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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT
Court File 27-CR-21-7460

State of Minnesota,

Plaintiff,

vs.

DEFENDANT'S RESPONSE TO STATE'S MEMORANDUM IN OPPOSITION AND ITS PRETRIAL MOTIONS

Kimberly Ann Potter,

Defendant.

Motion to Dismiss

When Officer Potter shouted "Taser, Taser, Taser," her perception was evident. 1) She didn't know she was about to create a risk of harm to Mr. Wright's death. 2) She couldn't have aware of that risk and then ignore it. Both elements comprise the requisite conscious recklessness charged in Count 1. State v. Engle, 743 N.W.2d 592, 596 (Minn. 2008)(defining the phrase).

What the jury will see and hear about instead is an accident. And a police officer's accidental shot is not a crime. See Pleasant v. Zamieski, 895 F.2d 272, 276-77 (6th Cir. 1990)(holding that the police officer's accidental shooting during

a suspect's escape was nonetheless reasonable within the Graham v. Connor standard); Tallman v. Elizabethtown Police Department, 344 F. Supp. 2d 992, 996 (W.D. Kentucky 2004)(holding the police officer's accidental discharge, occurring during the unlawful flight of the suspect, was reasonable because under the Graham v. Connor standard the officer was entitled to draw his gun, and there was no requirement that he place the gun back into the holster when the suspect's actions were unpredictable; hence "no causation exist[ed] between the death and an unreasonable act").

The State's view of the facts is at best confusing. In one memorandum, the claim is that Officer Potter consciously used her firearm. Memorandum in Opposition to Defendant's Motion to Dismiss, at p. 4. That she had to have known when "pointing" and when "depressing" the trigger, a gun was necessarily in her hand. Id. Yet she didn't shout, "Gun, Gun, Gun."

In another brief, the State claims Officer Potter "intend[ed] to use a Taser." Memorandum in Support of Motion to Exclude or Limit the Testimony of Dr. Laurence Miller, at p. 4. If she intended to use her Taser, it must follow that she "did not intend to shoot Mr. Wright," Id., whether by conscious recklessness (Court 1) or by consciously taking a chance of causing death (Count 2).

We can agreed a defendant's conscious mind is "generally prove[n]

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circumstantially," State's Memorandum in Opposition to Defendant's Motion to Dismiss, at p. 6 (quoting State v. Cooper, 561 N.W.2d 175, 179 (Minn. 1997)). Nothing in the body camera video possibly suggests, as the State would have it, Officer Potter decided, before pulling the trigger, to consciously "flout[]" her training, or "fail[]" to apply it. Memorandum at p. 7. Or that Officer Potter knew her "actions of reaching, grabbing, and pointing a weapon and depressing the trigger were clearly conscious and intentional conduct." State's Memorandum in Opposition to Defendant's Motion to Dismiss, at p. 5.

The State's end comparison of Officer Potter to a drunken snowmobiler racing into an innocent child is unpersuasive. Id. at p. 8 (citing State v. Coleman, 957 N.W.2d 72, 74 (Minn. 2021)) . In Coleman, the snowmobiler was convicted of third degree depraved mind murder. Officer Potter could never be charged with that offense. See State v. Noor, Slip Op. A19-1089 (Minn. Sept. 15, 2021).

The State can't prove any offense by playing the video, which shows an accident. The prosecution can't win on Officer Potter's shouts of "Taser, Taser, Taser," words meaning she was going to use her TASER, so as to not harm Mr. Wright. Nor for reasons of her enormous after-the-fact regret of what could not have been a conscious act.

When the facts do not support any charge, why not just pay for evidence,

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and hire an expert to announce her guilt? That's what the prosecution's case is about, really..

The State's Propose Expert Testimony defeats its Motions In Limine

Enter Seth W. Stoughton, whose report, if left unchallenged, will promote a false narrative, namely that because Mr. Wright was "unlikely to avoid later apprehension," he did not pose an "imminent threat." Report at p. 1. Hence, Mr. Stoughton allows, the Officers should have let him go to commit other crimes. Officer Potter should have concluded, he says, that a " TASER discharge would have created a substantial risk of serious injury and property damage," and thus she should not have employed it. Id.

This then is the State's expert opinion: no TASER should have been use, with Mr. Wright permitted to drive away. After all, "it was highly likely that they would be able to apprehend Mr. Wright later." Id. at 24. Ergo, the Officers at the scene should have ignored this Court's arrest warrant and just allowed Mr. Wright to commit more crimes as was his daily want.

Mr. Stoughton's non-factual claim is that Officer Potter also should not have shot her TASER in to a "moving vehicle," Id. at 28. The car was not moving. Mr. Wright had not gained control. It had not been placed it into gear.

The jury cannot be mislead to believe an expert's opinion on false facts,

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here that Mr. Wright's intentions were innocuous and innocent, that he would eventually surrender; he meant no harm. The State's expert's misleading-by-omission narrative, if not permitted to be corrected, would deny Officer Potter due process. Napue v. Illlinois, 360 U.S. 265, 268 (1959).

Left out of Mr. Staughton's report is that Mr. Wright's attempted flight was, as a matter of law, a crime of violence involving "the use or threatened use of deadly force." Minn. Stat. 609.066, Subd. 1(2). Mr. Stoughton, a law professor, fails to cite that statute and Sykes v. United States, 564 U.S. 1 (2011), where the High Court explained why Mr. Wright's attempted flight was so dangerous, and why force, in the form of a TASER here, was necessary to stop him.

In Sykes, the defendant's initial infraction was a headlight violation. When the police activated lights, he refused to stop. "A chase ensued," where Mr. Sykes drove "through yards," and eventually fled on foot. Id. at 6. The Supreme Court easily resolved Mr. Sykes' claim that his offense was not a violent one, and a basis to enhance his prison sentence.

> When a perpetrator defies a law enforcement command by fleeing in a car, the determination to elude capture makes a lack of concern for the safety of property and persons of pedestrians and other drivers an inherent part of the offense. Even if the criminal attempting to elude capture drives without going at full speed or going the wrong way, he creates the possibility that police will, in a legitimate and lawful manner, exceed or almost match his speed or use force to bring him

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> within their custody. A perpetrator's indifference to these collateral consequences has violent – even lethal – potential for others. A criminal who takes flight and creates a risk of this dimension takes action similar in degree of danger to that involved in arson, which also entails intentional release of a destructive force dangerous to others. This similarly is a beginning point in establishing that vehicle flight presents a serious potential risk of physical risk of injury to another.

Id. at 8.

Officer Potter could not ignore Mr. Wright's danger. He had to be arrested. That's what this Court directed her to do by issuing a warrant. Mr. Stoughton's opinion is that she should have done nothing, and let her colleagues later find Mr. Wright somewhere in the wasteland. An approach to policing that has been deemed untenable.

As the Supreme Court explained, "because an accepted way to restrain a driver who poses dangers to others is through seizure, officers pursuing fleeing drivers may deem themselves duty bound to escalate their response to ensure the felon is apprehended." Id. at 9 (emphasis added) (citing Scott v. Harrris, 550 U.S. 372, 385 (2007)). "And once the pursued vehicle is stopped, it is sometimes necessary for officers to approach with guns drawn to effect arrest. Confrontation with police is the expected result of vehicular flight. It places property and persons at sserious risk of injury." Id. (emphasis added). Id. at 10.

In our context, the phrase "serious risk of injury" means the same thing as "great bodily harm." Minn. Stat. 609.066, Subd. 1 (1)(2) and (3).

In light of Syke, Mr. Stoughton's opinion – that Mr. Wright would be arrested later so why bother with his arrest at the car– was is not what the law says. The Supreme Court: "having chosen to flee, and thereby commit a crime, the perpetrator has all the more reason to seek to avoid capture." Id. at 2274 (emphasis added). For emphasis, the High Court held "[r]isk of violence is inherent to vehicle flight." Id. The State's claim, and that of Mr. Stoughton – that there wasn't, for any officer on the scene, an "articulable fear of physical violence" – Motion to Exclude Irrelevant Evidence at p. 5, runs up against and counter to Sykes. Mr. Wright's physical violence is obvious on the video; his conduct caused a response, and a responsive fear.

The holding in Sykes, when applied to the criteria of Minn. Stat. 609.066, gives full justification to Officer Potter's use of a TASER. She perceived the attempted flight. Mr. Wright's conduct was a violent felony. His was a crime that endangered Officer Luckey and Sgt. Johnson, Mr. Wright himself, as well as his passenger.

Mr. Stoughton does at least opine that while Sgt. Johnson could perceive an imminent threat to himself. Yet Officer Potter, given her viewpoint, could not

have. Id. at 23, 24-26. His opinion that differentiates Sgt. Johnson's knowledge from Officer Potter's is in error. The "collective knowledge" doctrine holds that the "entire" knowledge of those at the scene of an arrest is imputed onto each officer there. State v. Conoway, 319 N.W.2d 35, 40 (Minn. 1982). Officer Potter, by operation of law, knew of Sgt. Johnson's perceived danger of impending death or at the very least great bodily harm. His risk of harm was hers.

Sgt. Johnson was inside the passenger compartment when Mr. Wright decided to drive away. Had not Officer Potter intervened, Sgt. Johnson might well have been dragged to his death. She didn't have see exactly where he was.

Under Minn. Stat. 609.066, which adopts the standard of Graham v. Connor, 490 U.S. 386 (1989), Officer Potter could employ a lesser harm, her TASER. The case law goes even further, and holds that she could have fired her weapon. The Supreme Court settled that question in Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (holding that it reasonable for an officer to shoot a suspect who is fleeing from arrest in an automobile) and Plumhoff v. Rickard, 572 U.S. 765, 777 (2014) (holding that an officer may shoot the driver of a car who was temporarily stopped but then decides to drive away in "an attempt to escape").

Mr. Stoughton also ignores (or was unaware of) Mr. Wright's history of repeated flights, his long held desire not to be captured. The opinion that Mr.

Wright would soon be arrested by local officers, that "it was highly likely that they would be able to apprehend Mr. Wright later" Report at p. 24, is not born out by his record. This Court has had to repeatedly issue bench warrants for Mr. Wright's failure to appear. See 27-CR-19-20754; 27-CR-19-22959; 27-CR-19-23184; 27-CR-19-23818; 27-CR-19-24205.

On March 4, 2021, a month before his death, Mr. Wright was charged by complaint for carrying a pistol without a permit, in a public place, in violation of Minn. Stat. 624.714.1a, and fleeing a peace officer by a means other than a motor vehicle, Minn. Stat. 609.487.6. The probable cause section:

> That on June 30, 2020, at approximately 1604 hours, Officers Boldo and Depies, Minneapolis Police, responded to a person with a gun call near 51st and Bryant Avenue North, Minneapolis, Hennepin County, Minnesota. The caller indicated that a light-complexed 17-year old black male, wearing black shirt and shorts and white shoes, was waiving black handgun. The male then got into a white Toyota Camry, occupied by 4 people with the drive wearing a red shirt. Officers located the car nearby, with a person Defendant herein, Daunte Demetrius Wright, d.o.b. 10/27/2020, matching the person with the gun's description sitting in the back seat. Once out of the vehicle, Defendant took off running with Officers in pursuit and managed to evade officers. Officers at the scene positively identified Defendant from prior interactions. A loaded Ruger .45 caliber handgun matching the caller's description was found on the floor of the vehicle where Defendant had been sitting. Another occupant of the vehicle verified it was Defendant's gun. Defendant does not have a permit to carry a firearm.

Mr. Wright failed to appear on April 2, 2021 and a bench warrant was

issued by this Court. That active warrant is referenced on Officer Potter's body camera.

On December 4, 2019, Mr. Wright was charged with Attempted Aggravated Robbery in the First Degree, a crime of evident violence. 27-CR-19-29850. That case, too, was pending when he was stopped by Officer Luckey in Brooklyn Park. One of the many conditions of Mr. Wright's release was that he remain law abiding. The jury can easily draw the inference that one of the reasons Mr. Wright wanted to flee was because he wasn't ever going to get out. A conviction for aggravated robbery results in a presumptive prison term.

According to the Complaint, on December 1, 2019, Mr. Wright stayed overnight at the victim's apartment, "unable to find a ride." In the morning, Mr. Wright announced that "he didn't have to work today." In the Probable Cause sworn statement, Mr. Wright told the victim he was about to "hit some stains," a vernacular for robbing someone. Just as he said would, Mr. Wright pointed a handgun at the victim, demanding the cash she had just secured for rent. "Give me the fucking money, I know you have it," he said. "I'm not playing around." Hennepin County's criminal complaint can't be ignored: "DEFENDANT WRIGHT placed his hand around VICTIM"S neck and choked her while trying to pull the cash out from under her bra." She screamed. Wright choked her again,

and then took flight from the scene.

The victim reported Mr. Wright's violent crime to the Osseo Police. She also filed a Petition for Harassment alleging the same facts, emphasizing anew that "Wright said he would shoot me." See 27-CV-19-20103.

Mr. Wright's patterned violence has also resulted in two civil cases filed against his estate. On May 14, 2019, at a gas station in North Minneapolis, at 1818 Lowry Avenue, he shot Caleb JaChin Duane Livingston in the head. Complaint, at paras 6-7, 27-CV-21-6193.

On March 21, less than a month before his arrest, Mr. Wright shot Joshua Hodges in the leg, assaulted his face, then robbed him of wallet and cell phone. Complaint, at p. 3; at paras. 12-14. 27-CV-21-7390.

All of this evidence, which the State seeks to exclude, is available for cross examination of Mr. Stoughton. Each flight, each gun, each robbery, each assault against an innocent undercuts Mr. Stoughton's opinion that Mr. Wright was not a danger to community, would be easily arrested, that he would comply with Court orders, and need not have been detained. There was no immediate need to effectuate this Court's bench warrant, either.

For exclusion, the State relies on Rules 403 and 404 and voices the standard prejudicial /probative value cant, failing to reference Rule 703, Minn.R.Evid,.

When impeaching Mr. Stoughton, we are permitted in depth leeway. "Nothing in this rule restricts admissibility of underlying expert data when inquired into on cross-examination." Id. (emphasis added). "Great emphasis is placed on the use of cross-examination to provide the trier of fact with sufficient information to properly assess the weight to be given any opinion." Committee Comment to Rule 703.

A fair assessment of Mr. Stoughton's opinions demands thorough probing. His "Understanding of Facts," Report at pp. 3-16, does not address Mr. Wright's willingness to avoid arrest, his instances of violence, his constant flights, his thumbing a nose at the Court system.

The only limitation within Rule 703 appears in the Committee Comments, suggesting that in "criminal cases, inadmissible foundation should not be admitted" where "such evidence might violate the accused's right to confrontation." (citing State v. Towne, 453 A.2d 1133 (1982)). No such violation is at issue.

Beyond Rule 703, admissibility is assured. The reports contain Mr. Wright's admissions against penal interest (e.g., "Give me the fucking money, I know you have it"), is a classic hearsay exception. Under Rule 804 (b)(3), Minn.R. Evid., Mr. Wright's statements subjected him, when said, to "criminal

liability"; he "would not have made the statement unless believing it to be true." Id.

Moreover, his statements to the victim of his robbery are fully corroborated. His victim said Mr. Wright grabbed her bra, attempting take the cash she had placed there; he threatened her; he took flight. The evidence supporting the harassment Order and the criminal complaint is not mere "innuendo instead of competent proof." Memorandum in Support of Motion to Exclude, at p. 9 (citation omitted). That sentence by the States diminishes his victim's trauma.

Mr. Wright's abject need to harm, to rob, to flee, are all habits of his, admissible for that secondary reason. Rule 406, Minn.R.Evid.

Dr. Laurence Miller's testimony

Mr. Stoughton has also opened a wide doorway for our own expert, Dr. Laurence Miller, to testify. Mr. Stoughton recognized "[i]t is well known in policing that there have been a small number of high-profile cases involving so called 'weapon confusion' in which an officer discharges a firearm after mistaking it for a TASER." Report at p. 41. He rejects that possibility, however, claiming that because Officer Potter was warned that "[c]onfusing a handgun with a [TASER] could result in death or serious injury," she should not have make the mistake that she did. Id. at 42. Mr. Stoughton relatedly opines that, because

Officer Potter's TASER was on the left side of her belt (the "reaction side"), with her gun on her right (the "dominant side"), she should not have made the mistake. Since a TASER isn't near akin to a handgun, her error, he writes, would have been "highly unusual." Report at pp. 42-43.

For Officer Potter, this was a singular and "rare occurrence," Report at p. 41, but a mistake did happen, and the reason it happened, opines, Mr. Stoughton, was that she failed to follow her training. Report at pp. 33-36. His myopic view we are also entitled to refute.

The State doesn't have the exclusive ability to present expert testimony. Officer Potter has the reciprocal obligation and right to present a complete defense. State v. Beecroft, 813 N.W.2d 814, 839 (Minn. 2012). Her right includes the right "to meet the States as an equal in our adversarial system of justice: strength against strength, resource against resource, argument against argument." Id. (quoting United States v. Bagley, 473 U.S. 667, 694 n. 2 (1985)(Marshall, J., dissenting)(internal quotations omitted)). "Therefore, if factfinders are exposed to the opinions of the government's expert witnesses, a defendant must have an equal opportunity to present to the factfinders the opposing views of the defendant's experts." Id. (emphasis added) (citation omitted).

Laurence Miller, Ph.D., has been retained by Officer Potter; his report has been submitted to this Court. He wrote: "One of the most well-established principles of neurocognition of learning and memory is that the more a skill is practiced, the more synaptically entrenched within the brain it becomes. If a new task later has to augment or replace the original one (using an ignition fob instead of a key on your new car; adding a conduced energy weapon, i.e., Taser, to your duty belt), the brain never 'unlearns' anything. Instead the new program and its subroutines have to partly override, partly integrate themselves with, the original ones (. . . use the Taser in less-lethal scenarios, use firearm in deadly force encounters). With time, an under optimal conditions, the individual can flexibly move back and forth between these behavioral programs as the situation requires. Indeed, one of the goals of training is for the most vital functions of any profession to go 'on automatic' when a critical situation is encountered. . . ." Id. at 7-8.

Where there is "less time or fewer practice opportunities to be 'learned into' the brain than the original program, and especially where the individual behavioral subroutines are similar to each other ([] draw a firearm or Taser), conditions of stress or distraction can monopolize and overwhelm cortical l conscious decision-making, leaving the subcortical subroutines to essentially deploy themselves. In

these cases, they will typically default to the most prepotent, previously engaged, or overlearned, program, resulting in a mismatch between the intended outcome and the actual one." Id. at p. 8.

When this happens, an "action error" occurs, a phrase "essentially describing a situation where a person consciously means to do one thing, but automatically does something else. In fact, action errors comprise a well-known area of study within the field of cognitive and operational psychology." Id. Action errors, Dr. Miller explains, are often found when the individual is "under conditions of stress, distraction, or perceptual hyperfocus ('tunnel perception'), especially where urgent time pressure requires an instantaneous response." Id.

In law enforcement, action errors include "misidentification of a target threat (subject is holding hammer, but it looks like a gun), unintentional firearm discharge (reflexive trigger pull during a weapon draw), or impaired recollection for events or one's own actions during a critical incident." Id.

A subcategory of action errors are termed "slip and capture errors," which include cases of "Taser/handgun confusion." Dr. Miller: "In such circumstances, a prepotent response, firearm deployment, unconsciously overrides the less prepotent, but consciously intended response, ie., Taser deployment." Thus "[d]espite difference in size, shape, weight, color, and position of these two

weapons, the time pressure and intense focus on a deadly threat predisposes the brain to the perceptual-cognitive 'slip' that allows the prepotent response to 'capture' and carry out the more overlearned but currently unintended action." Id. "Following the slip and capture episode, the officer him/herself typically expresses bafflement at their own actions, since they immediately recognize that what they just did is the opposite of, or different from, what they consciously intended to do." Id. at p. 9.

Officer Potter has had approximately 520 training hours on the use of a firearm (which she never fired during her 26-year career), compared to approximately 45-50 hours of Taser training since that instrument was introduced roughly ten years ago. Id. at p. 7.

As noted, State's case is that this incident shouldn't have happened, because, says Mr. Stoughton, Officer Potter ignored her training. Through Dr. Miller, we will offer an answer as to why it did for innocent reasons. How her training did not cause a crime to occur but rather an accident.

Rule 702's "foundational reliability" requirement, State v. Obeta, 796 N.W.2d 282, 294 (Minn. 2011) is satisfied by Dr. Miller's citation to "considerable scientific literature documenting" the phenomenon of "slip and capture." Report at pp. 10-15. Dr. Miller's report is well supported by his own

publications and attendant expertise. Miller, L (2019). *Police deadly force encounters: Psychological reactions and recovery patterns*. In L. Territo & J.D. Swell (eds.), Stress management in law enforcement (4th Ed. Pp. 115-144). Carolina Academic Press; Miller, L. (2020). *The psychology of police deadly force encounters: Science, practice, and policy*. Charles C. Thomas; see also Rule 702, Minn.R.Evid.

To argue that Dr. Miller "adds nothing of value," State's Memorandum in Support of Motion to Exclude or Limit the Testimony of Dr. Laurence Miller, at p. 3, is to attempt to skew the trial, to say Mr. Stoughton's testimony can't be challenged. To invite error.

This Court has abundant discretion to admit expert testimony. State v. Xiong, 829 N.W.2d 391, 396 (Minn. 2013). "An expert may testify '[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence to determine a fact in issue." Id. (quoting Rule 702, Minn.R.Evid.). The question for this Court is whether or not Dr. Miller's testimony will be helpful. Rule 702, Minn.R.Evid.; State v. Bradford, 618 N.W.2d 782, 793 (Minn. 2000)(noting the helpfulness standard). Yes, yes it will be.

He's well qualified, a critical factor for this Court to consider, Obeta, 796 N.W.2d at 294, far more qualified than Mr. Stoughton.

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The State agrees it is for the jury to decide whether a "slip and capture" occurred on April 11, 2021. Memorandum at p. 5. The argument is that the testimony concerning action errors is "well within a juror's knowledge, life experience, and common sense that when individuals are in stress or panic, they may act in error whereby their intentional conduct may have an unintended result." Memorandum at pp. 4-5. To make that decision, the jurors have to first hear what "slip and capture" is, and why it occurs. How a differential in training hours (gun compared to TASER) favors Officer Potter's expert testimony.

We are not offering Dr. Miller's opinion on the issue of Officer Potter's conscious intentions. He is being called to explain a phenomenon that happens in police work. Whether slip and capture may have caused Officer Potter's mistake he can't say; that question is for the jury to decide. State v. Valentine, 787 N.W.2d 630, 639 (Minn.Ct. App. 2010)(citing State v. Grecinger, 569 N.W.2d 189, 195-196 (Minn. 1997); State v. Hennum, 441 N.W.2d 793, 799 (Minn. 1989)). But for the State to write, a second time, that Dr. Miller offers "absolutely nothing" is quite remarkable. Memorandum at p. 3. He refutes Mr. Stoughton's opinion weapon confusion was not a factor here. Stoughton Report at p. 41.

The remaining In Limine Motions can be addressed with due hast.

The State would have this Court exclude the fact that the passenger in Mr.

Wright's car was high and hid her drugs in her groin. It is part and parcel of the res gestae; her intoxication/drug use is impeaching information against her testimony. We have a good faith reason to believe Mr. Wright gave his drugs to her moments before his decision to flee.

Mr. Wright's parents are felons. His mother, Katie Bryant, was convicted on a second degree drug charge in 2020, just five months before her son died. 27-CR-20-437. Impeachment of her testimony will not, as the State argues, "unnecessarily" prolong the trial, nor serve to "harass." Memorandum at p. 11. Under the Minnesota Supreme Court's interpretation of Rule 609, and our rationale for admissibility, "it is the general lack of respect for the law, rather that the specific nature of the conviction, that informs the fact-finder about a witness's credibility . . . In other words, any felony conviction is probative of a witness's credibility, and the mere fact that a witness is a convicted felon holds impeachment value." State v. Hill, 801 N.W.2d 646652 (Minn. 2011)(citation omitted).

Mr. Wright's father was convicted in 2007 of felony third degree controlled substance, 62-K5-07-002737; probation ended in 2009. This felony is beyond the ten years, we agree. See Rule 609 (a), Minn.R.Crim.P.

We of course do not object to testimony as to the training Officer Potter has

received, both with respect to the firearms and TASERs. Her training time differential for guns vs. TASER is consistent with our explanation of slip and capture.

Mr. Wright's parents may watch the trial, but only after they have testified. The State suggests they will be first up.

Evidence that a witness may have attended "protests, marches, vigils, and other demonstrations in Mr. Wright's name" evinces a bias. The State relies on State v. Cermak, 365 N.W.2d 243, 247 n. 2, which addressed the admissibility of photographs of the defendant's family members participating in incest. The Poloroid images were relevant to the charge that the defendant grandmother had conspired with her family (two sons and husband) to abuse the same children. Cermak does not hold any evidence of bias in that litigation was offered to gain an "unfair advantage," by "illegitimate means." Memorandum at p. 14.

"In criminal cases, the defendant's right to cross-examine witnesses for bias is secured by the Sixth Amendment." State v. Brown, 739 N.W.2d 716, 720 (Minn. 2007)(emphasis added)(citing Davis v. Alaska, 415 U.S. 308, 315 (1974)). A witness's attendance of protests concerning Mr. Wright may show an empathy for him and a belief that he did not cause his own death, and that everything that happened on April 11, 2021 was the fault of the police. We seek to explore, if

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necessary, a witness's clouded bias in favor of Mr. Wright while disfavoring Officer Potter. The jury should have that information in determining truthfulness.

Gang membership with Mr. Wright is also probative of bias. Id. (citing United States v. Abel, 469 U.S. 45, 47-49 (1984)).

Regarding the number of preemptory challenges, the better model is the Yanez trial where 5 and 3 worked just fine. If the Court's desire is to complete the trial before Christmas, we suggest a lesser number. It took three weeks to pick the Chauvin jury, less than four days in Ramsey County for Yanez.

Dated: October 13, 2021

Respectfully submitted,

/s/ Paul Engh

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