The parties agree with each other and with the pattern instruction on the first sentence of the definition of "culpable negligence." Both parties agree, first, that an element of second-degree manslaughter is that "the Defendant caused the death of Daunte Wright by culpable negligence, whereby the Defendant created an unreasonable risk and consciously took a chance of causing death or great bodily harm." 10 Minn. Prac., Jury Instr. Guides – Criminal CRIMJIG 11.56; State's Proposed Jury Instr. at 6; Def.'s Requested Jury Instr. at 8. The parties also agree that the jury should be instructed, per the pattern instruction, that "'[c]ulpable 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." 10 Minn. Prac., Jury Instr. Guides – Criminal CRIMJIG 11.56; State's Proposed Jury Instr. at 6; Def.'s Requested Jury Instr. at 8. The statement of the element and the subsequent expounding on "culpable negligence" provides the jury with a sufficient and correct statement of the law on which it can make its determination. The instruction should end there.

Defendant, however, requests that the Court add language to the definition of culpable negligence stating that "[c]ulpable negligence is more than ordinary negligence. It is more than

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gross negligence. It is gross negligence coupled with an element of recklessness. It is a conscious disregard of a substantial and unjustifiable risk of which one is actually aware, and not a disregarding of a risk of which one should be aware." (Def.'s Requested Jury Instr. at 8 (citing *State v. Frost*, 342 N.W.2d 317, 320 (Minn. 1983)). This proposed definition is confusing and misleading.

Defendant's proposed instruction, specifically the sentence that culpable negligence "is gross negligence coupled with an element of recklessness" is misleading and confusing in that it incorrectly implies that the State must prove, as an element, that Defendant acted recklessly in order to prove culpable negligence. This incorrect and misleading implication is furthered by the last sentence of Defendant's proposed instruction, that "it is a conscious disregard of a substantial and unjustifiable risk of which one is actually aware, and not a disregarding of a risk of which one should be aware," which seeks to provide the jury a definition more akin to that of "recklessness." (Def. Requested Jury Instr. at 8). In fact, the Minnesota Supreme Court defined "reckless" almost exactly that way in *Frost*, stating that one acts "'recklessly' when he consciously disregards a substantial and unjustifiable risk" and that "[t]he reckless actor is aware of the risk and disregards it." 342 N.W.2d at 319-20. Defendant's proposed version of the instruction would mislead the jury into applying an inflated standard of determining whether Defendant's conduct was "reckless," and should not be used.

One particularly problematic aspect of Defendant's proposed instruction is her assertion that culpable negligence is "not a disregarding of a risk of which one should be aware." (Def. Requested Jury Instr. at 8). *Frost* says differently. In *Frost*, the supreme court identified that culpable negligence falls somewhere in between recklessness and negligence. 342 N.W.2d at 319-20. Both a reckless actor and a negligent actor "create[] a *risk* of harm. The reckless actor is *aware*

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of the risk and disregards it; the negligent action is *not aware* of the risk but should have been aware of it." *Id.* at 320. Whether the actor "should have realized" the nature of the risk or the gravity of the danger is a "relevant" inquiry "in determining the presence of culpable negligence, the objective element." *Id.* at 323. The aspect of "recklessness" involved in culpable negligence comes, then, "in the form of" the disregard of the risk created by the conduct, whether the defendant was actually aware of it or should have been aware of it. *Id.* at 320. The pattern instruction reflects this objective standard in stating that culpable negligence is 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." 10 Minn. Prac., Jury Instr. Guides – Criminal CRIMJIG 11.56.

Defendant's requested additions beyond the pattern definition of culpable negligence are misleading and confusing. They state that proof of culpable negligence requires proof of "an element of recklessness" followed immediately by a definition of "recklessness," which would mislead the jury into applying the incorrect legal standard. While these requested additions are not a *per se* misstatement of the law, they invite the jury to materially misapply the law in a fashion unduly prejudicial to the State by raising the level of state of mind that must be proven. These requested additions also provide the jury with two additional mental states – gross negligence and recklessness – while attempting to define "culpable negligence." This is unnecessarily confusing when the pattern instruction adequately defines "culpable negligence," which is the sole mental state of which the second-degree manslaughter charge requires proof. Thus, the Court should use only the pattern instruction definition of culpable negligence, as recommended by both parties, and reject Defendant's request to add additional misleading and confusing language that improperly inflates the legal standard.

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ii. Defendant's proposed definition of "consciously" is misleading argument.

Defendant also requests that the Court instruct the jury that "'[c]onsciously' means the defendant was actually aware of the risk that she, by believing she was using a TASER, would be causing death or great bodily harm, and aware of the risk at that precise moment, disregarded it." (Def. Requested Jury Instr. at 8). This paragraph essentially proposes that the Court read "defense counsel's closing argument" in the form of legal instruction, which would improperly bolster Defendant's theory of the case and "potentially distract the jury from making findings beyond a reasonable doubt." *State v. Lindsey*, 632 N.W.2d 652, 662 (Minn. 2001). This requested instruction should not be provided.

This requested instruction also materially misstates the law. As noted above, the State is not required to prove, as part of culpable negligence, that Defendant was "actually aware" of the risk; instead, the proper inquiry "in determining the presence of culpable negligence" is whether Defendant was aware *or* should have been aware of the risk. *Frost*, 342 N.W.2d at 323. Defendant's proposed instruction materially omits the "should have been" aware language, misstating the correct standard, in an effort to have this Court advance her theory and provide an instruction that holds the State to a higher standard of proof.

Defendant's suggested language also includes a request for the Court to instruct the jury that Defendant must have been "aware of the risk at that precise moment" when she disregarded it. (Def. Requested Jury Instr. at 8). This proposition has no basis in law. Minnesota appellate courts have historically upheld prosecutions for second-degree manslaughter where there was no affirmative proof of active, contemporaneous awareness of the risk at the precise moment of the conduct.

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In *State v. Schaub*, the defendant unscrewed a cap on a gas line and opened the jets of a gas stove in his apartment. 44 N.W.2d 61, 62 (Minn. 1950). Police later responded to the apartment after receiving a call, turned off the jets from the stove, and instructed the defendant to close the gas and open the windows. *Id.* The defendant placed the cap back on the gas pipe and opened one window but failed to open any others. *Id.* As he left, the defendant turned off a light switch which caused an explosion that burned his wife, who ultimately died from her injuries. *Id.* The defendant was not present when the explosion occurred, having been taken into custody by police. *Id.* The facts of the case do not show any indication that the defendant was actively or contemporaneously thinking about the risk that flipping the light switch after having had the gas on and windows closed would cause an explosion and possibly injuries or death to another. Yet, the Minnesota Supreme Court found that the defendant could be prosecuted for second-degree manslaughter under these circumstances. *Id.* at 63.

The Minnesota Supreme Court likewise affirmed the defendant's second-degree manslaughter conviction when there was no direct evidence of actual, contemporaneous awareness of the risk at the time it was taken in *Frost*. In that case, the victim was the initial aggressor, and the defendant ran into a bedroom, where grabbed a loaded gun. 342 N.W.2d at 318. The defendant was "proficient in the operation of the gun and frequently went target shooting." *Id.* The "[d]efendant testified that she had no intent to shoot the gun, only to show the victim that she was in charge and that he had better comply with her demand . . . Unfortunately, events did not proceed according to that plan." *Id.* The defendant opened the bedroom door and the victim, who had been waiting outside, grabbed the gun and started pulling. *Id.* As the defendant pulled back, the gun "discharged and a single bullet penetrated [the victim's] chest, killing him almost instantly." *Id.* Again, no facts were offered that established that the defendant was actively and

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contemporaneously thinking about the risk at the time of her conduct. The defendant was convicted of culpably negligent second-degree manslaughter and, on appeal, argued that the evidence was legally insufficient to convict her because "the state had to establish that she was actually aware at the time of the incident that her conduct created an unreasonable risk." *Id.* at 319. The supreme court discussed the required mental state and, ultimately, affirmed the defendant's conviction stating that "the jury could easily infer from the evidence that defendant was in fact aware of the risk created by her conduct." *Id.* at 320. Thus, *Frost* affirms the proposition that there need not be direct evidence of contemporaneous awareness and that a defendant's state of mind and awareness of a risk can be proven by inference from the totality of the circumstances.

And inferences about a defendant's state of mind may be drawn from "events occurring before and after the crime." *State v. Rhodes*, 657 N.W.2d 823, 840 (Minn. 2003). This extends beyond the precise moment the action was taken. As the State has previously noted, the jury may make reasonable inferences concerning the defendant's state of mind at the time of the incident after considering the defendant's prior knowledge, experience, and history as part of the totality of the circumstances. In *State v. Coleman*, the Minnesota Supreme Court affirmed the defendant's conviction, referencing the fact that the defendant had both "a general knowledge" and personal and specific prior "first-hand knowledge" of the dangers of his conduct. 957 N.W.2d 72, 83 (Minn. 2021). Such knowledge and experience is relevant even when that first-hand knowledge arose from an incident months earlier and the defendant did not remember it; it provides relevant context and history from which reasonable inferences concerning a defendant's state of mind could be drawn. *Id.*

What these cases show is that Defendant's proposed instruction is misleading to the extent that it instructs the jury that the State must prove that she was "actually aware of the risk . . . at

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that precise moment." If the Court elects to instruct the jury on the meaning of "consciously," it should use the State's proposed instruction, which incorporates the instruction from *Frost* that:

> "Creating an unreasonable risk and consciously taking a chance of causing death or great bodily harm" means that the defendant took action under circumstances where she realized or should have realized the gravity of the danger to the deceased and, as a result of a choice on her part, assumed the risk which caused the death.

(State's Proposed Jury Instr. at 6 (citing *Frost*, 342 N.W.2d at 322)). This instruction more clearly and accurately explains the required state of mind for second-degree manslaughter, as opposed to Defendant's slanted requested instruction.

E. The Court Should Reject Defendant's Proposed Instruction On Causation.

The State agrees that it is required to prove beyond a reasonable doubt that Defendant caused the death of Mr. Wright and that the jury should be instructed on the legal meaning of "causation." Defendant requests that the Court instruct the jury on "proximate cause" and "superseding cause," providing an extended definition of "superseding cause" that modified the pattern causation instruction. (Def. Requested Jury Instr. at 9). These instructions are unnecessary and would be confusing to the jury.

It is worth noting at the outset that the pattern instruction on causation already states that "the defendant is not criminally liable if a 'superseding cause' caused the death," and provides a brief definition of "superseding cause." 10 Minn. Prac., Jury Instr. Guides – Criminal CRIMJIG 3.31. Defendant, instead, requests a detailed instruction on "superseding cause" that lists four elements. *Id.* (citing *State v. Smith*, 819 N.W.2d 724, 729 (Minn. Ct. App. 2012). But Defendant has made no offer of proof that this legal principle has any application to this case. As the instruction notes, "a superseding cause is a cause which comes *after* the original event and which alters the natural sequence of events." *Id.*. Indeed, the first element of a superseding cause is that

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it must occur after the negligent act of the defendant. *Id.*. This clearly is inapplicable here. Mr. Wright's attempt to flee began *before* Defendant's negligent conduct. Thus, there is no good faith basis on which any party could argue that Mr. Wright's conduct was a superseding cause in the chain of events. Including this extended instruction would only confuse and mislead the jury by diverting its attention. The pattern instruction adequately explains that a defendant is not criminally liable for a death when there is a "superseding cause" that causes the death. Defendant is still welcome to make argument in closing from that definition. The pattern instruction also captures the essence of Defendant's requested "proximate cause" instruction by stating that the defendant is only liable for the consequences of intervening causes "if such intervening causes were a natural result of the defendant's acts." 10 Minn. Prac., Jury Instr. Guides – Criminal CRIMJIG 3.31. There is no need to provide a more confusing, extended definition of these principles beyond the pattern instruction that is used in most criminal cases.

F. The Court Should Reject Defendant's Gratuitous Modifications To The Use Of Deadly Force Instruction As They Materially Misrepresent The Law.

Defendant requests an instruction on "authorized use of force by police officers" that includes several provisions not included in the pattern instruction. (Def.'s Requested Jury Instr. at 9-11). These additions are akin to what one would expect to hear in "defense counsel's closing argument" and include language that would improperly bolster Defendant's theory of the case and "potentially distract the jury from making findings beyond a reasonable doubt." *Lindsey*, 632 N.W.2d at 662. Additionally, Defendant's proposed instruction provides inapplicable information from case law. The Court should reject these argumentative proposed modifications to the pattern instruction.

Defendant first includes a definition of "apparent" as meaning "as perceived or believed subjectively by the officer." (Def.'s Requested Jury Instr. at 10). Her definition goes on to state "if

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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." (*Id.*). For this proposition, Defendant cites to Minn. Stat. § 609.066 – which, in fact, contains no definition of "apparent" whatsoever. Defendant invents this language and presents it as an established legal principle on which the jury should be instructed. The State is not aware of any case in which this definition was provided to the jury nor does the defense cite to any. Moreover, Defendant's proposed instruction misstates the legal standard and would mislead the jury into believing that the correct inquiry is a subjective one when, in fact, the jury must make an objective inquiry based on facts "known to the officer at the precise moment she acted with force." (State Proposed Jury Instr. at 7); 10 Minn. Prac., Jury Instr. Guides – Criminal CRIMJIG 7.18. Defendant is not entitled to have her closing argument provided to the jury as an instruction of law.

Defendant also requests that the jury be instructed that "[f]leeing a police officer is a crime of violence, which by definition involves 'the use or threatened use of deadly force.'" (Def.'s Requested Jury Instr. at 10). In support of this proposition, Defendant cites to *Sykes v. United States*, 131 S. Ct. 2267, 2273 (2011). Defendant's proposed instruction, once again, patently misrepresents and distorts the correct statement of the law to support her theory of the case. First, the Supreme Court did not hold in *Sykes* that fleeing a police officer is a crime that "by definition involves the use or threatened use of deadly force," as Defendant claims. (Def.'s Requested Jury Instr. at 10). Instead, it held that fleeing in a motor vehicle "is a violent felony for the purposes of the [federal Armed Career Criminal Act]." *Sykes*, 131 S. Ct. at 2268. This is a far cry from Defendant's version of the holding. Notably, Minnesota law does not include fleeing in a motor vehicle in its definition of "crime of violence." *See* Minn. Stat. § 624.712, subd. 5. The Court in

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Sykes then goes on to explicitly state that fleeing in a motor vehicle is not an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 131 S. Ct. at 2273 (citing 18 U.S.C. § 924(e)(2)(B)). It is astounding that Defendant somehow concluded that this means that fleeing "by definition involves 'the use or threatened use of deadly force'" when the Supreme Court concluded the exact opposite. Ultimately, and after paragraphs of dicta, which Defendant liberally quotes in her citations, the Court held that fleeing in a motor vehicle does involve "conduct that presents a serious potential risk of physical injury to another." *Sykes*, 131 S. Ct. at 2273-74. But this, again, is a far cry from holding that fleeing in a motor vehicle by definition involves the use or threatened use of deadly force and comes after the Supreme Court rejected that exact conclusion. Defendant's material misstatement of this holding has no place before the jury.

Defendant's proposed instruction then goes on to state that fleeing from police officers is a felony and discuss what is "sometimes necessary" for officers to do when approaching someone who is fleeing and what is "an accepted way" for officers to handle themselves in such situations. (Def. Requested Jury Instr. at 10-11). Again, Defendant's proposed instruction reads more as "defense counsel's closing argument" than meaningful and accurate guidance on the law and poses an extreme risk that, if given to the jury, it would "potentially distract the jury from making findings beyond a reasonable doubt." *Lindsey*, 632 N.W.2d at 662. What may or may not be "sometimes necessary" or appropriate for officers handling situations involving individuals who are fleeing or attempting to flee is not for the Court to decide.

Defendant's proposed instructions, taken together, essentially ask the Court to tell the jury when deadly force is authorized followed by a request to tell the jury that deadly force was authorized here by definition. But these are precisely the questions for the jury, who must make

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these determinations after hearing testimony from witnesses and viewing evidence presented during trial. The Court providing these instructions would improperly "invade[] the province of the factfinder." *State v. Williams*, 324 N.W.2d 154, 160 (Minn. 1982). It would be erroneous for the Court to remove these questions from the jury's consideration. *See State v. Moore*, 699 N.W.2d 733, 737 (Minn. 2005) (stating that it is error for a trial court to provide an instruction that states that an element is met, thereby removing consideration of that element from the jury). Providing Defendant's proposed instruction would also "emphasize[] one factor, one piece of circumstantial evidence, bearing on [the jury's] determination" and improperly suggests to the jury that the Court found this factor "of greater importance that other relevant factors." *State v. Olson*, 482 N.W.2d 212, 216 (Minn. 1992). The Court should reject all of Defendant's proposed modifications to the pattern instruction for authorized use of deadly force because they materially misstate the law and, if provided, would confuse and mislead the jury and unfairly bolster Defendant's theory of the case by providing the jury with one-sided argument.

II. THE COURT SHOULD REJECT DEFENDANT'S REQUESTED NONPATTERN JURY INSTRUCTIONS THAT HAVE NO PLACE IN MINNESOTA LAW OR IN THIS CASE.

A. The Court Should Deny Defendant's Request For An Instruction On "Reasonable Use Of Force."

Peace officers are justified in using deadly force in the line of duty "only when necessary" under certain, specifically enumerated, circumstances. *See* Minn. Stat. § 609.066, subd. 2. The necessity of an officer's use of deadly force is assessed using an objective standard based on "facts known to the officer at the precise moment she acted with force." (State Proposed Jury Instr. at 7); 10 Minn. Prac., Jury Instr. Guides – Criminal CRIMJIG 7.18.

Defendant proposes that the Court instruct the jury on the "reasonableness" of use of force, including language prohibiting judging Defendant's conduct "with the 20/20 vision of hindsight,"

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and that the jury's assessment must "allow[] for the fact that police officers are often forced to make split-second judgments about the amount of force that is necessary in a particular situation under circumstances that are tense, uncertain, and rapidly evolving." (Def. Requested Jury Instr. at 11) (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)). This language is dicta borrowed from a federal case alleging a civil rights violation, which has no place in this state criminal prosecution. Inclusion of such language threatens to confuse and mislead the jury into applying an inapplicable and irrelevant federal civil standard to this state-level criminal case. The Court should also reject Defendant's requested instruction under the same heading that "[i]n considering the reasonableness of the use of force, the jury may consider whether the force was applied in good faith by Officer Potter." *Id.* This proposed language also risks misleading the jury by improperly injecting a subjective component into an objective inquiry.

i. Defendant's request misstates the legal standard for a peace officer's justified use of deadly force.

First, Defendant's requested instruction would mislead the jury about what it must consider in determining whether a peace officer's use of deadly force is justified. The statute does not say a peace officer's use of deadly force is justified when it is "reasonable." Minn. Stat. § 609.066, subd. 2. It says a peace officer's use of deadly force is justified "only when *necessary*" to meet one of three specifically enumerated circumstances. *Id.* (emphasis added). The question before the jury is not whether Defendant's use of deadly force was "reasonable"; it is whether Defendant's use of deadly force was "necessary" and whether the circumstances meet one of the three listed. If Defendant's use of deadly force does not meet one of those three circumstances, it was unnecessary and Defendant may not avail herself of this justification defense.

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ii. The "20/20 hindsight" language has no place in state criminal cases.

Second, the State is not aware of a single precedential Minnesota appellate criminal decision that has adopted the use of the "20/20 hindsight" language from *Graham* as appropriate for inclusion in jury instructions. That phrase arose from and typically appears only in appellate decisions reviewing civil rights cases related to qualified immunity or the sufficiency of evidence for claims regarding constitutional violations. *See, e.g., Baker v. Chaplain*, 517 N.W.2d 911, 916 (Minn. 1994); *Johnson v. Morris*, 453 N.W.2d 31, 36-37 (Minn. 1990). But this language has no place in a criminal case. In a criminal trial, there is no need for an instruction against "20/20 hindsight." Instead, criminal defendants are afforded rights such as the burden of proof beyond a reasonable doubt, the presumption of innocence, and the right to confront witnesses against her. These important rights subsume any need for the phrase "20/20 hindsight." The jury does not need this instruction to objectively analyze the circumstances before Defendant at the time of the incident.

Instead, this language misleads the jury away from the proper evaluation of whether Defendant's use of force was reasonable. Rather than inviting jurors to independently weigh the evidence and evaluate the credibility of the witnesses before them, the phrase "20/20 hindsight" instead offers an excuse unsupported by law for Defendant's failure to act properly at an earlier time; it suggests that juror cannot and should not hold peace officers accountable for misconduct after misconduct occurs. This language impermissibly suggests that any evidence of Defendant's guilt must be disregarded as mere "20/20 hindsight."

iii. The "split-second decision" language will mislead the jury.

Second, Defendant's proposed language that "[t]he determination of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments

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about the amount of force that is necessary in a particular situation under circumstances that are tense, uncertain, and rapidly evolving" will also mislead and confuse the jury. (Def.'s Requested Jury Instr. at 11). The role and duties of a police officer are within the jury's general knowledge and awareness. But the jury need not consider what situations officers "often" face; the jury must consider the situation before this Defendant and "the facts known to [her] at the precise moment she acted with force" on April 11, 2021. *See* 10 Minn. Prac., Jury Instr. Guides – Criminal CRIMJIG 7.18. It is from those facts, the facts known to Defendant when she used force, that the jury must determine whether Defendant's use of deadly force was necessary. What officers "often" face is irrelevant.

Further, Defendant's proposed language unfairly suggests that the Court has concluded that Defendant faced a "tense, uncertain, and rapidly evolving" situation, and "emphasizes one factor, one piece of circumstantial evidence, bearing on [the jury's] determination" and improperly suggests to the jury that the Court found this factor "of greater importance that other relevant factors." *Olson*, 482 N.W.2d at 216. Courts should "avoid as much as possible the giving of instructions on particular kinds of evidence, especially inferences." *Id.* Because both the "20/20 hindsight" and "split-second decision" language would confuse or mislead the jury, the Court should reject Defendant's request to include it.[1]

[1] This "20/20 hindsight" and "split-second decision" language has been rejected in other cases in which the defendant raised a reasonable-use-of-force defense. *See State v. Reiter*, No. 27-CR-17-6475; *State v. Hamilton*, No. 27-CR-17-2104; *State v. Noor*, 27-CR-18-6859; *State v. Chauvin*, No. 27-CR-20-12646. Several other states have likewise excluded this language from their pattern instructions on the question of whether an officer's use of force was reasonable. *See Judicial Council of California Criminal Jury Instruction* 507 (2020) (making no mention of Defendant's proposed language); *Indiana Pattern Criminal Jury Instructions* 10.1200 (2019) (same); *Massachusetts Superior Court Criminal Practice Jury Instructions* § 5.4.3(g) (2018) (same); *Michigan Nonstandard Jury Instructions Criminal* §13:10 (2020) (same).

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iv. The "good faith" language materially misstates the legal standard.

In *Graham*, the United States Supreme Court found error in considering "whether the individual officers acted in good faith or maliciously or sadistically." 490 U.S. at 397. An inquiry into an officer's "good faith" directly contradicts the objective nature of the inquiry required into whether the use of force was justified because it "puts in issue the subjective motivations of the individual officers." *Id.* Infusing a subjective inquiry into an objective legal standard would materially misstate the law, would mislead the jury, and would be erroneous. *Larson*, 787 N.W.2d at 601.

B. The Court Should Decline To Provide Defendant's Argumentative And Misleading "Reasonableness Defined" Instruction.

Defendant's proposed instruction in the "Reasonableness Defined" section is a blatant recitation of "defense counsel's closing argument" rather than any meaningful guidance for the jury on the legal elements of the charged offenses and risks "distract[ing] the jury from making findings beyond a reasonable doubt." *Lindsey*, 632 N.W.2d at 662. Defendant essentially asks the Court to instruct the jury that Defendant's actions were reasonable as a matter of law, instead of instructing the jury to weigh the evidence. To do so would improperly "invade[] the province of the factfinder." *Williams*, 324 N.W.2d at 160. Including this requested instruction would mislead the jury and improperly bolster Defendant's theory of the case, removing from the jury their role as finders of fact as to whether Defendant's conduct was appropriate, necessary, and justified under the limited circumstances enumerated in Minn. Stat. § 609.066. Jury instructions must accurately define the charged offenses and the elements of those offenses, *Vance*, 734 N.W.2d at 656, and must fairly and adequately explain the law governing the case, *Flores*, 418 N.W.2d at 155. They should not be used as a vehicle for the defense to relay its closing argument disguised as legal principle.

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In support of this requested instruction, Defendant cites again to two federal civil rights cases in which the cause of action was for a violation of the plaintiffs' constitutional rights. *Pleasant v. Zamieski*, 895 F.2d 272 (6th Cir. 1990); *Tallman v. Elizabethtown Police Dept.*, 344 F. Supp. 2d 992 (W.D. Kentucky 2004). As noted above, these cases, and the application of *Graham* within them, have no bearing on this state criminal prosecution for manslaughter. *See supra*, at 4-5. Defendant is not entitled to have this Court issue an instruction that is the equivalent of a directed verdict based on inapplicable law. The Court should reject this requested instruction.

C. Defendant's Proposed Instruction On "The Collective Knowledge Doctrine" Should Be Rejected As A Misstatement Of The Law And Inapplicable To This Case.

The Court should reject Defendant's request for any instruction related to the "collective knowledge" doctrine. First, Defendant's requested instruction materially misstates this legal principle. Defendant states, "[t]he law does not differentiate the danger and apprehension of one officer at the scene of an arrest from other officers present. . . . If an officer on the scene perceived he was in danger of great bodily harm, the 'collective knowledge' doctrine holds that [Defendant] perceived that same danger." (Def. Requested Jury Instr. at 13) (citing *State v. Conway*, 319 N.W.2d 35, 40 (Minn. 1982)). But this is simply not true. Instead, *State v. Conway* states, "[u]nder the 'collective knowledge' approach, the entire knowledge of the police force is pooled and imputed to an arresting officer *for the purpose of determining if sufficient probable cause exists for an arrest*." 319 N.W.2d at 40 (emphasis removed and emphasis added). The doctrine has nothing to do with perceived danger by officers at a scene; instead, it addresses how officers through their police network may share and use information that each individual officer may not have underlying personal knowledge of to establish probable cause for an arrest. Defendant, in her requested instructions, has taken a legal principle related to sufficiency of probable cause completely out of context and contorted it into an entirely different idea.

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The discussion in *Conway* following its articulation of the "collective knowledge" doctrine makes clear that the officer relying on the "collective knowledge" must still be personally informed of the information being acted on. *Id*. There, the court stated that "[p]olice officers are entitled to act on the strength of information *received* from the department and may assume at the time of apprehension that probable cause exists" and discusses officers acting or relying on information that "is communicated to an officer." *Id.* Thus, even if the "collective knowledge" doctrine had any applicability to the issues that the jury will be asked to decide, which it does not, Defendant still would have had to have received that information. It cannot be telepathically imputed onto her. Defendant's materially misstated requested instruction cannot be presented to the jury. *Kuhnau*, 622 N.W.2d at 556.

Even if Defendant correctly stated the "collective knowledge" doctrine and provided it in the correct context, it has no applicability to this case. The necessity of an officer's use of deadly force is assessed using an objective standard based on "facts known to the officer at the precise moment she acted with force." (State Proposed Jury Instr. at 7); 10 Minn. Prac., Jury Instr. Guides – Criminal CRIMJIG 7.18. It is not assessed using facts known to some other officer on scene. Defendant's proposal misstates the law applicable to this case, perhaps in an effort to subvert any need for her to testify in her own defense. The objective standard on which the jury must determine whether Defendant committed the charged offenses and was justified in her use of force is based on the totality of the facts and circumstances known to her, specifically. What another officer perceived is entirely irrelevant to these determinations if Defendant herself did not perceive it or personally know about it. Accordingly, the Court must reject this proposed instruction. *See Kuhnau*, 622 N.W.2d at 556 ("An instruction is in error," and therefore cannot be given to the jury, "if it materially misstates the law").

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D. The Court Should Reject Defendant's Confusing And Misleading "Arrest By Warrant" Instruction.

Defendant requests that the jury be instructed on an officer's authority to arrest a person on an active warrant. (Def.'s Requested Jury Instr. at 13). This instruction is merely a distraction from the ultimate issues in the case. Whether Defendant was authorized to arrest Mr. Wright is wholly irrelevant to her guilt. It is not an element of the charged offenses and it is not a legal defense to the charges against her. After all, Defendant faces criminal charges for killing Mr. Wright, not for arresting or attempting to arrest him. The only issues before the jury are whether Defendant caused Mr. Wright's death by her reckless use or handling of her firearm and by her culpable negligence, and whether Defendant's use of deadly force was justified under the circumstances known to her. Defendant's requested instruction risks confusing the issues by improperly suggesting to the jury that whether Defendant was authorized to arrest Mr. Wright on a gross misdemeanor warrant is a factor critical to these issues. It is not. Indeed, such an instruction may mistakenly invite the jury to conclude that if Defendant's attempt to arrest Mr. Wright was authorized, then her use of deadly force would likewise be authorized. The Court should reject this misleading requested instruction.

E. The Court Should Decline To Instruct The Jury On "Negligence Of Decedent."

Defendant proposes that the Court instruct the jury that Mr. Wright's negligence (if any) cannot be a defense to a criminal case, but also that the jury can consider Mr. Wright's conduct and "all of the other circumstances that existed at the time the incident occurred" in assessing "whether or not [Defendant] exercised the care of a reasonably prudent peace officer or failed to exercise such care." (Def.'s Requested Jury Instr. at 13-14). Defendant also proposes language that "if there was any negligence on the part of Mr. Wright," it can only be considered to the extent

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that it shows "that [Defendant's] acts did not constitute the proximate cause of the accident." *Id.* at 14. The Court should reject this proposal.[2]

"It is well settled that the contributory negligence of the victim is never a defense to a criminal prosecution." *State v. Crace*, 289 N.W.2d 54, 59 (Minn. 1979). Instead, "conduct of the victim" is relevant only "insofar as it tends to show that the defendant was not himself negligent or that his acts did not constitute the proximate cause of the accident." *Id.* at 60 n.5. Thus, in deciding whether the defendant's conduct was negligent, the "jury may take into consideration the conduct of the victim" in the same way that it considers "all of the other circumstances that existed at the time the [incident] occurred." *Id.* The conduct of the victim should not be elevated and automatically assigned a greater weight than any other factors that the jury may consider in evaluating Defendant's negligence.

A separate instruction that the jury must consider Mr. Wright's conduct in assessing whether Defendant was negligent is therefore unnecessary and poses a risk of misleading the jury. In assessing whether Defendant's use of deadly force was reasonable, the jury will be in instructed to consider "those facts known to the officer at the precise moment she acted with force." 10 Minn. Prac., Jury Instr. Guides – Criminal CRIMJIG 7.18. This would include the facts of Mr. Wright's conduct known to Defendant during the encounter. Additionally, the instruction on "recklessness" also instructs the jury to consider "the totality of the circumstances." 10 Minn. Prac., Jury Instr. Guides – Criminal CRIMJIG 32.02. Thus, the pattern jury instructions already allow the jury to consider Mr. Wright's actions that were known to Defendant. No separate instruction requiring the

[2] The State acknowledges that it also proposed additional language to the pattern jury instructions on causation concerning contributory negligence. (State's Proposed Jury Instr. at 4, 6). After further research and consideration, the State withdraws its proposal to include that language and requests that the Court provide only the pattern jury instruction on causation.

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jury to consider Mr. Wright's supposed negligence should be given. To do so would elevate that single factor above "all of the other circumstances that existed at the time the [incident] occurred." *Crace*, 289 N.W.2d at 60 n.5. This would "single out and unfairly emphasize one factor," leading the jury to believe "that in the court's opinion that factor was of greater importance that other relevant factors." *Olson*, 482 N.W.2d at 216.

If the Court is concerned the other pattern instructions do not adequately instruct the jury to consider the complete set of known circumstances before Defendant, the State suggests that the appropriate remedy would be to add a sentence instructing the jury to consider the totality of the circumstances into CRIMJIG 7.18, Authorized Use of Deadly Force by a Peace Officer, not a separate instruction on "Negligence of Decedent" that would unfairly elevate this factor. General instructions are preferable to particularized instructions that may overemphasize one side of the case and confuse the jury. *Cameron v. Evans*, 62 N.W.2d 793, 799 (Minn. 1954). Instructions "setting forth a litigant's theory of the case may be denied if the substance of it is adequately covered by the charge as a whole." *Poppenhagen v. Sornsin Constr. Co.*, 220 N.W.2d 281, 286 (Minn. 1974). Instructing the jury specifically on a duty to consider Mr. Wright's conduct would confuse and mislead the jury by shifting its focus away from Defendant's conduct even though other instructions already inform the jury that it may consider Mr. Wright's conduct that was known to Defendant as part of its analysis. Defendant's requested instruction on "Negligence of Decedent" seeks primarily to inject her closing argument into the jury instructions and to unfairly focus the jury on Mr. Wright's conduct, rather than Defendant's. *See Lindsey*, 632 N.W.2d at 662. This would mislead the jury into assuming that Mr. Wright's conduct authorized Defendant to use deadly force against him. The Court should not permit this.

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F. "Forms Of Mr. Wright's Negligence"

Defendant's request that the Court instruct the jury about specific examples of "Forms of Mr. Wright's Negligence" again blatantly seeks to have the Court provide the defense closing argument to the jury in the form of instructions. To include this requested instruction would be unduly prejudicial and irreparably harmful to the State as it would mislead the jury and improperly bolster Defendant's theory of the case. The focus of this case is Defendant's conduct, not Mr. Wright's. The key issues for the jury to determine are the elements of the charged offenses. Defendant's requested instruction would confuse these issues and unfairly prejudice the jury against Mr. Wright. If the Court were to provide this instruction, the jury would incorrectly conclude that the Court finds these factors more important than the rest of the evidence. *See Olson*, 482 N.W.2d at 216. Moreover, directing the jury to presume that the specific conduct listed in Defendant's requested instruction occurred and that such conduct was "a crime, and unreasonable and negligence," (Def.'s Requested Jury Instr. at 14), instead of permitting the jury to weigh the evidence improperly "invades the province of the factfinder," *Williams*, 324 N.W.2d at 160. And, while Defendant cites to statutes criminalizing certain types of behavior, she provides no legal support for providing the jury with an instruction on these offenses as they relate to a victim's purported negligence. The Court should reject this request by Defendant to functionally have the Court provide the defense closing argument in the form of legal instruction.

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CONCLUSION

For the reasons stated above, the State respectfully requests that the Court reject Defendant's requested modifications to the pattern jury instructions and Defendant's requested inclusion of impermissibly argumentative nonpattern jury instructions.

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Respectfully submitted,

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