STATE OF MICHIGAN

IN THE 17th CIRCUIT COURT FOR THE COUNTY OF KENT

PEOPLE OF THE STATE OF MICHIGAN,	Hon. Christina Elmore
Plaintiff,	
v	Case No. 22-10260-FC
CHRISTOPHER SCHURR,	
Defendant.	

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PEOPLE'S RESPONSE TO DEFENDANT'S MOTION TO QUASH BIND-OVER AND DISMISS THE CHARGE AGAINST DEFENDANT

NOW COME the People of the State of Michigan, by and through Prosecuting Attorney Christopher Becker, and responds to Defendant's Motion to Quash Bindover as follows:

Defendant is charged with second-degree murder, contrary to MCL 750.317, arising out of the killing of the victim, Patrick Lyoya. After a preliminary examination, Defendant was bound over as charged to this Court. Defendant now moves this Court to quash the bindover. For the reasons

discussed below, Defendant's motion should be denied.[1]

LAW AND ARGUMENT

I. Legal standard for bindover decision

"In order to bind a defendant over for trial in the circuit court, the district court must find probable cause that the defendant committed a felony." *People v Seewald*, 499 Mich 111, 116; 879 NW2d 237 (2016), citing MCL 766.13. A district court's "decision to bind over a defendant based on the factual sufficiency of the evidence is reviewed for an abuse of discretion." *People v Henderson*, 282 Mich App 307, 312; 765 NW2d 619 (2009). A court abuses its discretion when its decision falls outside the range of principled outcomes. *People v Thorpe*, 504 Mich 230, 251-252; 934 NW2d 693 (2019). "In reviewing the bindover decision, a circuit court must consider the entire record of the preliminary examination and may not substitute its judgment for that of the district court." *Henderson*, 282 Mich App at 312-313. Only where "it appears on the record that the district court abused its discretion" may the decision to bind over a defendant be reversed. *Id.* at 313.

MCL 766.13 sets forth the standard for bindover:

> If it shall appear to the magistrate at the conclusion of the preliminary examination that a felony has been committed and there is probable cause for charging the defendant therewith, the magistrate *shall* forthwith bind the defendant to appear before the circuit court of such county, or other court having jurisdiction of the cause, for trial. [Emphasis added.]

Stated otherwise, "[a] district court must bind over a defendant for trial when the prosecutor presents competent evidence constituting probable cause to believe that a felony was committed and that the

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[1] The People note that Defendant's 45-page brief exceeds the 20 pages allotted by our Michigan Court Rules, see MCR 2.119(2)(a), and it is the People's understanding that the defense intends to file a reply brief responding to the arguments set forth in this Response, which is also not permitted without leave of court, see MCR 2.119(2)(b). The People leave it to this Court's discretion whether to accept Defendant's motion in excess of the page limitations and reply brief for filing.

defendant committed the offense." *People v Jenkins*, 244 Mich App 1, 14; 624 NW2d 457 (2000).

Evidence "meets the 'probable cause' standard when, 'by a reasonable ground of suspicion, [it is] supported by circumstances sufficiently strong to warrant a cautious person in the belief that the accused is guilty of the offense charged[.]" *People v Hudson*, 241 Mich App 268, 279; 615 NW2d 784 (2000), quoting *People v Woods*, 200 Mich App 283, 288; 504 NW2d 24 (1993). As our Supreme Court has explained, the probable-cause standard "signifies evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997), quoting *Coleman v Burnett*, 155 US App DC 302, 316-317; 477 F 2d 1187 (1973). Importantly, there is a "broad" gap between this probable-cause standard and proof beyond a reasonable doubt. *Id.* As such, the district court "may become satisfied about probable cause on much less than he would need to be convicted [beyond a reasonable doubt]. Since he does not sit to pass guilt or innocence, he could legitimately find probable cause while personally entertaining some reservations." *Id.*

Moreover, "[i]f the evidence introduced at the preliminary examination conflicts or raises a reasonable doubt about the defendant's guilt, the magistrate *must* let the factfinder at trial resolve those questions of fact." *Hudson*, 241 Mich App at 278 (emphasis added); see also *People v Grayer*, 235 Mich App 737, 744 n 3; 599 NW2d 527 (1999) (explaining that if "there is credible evidence to both support and negate the elements of the crime," the defendant should be bound over for trial because "questions of fact exist that must be determined by the jury"). "In other words, the magistrate may not weigh the evidence to determine the likelihood of conviction, but must restrict his or her attention to whether there is evidence regarding each of the elements of the offense after examining the whole matter." *Id.* (internal citations omitted).

II. The district court did not abuse its discretion in binding Defendant over for trial on the charge of second-degree murder.

Here, Defendant is charged with second-degree murder, the elements of which are "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). "Malice is defined as 'the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.'" *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002), quoting *Goecke*, 457 Mich at 464. "Malice may be inferred from evidence that the defendant 'intentionally set in motion a force likely to cause death or great bodily harm.'" *Id.*, quoting *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998).

Here, Defendant does not dispute the first three elements of second-degree murder: that he caused the death of Lyoya by shooting him in the back of the head, an act done with either the intent to kill, to cause great bodily harm, or in wanton and willful disregard of the likelihood that the natural tendency of the act was to cause death or great bodily harm. The only element, therefore, in dispute is the fourth element: whether Defendant acted "without justification or excuse." *Goecke*, 457 Mich at 463-464.[2]

In asking this Court to quash the bindover and dismiss the second-degree murder charge, Defendant argues that the district court erred in its interpretation of the law and the application of the facts as it relates to Defendant's proffered justifications for killing Lyoya. The People address each of the defense's arguments, in turn, below.

[2] Facts will be included herein as necessary for the resolution of the issues raised by Defendant.

A. Fleeing-Felon Rule

First, Defendant argues that the district court erred in its interpretation of the common-law fleeing-felon rule. In *People v Hampton*, 194 Mich App 593, 596-597; 487 NW2d 843 (1992), the Court of Appeals set forth the test to determine whether the fleeing-felon rule justified the use of deadly force:

> [T]he use of deadly force to prevent the escape of a fleeing felon is justifiable where the following circumstances are present: (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.*, citing *People v Whitty*, 96 Mich App 403, 411, 413; 292 NW2d 214 (1980).]

Importantly, the *Hampton* Court held "that the issue of necessity is one of fact that should have been left for the jury to decide." *Id.* at 597. There, the defendant filed a motion to quash the bindover after the preliminary examination, which was granted on the basis that the victim was a fleeing felon at the time he was killed. *Id.* at 594-595. The Court of Appeals reversed the circuit court, finding that the defendant had been properly bound over for trial where "the justification for defendant's actions was a question of fact." *Id.* at 598.

Defendant nonetheless argues that this necessity requirement is "exclusively for private citizens" (Def brief, p 28). He asserts that law enforcement officers are held to a lesser "reasonable belief" standard (Def brief, p 29). Despite this argument, Defendant fails to set forth any legal authority holding that the requirement of "necessity" disappears when the person using deadly force is a law enforcement officer.[3] As our Supreme Court expressly recognized in *People v*

[3] Our appellate courts have explicitly distinguished between police officers and civilians for other inquiries under the fleeing-felon rule, including the knowledge required to make an arrest. For instance, in *People v Whitty*, 96 Mich App 403, 411; 292 NW2d 214 (1980), the Court of Appeals explained that "[w]hile a private citizen could arrest a person who was *suspected* of committing a felony that *in fact* occurred," the private citizen's use of deadly force is "justified only if the felony

Couch, 436 Mich 414; 561 NW2d 683 (1990), the analysis remains the same:

> [B]oth 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*. . . . [*Couch*, 436 Mich at 421, quoting *People v Gonsler*, 251 Mich 443, 446-447; 232 NW 365 (1930) (quotation marks omitted) (emphasis in original).]

Further weakening Defendant's argument is the Court of Appeals' discussion of the common-law fleeing-felon rule in *People v Fiedler*, 194 Mich App 682, 694; 487 NW2d 831 (1992) – a case analyzing an officer-involved shooting. There, consistent with *Couch*, the Court lists "the use of deadly force *when necessary* to prevent the person being arrested from fleeing" as one of the permissible uses of deadly force in making an arrest. *Id.* at 694 (emphasis added). Under these authorities, the district court did not err in finding that the law requires the use of deadly force to be necessary to ensure apprehension of the felon and that necessity is an issue of fact for the jury to decide. See *Hampton*, 194 Mich App at 597.

Defendant next argues that, even if there exists a necessity requirement for police officers using deadly force against a fleeing felon, the district court applied the wrong standard in its analysis. Defendant specifically takes issue with the district court's use of the term "reasonably necessary" as opposed to "necessary," arguing that this equates the necessity requirement under the fleeing-felon rule with the necessity requirement under the "civilian" standard of self-defense (Def brief, p 32). This argument is a red herring. After discussing the common-law fleeing-felon

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actually occurred and the person against whom the force was used was in fact the person who committed the felony." (Emphasis in original). Conversely, "[a] police officer [is] justified in acting on the basis of reasonable belief at both levels of inquiry." *Id.* No similar distinction between police officers and private citizens has ever been made by our appellate courts regarding the element of necessity, nor would such a distinction be prudent, as the necessity element provides an important safeguard for preserving human life.

rule and the necessity requirement, the district court found as follows:

> [A]pplying 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. As the prosecutor suggests, at the instant the shot is fired, Lyoya is not in a position of actively escaping or fleeing. A reasonable juror could find a lack of necessity for deadly force strictly for the purpose of preventing escape. [District Court Opinion, p 11.]

This was neither an abuse of discretion nor a misunderstanding of the law. In support of his argument that the standard applied by the district court impermissibly equates the necessity requirement of the fleeing-felon rule with the necessity requirement of self-defense, Defendant cites an article from the Florida Law Review for the notion that the common-law fleeing-felon rule authorizes deadly force "even when the felon is not presently attacking someone." Robert Leider, *Taming Self-Defense: Using Deadly Force to Prevent Escapes*, 70 Fla L Rev 971, 1000 (2019). However, as Leider also explains, it is axiomatic that the fleeing-felon rule authorizes deadly force "based on a felon's *flight*." *Id.* at 1000 (emphasis added). As the district court found, the evidence at the preliminary examination established that Lyoya was neither "actively escaping or fleeing" when Defendant used deadly force against him (District Court Opinion, p 11). Given these facts, which the defense does not appear to dispute, whether Lyoya's actions constituted "flight" and whether it was necessary to use deadly force to prevent his escape are appropriate questions of fact for the jury, and, thus, the district court did not abuse its discretion in binding the second-degree murder charge over to this Court on this basis.

B. Use of Deadly Force When Met with Force During an Arrest

Defendant next argues that the district court erred in its interpretation of the law as it relates to Defendant's second proffered "justification" for killing Lyoya: that officers are permitted to use deadly force when met with force during an arrest. Defendant argues that the district court erred

in finding this rule indistinguishable from self-defense, asserting that the district court's opinion "makes officers indistinguishable from the average citizen who has simply harmed another person" (Def brief, p 36). Explaining that law enforcement officers are treated differently than private citizens, Defendant argues that our State's law permits law enforcement officers to use deadly force whenever they are confronted with force by someone resisting a lawful arrest, *even if* the officer is not in fear of great bodily harm or death (Def brief, p 37).

Defendant cites two cases for this proposition, *Fiedler* and *Whitty*. Notably, in neither case did our Court of Appeals hold that a police officer was justified in using deadly force against a private citizen using force to resist arrest. Likewise, neither case specifically analyzed the circumstances under which an officer is justified in using deadly force against someone resisting arrest. Rather, Defendant cherry-picks the following quotes from each case to support his entire argument:

- "[U]nder 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." *Fiedler*, 194 Mich App at 693-694.

- "[T]he 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." *Whitty*, 96 Mich App at 411.

Neither of these cases, or quotations therefrom, supports the argument advanced by Defendant. Considered in context, Defendant's challenge to the district court's analysis fails.

First, in *Fiedler*, the defendant-officer was charged with involuntary manslaughter and possession of a firearm during the commission of a felony. *Fiedler*, 194 Mich App at 684. The circuit court quashed the information, finding that the magistrate never found a crime was committed as required by MCL 766.13. *Id.* at 688. The People appealed, and the Court of Appeals

reversed and reinstated the charges. *Id.* at 684. As here, the charges in *Fiedler* arose out of a shooting death. *Id.* Specifically, police dispatch received an anonymous tip that an individual named Terry Jenkins, who was wanted on an open-murder charge, had been spotted in the vicinity of 700 Pavone Street. *Id.* The informant described the individual's race and clothing but provided no information regarding his height, weight, or complexion. *Id.* at 684-685. The defendant-officer responded to Pavone Street, knocked on the door of an apartment, and requested entry. *Id.* at 685. After the defendant asked for identification of the occupants, one of the occupants stated his name as Norris Maben but did not produce any identification. *Id.* Maben then ran from the kitchen to a bedroom, where he "leaped outside through the glass of a closed window." *Id.* The defendant followed Maben's path through the apartment and, after yelling at Maben to "halt," fired three shots, killing him. *Id.* at 686.

The issue in *Fiedler* did not concern whether the defendant was permitted to use deadly force when met with force from a party to be arrested, but rather whether the fleeing-felon rule prohibited the defendant's prosecution. *Id.* at 692. Beginning its discussion on the issue of justification, the Court stated as follows:

> In *People v Whitty*, 96 Mich App 403, 411; 292 NW2d 214 (1980), this Court pointed out that, under the common law, the use of deadly force in making an arrest can be divided into two categories: (1) the use of deadly force when the arresting person is met with force from the party to be arrested, and (2) the use of deadly force when necessary to prevent the person being arrested from fleeing. [*Fiedler*, 194 Mich App at 693-694.]

The Court then continued to analyze the issue presented under the second category, *i.e.*, under the fleeing-felon rule. It found that the circuit court had impermissibly resolved conflicts in the evidence and substituted its judgment for that of the district court by concluding that the defendant-officer was justified in using deadly force against Maben. *Id.* at 694. Holding that the circuit court

erred in quashing the information, the Court of Appeals explained that "[w]hether defendant was justified in believing that Maben was Jenkins and in using deadly force against Maben is a question for the trier of fact." *Id.* Accordingly, contrary to Defendant's argument, *Fiedler* does not authorize law enforcement to use deadly force when met with force; rather, it supports the People's position that whether Defendant was justified in using deadly force against Lyoya is a question for the jury.

Whitty likewise does not support Defendant's argument that the law entitles him to use deadly force when met with force while making a valid arrest. As the *Fiedler* Court explained, *Whitty* set forth two categories under which deadly force may be used in making an arrest: "the use of deadly force when the person making the arrest is met with force from the person who is to be arrested, and the use of deadly force when necessary to prevent the person who is to be arrested from fleeing." *Whitty*, 96 Mich App at 411. Notably, the *Whitty* Court went on to state, "The first is generally analyzed under principles of self-defense[.]" *Id.*[4] Given this, Defendant's argument that the district court erred by failing to distinguish this common-law rule from self-defense is unavailing.

Moreover, analyzing an officer's use of force under principles of self-defense, as the *Whitty* Court directs, practically makes sense. Defendant asks this Court to find error where the district court refused to find a justification for Lyoya's killing where "(1) Officer Schurr made a valid arrest and (2) Lyoya used force against Officer Schurr to avoid arrest" (Def brief, p 34). Eliminating the principles of self-defense from this analysis would carry catastrophic consequences. Hypothetically, the standard advanced by the defense would permit an officer to

[4] The quotation used by Defendant on page 34 of his brief in support of this argument does not relate to the self-defense category but rather comes from the *Whitty* Court's discussion of the fleeing-felon rule.

use deadly force against any individual who uses even the slightest amount of force in resisting arrest, such as pushing an officer, pulling one's arm away while being handcuffed, or throwing a small object (such as a driver's license or their car keys) at the officer. That is not, and has never been, the law justifying the use of deadly force.

Accordingly, because *Whitty* specifically directs courts to consider the principles of self-defense when analyzing the use of deadly force by a law enforcement officer met with force during an arrest, Defendant's argument that the district court misinterpreted the law in this regard fails.

C. Self-Defense

Next, Defendant argues that the district court misapplied the legal standard for self-defense as it relates to a police officer acting within the scope of his duties. The People disagree.

It is well established that the killing of another person in self-defense is only justifiable "if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm." *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). Generally, a defendant may not use any more force than that necessary to defend himself or herself. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). As such, the use of deadly force in self-defense is justified only when (1) the defendant honestly and reasonably believes he is in danger; (2) the danger the defendant fears is either serious bodily harm or death; and (3) the defendant's use of force appears to be immediately necessary to defend himself. See MCL 780.972; MCL 780.961; *Heflin*, 434 Mich at 502.

Defendant argues, without citing to any legal authority, that the trial court erred by erroneously applying a "reasonable person" standard rather than a "reasonable officer" standard. However, as our Supreme Court has recognized, "police officers making a lawful arrest may use that force which is reasonable under the circumstances in self-defense," and "*like the private*

citizen, the police officer who claims self-defense must have reasonably believed himself to have been in great danger and that his response was necessary to save himself therefrom." *People v Doss*, 406 Mich 90, 102; 276 NW2d 9 (1979) (emphasis added). Thus, contrary to the defense's argument, there is no separate "civilian self-defense standard" under which the district court erroneously analyzed this case. Rather, the jury is instructed to consider whether the force was reasonable under the circumstances, which might, of course, differ depending on whether the defendant is a trained law enforcement officer or a civilian. See *People v Guajardo*, 300 Mich App 26, 42; 832 NW2d 409 (2013), quoting *People v Orlewicz*, 293 Mich App 96, 102; 809 NW2d 194 (2011) ("The reasonableness of a person's belief regarding the necessity of deadly force 'depends on what an ordinarily prudent and intelligent person would do on the basis of the perceptions of the actor.'"). Given that the trial court examined the evidence under the correct principles of self-defense, Defendant has not established error in this regard.

Next, Defendant argues that the district court erred[5] in finding sufficient evidence to establish probable cause where the prosecution did not present evidence that the killing was unjustified. Again, the People disagree. As noted above, "[i]f the evidence introduced at the preliminary examination conflicts or raises a reasonable doubt about the defendant's guilt, the magistrate *must* let the factfinder at trial resolve those questions of fact." *Hudson*, 241 Mich App at 278 (emphasis added). Here, the People introduced video evidence of the struggle between Defendant and Lyoya, including the moment that the shot was fired into the back of Lyoya's head. As the video shows, Lyoya was on his hands and knees, facing the ground, with Defendant on his back when Defendant drew his weapon from his belt and fired the fatal shot. (See People's Exhibit

[5] As discussed above, the proper standard of review for whether the prosecution presented sufficient evidence at the bindover stage is an abuse of discretion.

4). Wayne Butler, an eyewitness to the struggle, testified that Defendant "ha[d] control of Patrick the whole time" and "always had the upper hand" (PE Tr I, pp 64-65).[6] Butler testified Lyoya "was never on the offensive," never threw any punches at Defendant, and did not appear to have a weapon (*Id.* at 74). Consistent with the video evidence, Dr. Stephen Cohle, who performed the autopsy on Lyoya, testified that the path of the bullet was "back to front," and "the bullet passed through the scalp and through the skull in the back of the head" (Dr. Cohle Trans, p 7).[7]

The People further presented testimony from Bryan Chiles, a Senior Investigations Engineer at Axon, who performed a forensic analysis of Defendant's TASER and body-worn camera (PE Tr I, p 109-110). Chiles first explained how the TASER works: when the TASER is deployed, its probes hit and penetrate skin on the subject, causing neuromuscular incapacitation ("NMI") (*Id.* at 110). On the model used by Defendant, there were two cartridges that could be deployed (*Id.* at 120).[8] Here, according to Chiles's analysis, both cartridges were deployed and missed during the struggle between Defendant and Lyoya (*Id.* at 117-120). With respect to the second deployment, in particular, Chiles testified that a noticeable "pop" from the deployment (*i.e.*, "a compressed nitrogen gas capsule that is punctured," letting air out) could be heard on Defendant's body-worn camera at the time the TASER was deployed into the ground (*Id.* at 119-120). According to Chiles, after both cartridges were deployed, the TASER could simply be used

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[6] Butler testified that he stopped watching after Defendant attempted to tase Lyoya (PE Tr I, p 69).

[7] Dr. Cohle was unavailable for the preliminary examination, so the parties took Dr. Cohle's deposition prior to the hearing and submitted the deposition transcript in lieu of his in-court testimony for the district court to review (PE Tr I, p 4).

[8] According to Chiles, the TASER could be reactivated through a button on its side; for instance, if the cartridges are deployed and the probes hit a person, the person handling the TASER could then press the TASER into the skin of the person and complete the circuit to potentially cause NMI again (PE TR I, pp 120-121).

to cause a drive-stun, which is accomplished by pressing the front of the TASER into a person (*Id.* at 121). When no probe attaches to an individual, as here, the drive-stun delivers an electrical charge locally to where it is being pressed and generally causes pain, rather than incapacitation (*Id.* at 122).

Finally, during the defense's presentation of evidence, Captain Chad McKersie testified about a number of alternative use-of-force options that may have been available to Defendant in his belt, including an ASP, pepper spray, and a flashlight that could be used to strike someone (*Id.* at 35-36). Captain McKersie explained that there is no requirement to follow a certain course of action (*e.g.*, physical force, TASER, then gun); rather, that decision is based on the facts and circumstances (*Id.* at 36). Captain McKersie was also unable to tell from his review of the video evidence whether Lyoya was simply trying to break free from Defendant or attack the officer (*id.* at 17).

Following the parties' presentation of evidence and arguments, the district court properly found that conflicting facts existed regarding Defendant's claim of self-defense, concluding that the evidentiary record contained sufficient evidence for the trier of fact to find that Defendant's fear was not reasonable or that his "shooting of Lyoya in the back of the head" was not necessary under the circumstances (District Court Opinion, p 8). Defendant's argument improperly attempts to impose a higher burden on the prosecutor than that required at this stage of the criminal proceeding. As our Court of Appeals has explained, "affirmative defenses in criminal cases should typically be presented and considered at trial and . . . a preliminary examination is not a trial." *People v Waltonen*, 272 Mich App 678, 690 n 5; 728 NW2d 881 (2006). Only "in a situation in which the defense is complete and *there are no conflicting facts regarding the defense*" could it be argued that there is no probable cause to believe a crime was committed. *People v Redden*, 290

Mich App 65, 84; 799 NW2d 184 (2010) (emphasis added). While a district court is, therefore, permitted to "consider evidence in defense," it "cannot discharge a defendant if the evidence conflicts or raises reasonable doubt concerning a defendant's guilt because this presents an issue for the trier of fact." *Id.*

Considering the evidence presented by the prosecution concerning the circumstances of the offense, as discussed above, a jury could reasonably find that Defendant did not have an honest and reasonable belief that his life was in imminent danger or that there was a threat of serious bodily harm. The fact that Defendant interprets the facts adduced at the preliminary examination differently as support of his claim of self-defense does not establish an abuse of discretion by the district court. Rather, because there is conflicting evidence casting doubt on whether Defendant's use of deadly force was justified, see *Doss*, 406 Mich at 103, the district court properly bound Defendant over for trial, finding that the issue of self-defense must be determined by a jury.

D. Constitutional Challenge

Lastly, Defendant argues that the bindover decision should be quashed, asserting that the second-degree murder statute as applied to police officers violates the Due Process Clause as it is void for vagueness. In support of this argument, Defendant contends that law enforcement officers have no statutory framework upon which to rely in determining whether they can use deadly force. He asserts, "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" (Def brief, p 42).

"[A] statute is presumed to be constitutional and is so construed unless its unconstitutionality is clearly apparent." *People v Boomer*, 250 Mich App 534, 538; 655 NW2d 255 (2002). The party challenging a statute's constitutionality bears the burden of proving its

invalidity. *People v Malone*, 287 Mich App 648, 658; 792 NW2d 7 (2010).

The statute at issue, MCL 750.317, reads as follows:

> All other kinds of murder shall be murder of the second degree, and shall be punished by imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same.

Defendant argues this statute is unconstitutionally vague for failing to provide fair notice of the proscribed conduct.[9] Notably, Defendant focuses his analysis on the term "without justification or excuse," alleging that this element "in the second degree murder statute" is unconstitutionally vague as applied to law enforcement officers acting within the scope of their duties (Def brief, p 43). When determining whether a statute is unconstitutionally vague, Michigan courts consider "the entire text of the statute and give[] the words of the statute their ordinary meanings." *People v Lockett*, 295 Mich App 165, 174; 814 NW2d 295 (2012). Here, the challenged language – "without justification or excuse" – appears nowhere within the text of the statute but rather is a judicial construction of categories of "innocent homicide." See *People v Morrin*, 31 Mich App 301, 310; 187 NW2d 434 (1971). Because Defendant's constitutional challenge is based on language that does not actually appear within the statute, it necessarily fails.

To the extent this Court chooses to consider Defendant's argument further, his challenge remains unavailing. "To give fair notice, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or required." *People v Noble*, 238 Mich App

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[9] Our Court of Appeals has outlined three grounds on which a statute may be challenged for vagueness:

> (1) it is overbroad and impinges on First Amendment freedoms; (2) it does not provide fair notice of the conduct proscribed; or (3) it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed. [*People v Roberts*, 292 Mich App 492, 497; 808 NW2d 290 (2011) (quotation marks and citation omitted).]

647, 651-652; 608 NW2d 123 (1999); see also *People v Lino*, 447 Mich 567, 575; 527 NW2d 434 (1994), quoting *Kolender v Lawson*, 461 US 352, 357; 103 S Ct 1855; 75 L Ed 2d 903 (1983) ("[T]o pass constitutional muster, a penal statute must define the criminal offense 'with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement'."). "The statute cannot use terms that require persons of ordinary intelligence to guess its meaning and differ about its application." *Id.* Instead, "[a] statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." *Id.* But, "[t]o survive constitutional scrutiny, the words used in a statute are not required to have a single meaning, and a statute need not define an offense with mathematical certainty." *Lawhorn*, 320 Mich App at 200 (quotations and citations omitted).

Here, the meaning of the second-degree murder statute can be fairly ascertained by reference to judicial interpretations, the common law, dictionaries, and treatises, all of which frequently discuss and analyze the elements of a second-degree murder charge. As noted above, second-degree murder requires "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *Goecke*, 457 Mich at 463-464. Defendant takes issue with the fourth element, arguing that "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" (Def brief, p 43). However, "justifiable homicide" and "excusable homicide" are legal terms of art that have well-established meanings in the law.[10] Specifically, "[h]omicide is 'justifiable' if it is

[10] Other state and federal courts have consistently rejected arguments concerning similar language and have held that the words "without justification" are not unconstitutionally vague. See *In Interest of EB*, 287 NW2d 462 (ND 1980); *Ex Parte Strong*, 95 Tex Cr R 250; 252 SW 767 (Texas

authorized (E.g., self-defense) or commanded (E.g., execution of death sentence) by law." *Morrin*, 31 Mich App at 310. Likewise, Black's Law Dictionary defines "justification" as "[a] lawful or sufficient reason for one's acts or omissions; any fact that prevents an act from being wrongful." *Black's Law Dictionary* (11th ed). "Homicide is 'excusable' if the death is the result of an accident and the actor was not criminally negligent." *Morrin*, 31 Mich App at 310. Black's Law Dictionary defines "excuse" as "[a] defense that arises because the defendant is not blameworthy for having acted in a way that would otherwise be criminal," providing the examples of duress, entrapment, infancy, insanity, and involuntary intoxication." *Black's Law Dictionary* (11th ed). Given these judicial interpretations and dictionary definitions, Defendant's argument that courts "cannot expect police officers to comport their behavior to the law when no one knows what the law is" lacks any merit.

While the statute may not define second-degree murder "with mathematical certainty" as it relates to the conduct of police officers, it is not required to. *Lawhorn*, 320 Mich App at 200. Its meaning is clear that no person – law enforcement or otherwise – may cause the death of another with malice and without the killing either being authorized by law or excusable because the defendant is not blameworthy. Contrary to Defendant's argument, interpreting the second-degree murder statute in this way, as courts have done for decades, does not set the precedent that a criminal charge will be brought whenever a police officer uses force on duty. Officers routinely use lawful force on duty, up to and including the use of deadly force as the law authorizes under

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1923); *State v Gardner*, 51 NJ 444; 242 A2d 1 (1968); *State v Norflett*, 67 NJ 268; 337 A2d 609 (1975); *Galbreath v City of Oklahoma City*, 632 Fed Appx 482, 484-485 (CA 10, 2015). "[C]ases from foreign jurisdictions, which are not binding, can be persuasive." *People v Campbell*, 289 Mich App 533, 535; 798 NW2d 514 (2010). As an example, rejecting a constitutional challenge to one of its penal statutes, the Supreme Court of North Dakota found that "[t]hese words are not ambiguous and have a meaning well understood in common language." *In Interest of EB*, 287 NW2d at 464.

certain circumstances.[11] But, law enforcement officers, like private citizens, are also not immune to prosecution when there is no "lawful or sufficient reason" for their use of force. See *Black's Law Dictionary* (11th ed) (defining "justification"). Accordingly, because the second-degree murder statute and its judicial construction provides a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited, Defendant's constitutional challenge to MCL 750.517 fails.

CONCLUSION

Wherefore, because the district court did not abuse its discretion in finding probable cause to bind Defendant over on the charge of second-degree murder or erroneously apply the legal standards underlying its bindover decision, Defendant's motion to quash the bindover should be denied.

Respectfully submitted,

Christopher R. Becker (P53752)
Kent County Prosecuting Attorney

Dated: January 24, 2023

By: Katherine E. Wendt
Katherine E. Wendt (P78909)
Chief Appellate Attorney

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on 1/24/2023

By: ☐ U.S. Mail ☐ FAX
☐ Hand Delivered ☐ Overnight Courier
☐ Certified Mail ☒ Other email

Signature: Katherine E. Wendt

[11] For example, see the discussion above regarding the common-law fleeing-felon rule and self-defense.