

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF WASHINGTON

TENTH JUDICIAL DISTRICT

File 82-CR-19-2887

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State of Minnesota,

Plaintiff,

**MOTION TO DISMISS**

vs.

Brian Jeffrey Krook,

Defendant.

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The Defendant, Washington County Deputy Brian Jeffrey Krook, through and by his lawyers, Kevin Short and Paul Engh, and in accordance with Rule 11.04, Minn.R.Crim.P., moves the Court for an Order dismissing the Indictment. The prosecution was aware of an expert opinion that the shooting was justified, and did not offer it, all in violation of their duty to present exculpatory evidence.

The factual basis of the Indictment is likewise flawed. The “victim’s” own negligence – in the form of his intoxication, his implicit and repetitive violence – caused his death.

**The Facts Presented to the Grand Jury**

1. On July 18<sup>th</sup> and 19<sup>th</sup> of this year, a Washington County Grand Jury was

convened. Five prosecutors participated, including Assistant Ramsey County Attorney Richard Dusterhoft, Chief of the Criminal Division.

2. During initial instructions, the Grand Jurors were told by Judge Gregory Galler to “confine” their inquiry “brought to your attention by the county attorney.” And while the Grand Jurors were permitted to inquire as to “additional matters,” the Court discouraged that approach: “I will, however, emphasize again that society has a law enforcement investigative apparatus and a prosecuting attorney, and nearly all matters will be more efficiently come through this apparatus.” Grand Jury Trans. at p. 5. Because the prosecutor “is the only person in the grand jury room who is trained in the law, and who will be able to assist you in sorting out legally admissible evidence from inadmissible evidence. You should listen closely to this advice and attempt to proceed about your business following their legal advice.” Id.

The grand jurors were cautioned, too, as to their “grave responsibilities,” and to be “motivated by the highest sense of justice.” They were supposed to be the “shield” that “protects the innocent against unjust prosecution.” Id. at 15.

3. In his opening statement, Assistant Ramsey County Attorney Andrew Johnson promised that “Jeff Nobel,” (sic) a “use-of-force expert” would be called. A copy of second expert’s opinion would be introduced as well. Id. at 25-26. The

jurors were not told that the prosecution team was aware of a contrary opinion, that of Steven Frazer, now the Chief of the Prior Lake Police Department, who would have testified the shooting was justified, just as he had repeatedly told Mr. Dusterhoft of the prosecution team before the Grand Jury convened.

4. The cause of this tragedy is found in two related places, 1) binge drinking, and 2) the written suicide request by Benjamin Evans for the police to end his life on April 11, 2018, which is what happened.

5. Brianna Gysbers, was the last person with Mr. Evans, and described his troubled emotional state, his consumption of rum and cokes, over the course of the afternoon. Id. at 37. In the hour before his death, Evans added “four strong ones” to the mix, this back at this apartment in Lake Elmo. Id. at 37. His BAC would test out at .204.

Ms. Gysbers described how Evans, intoxicated and appearing distraught, called his estranged girlfriend, proposing anew a marriage that would never happen. His past default proposals also refused, “she hung up on him.” Id. at 38. Then Evans told Gysbers, “you need to understand that there’s absolutely nothing you can do to stop what’s about to happen . . .” Id. at 40. He picked up his gun, Id. at 40, and “started like calling friends, saying goodbye.” Id. at 41.

Exh. 2 is Evans’ letter “To the first responders, I’m so sorry that this is

another memory in your career, of another lost soul, but your job is not to save them all, just the ones you can. Carry on, you have the watch from here my friends. In his service, /s/ Benjamin Evans, Firefighter – EMT.”

Mr. Evans’ contemporaneous note to his parents, confirms his desire to be killed by the on-the-scene officers: “I’m so sorry for the pain this will cause you. I’m going home now to meet grandma and grandpa again, and I’ll tell them you send your love. With all my best, Your Son.” Exh. 1.

After writing the notes, Evans hugged Geysbers, and said goodbye. Id. at 44. “I was trying everything I could possibly think of to get him to stop,” she said but to no avail. Id. at 43. Geysbers dialed 911, setting in motion the death she had tried to prevent. Id. at 45.

6. Washington County Deputy Sheriff Joshua John Ramirez received the dispatch “for a suicidal male, third party called in.” Id. at 52. In dimly lit downtown Lake Elmo, Deputy Ramirez found Mr. Evans “[k]neeling down in the middle of the road with a gun to his head.” Id. at 54. Deputy Ramirez unholstered. Id. at 56. “I told him to drop the weapon, drop the gun, and then I proceeded to try and talk to him, figure out what was going on.” Id. at 56.

Deputy Ramirez started a conversation/dialogue, which took “a very long time.” Id. at 60. “I was making some progress and I felt that he was beginning to

trust me,” Ramirez testified. Id. at 60. “I did not really have a plan,” he added. Id. at 60. “I didn’t want to pressure him to think that he only had so much time to pull the trigger and either to shoot himself or one of us and that’s why I didn’t approach him. I didn’t want to force that situation.” Id. (emphasis added).

We encourage the Court to view the forty-minute standoff video. Note the position of Evans’ head, his jerky movements, the unpredictability of the unfolding crisis. Note that when Evans threw the magazine from his semi-automatic, Ramirez assumed that one round was still in the chamber. Id. at 62.

Evans also threw a cell phone, “saying that it was dead and he couldn’t make a phone call.” Id. at 62.

“[H]e just kept saying he made a mistake,” Ramirez remembered. Id. at 64. “I don’t know what he was going to do and there was – I mean – there was (sic) houses back there also, innocent people, so I was worried. Is he going to try to run into his house or a neighbor’s house or? I didn’t really know.” Id. at 65. He added, “[o]bviously you see somebody on the ground with a gun to their head, that’s cause for concern in itself – um – and he wasn’t listening to my command at all – um – so.” Id. at 67. “It did make us worry because we didn’t know what he was thinking or what he might do, so it did concern us when he did look around.” Id. at 68 (Emphasis added). “I mean, it made me uneasy that he was looking

around because I didn't know what he was thinking or planning." Id. at 68 (Emphasis added).

Michelle Folendorf, a Sergeant with the Washington County Sheriff's Office, would become the officer in charge. She also heard the dispatch, concerning a "suicidal male" Id. at 122, who was "outside in the middle of the street and he had a firearm." Id. at 126. While at the Sheriff's office, Sgt. Folendorf saw Deputy Krook, who was at the end of his shift. The irony of the case is that he didn't have to go. Id. at 123. Sgt. Folendorf told him there were enough officers responding. Id. at 125. She didn't have a body camera, though, so she took his. Id. at 126-7. She then talked with him "about grabbing the less lethal shotgun and about grabbing the ballistics bunker," a shield. Id. at 29. And both proceeded to the scene.

Upon her arrival, Sgt. Folendorf described how Evans had a "firearm to his right temple;" he was wearing a uniform, "dress blue," Id. at 133, and appeared "very agitated." Id. at 134. "This was extremely serious," she said. Id. at 126, 134. "We all had our weapons drawn." Id. at 132. She called the SWAT commander, but did not receive a response. Id. at 134.

When Evans was asked over and over again to put the gun down, he kept saying no, "I can't do that." Id. at 136. As the standoff went on, Sgt. Folendorf

thought Evans “was getting a little more amped up and agitated, and that’s when he just yelled out you’ve got two minutes and, to me, that meant you have two minutes to give me the phone or I’m going to shoot one of these citizens out here that we had told to go back in, he’s going to shoot one of us, or he’s going to shoot himself.” Id. at 138 (emphasis added).

Said Sgt. Folendorf: “It takes a fraction of a second for anyone to turn a firearm in the direction of a citizen or law enforcement and fire that gun.” Id. at 140.

Michael Ramos, a Washington County Deputy on patrol was also dispatched to the scene. Once there he saw Evans moving his gun “between his chest and his head.” In Ramos’ view, “[Evans] didn’t aim it at us, but kind of flagged us. Like when moving the gun, just kind of points in our direction. I don’t know if it was intentional or not.” Id. at 102 (emphasis added). He thought Evans had pointed the gun at the officers, “in our direction a time or two.” Id. at 103 (emphasis added). He was concerned about a “loaded gun in a crosswalk.” Id. at 105.

The scene was fluid, tense, unpredictable and dangerous. When Evans turned for a last time, Krook perceived eminent danger. In his statement, offered to the Grand Jury, Deputy Krook described Evans’ motion with the gun as getting

“close to where it’s pointing at us, and I’m getting uncomfortable. . . I’m worried that if you know, if he did pull the trigger while he’s got his head turned the bullet is going to come at us, or at you know me, Ramos or Ramirez, um so I and at one point I make a comment like I’m not comfortable with him turning his head.”

Krook Statement at p. 6.

Deputy Krook continued: “Um, and so he turns his head again and this time um it goes, it’s further than it has in the past to where his it’s for sure at me and I felt that it was even past me and at Ramos so I fired um I just fired. I know uh a few rounds um he kinda goes limp and falls over.” Id.

In his statement to the BCA, Krook emphasized that, in his view, Evans’ gun was “pointed at Ramos so I felt that if he would’ve pulled the trigger then it wouldn’t you know come at one of us and hit one of us or hurt one of us and so that’s what I was concerned about.” Id. at 8. He added that it “seemed like he wanted the phone and then he was gonna kill himself and so I didn’t want him to take one of us with him was my big worry.” Id. at 8.

After Deputy Krook fired the initial round of shots, Deputy Ramos said Evans “slumped over. He didn’t fall over, and he still had the gun to his head. Id. at 71. Deputy Ramos ran towards Evans, having had no training as to what to do at this point. Id. at 72.

“Deputy Ramirez recalled the terror at his moment: “[Evans] could turn the gun on me. He may feel cornered.” Id. at 73.

After the first volley of shots, Ramirez said Evans’ “hand came down like this, and I was in the line of fire so I moved. . .” The second round of shots were fired as Krook approached, because Evans’s gun was still pointed at Ramirez. Id. at 74. “I was scared in that moment. I didn’t know if the gun was going to go off or not. . .,” Ramirez said. Id. at 79. “I can’t speak for Krook and what he saw or what he observed.” Id. at 86. When he was down, after the first volley, and the gun was pointed at him, Ramirez was asked, “did you feel like that was a deliberate move on his part” and he responded, “I didn’t know, that’s why I was afraid. I didn’t know if he was going to shoot or.” Id. at 92.

Deputy Ramos agreed with Deputy Krook’s perception. It “looked like the gun pointed in our direction, and then, from about a few inches away from me, Deputy Krook was on my right and fired a few shots at Mr. Evans.” Id. at 109. The gun was pointing forward. Id. 130. Deputy Ramos was “[u]ncomfortable. At that point I raised my rifle and pointed it at him.” Id. at 110. There was no question but that Evans’ gun was pointed “in our direction, yeah.” Id. at 111. Even if he had been hit with a less lethal beanbag, Ramos thought Evans could still pulled the trigger, shot to kill. Id. at 116.

Ramos would retrieve Evans' gun, with a bullet in the firing chamber. Id. at 172.

Concerning the second round of shots, Sgt. Folendorf recalled when Evans "went down, he still had the gun in his hand," and usually when someone is shot, "they drop their gun and that was not the case." Id. at 144. Once the initial shots were fired, she thought Evans' gun was "turned with the muzzle right towards myself, Deputy Krook and Deputy Ramos." Id. at 149. She explained, when approaching the downed Evans, "You have to keep moving forward." Id. at 150. "If he has one weapon, we need to make sure he doesn't have more." Id. at 151. She agreed that Krook's second round of shots occurred while Evans still had the gun in his hand. Id. at 151. "I don't know what [Evans's] intentions were or where he was at that point, but if a muzzle of a firearms is pointing at me, I'm not taking the chance of letting him fire it at me or one of my partners." Id. at 152.

At a subsequent meeting with the officers on the scene, Krook told Folendorf "that he saw the gun turn and he saw the muzzle and, as a perceived threat, action was taken." Id. at 155. He said to her, Evans "turned and the gun was facing him." Id. at 156. Deputy Krook continued: "As I get up close the gun falls out and we're kinda like you know around him. The gun falls out and is now starting to point to my other partner so then I fire again at him." Id. at p. 6.

Given the intense and unpredictable setting, Sgt. Folendorf testified, Krook didn't have to wait for an order to shoot: "They're trained and they are not given that badge if we don't think they're capable to do that. I trust every single one of them out there. I've worked with Deputy Krook for years and I think he is – is a more-than-capable deputy." Id. at 163.

7. Subsequent investigation by the BCA concluded that Evans did not discharge his weapon. Id. at 182. Only Deputy Krook fired. Id. at 182. The cause of death: "exsanguination due to multiple gunshot wounds" Id. at 184.

8. Without the expert testimony, the facts of the critical moment offer an intoxicated individual. Who had just made a written request to be killed. Who had a loaded gun in middle of a downtown Lake Elmo Street. Who was a danger to himself and others and who refused to repeated orders to disarm. When this individual he moved his pistol in the direction of law enforcement, Deputy Krook was "forced to make a split-second judgment[s] – in circumstances that are tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation," Graham v. Connor, 490 U.S. 386, 397 (1989).

### **The Expert Testimony that Swayed the Grand Jury to Indict**

This brings us to State's experts, and the omitted testimony favorable to Deputy Krook.

9. Jeff Noble, a “police practices consultant” for twenty-eight years a police officer in Irvine, CA, is now a full time expert witness, charging \$295.00 per hours, \$2,950.00 per day, Id. at 197-198.

Not surprisingly, Mr. Noble found fault. He opined, initially, that Deputy Krook didn’t have adequate cover. Id. at 205. Mr. Noble believed that Evans’ turn of his head was only to see if someone were coming from behind. Id. at 207. That no one warned Evans about turning his head, Id. at 207, leaving aside the fact that Evans wouldn’t comply with reasonable requests. At the seventh turn of the head, Noble discerned that Krook “believes Mr. Evans is holding the gun and he is pointing the gun in the direction of the officers, so he fires and shoots Mr. Evans again.” Id. at 209-10.

Mr. Noble told the Grand Jurors that Krook’s first volley of shots were objectively unreasonable. Id. at 211. Mr. Noble thought he should have first used a beanbag shotgun. Id. at 212. He criticized the BCA agents for not asking the other cops if they feared for their lives, Id. at 221, though Ramos, Ramirez and Folendorf all explained their safety concerns. Noble also said that Evans should have been given a clear warning. Id. at 223. Hence there was, after a forty-minute standoff of a constant back and forth, a failure to communicate. Id. at 213.

As for the second round of shots, Noble saw no reason for Evans to be

approached. Id. at 217. Evans should have been left on the street apparently, while bleeding to death. Id. at 219. He was asked by the Assistant Ramsey County Attorney, “in your opinion, is this a close case?” His answer was unequivocal: “No. No. No,” Id. at 223, that “this force could have been avoided.” Id. at 224.

10. A second expert’s report was submitted on paper, with selected portions read to the Grand Jury. Stuart Robinson, once a local police officer and now of California, thought it “unreasonable to believe that simply because Evans had a gun to his own head, that the deputies were in apparent danger.” Id. at 232. “This was a static situation. Evans never made any threats towards the deputies.” Id. at 233. Robinson also opined that Krook should not have been that close after the first shots. Id. at 235.

Mr. Robinson specifically discounted the statement Deputy Joshua Hutchins, who was not called. In the statement, Deputy Hutchins said he “believed he saw Evans moving his trigger finger in an attempt to fire the gun, but I cannot view that in the video, nor did any other Deputy mention this in their statement.” Id. at 236. Robinson did not mention the balance of Deputy Hutchins’ statement to the BCA where he emphasized thta “unfortunately [Evans] just never put the gun down.” Statement at p. 5; Exh. 8. “He wouldn’t comply.” “He would

not put the gun down.” Id. at 6 “Uh like I said many times he kept moving.” Id. After being shot with the first volleys, Deputy Hutchins remained concerned. “The gun was still to his temple and burned into my mind is the movement of a trigger pulling the Glock, was this movement.” Id. at 7. “It was not a good situation for any of us to be in and he just would not, he just would not put the gun down.” Id. at 8. “He just wouldn’t comply, he just wouldn’t.” Id. After the first volley, Evans continued his danger. In Deputy Hutchins’s perception, “he’s pulling, he’s pulling,” referring to the trigger of Evans’ gun. Id. at 231.

**The Brady Violation: the Omitted Testimony of Chief Steven Frazer**

11. The prosecutors from Ramsey County ended with the live testimony of its experts. If one were to read the Grand Jury transcript in isolation, the impression was that Mr. Noble and Mr. Robinson came to identical conclusions, with nary of dissent to be found anywhere else.

That inference was false. The lawyers from Ramsey County, through their leader, Mr. Richard Dusterhoft, the Chief of the Criminal Division, knew of a contrary opinion, an opinion that held reasonable force was used, that Deputy Krook was justified in what he did and how he did it. Mr. Dusterhoft just made sure the Grand Jurors never heard about it.

12. This is an experienced prosecution team. Naivete cannot be claimed

vis-a-vis the rule mandating the presentation of exculpatory evidence. “A prosecutor should not knowingly withhold evidence from the grand jury which would tend to substantially negate a suspect’s guilt.” State v. Roan, 532 N.W.2d 563, 570 (Minn. 1995)(citing State v. Olkon, 299 N.W.2d 89, 105-06 (Minn. 1980), cert. denied, 449 U.S. 1132 (1981)).

13. The failure to disclose a favorable expert opinion in this case “materially affected the [grand jury] proceeding,” the standard for dismissal we must and do meet. State v. Moore, 438 N.W.2d 101,104-105 (Minn. 1989).

14. Long before contacting and retaining Noble and Robinson, Mr. Dusterhoft presented the Evans investigative file to Prior Lake Police Chief Steven Frazer for his review. With this Motion we attach an Offer of Proof of Chief Frazer’s interactions with the Ramsey County Attorney’s Office. The Court will also hear his subpoenaed testimony on December 9<sup>th</sup>.

15. According to our Offer of Proof, Chief Frazer has trained scores of police officers in the appropriate use of use-of-force during critical incidents, and has testified as an expert witness in that capacity on approximately twenty-five to thirty occasions.

In light of his abundant expertise, Chief Frazer was contacted by Richard Dusterhoft in early December 2018. He had worked with Mr. Dusterhoft on a

number of cases in the past. He remembers their conversations, difficult to forget given the gravity of the case, and the importance of his opinion.

During the first conversation, Mr. Dusterhoft told Chief Frazer that John Choi, the Ramsey County Attorney, and John Kelly, the First Assistant Ramsey County Attorney, had respect for his opinions. That was why they wanted him to review the police reports and videos in the matter concerning Washington County Deputy Krook. Mr. Dusterhoft indicated that, within the Ramsey County Attorney's Office there was disagreement as to whether the shooting was justified, and he sought out his opinion to help resolve the internal office debate. Chief Frazer's impression was that Mr. Dusterhoft sought his opinion, if favorable to the Deputy, to dissuade his office from engaging in the Krook prosecution. To that end, Mr. Dusterhoft supplied the Evans videos and reports. Chief Frazer reviewed the data as requested over the Christmas break.

Chief Frazer was not provided with Mr. Evans' suicide note, which he also believed to be critical information in evaluating the case. Nor the note Evans left for his, confirming his evident desire to be killed by the on-the-scene officers.

During his second conversation with Mr. Dusterhoft, in late December or early January 2019, Chief Frazer reviewed with him video from that night, including the critical moments before the shots were fired. During this

conversation, Chief Frazer told Mr. Dusterhoft that in his opinion Deputy Krook's conduct was justified. Chief Frazer could see what happened. He did not need to review Tru View crime scene software, as Mr. Dusterhoft infers in a September 23, 2019 self-serving statement. Nor was Chief Frazer ever informed he was not qualified to render an opinion because he did not work for what is described in Mr. Dusterhoft's statement as a "smaller agency." Mr. Dusterhoft was aware Chief Frazer once worked for the Roseville Police Department. He was never told, when first approached by Mr. Dusterhoft, that he would not be a witness. Nor was there ever a claim that his opinion was skewed by "loyalty or bias," as Mr. Dusterhoft now alleges. Chief Frazer was always been willing to testify consistent with his opinion, and he disagrees with Mr. Dusterhoft's suggestion that he was not. Mr. Dusterhoft's further assertion, set out in his September 23, 2019 statement, that their conversations about the Evans shooting had no "significance" to him is also incorrect. He specifically told Chief Frazer that his opinion would be forwarded to John Choi and John Kelly, in order to assist in their evaluation.

Our offer of proof continues. When the Indictment was filed against Deputy Krook, Chief Frazer called Mr. Dusterhoft and told him that the law enforcement community was aware that he had rendered an opinion that this was a justifiable shoot, and that Dusterhoft should disclose it to the defense. Mr. Dusterhoft did

not dispute that requirement. Chief Frazer's conclusions and opinions were not a part of the discovery provided to the Defense.

16. On August 21, 2019, a month after the Instant indictment and after initial discovery had been disclosed, Dusterhoft telephoned Chief Frazer, and further provided his memory of their conversations and his work on his office's behalf. In that conversation, Mr. Dusterhoft suggested Mr. Choi had no involvement with Chief Frazer's review, and that Mr. Choi was unaware of his opinion. Mr. Dusterhoft also mentioned that his and John Kelly's memory was that Chief Frazer was only asked about the supervisor's conduct in the Krook matter, and not Mr. Krook's own behavior. Chief Frazer told Mr. Dusterhoft that was incorrect, and asked him why he was attempting to diminish what had been said between the two of them, the nature of his opinion, who knew about it, and when.

17. Thereafter, the Defense team found out, as Chief Frazer had anticipated, that he had been consulted. Chief Frazer met with Deputy Krook's defense lawyers on September 4<sup>th</sup>, 2019. Only after our awareness of his opinion did the prosecution decide to disclose Mr. Dusterhoft's conversation with Chief Frazer and his favorable, omitted testimony, an opinion wholly inconsistent with the expert testimony adduced before the Grand Jury.

18. In a September 23, 2019 narrative statement, which will be offered at the Omnibus Hearing, Mr. Dusterhoft admits discussing with Chief Frazer his opinion, which was that “he did not see an issue with the tactics employed.” According to Mr. Dusterhoft’s statement, “Frazer also said that he thought that Krook was justified in using deadly force.”

But Mr. Dusterhoft then couches, unfairly, the interaction. He wasn’t interested in Chief Frazer’s testimony, because “regardless of Frazer’s opinion, he would not be a witness because of his leadership position, at that time with the Ramsey County Sheriff’s Office, and subsequently with the Saint Paul Police Department, and status as an active law enforcement officer.” This qualifying detail was never conveyed to Chief Frazer, either.

The dispute this Court must resolve is whether Chief Frazer’s opinion was 1) known to the prosecution, and 2) whether it should have been disclosed the Grand Jury. That answer to both questions is yes.

19. In most prosecutions, “a presumption of regularity attaches a grand jury indictment, and it is a rare case where an indictment is invalidated.” State v. Penkaty, 708 N.W.2d 185, 196 (Minn. 2006). Our Supreme Court has not suggested a process of rubber stamping, however. “[A]n indictment should be dismissed if the state knowingly engaged in misconduct that substantially

influenced the grand jury's decision to indict and if we have grave doubts that the decision to indict was free of any influence of the misconduct." State v. Morrow, 834 N.W.2d 715, 721 (Minn. 2013)(quoting Penkaty, 708 N.W.2d at 196). In evaluating our Motion to Dismiss, this Court must look to the entire transcript and the critical omission. State v. McDonough, 631 N.W.2d 373, 386 (Minn. 2001); State v. Lynch, 590 N.W.2d 75, 79 (Minn. 1999)(same).

20. "As a philosophical and even constitutional matter, since a suspect is entitled to an impartial grand jury, a grand jury kept ignorant of significant evidence favoring the suspect is certainly not 'impartial' in the normal meaning of that word." Sec. 13.12, Nordby and McCarr, *Minnesota Criminal Law and Procedure* (Thomson Reuters 2018), at 96. The Grand Jury is supposed to be an independent fact finder, and that is why Minnesota jurisprudence requires a balanced presentation, where evidence helpful to the target is presented along side what is not. Only when those predicates are in place, can a prosecutor satisfy his obligation to "see that justice is done." Penkaty, 708 N.W.2d at 196.

21. For this Motion, we must make an offer of proof as to what was omitted. Penkaty, 708 N.W.2d at 196; Morrow, 834 N.W.2d at 722. Our offer, attached, is what Chief Steve Frazer will discuss at the December 9<sup>th</sup> hearing. Had this exculpatory testimony been presented, as required by law, Roan, 532

N.W.2d at 570, Chief Frazer’s opinion have countered the testimony of Jeffrey Noble and Stuart Robinson, providing the jurors with reason for a no bill.

Moreover, Chief Frazer’s opinion would have confirmed and corroborated the testimony of the officers at the scene, to wit: how dangerous and unpredictable the situation actually was; how an officer could assume, as Ramirez did, that Evans could “shoot himself or one of us . . .” Id. at 61. Which was how Sgt. Folendorf felt as well, that “he’s going to shoot one of us, or he is going to shoot himself.” Id. at 138 (Emphasis added). How Ramos discerned that Evans’ “gun was pointed in our direction . . .” Id. at 102, “a time or two.” Id. at 103 (Emphasis added). How, after the first round of shots, Evans’ gun was still pointed at the officers, causing Krook to fire the second volley. Id. at 74.

22. Mention, too, must be made of the State’s suggestion, in an email to this Court dated September 29, 2019, of, essentially, no harm no foul in omitting Chief Frazer from the Grand Jury, since the case against Deputy Krook could well proceed by Complaint (citing Rule 17.06, Minn.R.Crim.P. and State v. Pettee, 538 N.W.2d 126, 128 (Minn. 1995)). The use of a complaint to charge a case like this one runs afoul of Minn. Stat. 629.61 (mandating the grand jury “shall inquire . . . (3) into the willful and corrupt misconduct in office of all public officers in the county.”

23. In the same email, the State claims Chief Frazer was not objective and did not review everything he needed to, citing State v. Torkelson, 404 N.W.2d 352, 355 (Minn. App. 1987). The holding of Torkelson was, unlike here, that the expert opinion was not exculpatory, hence any error in failing to disclose, even if there was one, was harmless. This Court will have the opportunity to decide, first hand, the objectivity of Chief Frazer, and the ample reasons why he was approached in the first instance.

### **The Lack of Culpable Negligence**

This Court may wish to avoid the issue of prosecutorial misconduct altogether. The charge is factually unsustainable.

24. Manslaughter in the Second Degree is defined as “culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death . . .” Minn. Stat. 609.205 (1). Under this statute, the query isn’t just about what Deputy Krook perceived. This dialectic must be resolved: “the victim’s negligence is relevant on questions of whether the defendant was negligent, and, if so, whether that negligence was the proximate cause of the victim’s [death].” State v. Crace, 289 N.W.2d 54, 60 (Minn. 1979).

The question we raise is whether Mr. Evans was negligent. And if so, did his negligence at least contribute to this tragedy; was it, in other words, an

intervening factor. State v. Schaub, 44 N.W.2d 61, 64 (Minn. 1950); Crace, 289 N.W.2d at 60. If these inquires are answered in the affirmative, the evidence, in our context, is deemed “exonerating.” State v. Florence, 239 N.W.2d 892, 904 (Minn. 1976).

25. Mr. Evans’ intervening conduct caused the tragedy. Blood draws reveal a high reading, .204 BAC, well over .08, the standard measure of impairment.

He alone sought to have the officers harm him, by writing, and while drunk, an explicit suicide note forgiving their shooting before it happened.

When repeatedly asked, he refused, while drunk, to put down his weapon, thereby causing fear of death in the officers on the scene.

Thus Evans is at fault, a critical factor the Grand Jury did not consider. No instructions were given on this point.

25. Manslaughter in the Second Degree requires proof of both “an objective and a subjective element.” State v. Frost, 342 N.W.2d 317, 320 (Minn. 1983). The objective element is “gross negligence and the subjective element [is] recklessness in the form of an actual conscious disregard of the risk created by the conduct.” Id. Under this statute, “culpable negligence” is “more than ordinary negligence” and “more than gross negligence.” State v. Beilke, 127 N.W.2d 516,

521 (Minn. 1964).

27. Deputy Krook could not be negligent, “culpably or otherwise,” unless he breached a duty. And he could not breach a duty, holds our High Court, when facing the irrationality of “the narcotic addict.” State v. Back, 775 N.W.2d 866, 870 (Minn. 2009)(quoting Pietila v. Congdon, 362 N.W2d 328, 333 (Minn. 1985)(quoting Goldberg v. Housing Authority of City of Newark, 186 A.2d 291, 297 (New Jersey 1962)). That’s where the contributory fault is to be found – within the diminished and impaired blood stream of Mr. Evans. Substitute “narcotic addict” for “binge drinker” and we find a similar irrationality: someone too intoxicated to make wise decisions about a thing called life.

28. Beyond his contributory and intervening negligence, Mr. Evans committed the following crimes:

-He was prohibited from carrying a pistol while under the influence of alcohol. Minn. Stat. 624.7142, Subd. 1. The grand jurors should have been instructed as to this black letter law too. The State’s expert witnesses did not discuss this exculpatory, statutory factor. The Grand Jurors knew nothing of it.

-Mr. Evans also violated Minn. Stat. 609.50, interfering with a police officer while the officer is engaged in the performance of his official duties. Evans decided, many times, to not obey the orders to drop his gun. He obstructed and

interfered with established legal process. See State v. Krawsky, 426 N.W.2d 875, 877 (Minn. App. 1988)(describing the crime).

-Evans conduct was disorderly, needless to say. Minn. Stat. 609.72.

-He brandished a firearm, in violation of Minn. Stat. 609.11, Subds. 4 and 5.

-By pointing the gun at the officers, Evans attempted a First Degree Assault. Minn. Stat. 509.221, Subd. 2. He created a substantial risk of serious bodily harm to the officers on the scene. State v. Lindsay, 654 N.W.2d 718, 723 (Minn. App. 2002)(defining the predicate risk).

29. Deputy Krook's response to Evans' gun pointing lawlessness was entirely reasonable. After observing these crimes, he was authorized to make an arrest, and was not barred from doing so by what was his reasonable use of force. See Minn. Stat. 629.34; 629.40, Subd. 2 (authorizing the arrest).

The “calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgements – in circumstances that are tense, uncertain and rapidly evolving.” Schulz v. Long, 44 F.3d 643, 648 (8<sup>th</sup> Cir. 1995). What Deputy Krook knew “at the time of his decision” determines the reasonableness of his conduct. Johnson v. United States, 135 S.Ct. 2551 (2015); Cole v. Bone, 993 F.2d 1328, 1333 (8<sup>th</sup> Cir. 1993). If he believed, and he did, that Mr. Evans “pose[d] a threat of serious physical harm,

either to the officer or to others,” he could shoot him. Tennessee v. Gardner, 471 U.S. 1, 11-12 (1985). That lesser harms may have been available to Deputy Kroof – a bean bag shot says Noble – does not vitiate the fact that Mr. Evans provoked his own death. See County of Los Angeles v. Mendez, 137 S.Ct. 1539, 1543 (2017).

30. Minn. Stat. 609.066 provides a complete defense, once we have shown, as the Grand Jury transcript does, that Deputy Krook shots were necessary to protect himself and the other officers from great bodily harm or worse, their demise. Mr. Evans caused his own death, a death he had written would happen and did.

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Respectfully submitted,

/s/ Paul Engh

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