STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR THE COUNTY OF KENT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiffs,

CASE NO. 22-10260-FC

vs. HON. CHRISTINA ELMORE

CHRISTOPHER SCHURR,
Defendant.
_____/

DEFENDANT'S MOTION AND BRIEF IN SUPPORT OF MOTION TO QUASH BIND-OVER AND DISMISS THE CHARGE AGAINST DEFENDANT

The district court erred when it bound this matter over to the Circuit Court, holding that the prosecution had established probable cause that Officer Christopher Schurr's actions on April 4, 2022 during the arrest of Patrick Lyoya met all four elements of second degree murder. Specifically, the district court erred when it found probable cause that Officer Schurr's use of deadly force while making a lawful arrest was unjustified – the only element at issue at the preliminary examination. The court noted that there were three separate ways in which Officer Schurr's use of deadly force could have been justified as a matter of law: (1) the common law fleeing felon rule, (2) force in response to force being used by the person being arrested, and (3) self-defense. The court erred in its interpretation of the law and the application of undisputed facts as to all three justifications.

First, the court erred as a matter of law when it held that the common law fleeing felon rule required not only that Patrick Lyoya was (1) fleeing and (2) committed a felony, but also that Officer Schurr was compelled to satisfy a third

prong: that it was "necessary" for him to use deadly force to prevent Patrick Lyoya's escape. Even if "necessary" is a prong of the fleeing felon rule, the court erred when it applied the incorrect standard of law by holding that it had to be "reasonably necessary." It also erred in considering only the "instant" that Officer Schurr used deadly force when finding there was probable cause that his actions were "reasonably unnecessary."

Second, the court erred as a matter of law when it conflated the common law rule that police officers are authorized to use deadly force when confronted with force while making a lawful arrest, with self-defense, wrongfully negating the common law. Specifically, the court erred when it held that this common law rule is not a distinct theory of justification from that of self-defense.

Third, the court erred as a matter of law when it applied the civilian self-defense standard to a police officer acting within the scope of the officer's duties. The correct standard for police officers (who have no duty to retreat, and, indeed, have a duty to pursue) is that no reasonable officer could have believed Lyoya posed an imminent threat of death or serious bodily injury when he disarmed Officer Schurr of his TASER. Further, the district court erred when it found there was probable cause that Officer Schurr did not act in self-defense under either standard, and when the prosecution failed to present any evidence of non-justification.

Finally, this Court should quash the bind-over order because the statute charged, as applied to Officer Schurr, violates his right to due process because the element of justification is void for vagueness.

BACKGROUND

I. The Incident

On April 4, 2022, Defendant Grand Rapids Police Department ("GRPD") Officer Christopher Schurr was on duty alone, patrolling the city's southeast side in his police vehicle. D. Ct. Op. at 1. Officer Schurr approached, from behind, a tan Nissan Altima that was traveling unusually slow on Kalamazoo Avenue. Believing that the Nissan matched the description of a reported stolen car, Officer Schurr ran the vehicle's license plate. The responsive report showed that the plate was registered to a 2015 Ford Fiesta, rather than the Nissan to which it was attached.[1] After learning the plate did not match the vehicle description, Officer Schurr turned his patrol car around to find the Nissan. Once he located the Nissan on an adjacent street, Officer Schurr initiated a traffic stop at approximately 8:11 AM.[2] Def. Ex. A, Video.

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[1] During the preliminary hearing, Wayne Butler, a neighbor and witness to the incident, testified that the neighborhood had a high incidence of stolen cars, including his. Prelim. H'g Tr. at 78:4-15. In 2020 and 2021, respectively, at least 803 and 792 vehicles were reported stolen in Grand Rapids alone and that trend continued into 2022. John Tunison, 8 personal stories of cars being stolen during large surge in West Michigan, MLive, Feb. 4, 2022, https://www.mlive.com/news/grand-rapids/2022/02/8-personal-stories-of-cars-being-stolen-during-large-surge-in-west-michigan.html.

[2] There is no dispute here about the validity of the traffic stop. By Michigan statute, it is a crime "to carry or display upon a vehicle any…registration plate not issued for the vehicle or not otherwise lawfully used under this act." Violation of the statute is a misdemeanor punishable by imprisonment for not more than 90 days, or by a fine of not more than $500.00, or both. MCL 257.256. Contrary to Lyoya's family attorneys' claims, Officer Schurr did not see the race of the occupant of the vehicle until after he got out of the car.

Before Officer Schurr could fully exit his car, the driver of the Nissan, who was later identified as Patrick Lyoya ("Lyoya"), quickly stepped out despite Officer Schurr's commands to "stay in the car".[3] Alarmed, Officer Schurr walked towards Lyoya and again commanded him to get back in his car. D. Ct. Op. at 2. Lyoya did not comply or otherwise verbally respond. *Id.* Officer Schurr approached Lyoya and requested his identification. As Lyoya had yet to acknowledge or respond, Officer Schurr asked him if he spoke English, to which Lyoya responded, "Yes." *Id.*; Def. Ex. A at RFN 1,701. Officer Schurr asked again whether Lyoya had a driver's license. *Id.*; Def. Ex. A at RFN 1,840. After Officer Schurr's seventh request for identification, Lyoya told the Officer that his license was in the car. Officer Schurr calmly told Lyoya to "get it for me." Def. Ex. A at RFN 2,282. Lyoya opened the driver's side door of his car and asked the passenger to get his license. *Id.* at RFN 2,516.

Lyoya had lied to Officer Schurr, as there was no valid license in the Nissan. Lyoya, who had an active warrant out for his arrest for domestic violence and was on bond pending sentencing for an OWI third offense, did not want Officer Schurr to discover that the Nissan contained stolen identifications that Lyoya had been using to commit additional crimes. Prelim. H'g Tr. 1 at 187:2-194:23; Def. Exs. C, C1, D. As the passenger, later identified as Aime Tuyishime, searched in vain for a license that was not there, Lyoya abruptly closed the car door and turned to walk away

[3] The traffic stop and aftermath thereof were captured on video recordings from three separate sources: (1) the police car's dashboard camera; (2) the officer's body-worn camera; and (3) cell phone video taken by the passenger in Lyoya's vehicle, Aime Tuyishime. Unless otherwise noted, the recitation of these background facts is based on the Court's review of those videos in conjunction with one another as presented in Defense Exhibit A and will be referenced by the Relative Frame Number ("RFN") located in the center of the video.

from Officer Schurr towards the front of the car in an attempt to escape from the officer and distance himself from the contraband in the car. D. Ct. Op. at 2. A later search of the vehicle led to the discovery of a bag with empty Budweiser beer cans, several stolen identification cards, driver's licenses, Bridge Cards, a social security card, and credit cards for individuals other than Lyoya. Prelim. H'g Tr. 1 at 186:22-194:23; Def. Exs. C, C1, D.

Seeing Lyoya's movement, Officer Schurr tried to stop him with verbal commands: "No. No. Nope. Stop. Stop." Def. Ex. A at RFN 3,182. Lyoya did not stop. In quick succession, Officer Schurr reached with his right hand for the top of Lyoya's right arm to attempt to restrain and handcuff Lyoya while continuing to command, "Stop. Put your hands behind your head." Def. Ex. A at RFN 3,232. Lyoya pulled away, avoiding restraint and struck Officer Schurr. *Id.* at RFN 3,271-3,302. In the middle of the road, the struggle between Officer Schurr and Lyoya continued while Officer Schurr repeatedly attempted to detain Lyoya and Lyoya fought to break away. *Id.* Lyoya eventually broke free from Officer Schurr's grasp and ran around the back of the Nissan into the adjacent residential front yard. D. Ct. Op. at 2.

Officer Schurr pursued Lyoya, yelling at him to stop, and radioed out that the unknown suspect was "running." *Id.*; Def. Ex. A at RFN 3,396. Officer Schurr quickly caught Lyoya in the side yard of a neighboring house, grabbing Lyoya from behind and temporarily stopping Lyoya's flight. Officer Schurr struggled to fully restrain and take control of Lyoya and continued to yell commands at Lyoya to

"stop" and to "get [his] hands behind [his] back," all to no avail. D. Ct. Op. at 2; Def. Ex. A at RFN 4,068. Though Lyoya verbally responded to Officer Schurr saying, "okay," he never stopped fighting and never followed Officer Schurr's commands. D. Ct. Op. at 2. Officer Schurr, consistent with his training, attempted to strike Lyoya with a knee to his midsection several times in an effort to subdue him, with no apparent effect. Rather, Lyoya appeared "completely impervious to the officer's attempts to subdue and restrain him." D. Ct. Op. at 2. Recognizing that he was not able to control Lyoya, Officer Schurr radioed again for more help, "1915. Send me more cars," and issued more verbal commands to Lyoya to, "Stop. Stop resisting!" Def. Ex. A at RFN 4,639-5,158.

As Lyoya continued to resist arrest, the homeowner in the adjacent house, Wayne Butler, came outside. D. Ct. Op. at 2; Def. Ex. A at RFN 3,980. Butler pleaded with Lyoya to follow the officer's orders, saying, "Come on bro. I came down for your own safety, man. Come on, comply with him." D. Ct. Op. at 2. Meanwhile, the passenger of the Nissan, Aime Tuyishime, exited the car and started yelling toward Officer Schurr. Def. Ex. A at RFN 4,350. Butler shouted to Tuyishime to tell Lyoya to comply and get on the ground. D. Ct. Op. at 2. Tuyishime ignored Butler and instead told Officer Schurr, "Don't grab him like that though . . . Nah he good. He not resisting, nothing bro . . ." *Id.* at RFN 4,430. Officer Schurr's efforts to gain control were ineffective as Lyoya again maneuvered out of Officer Schurr's hold and attempted to throw Officer Schurr off of him, while ordering, "[Aime], get the keys!"

to Tuyishime, in an apparent attempt to plan for his escape once he freed himself from Officer Schurr. Def. Ex. A at RFN 4,956.

Breathing heavily, Officer Schurr momentarily stood Lyoya up with his hands behind his back and tried to restrain Lyoya's upper arms with both hands. Despite Lyoya's verbal, "okay[s]," he continued to push forward, attempting to get out of Officer Schurr's hold. *Id.* at RFN 4,851. Officer Schurr repeated his previous commands: "Stop . . . Stop resisting." *Id.* at RFN 5,055-5,144. Lyoya showed no signs of compliance and yelled to Tuyishime two more times to "get the keys!" *Id.* at RFN 5,218-5,433.

Unable to maintain control of Lyoya with any verbal or physical restraints or techniques, Officer Schurr, consistent with his training, pulled his TASER (an acronym for Thomas A. Swift's Electric Rifle) from his duty belt. Officer Schurr aimed the TASER at Lyoya and fired. Before the TASER probes could make contact, Lyoya grabbed the front of the TASER with his left hand and diverted the direction of the probes. *Id.* at RFN 5,641. The first probe, meant for Lyoya, hit the ground. *Id.* at RFN 5,737-5,741.

Trying to catch his breath while fighting for possession of the TASER, Officer Schurr commanded Lyoya to "let go of the TASER." *Id.* at RFN 5,903. Lyoya did not let go, and instead attempted to wrench it from Officer Schurr's grasp. *Id.* at RFN 5,994. Still battling for control, Officer Schurr and Lyoya wrestled to the ground. Officer Schurr again yelled, "Let go of the TASER!" Breathing heavily and groaning with exhaustion, Officer Schurr repeated his command for Lyoya to "Let go of the

TASE…" as the second cartridge discharged into the wet, muddy grass. *Id.* at RFN 6,282.

Balanced on top of Lyoya's back, Officer Schurr attempted to reach over Lyoya's left shoulder with his left hand for the TASER before he was lifted off the ground by Lyoya, who was moving up on all fours. *Id.* at RFN 7,469. Tuyishime, still recording, moved in on Officer Schurr as neighbor Wayne Butler pleaded with Tuyishime again to "tell your man that it ain't going to be no shootout." *Id.* at RFN 6,621. Lyoya, having gained exclusive control, switched the TASER to his right hand as Officer Schurr tried to stabilize himself on Lyoya's back while his feet dangled in the air. *Id.* at RFN 7,442; RFN 7,452; RN 7,459; RFN 7, 469, RFN 7,491; D. Ct. Op. at 2. With both legs suspended off the ground and contact lost with the device, Officer Schurr started to fall to the left while Lyoya continued rising off the ground with sole possession and control of the TASER. *Id.* at RFN 7,452; RFN 7,516; D. Ct. Op. at 2. All the while, Officer Schurr continued to shout the command, "Let go of the TASER!" and "Drop the TASER!" *Id.*

After fighting to regain control of his TASER for over a minute without success and after commanding Lyoya to let go of the TASER five times, Officer Schurr reached for his service weapon, his right leg still suspended off the ground while Lyoya twisted with the TASER in his right hand up and to the left, turning his body towards Officer Schurr. *Id.* at RFN 7,442; RFN 7,483; RFN 7,491; RFN 7,502; RFN 7,504. With Lyoya continuing to force himself up, a completely exhausted Officer Schurr used his right hand to draw his service firearm and aimed

it at Lyoya. As he gasped for air, Officer Schurr yelled, "Drop the TASER!" one final time before firing a single shot.

At the preliminary hearing, the prosecution offered testimony from two experts. First, the Kent County medical examiner who performed the autopsy on Lyoya, Dr. Stephen Cohle, stated that Patrick Lyoya's cause of death was homicide by a gunshot wound to the back of the head.[4] People's Ex. 1 at 5:7-8. Dr. Cohle testified that the gunshot wound was consistent with a suspect who had been turning his head to the left, not looking down at the ground, at the time he was shot. *Id.* at 15:17-16:13. Dr. Cohle also testified that Lyoya's vitreous fluid alcohol level around the time of his death was as high as .33, which was four times the legal limit. *Id.* at 23:1-8. Dr. Cohle also opined that Lyoya was a heavy drinker, after examining Lyoya's liver. *Id.* at 22:20-25:12.

Second, the prosecution called Bryan Chiles, a senior investigations engineer at the TASER manufacturer, Axon. Mr. Chiles testified that Officer Schurr's TASER contained two cartridges capable of projecting electrical probes up to about 25 feet. Prelim. Tr. at 132:14-22. Mr. Chiles testified that the TASER has two modes with different effects: incapacitation and pain. When probes from the cartridges make contact with a person, they deliver electrical energy that will cause the person temporary neuromuscular incapacitation or "NMI". *Id.* at 110:8-111:22. A person struck with the probes is rendered completely incapacitated for around five seconds. Mr. Chiles explained that once both cartridges have been deployed, the "base" or

[4] Dr. Cohle provided sworn deposition testimony on October 11, 2022. The transcript of his sworn testimony was received into evidence by the Court on the stipulation of the parties as People's Exhibit 1.

"handle" of the TASER is still capable of delivering a "drive stun." *Id.* at 147:11-23. A drive stun delivers localized severe pain to the part of the body touching the front of the TASER; however, a drive stun does not result in NMI. Each of the TASER modes can cause great bodily harm and/or death, depending on the contact point. *Id.* at 137:21-140:2.[5]

The defense called GRPD Captain Chad McKersie. Prelim. Tr. 2 at 4. Captain McKersie testified that he trains police officers and is certified as a Master TASER Instructor. *Id.* at 5:5-6:19. He testified that he had reviewed the video and, in his opinion, Officer Schurr had followed the department's policies, procedures, and training, and that his use of deadly force was justified under the totality of the circumstances. *Id.* at 7:4-17; 31:3-6. Captain McKersie also testified that Officer Schurr appropriately pursued Lyoya on foot, followed the Michigan Commission on Law Enforcement Standards (MCOLES) continuum of force measures and techniques in an attempt to control Lyoya's active aggression, and utilized the other reasonable force options that were available to him and within his abilities at the time. *Id.* at 15:17-19:7. Captain McKersie testified that MCOLES essential functions required officers to " . . . pursue fleeing suspects on foot both day and

[5] Mr. Chiles also testified that officers are trained to pay attention to and avoid touching deployed wires from the TASER because coming into contact with a barbed probe, any metal part of the probe excluding the barb, a wire that could have been easily damaged, or a wire that remains attached to the TASER while the arc switch is pressed or the TASER trigger is pulled can still complete the circuit necessary to use the TASER and cause NMI, even through clothing, so long as the exposure is close enough to the skin. *Id.* at 137:10-20. A TASER, Mr. Chiles stated, also maintained its ability to re-energize all four probes by pressing the arc switch or pulling the trigger, meaning the device was still fully operational even after both cartridges were deployed. Alternatively, a drive stun in which the device itself makes contact with a target can complete the circuit and cause serious injury, as well. In this case, there was no indication that the cartridges holding the wires were disconnected from the TASER and it is, therefore, presumed that they were still connected and could cause NMI if the arc switch was pressed or the trigger was pulled at any point during the struggle.

night in unfamiliar terrain," and failure to pursue a fleeing suspect could be grounds for cowardice, a form of disciplinary action. *Id.* at 15:25-16:20.

Captain McKersie also testified that Lyoya attempted to and ultimately did forcefully disarm Officer Schurr of his TASER, which is an inherently violent felony under Michigan law. *Id.* at 17:19-18:13. Captain McKersie testified that he saw Lyoya commit at least four felonies, including resisting and obstructing a police officer, assault with a dangerous weapon, possession by a civilian of a TASER, and larceny.[6] *Id.* at 14:24-15:13; 21:6-21. Captain McKersie also explained that GRPD's firearms training taught officers to shoot for center mass, along with other target areas such as the head, noting officers are not trained to avoid headshots. *Id.* at 21:22-23:13. Captain McKersie opined that if Officer Schurr had been "tased," he would have been incapacitated and unable to defend himself or prevent access to the firearm in his duty belt. *Id.* at 26:13-31:6. Under the totality of the circumstances, Captain McKersie attested that Lyoya had control of a weapon capable of causing serious injury or death, it was reasonable for Officer Schurr to fear serious bodily harm or death at the time he used deadly force, and Officer Schurr did everything right in the situation. *Id.* at 29:23-31:6. When asked by the prosecutor why Officer Schurr was fired if had followed his training, Captain McKersie stated that the only reason was the charge itself, brought by the prosecutor, and that there had been no finding that Officer Schurr violated any policies. *Id.* at 37:5-38:2.

[6] The prosecution stipulated that Lyoya also committed the felonies of resisting and obstructing and operating while intoxicated third or fourth. Prelim. Tr. 1 at 189:7-11.

The prosecutor provided no rebuttal evidence and at no time proffered any evidence that Officer Schurr acted inconsistent with his training or otherwise acted unreasonably, or that Officer Schurr was unjustified in using deadly force.

II. Procedural History

On June 9, 2022, the Kent County Prosecutor's Office brought one count of second degree murder against Officer Schurr. On June 10, 2022, Officer Schurr made his initial appearance before the district court and was arraigned on the sole count in the complaint. The district court presided over the preliminary examination on October 27, 2022 and October 28, 2022, and heard argument on the motion on October 28, 2022. The court issued its ruling on October 31, 2022, along with a written opinion, in which the court bound the case over to the Circuit Court for trial.

ARGUMENT

I. The Burden of Proof, Standard of Review, and Elements of the Offense

A. Burden of Proof at a Preliminary Examination

In order for a prosecutor "[t]o meet his burden of proof at the preliminary examination, [he] must present 'enough evidence on each element of the charged offense to lead a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt.'" *People v. Cohen*, 294 Mich. App. 70, 74 (2011) (quoting *People v. Perkins*, 468 Mich. 448, 452 (452)) (internal brackets omitted); *see also* MCR 6.110. However,"[w]here a prosecutor fails to present evidence on each of the elements of a charged offense, the district court

abuses its discretion in binding over the defendant for trial." *People v. Herrick*, 277 Mich. App. 255, 258 (2007).

B. Standards of Review of a Preliminary Examination's Bind-Over Order

This Court reviews a district court's legal rulings *de novo*. A party must challenge a bind-over decision in the circuit court, which "has jurisdiction over all felonies from the bind-over from the district court unless otherwise provided by law," prior to any plea or trial. MCR 6.008(B). This Court reviews a lower court's ruling on questions of law, as well as "questions of constitutional and statutory interpretation," *de novo*. When reviewing a lower court's bind-over decision, this Court "must consider the entire record of the preliminary examination." *People v. Drake*, 246 Mich. App. 637 (2001).

This Court reviews a district court's findings of fact for an abuse of discretion. *People v. Magnant*, 508 Mich. 151, 161 (2021). "An abuse of discretion is found only where an unprejudiced person, considering the facts upon which the court acted, would say there was no justification or excuse for the ruling." *People v. Orzame*, 224 Mich. App. 551, 557 (1997).

C. The Elements of Second Degree Murder

For the district court to find probable cause on a charge of second degree murder, the prosecution must present evidence to establish that probable cause exists for each of the following four elements: "(1) a death, (2) caused by an act of the defendant, (3) absent circumstances of justification, excuse, or mitigation, and (4) done with an intent to kill, an intent to inflict great bodily harm, or an intent to

create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm." *People v. Bailey*, 451 Mich. 657, 669 (1996). Thus, in addition to producing some evidence that a death was caused by a defendant with malice, the prosecution must also provide some evidence at the preliminary examination that the death was unjustified or unexcused. *People v. Goecke*, 457 Mich. 442, 464 (1998).

II. The District Court Erred When It Found Probable Cause on the Elements of Second Degree Murder

The district court erred when it bound this matter over to the Circuit Court, holding that the prosecution established probable cause that Officer Schurr's actions met all four elements of second degree murder. Specifically, the district court erred when it found probable cause that Officer Schurr's use of deadly force while acting in the line of duty was unjustified. The court noted three separate ways in which Officer Schurr could be justified as a matter of law when using deadly force: (A) the common law fleeing felon rule, (B) force in response to force used by the person being arrested and (C) self-defense. However, the court erred in its interpretation of the law and the application of undisputed facts as to all three justifications.

A. The District Court Erred In Its Interpretation of the Law and the Application of Undisputed Facts as to the Common Law Fleeing Felon Rule.

The district court recognized that the Michigan common law fleeing felon rule provides that if Lyoya had committed a felony and was fleeing arrest from that felony, Officer Schurr would be justified in using deadly force to arrest him. The

district court erred, however, when it added a third prong to the fleeing felon rule – that the deadly force used must be "necessary" to make the arrest. Even if "necessary" is a prong of the common law fleeing felon rule – which it is not – the court erred when it applied an incorrect standard of law by holding that it must not only be "necessary" but that it had to be "reasonably necessary" the "instant" in time that Officer Schurr used deadly force.

1. The Common Law Fleeing Felon Rule Has Long Justified Using Deadly Force in the Apprehension of Felons.

The common law fleeing felon rule originated in medieval England at a time when punishment for the breach of a feudal obligation was the forfeiture of all property owned by the person who committed the violation, otherwise known as a felony ("fee" meaning "the fief, feud, or beneficiary estate" and "lon" meaning "price or value"). Nicholas A. Serrano, *Vigilante Justice at the Home Depot: The Civilian Use of Deadly Force Under Michigan's Common Law Fleeing Felon Rule*, 11 Charleston L. Rev. 159, 166 (2017). At its inception, a "felony was not a criminal act per se." Will Tress, *Unintended Collateral Consequences: Defining Felony in the Early American Republic*, 57 Clev. St. L. Rev.461, 463 (2009). Rather, "felony" was synonymous with disloyalty to a lord and "did not necessarily result in the death of the felon." *Id.* at 463-64. After the eleventh century Norman Conquest of England, "felony" lost its meaning as a breach in loyalty to a lord and was instead adopted to indicate a specific group of nine serious and violent crimes punishable by death: "murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny." *Id.*

Historically, anyone could use deadly force to apprehend a suspect who had committed a felony in order to prevent his/her escape.[7] Robert Leider, *Taming Self-Defense: Using Deadly Force to Prevent Escapes*, 70 Fla. L. Rev. 971, 972 (2019). The rationale for allowing deadly force was twofold: (1) Because all felonies were punishable by death, killing a fleeing felon simply hastened an inevitable result, and (2) killing a fleeing felon was viewed "as an act of community defense."[8] *Id*. at 978. The use of deadly force in this manner was not just a right to be exercised at will, but a duty in which private citizens were "required to use their best efforts to either apprehend or kill the assailant." Serrano, *supra* at 168. If a private citizen who was present at the time the felony was committed failed to follow the law and arrest or stop the assailant, he could be punished by fine or imprisonment. *Id*.; 4 William Blackstone, *Commentaries* 171.

In reflecting on the history of "felony," Blackstone wrote that the idea of it "is indeed so generally connected with that of capital punishment, that we find it hard to separate them . . ." *Id*. at 464 (quoting Blackstone, *supra* at 97). "[T]herefore, if a statute makes any new offence [sic] a felony, the law implies that it shall be punished with death, *viz.* by hanging, as well as with forfeiture . . ." Blackstone, *supra* at 98. Around 1620, the number of felonies on the books rose to 34, and in

[7] "[I]n some cases homicide is justifiable, rather by the permission, than by the absolute command of the law . . ." 4 William Blackstone, *Commentaries* 103. A justifiable homicide, Blackstone wrote, was one "committed for the advancement of public justice . . ." (e.g., "[w]here an officer, in the execution of his office, either in a civil or criminal case, kills a person that assaults and resists him" or "[i]f an officer, or any private person, attempts to take a man charged with felony, and is resisted; and, in the endeavor to take him, kills him." Id.

[8] Community defense was viewed as distinct from self-defense or defense of others; it justified deadly force as a way to protect the community from a felon's general "intangible threat" as opposed to "the felon's threat to particular individuals." *Id*. at 978.

1846, at least 160 felony offenses existed – all punishable by death. Tress, *supra* at 464. When Michigan was admitted to the Union in 1837, it adopted much of the old English common law, first as a continuation of governance as part of the Northwest Territory and then in its own state constitution (1850). Serrano, *supra* at 169; *see also* Vincent A. Wellman, *Michigan's Reception of the Common Law: A Study in Legal Development*, 62 Wayne L. Rev. 395, 402 (2017). Thus, several old English common laws, including the common law fleeing felon rule as it exists today, derive from this history and remain binding until they are modified or abolished by the legislature. Serrano, *supra* at 169.

2. Common Law Fleeing Felon Rule Jurisprudence Has Evolved Limiting Justification as a Defense for Vigilanties.

While Michigan's criminal laws, policies, and penalties continued to develop and modernize, the common law fleeing felon rule remained in its original 1846 form. Despite calls from the U.S. Supreme Court to act, Michigan's legislature has yet to pass a law abandoning or overturning the rule, and while many may express their dismay and criticism of such a law that allows deadly force in order to arrest a felon, no matter how serious or trivial the felony, the common law fleeing felon rule is and remains the law in Michigan. *People v. Couch*, 436 Mich. 414 (1990) (holding *Tennessee v. Garner*, 471 U.S. 1 (1990), did not criminalize the use of deadly force to apprehend even a non-dangerous fleeing felon in Michigan and leaving the question of whether police officers should be subject to criminal liability for such use of force to the legislature).

While the common law fleeing felon rule is still the law in Michigan, over the course of the past 100 years, Michigan courts have grappled with what to do with those citizens who would have been viewed as doing their duty to make citizens' arrests in the mid-19th and early 20th century, but would today be seen as vigilantes. The district court relied in large part on those cases that examine the limits of vigilante justice, to hold that police officers, like private citizens making a citizen's arrest, have a duty to ensure that the use of deadly force is "reasonably necessary" to arrest a fleeing felon.

One such case relied upon by the district court is *People v. Gonsler*, 251 Mich. 443, 443 (1930), in which the Michigan Supreme Court held that the lower court did not err in denying a defendant's motion for a directed verdict "on the ground that he was justified in taking the life of the decedent in an effort to effect the latter's arrest." In *Gonsler*, the defendant and his brother were involved in the unlawful sale of moonshine during prohibition, and attempted to stop the decedent from burglarizing the garage that held their illegal contraband. *Id. at* 444. Gonsler proceeded to trial on murder and manslaughter charges, and the jury was asked to determine whether the decedent had actually committed a felony (*i.e.*, whether the decedent had actually made it into the garage) and whether the defendant had notified the decedent he was attempting to apprehend him. *Id*. In denying the defendant's motion for directed verdict, the Court held that, "[t]he undisputed testimony discloses that notwithstanding defendant's claim that they were attempting the arrest of the intruder, neither he nor his brother attempted to

pursue him after the shooting, nor did they call the police." *Id.* at 444. The Court also held that, even if the decedent had been fleeing after breaking into Gonsler's garage, Gonsler and his brother would not have been justified in using deadly force in chasing him down unless they had exercised "reasonable care" to prevent the escape "without violence" and that the killing needed to be "necessary" to prevent the decedent's escape. *Id*. at 446-47.[9]

In another case relied upon by the district court, the Michigan Court of Appeals fifty years after *Gonsler* revisited the issue of "whether a private person may lawfully use deadly force in effectuating an otherwise valid arrest of a felon" after a defendant was convicted of first degree murder and sentenced to a mandatory life term. *People v. Whitty*, 96 Mich. App. 403, 410-11 (1980). In *Whitty*, Gregory Smith (the decedent) pulled a gun, robbed the cash register of a party store, threatened to kill the defendant (who managed the store, but was not present at the time of the threat), and threatened to kill the store clerk if she identified him as the robber before fleeing. *Id*. at 408. The police were called to the store and based on the clerk's description of the deceased, the defendant deduced who the man was and told the police "he would kill Smith if he found him before the police did." *Id*. The defendant went searching for Smith, found him at a hotel, and shot him. *Id.* Testimonies of the event differed; one witness said she saw the defendant push Smith against a window before Smith ran away down an alley and the defendant

[9] The trial court gave the following instruction: "Both officers and private persons seeking to prevent a felon's escape must exercise reasonable care to prevent the escape of the felon without doing personal violence, and it is only where killing him is necessary to prevent this escape, that the killing is justified." *People v. Gonsler*, 251 Mich. 443, 446-47 (1930).

pursued him, while the defendant's testimony was that he confronted Smith about the robbery and threats, "told Smith he was going to take him to the police," and shot Smith after Smith "reached toward his waist for what [the] defendant believed to be a gun." *Id*. at 408-09.

The *Whitty* court reversed the trial court on two grounds: (1) the trial court's jury instruction "limit[ed] the justifiable use of deadly force to circumstances where [the] defendant was confronted with deadly force . . ." and (2) the trial court's jury instruction required that the defendant be in "fresh pursuit" of the decedent from the scene of the crime. *Id*. at 413-14. With respect to the justifiable use of deadly force, it concluded that the "instruction ignore[d] the possibility of the use of deadly force when necessary to stop a felon from fleeing." *Id*. at 413. In its rationale, the court held that the common law distinguished between police officers and private citizens in the necessity of retreat and in the use of deadly force. *Id*. at 411. "While a private citizen could arrest a person who was suspected of committing a felony that in fact occurred, deadly force was justified only if the felony actually occurred and the person against whom the force was used was in fact the person who committed the felony." *Id*. (italics omitted). A police officer, on the other hand, was justified in using deadly force when he reasonably believed a felony had occurred and reasonably believed that the person against whom the force was used had committed the felony. *Id*. The "purpose of permitting force," the court noted, "is to enable the arrestor to apprehend the arrestee . . ." *Id*. at 413.

The *Whitty* court also held that the trial court erred in its jury instruction requiring "fresh pursuit" from the scene of the crime in order for the use of deadly force to be justified. The question of whether deadly force is justified, it concluded, "must be examined in terms of 'fresh pursuit' from the *attempted arrest* . . ." rather than from the scene of the crime, and is determinant in whether the use of deadly force was "necessary." *Id.* at 413-14. Deadly force is probably not "necessary" where "an arrest is attempted but the felon flees the attempt" and then the arrestor "*later* finds the felon again to shoot him without notice." *Id.*

As Michigan and other states examined common law rules regarding citizen arrests and vigilante justice, few states considered whether law enforcement officers should be charged with crimes for using deadly force. In 1985, the U.S. Supreme Court issued the landmark opinion addressing when police officers could be sued *civilly* for excessive force. In *Tennessee v. Garner* (1985), the Court articulated the objectively reasonable standard that must be applied to police officers when evaluating the constitutionality of their use of force under the Fourth Amendment in civil suits, and struck down Tennessee's fleeing felon law as unconstitutional where the felony at issue was a non-violent crime. 471 U.S. 1 (1985). While *Garner* explicitly held that the Tennessee law was not unconstitutional on its face, it set out the reasonableness test that should be applied under the totality of the circumstances to the facts and circumstances under which police officers may be held responsible for a civil excessive use of force claim. *Id.* at 10. "Where the officer has probable cause to believe the suspect poses a threat of serious physical harm,

either to the officers or others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Id.* Further, if a suspect threatens an officer with a weapon or there is probable cause to believe the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape if, where feasible, some warning has been given. *Id.* at 11. Post-*Garner*, many states began adopting the objectively reasonable civil standard as their criminal standard for use of deadly force. Michigan, however, expressly declined to change its fleeing felon rule or apply the *Garner* standard as a means to impose *criminal liability* when the issue was raised just five years later, noting that it was an issue "for the Legislature, not this Court." *See People v. Couch*, 436 Mich. 414, 423 (1990).

In *Couch*, the Court explicitly declined to change this state's fleeing felon rule because it is premised upon the notion that the United States Supreme Court can require a state to criminalize certain conduct, noting that "the power to define conduct as a *state* criminal offense lies within the individual states, not with the federal government or even the United States Supreme Court." *People v. Couch*, 436 Mich. 414, 416 (1990). In *Couch*, the defendant, a private citizen, shot Alphonso Tucker Jr., the decedent, after hearing his car's burglar alarm, witnessing the broken driver's window, and observing Tucker sitting in the front seat of the car stealing his radio. *See People v. Couch,* 176 Mich. App. 254, 255-56. After first drawing his gun, the defendant told Tucker to, "get out of the car and go with me so that I can call the police." *Id.* at 256. Tucker initially complied, but then lunged at

the defendant, who fired a single shot in response. *Id*. The shot missed Tucker who then started running away. *Id*. From 20 to 30 feet away, the defendant fired two more shots at Tucker, who died as a result of those injuries. *Id*. The defendant was charged with manslaughter and raised the use of deadly force to make the arrest of a fleeing felon as a complete defense. *Id*. The trial court agreed and quashed the charge. *Id.*

Upon hearing the case, the Court of Appeals reversed the trial court and adopted the *Garner* reasonableness standard as it applied to private citizens making citizen's arrests, modifying the *Whitty* fleeing felon rule. *See id*. at 259. On further appeal, the Supreme Court of Michigan reversed. Not only did the Supreme Court pronounce that *Garner* did not criminalize the use of deadly force to apprehend even a non-dangerous fleeing felon in Michigan and "never expressed an intent to do so," but it also refused "to change the common-law fleeing-felon rule with respect to criminal liability to conform with *Garner*." *Couch*, 436 Mich. at 417. Instead, the Court declared that "if that state, for whatever reason, chooses not to criminalize such conduct, it cannot be compelled to do so." *Id*. at 416. Therefore, the Legislature is responsible for deciding such questions rather than the Court. *Id*. at 423.

In its holding, the Court recognized that "[w]here the Legislature 'has shown no disposition to depart from the common-law definition, therefore it remains.'" *Id. at* 420 (quoting *People v. Schmitt*, 275 Mich. 575, 577 (1936)) (italics omitted). The common law rule "[t]he Legislature is presumed to have accepted . . . [states:] that

'any private person (and a fortiori a peace-officer) may arrest a fleeing felon . . . and if they kill him, provided he cannot otherwise be taken, it is justifiable . . .'" *People v. Couch*, 436 Mich. 414, 420 (1990) (quoting 4 Blackstone, *Commentaries*, 293) (internal brackets and italics omitted).[10] At present, the Michigan Legislature has not adopted or codified any rule regarding the use of deadly force to apprehend a fleeing felon as it relates to police officers. Therefore, police officers using deadly force are bound and governed only by common law, including the fleeing felon rule.

The Michigan Court of Appeals subsequently released two published opinions discussing the fleeing felon rule post-*Couch*: *People v. Fiedler* (involving a police officer) and *People v. Hampton* (involving a private citizen). In *Fiedler*, the court reversed the circuit court's order to quash an involuntary manslaughter information charge. *People v. Fiedler*, 194 Mich. App. 682, 684 (1992). In that case, the defendant police officer received a "be on the lookout" (BOLO) bulletin for a black male wanted on an open murder charge. *Id*. The officer arrived at the neighborhood block where the suspect was reportedly located and proceeded to request identification from a black male named Norris Maben, the decedent, who was located within one of the apartments within the block. *Id*. at 685. Maben provided his name, but then ran from the apartment and leapt out a window before the defendant shot at him three times, hitting Maben once in the chest and killing him.

[10] In *Couch,* a majority of justices agreed that *Tennessee v. Garner* did not modify Michigan criminal law and that the question of changing the fleeing felon rule was better left to the legislature. *See* Serrano, *supra* at 185. The plurality opinion presumed that the legislature had adopted the *Gonsler* manslaughter instruction for private citizens because the legislature had not created a law stating otherwise. *Id*. at 187. However, there was no majority that agreed on which version of the common law fleeing felon rule to follow and, therefore, "the rationale specific to the lead opinion [(i.e., the *Gonsler* jury instruction)] should not be considered binding precedent going forward." *Id*. at 185.

Id. at 686. The owner of the apartment testified that the "defendant never told the occupants of the apartment why he was there or for whom he was looking . . ." *Id.* Later, the defendant told another officer that he thought the decedent was the BOLO suspect, but was mistaken. *Id.*

Among the reasons for the circuit court's granting of the motion to quash was its determination that no crime was committed because the killing of the decedent was justified under the fleeing felon rule. *Fiedler*, 194 Mich. App. at 688. The Court of Appeals, however, determined that the lower court had "resolved conflicts in the testimony" by deciding that the defendant reasonably believed the decedent was the BOLO suspect and was, therefore, justified in using force against him. *Id.* at 694. Because the testimony presented at the preliminary examination left the questions in dispute – mainly the identity of the BOLO suspect – the Court of Appeals determined they were to be properly resolved by the trier of fact. *Id.* In *Fiedler*, the court relied on the *Whitty* interpretation of the fleeing felon rule. *Id.* at 693-94. Therefore, the only questions that remained to be answered by the trier of fact were (1) whether the defendant police officer reasonably believed the murder had been committed, and (2) whether the defendant police officer reasonably believed the decedent was the BOLO suspect who had committed the murder, and accordingly, whether the use of deadly force was justified against the decedent. *Id.* at 694.

In the *Hampton* opinion, decided at the same time as *Fiedler*, the court also reversed the trial court order to quash a murder information charge – in this instance, however, against a private citizen. 194 Mich. App. at 594. In *Hampton*, a

homeowner awoke to a door of his house being kicked and witnessed a man walking away and subsequently kicking in the garage door of a neighbor's house before stealing a lawn mower. *Id*. The private citizen defendant opened his house door and fired one shot at the man, who died of a gunshot wound to the head. *Id*. Noting that while MCL 764.16 provides for the occasions when a private citizen "may make an arrest for felonies committed in their presence," no Michigan statute "address[es] the issue [of] whether a private citizen may use deadly force." *Id*. at 596. Therefore, the common law controlled. *Id*.

The Court of Appeals again noted the two circumstances laid out in *Whitty* when deadly force may justifiably be used by a private citizen: (1) "where the person making the arrest is met with force from the person being arrested" and (2) "where force is necessary to prevent the flight of a suspected felon." *Id*. (quoting *People v. Whitty*, 96 Mich. App. 403, 411 (1980)). Unlike the rule cited in *People v. Fiedler* for police officers, the fleeing felon rule the *Hampton* court recited for private citizens added both a knowledge component, *as well as a necessity component*. *Id*. at 596-97. For a private citizen's use of deadly force against a fleeing felon to be justified, the following circumstances must be present: (1) a felony must have actually occurred, (2) "the fleeing suspect against whom force was used must be the person who committed the felony," and (3) "the use of deadly force must have been necessary to ensure the apprehension of the felon." *Id*. (internal quotations omitted).

3. The District Court Erred When It Failed to Adhere to the Common Law Fleeing Felon Rule as it Existed in 1846 and Added a "Necessity" Requirement.

The district court held that, under the common law fleeing felon rule, the use of deadly force by a private citizen and a police officer alike is justified if: "(1) evidence shows that a felony actually occurred, (2) the fleeing suspect against whom force was used was the person who committed the felony, and (3) the use of deadly force was 'necessary' to ensure the apprehension of the felon. *People v Spears* . . ." D. Ct. Op. at 11. After determining as a matter of law that Officer Schurr should be held to the same standard as private citizens seeking to arrest a fleeing felon, the court bound the case over for the jury to determine "the question of whether the use of deadly force was "necessary to ensure the apprehension of the felon." *Id.* The court further held that, "applying the probable cause standard, there is at least some evidence from which a person of average intelligence could conclude that defendant's shooting of Lyoya in the back of the head was not reasonably necessary to prevent his escape." *Id.*

The district court erred in two ways. First, it erred in finding that the 1846 common law fleeing felon rule as applied to police officers acting in the line of duty consisted of three prongs: "[T]he use of deadly force is justified if: (1) evidence shows that felony actually occurred, (2) the fleeing suspect against whom force was used was the person who committed the felony, *and* (3) the use of deadly force was "necessary" to ensure the apprehension of the felon." D. Ct. Op. at 10-11.[11] Second,

[11] "It has been suggested that Michigan is the only state that continues to adhere to the rule in its strictest common law form." D. Ct. Op. at 11 n. 13 (citing Chad Flanders and Joseph Welling, *Police*

even if the "necessity" prong of the rule applies to law enforcement officers making a valid arrest of a fleeing felon, the district court failed to apply that rule correctly, when it created a new, heightened standard by adding that there was probable cause to believe it was not "reasonably necessary" for Officer Schurr to use deadly force the "instant" he fired his service weapon.

a. The Common Law Fleeing Felon Rule Does Not Require that Officer Schurr's Use of Deadly Force Was "Necessary."

As discussed above, law enforcement officers and private citizens in the process of making a lawful felony arrest have historically been authorized to use deadly force if the felon fled or otherwise resisted. Given that the penalty for a felony conviction was death by hanging for much of Michigan's pre-statehood early history, it is no surprise that if a felon fled, officers had the right to use deadly force to apprehend the felon before he got away.[12] In 1846, the common law fleeing felon rule consisted of only two elements: (1) a felony was committed and (2) the person who committed the felony was fleeing or otherwise resisting arrest. *See* Leider, *supra* at 979; *see* Blackstone, *supra* at 293. The law was intended to be clear, and thus, no additional "reasonableness" or "necessity" requirement existed.

As laid out by the Michigan Court of Appeals and Michigan Supreme Court, the "necessity" requirement is exclusively for private citizens who are held to a higher "knowledge" standard when it comes to determining whether a felony has

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Use of Deadly Force: State Statutes 30 Years after Garner, 35 St. Louis U. Pub. L. Rev. 109, 122 (2015)).

[12] During oral argument at the preliminary examination, the District Court questioned whether the felony had to be a common law felony at the time. Here, Lyoya committed at least two common law felonies at the time deadly force was used: mayhem and larceny.

actually been committed and whether the person fleeing committed the felony. *People v. Whitty*, 96 Mich. App. 403, 411 (1980). Rightfully, private citizens who were untrained and meant to assist police officers in the capture of a felon had the additional requirement of assuring who they were killing and what crime the person had committed, as well as assessing whether deadly force was necessary in order to apprehend the felon, before using deadly force.[13] Indeed, courts have routinely questioned whether it was really "necessary" for the private citizen to make the arrest at all, instead of calling the police.

On-duty law enforcement officers, on the other hand, are required as part of their duties, and for the general safety of the community, to stop an assailant and are held to the lower "reasonable belief" standard (*i.e.*, the officer reasonably believed a felony had been committed and reasonably believed the assailant was the person who committed the felony) because of their training and legal authority. Law enforcement officers have no option to call the police, as it is their job to make the arrest.

Whitty recognized the distinction between private citizens and police officers, both with regard to the necessity of retreat and "when the matter escalated beyond the issue of making the arrest to the question of when deadly force could be used to make the arrest." *People v. Whitty*, 96 Mich. App. 403, 411 (1980). Not only is the justifiable use of deadly force not limited "to circumstances where the defendant [is]

[13] "The fact remains that the police cannot be everywhere they are needed at once. The occasion may arise when a private citizen is confronted with the choice of attempting a citizen's arrest or letting the felon escape. In order to make a citizen's arrest, it is regrettable, but sometimes necessary, to make use of deadly force." *People v. Whitty*, 96 Mich. App. 403, 416 (1980).

confronted with deadly force," but police officers are justified when they act on reasonable belief at "both" (*i.e.*, two) levels of inquiry. *People v. Whitty*, 96 Mich. App. 411, 413 (1980). The history and tradition of the fleeing felon rule does not support a "necessity" requirement for on-duty officers, and every case that has added a third "necessity" component was a case involving a private citizen rather than an on-duty police officer.

The district court erroneously relied on the unpublished opinion in *People v. Spears*, 2007 Mich. App. LEXIS 1121 (Apr. 24, 2007), for the proposition that police officers should be held to the same "necessary" standard as private citizens and conflated the definition of "necessity" to the self-defense standard. D. Ct. Op. at 11. In *Spears*, the private citizen defendant shot the decedent as he ran from Spears' house, after the two fought on Spears' porch. Spears maintained that he could shoot him as he ran because the decedent had robbed him. Spears was charged and convicted of manslaughter. On appeal, the court affirmed the conviction and noted that Spears, *unlike a police officer*, could not rely on the fleeing felon defense without establishing that it was "necessary" for him to shoot the decedent as he ran:

> Defendant also argues that the shooting was justified under the fleeing felon exception. The court read the instruction for this exception to the jury. A ***private citizen*** may make an arrest for a felony committed in his presence. MCL 764.16(a); *People v Hampton*, 194 Mich. App. 593, 596; 487 N.W.2d 843 (1992). The use of deadly force is justified where the person is met with force from the person being arrested or where it is necessary to prevent the flight of the felon. *Id.* To justify the use of deadly force to prevent the escape of a fleeing felon: "(1) the evidence must show that a felony actually occurred, (2) the fleeing suspect against whom force was used must be the person who committed the felony, and (3) the use of deadly force must have been 'necessary' to ensure the apprehension of the felon." *Id.* at 596-597. Necessity is a

> question of fact for the jury to decide. *Id.* at 597. In addition, the ***private person*** must apply reasonable care to prevent the felon's escape without violence. People v Couch, 436 Mich. 414, 421; 461 N.W.2d 683 (1990), quoting People v Gonsler, 251 Mich. 443, 446-447; 232 NW 365 (1930).
>
> Even if Rouse had been trying to rob defendant at gunpoint, the jury could have concluded from the evidence that defendant was not justified in using deadly force against him as a fleeing felon. According to the evidence, defendant knew Rouse from the neighborhood; it was widely known in the neighborhood that Rouse and his brothers lived on Barlow Street, only a block away, and they had tattoos of their rap group, "Barlow Boys." A ***private citizen*** is not justified in using deadly force against a suspected felon when the citizen knows where the fleeing felon lives, ***and the police could arrest the suspect there***. *People v Smith,* 148 Mich. App. 16, 25-26; 384 N.W.2d 68 (1985).

Id. at *6-8 (emphasis added).

In other words, it was not "necessary" for Spears to shoot the decedent in the back because he could have easily called the police and reported the crime. *Spears* is consistent with the defense's position that police officers do not stand in the shoes of private citizens for purposes of the common law fleeing felon rule. Thus, the district court erred when it applied the same standard in *Spears*, which involved a private citizen shooting a fleeing felon in his home, to an officer making a lawful arrest in the line of duty.

b. The District Court Erred When it Considered Whether Officer Schurr's Actions Were "Reasonably Necessary" the "Instant" He Used Deadly Force.

Even if there is a "necessary" requirement for on-duty police officers as there is for private citizens, the district court erred when it applied the wrong "necessity" standard. In its opinion, the district court found "there is at least some evidence from which a person of average intelligence could conclude that defendant's

shooting of Lyoya in the back of the head was not *reasonably necessary* to prevent his escape." D. Ct. Op. at 11 (emphasis added). Thus, the district court erroneously equated the "necessity" to use deadly force "to ensure the apprehension of the felon" to the "necessity" requirement of civilian self-defense (*i.e.*, to protect oneself from death or great bodily harm). The district court created a new standard that is not supported by case law which requires a much higher standard of proof for police officers. By defining "necessity" in this way, the district court's opinion ensures there is *always* a question of fact that must be decided by a jury when a police officer is charged criminally, and therefore, no way to overcome the presumption outside of a trial. Deciding "necessity" in this way also adds a reasonableness requirement (*i.e.*, "reasonably necessary") that the fleeing felon rule never intended to require for police officers. *Id*.; *see* Leider, *supra* at 1000. ("Indeed, if all the fleeing felon rule did was specify that deadly force was permissible against fleeing felons who were attacking, the rule would be unnecessary and coextensive with self-defense and defense of others.") The addition of "necessity" and "reasonableness," then, levels the fleeing felon rule with the self-defense doctrine, or a civil standard that was not meant to provide the foundation for a criminal defense.

The district court also contradicts itself in finding that not only must "necessity" be reasonable within the entire context of a felon's flight or escape, but the determination is also one that is dependent on what the felon was doing "at the instant" deadly force was used. D. Ct. Op. at 11. "Necessity," as it applies to private

citizens and as defined by the case law, does not mean whether deadly force needed to be used, in general. Rather, within the context provided by *Whitty*, "necessity" means when an arrestor has to make an arrest of a felon, but is otherwise unable to. In other words, "necessity" occurs when a felon cannot be captured or taken because he is either fleeing or resisting. *See People v. Coleman*, 210 Mich. App. 1, 4 (1995) ("The term 'flight' has been applied to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody.")

The fleeing felon rule was meant to make it explicitly clear to all when deadly force could be used against a felon and there is no requirement that every other possible alternative (*i.e.*, punching, hitting, tasing, macing, etc.) to make the arrest needs to be used prior to the use of deadly force. The rule puts everyone on notice that if they commit a felony and resist or flee, deadly force can be used against them. Likewise, the rule does not allow the arrestor to use deadly force against a felon who is complying; the felon must be resisting, fleeing, or attempting to flee the arrest. The *Whitty* court also made it clear that so long as the arrestor is in "fresh pursuit" from an immediate attempted arrest of the felon, deadly force is justified. *People v. Whitty*, 96 Mich. App. 403, 414 (1980).

In defining "necessity" so that it equates to the self-defense "reasonableness" or "reasonably necessary" standard, the district court erred by establishing a meaning of "necessity" far beyond what the Court of Appeals and Michigan Supreme Court intended or prescribed. The authority to use deadly force enables an

arrest against an unruly or fleeing felon to be made, and deters those who have committed a felony from fighting back. "Necessity" as it applies to private citizens, means that an arrestor is actively trying to arrest a felon who he knows has committed a felony and is unable to stop the felon from resisting or fleeing. Endless or even numerous "alternative" attempts to capture the felon are not required. Therefore, the district court erred in its interpretation of "necessity" even as it applies to private citizens acting under the fleeing felon rule.

B. The Court Erred In Its Interpretation of the Law and the Application of Undisputed Facts as to the Common Law Rule that Law Enforcement Officers are Authorized to Use Deadly Force When Met with Force.

Like the common law fleeing felon rule, the use of deadly force against Lyoya was justified if the district court found that (1) Officer Schurr made a valid arrest and (2) Lyoya used force against Officer Schurr to avoid arrest. *People v. Fiedler*, 194 Mich. App. 682, 693-94 (1992) ("under the common law, the use of deadly force in making arrest" includes "the use of deadly force when the arresting person is met with force from the party to be arrested . . ."); *People v. Whitty*, 96 Mich. App. 403, 411 (1980) ("the common law imposed a further distinction between police officers and private person when the matter escalated beyond the issue of making the arrest to when deadly force could be used to make the arrest.")

Here, the district court found ample facts that supported each of those factors. D. Ct. Op. at 2. The court's findings that Lyoya "grabbed," "struggled," "[threw]," and "pushed" Officer Schurr, who was making a lawful arrest, constitute "force" under the common law rule. *Id*. The district court, however, held as a matter

of law that Officer Schurr was only justified in using deadly force when confronted with force where an average person would have reasonably thought that he was in fear of great bodily harm or death, *i.e.* self-defense. Indeed, the district court erroneously held that the common law rule "is completely duplicative and, indistinct from, the theory of self defense."

The district court relied on *People v. Doss*, 406 Mich. 90 (1979), for the proposition that under the common law rule, force in response to force used by the person being arrested is indistinct from self-defense. In *Doss*, a Detroit police officer was charged with manslaughter after he shot a man in the back from a distance, after the man ran from the police. *Doss* at 93-94. The decedent in that case may have been turning when the shot was fired, and had what was later determined to be a wooden chair leg or spindle in his hand. *Id*. The decedent used no force against the police officer, and the officer was apparently mistaken that the decedent had the ability to harm him. *Id.* The Supreme Court considered the issue of whether "absence of malice is an essential element of manslaughter." *Id*. at 97. The Court held that while "the absence of malice is fundamental to manslaughter in a general definitional sense, it is not an actual element of the crime itself which the people must establish beyond a reasonable doubt." *Id*. at 99. The Court also examined the civil standard for use of excessive force in the context of malice and self-defense. *Id.* The defendant did not raise the common law fleeing felon rule or the rule that the officer can use deadly force if met with force, and neither the trial court nor appellate courts considered it.

The *Doss* decision evaluated an officer's right to protect themselves in the course of an arrest, *i.e.,* self-defense, and the civil excessive force reasonableness, but the Court in that case did not vitiate the common law rule that an officer may use deadly force to make an arrest if met with force. The Court's opinion does not discuss the common law rule. If it had made the common law rule indistinguishable from self-defense surely the cases would have been decided differently, and they were not. *See, e.g., People v. Fiedler*, 194 Mich. App. 682 (1982) (recognizing that under common law, an officer may use deadly force when confronted with force, in addition to the separate defense of self-defense).

Further, by making the common law rule indistinguishable from self-defense, the district court makes officers indistinguishable from the average citizen who has simply harmed another person. Officer Schurr was not acting as a civilian on the morning of April 4th. He was in full uniform, in a marked squad car, and it is undisputed that he was acting as a sworn police officer when he stopped Lyoya. Unlike a civilian, Officer Schurr had different rights and duties as a sworn law enforcement officer of the State of Michigan. Police officers can perform functions that would otherwise be considered illegal for a private citizen. Entering property with probable cause or under exigent circumstances is not trespass, seizing the proceeds of crimes with probable cause is not theft or conversion, arresting suspects with probable cause and taking them to jail is not kidnapping. Similarly, with the powers provided to them, police officers are permitted and trained to use force, even deadly force, as part of their job to respond to inherently dangerous situations (*i.e.,* running towards gunshots, responding to an active shooter), which cannot be

considered murder. Use of force is unlike other inherently criminal acts for which an officer could be arrested, regardless of his/her status as a civilian or a police officer. For example, when an officer takes a bribe, lies under oath, or keeps seized money or drugs, s/he is clearly acting outside of the scope of his/her duty and can, therefore, be held criminally responsible. Under the district court's interpretation of the law, however, any case in which an officer uses force is probable cause to sustain a criminal charge and for a jury to decide whether the officer acted in self-defense.

Police officers and civilians are not similarly situated: Officers act with State authority (MCL 28.602(f)(i)(A)), they are often not permitted to retreat, and they are trained and expected to use force. *See People v. Hanna*, 223 Mich. App. 466, 474 (1997) ("[P]olice officers . . . are not required to use the least intrusive degree of force possible") (internal quotation omitted); Rachel A. Harmon, *When is Police Violence Justified?*, 102 Northwestern Univ. L. Rev. 1119-187 (2008). No occupation (aside from military and police officers) is allowed or permitted under the law to affirmatively use deadly force. Rather, police officers are State actors who are authorized to use force against criminal suspects in certain circumstances.

Here, it is undisputed that Lyoya resisted and attempted to evade a lawful arrest, refused to obey police orders, pushed, wrestled, struck, and disarmed Officer Schurr when Officer Schurr attempted to arrest him. Michigan common law permits active duty police officers to use deadly force when confronted with force by a person resisting a lawful arrest not only when they are in fear of harm or death. An officer in Officer Schurr's position would have had probable cause to believe that Lyoya committed several felonies, as Captain McKersie testified that he observed Lyoya

commit at least four felonies, the prosecution stipulated that Lyoya committed at least two felonies, and MSP Investigator Jackie Stasiak testified that Lyoya had at least one active warrant out for his arrest for a violent crime. Prelim. Tr. 2 at 14:24-15:13; 21:6-21; Prelim. Tr. 1 at 189:7-11; Prelim. H'g Tr. 1 at 186:22-194:23; Def. Exs. C, C1, D. Instead of complying with Officer Schurr's lawful commands, he fought with Officer Schurr. Under Michigan common law, Officer Schurr had the right to use deadly force to effect the arrest. Indeed, it was his duty to arrest Lyoya. The district court erred when it took this right away from Officer Schurr and held that Officer Schurr could only use deadly force in response to force that put him in fear for his life or in fear of great bodily harm.

C. The District Court Erred When it Misapplied the Legal Standards and Self-Defense Act to a Police Officer Acting Within the Scope of His Duties.

The district court erred as a matter of law when it misapplied the self-defense standard to a police officer acting within the scope of his duties when there were no disputed questions of fact. The district court also failed to make a legal determination on whether it believed the prosecution met its burden of proof under the Self-Defense Act based on the evidence presented, and erroneously held that factual questions remain for the jury to decide.

1. The Court Erred as a Matter of Law When it Applied the Civilian Self-Defense Standard to a Police Officer Acting Within the Scope of His Duties.

The district court erroneously applied a "reasonable person" standard under the Self-Defense Act evaluating whether Officer Schurr had a duty to retreat

instead of applying the "reasonable officer" standard.[14] The correct standard for police officers (who have no duty to retreat, and indeed who have a duty to pursue legitimate law enforcement purposes) is that no reasonable officer could have believed that Lyoya posed an imminent threat of death or serious bodily injury when he disarmed Officer Schurr of his TASER. The district court erred when it found there was probable cause that Officer Schurr did not act in self-defense under either standard. The district court correctly concluded that Officer Schurr was legally pursuing Lyoya and had no obligation to retreat, but incorrectly applied the civilian self-defense standard without consideration of Officer Schurr's duties and rights as a police officer. D. Ct. Op. at 7 (citing *People v Riddle*, 467 Mich 116 (2002) (discussing the civilian common law duty to retreat and stand your ground exceptions – neither of which apply to police officers); *People v Doe*, 1 Mich 451, 456 (1850) (same).

2. The District Court Erred When it Bound the Case Over Without Any Evidence that the Use of Deadly Force was Not Used In Self-Defense.

The question before the district court was whether there was sufficient evidence to establish probable cause to believe that Officer Schurr's actions were not justified under the law. D. Ct. Op. at 6; MCL 766.13. The district court applied the wrong burden of proof under the Self-Defense Act. D. Ct. Op. at 9. Under Michigan's Self-Defense Act, if the prosecution believes that deadly force is not justified, it is required to show the force is unjustified under Section 2 of the

[14] Officer Schurr has a right to assert self-defense as an individual, but also has other justifications as a police officer.

Self-Defense Act. MCL 780.961(2). "The prosecutor may charge the individual with a crime arising from the use of deadly force … and *shall present evidence to the judge or magistrate* . . . at the time of any preliminary examination . . . establishing that the individual's actions were not justified under section 2 of the self-defense act." *See* MCL 780.961(2). Section 2 of the Self-Defense Act justifies the use of deadly force when "the individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual." MCL 780.972(1)(a). "Where a prosecutor fails to present evidence on each of the elements of a charged offense, the district court abuses its discretion in binding over the defendant for trial." *People v. Herrick*, 277 Mich. App. 255, 258 (2007).

At the preliminary hearing the prosecution failed to present even a scintilla of evidence to support a finding of probable cause that Officer Schurr's actions were unjustified under the Self-Defense Act. The prosecution did not offer or provide any evidence that Officer Schurr was unjustified in using deadly force as a result of Lyoya fleeing, resisting, and disarming Officer Schurr of his TASER. The prosecution's own TASER expert, Bryan Chiles, testified that a TASER is considered a serious and dangerous weapon that could cause serious bodily injury, regardless of whether it is actively used via the probes or in drive stun mode. Prelim. H'g Tr. 1 at 148:7-149:19. Captain McKersie also testified that if Officer Schurr was tased, he would be incapacitated and unable to defend himself or prevent access to the firearm in his duty belt. The People also failed to present any

evidence that Officer Schurr acted unreasonably when using deadly force under the circumstances. The overwhelming and undisputed evidence presented by all three experts at the hearing supported a finding that Officer Schurr acted as a reasonable officer when using deadly force under the circumstances. Thus, the prosecution failed to meet its burden to show that Officer Schurr was not in fear of great bodily harm or death to himself or others.

III. The Second Degree Murder Statute as Applied to an On-Duty Police Officer Using Deadly Force Violates the Due Process Clause

Because the legislature has failed to act, law enforcement officers have no statutory framework upon which to rely to determine when they can use deadly force and face criminal charges. Further, Michigan's common law related to the use of deadly force by off-duty police officers or private citizens making a citizen's arrest does not provide on-duty police officers with a clear understanding of when they can and cannot employ deadly force (or any type of force) without being charged with a crime.

In Michigan, police officers are vested with the power to enforce criminal laws of the state, provide for public safety, detect and deter crime, reduce a suspect's access to weapons, reduce a suspect's access to means of escape, reduce a suspect's opportunity to escape, reduce a suspect's opportunity to assault officers or others, and prevent future threats of harm to the public. MCL 28.602(f)(i)(A); *see also Peden v. City of Detroit*, 470 Mich. 195 (2004) (defining essential tasks of a police officer to include the prevention of crime, the protection of the community from criminals, the

preservation of domestic tranquility, the enforcement of the criminal laws of Michigan, and the duty to effect arrests).

Inherent in those duties is an officer's ability to use force. Indeed, any police officer who intentionally retreats and neglects to perform his specific duty "to make an arrest where necessary has committed a criminal offense." *Peden*, 407 Mich. at 211. At present, it is ambiguous when a police officer may use force, including deadly force, while performing his/her duties and in what instances s/he may be charged with a crime for his/her conduct. Accordingly, no clear understanding exists of when a criminal wrong has been committed by an officer while the officer is on duty, when or how an officer must conform his/her conduct, and in what instances a prosecutor may charge an on-duty police officer with a crime.

Under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, no person shall be held criminally responsible for conduct which a person could not reasonably understand to be proscribed. *People v Ford*, 417 Mich 66, 98 (1982). A criminal statute is void for vagueness if it fails to give a person of ordinary intelligence reasonable notice that his or her behavior may be unlawful. *People v DeFillippo*, 80 Mich App 197 (1977), *rev'd on other grounds*, 443 U.S. 31 (1979). "[T]he more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine - the requirement that a legislature establish minimal guidelines to govern law enforcement." *People v. Harris*, 495 Mich. 120, 134-35 (2014) (internal quotations omitted). Where the legislature fails to provide such minimal guidelines, a criminal statute may permit

"a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.* at 135.

A statute may be challenged for unconstitutional vagueness on three grounds:

> (1) "it fails to provide fair notice of the conduct proscribed" (i.e., it provides a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly");
>
> (2) "it is so indefinite that it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed" (i.e., the law fails to "provide explicit standards for those who apply them" leading to arbitrary application); or
>
> (3) "its coverage is overbroad and impinges on First Amendment protection" (i.e., it leads people to "steer far wider of the unlawful zone than if boundaries of the forbidden areas were clearly marked").

People v. Harris, 495 Mich. 120, 133-34 (2014); *People v. Gasper*, 314 Mich. App. 528, 536-37 (2016) (internal quotations and punctuation omitted).

Here, the element of "without justification or excuse" in the second degree murder statute is unconstitutionally vague as applied to law enforcement officers acting within the scope of their duties because it fails to provide notice of what conduct is prohibited in situations where officers are otherwise authorized to use deadly force by law and it allows the arbitrary and unpredictable charging of criminal conduct whenever an officer uses force. *See e.g., Kolender v. Lawson*, 461 U.S. 352, 358, 360 (1983) (A statute requiring an individual to produce "credible and reliable" identification to avoid arrest was void for vagueness where it provided "no standard for determining what a suspect ha[d] to do in order to satisfy the requirement" and allowed an arrest "unless the officer [was] satisfied the

identification [was] reliable.") (internal quotations omitted). Officers cannot be expected to keep pace with a moving legal standard of when they can use deadly force or be charged with a crime. Rather, it must be clear when an officer can be criminally prosecuted for actions taken within the performance of his/her duties so as to avoid committing a criminal offense.[15] At a minimum, the common law is unclear, and this Court cannot expect police officers to comport their behavior to the law when no one knows what that law is. Moreover, if the Court permits the second degree murder charge against Officer Schurr to proceed, it will also set the precedent that a criminal charge can be brought at will any time a police officer uses force or engages in nearly any action while on duty, creating a chilling effect and preventing officers from carrying out the responsibilities and duties entrusted to them.

CONCLUSION

Officer Schurr respectfully requests that the Court grant his motion to quash the bind-over and dismiss the charge against him. Michigan law permits Officer Schurr to use deadly force (1) to prevent Patrick Lyoya from fleeing and to effectuate his arrest, (2) under legal authority given to Officer Schurr by the State in response to force used by Lyoya, and (3) in self-defense. The district court erred in its legal findings related to the raised defenses, and the government's evidence presented at the preliminary examination failed to provide disputed facts that would leave any question open for a jury to decide or support a finding that Officer

[15] If the Court or legislature creates new law applied to police officers, it may also raise an ex post facto issue of law under the Ex Post Facto Clauses of the United State Constitution and Michigan Constitution. *See People v. Patton*, 325 Mich. App. 425, 439 (2018).

Schurr committed a crime. The current state of the law precludes the continuation of a criminal proceeding against Officer Schurr. In addition, the element of justification in the second degree murder statute is void for vagueness as applied to law enforcement officers, and requires that this Court dismiss the charge against Officer Schurr.

Respectfully submitted,

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