

STATE OF MICHIGAN
IN THE 61st DISTRICT COURT

THE PEOPLE OF THE STATE OF
MICHIGAN,

Plaintiff,

v

CHRISTOPHER SCHURR,

Defendant.

Case No.: 2022-FY-000827

Hon. Nicholas S. Ayoub

OPINION OF THE COURT
FOLLOWING PRELIMINARY EXAMINATION

Defendant is charged with second-degree murder, MCL 750.317. A preliminary examination was conducted on October 27 and 28, 2022. Following the presentation of proofs by both parties, the People moved the Court to bind defendant over on the single charge of second-degree murder. For the reasons discussed herein, the Court finds that there is probable cause to bind defendant over to the Circuit Court to stand trial on the charge contained in the felony complaint.

I. BACKGROUND

The relevant underlying factual background is not disputed. On April 4, 2022, Defendant Christopher Schurr was a police officer with the Grand Rapids Police Department on duty and on assignment patrolling the city's southeast side. Just after 8:00 A.M., defendant initiated the traffic stop of a Nissan Altima after observing that the license plate on the vehicle was issued to another car.¹

¹ There is no dispute here about the validity of that 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.

Before defendant fully exited the police cruiser, the driver of the Nissan, who was later identified as Patrick Lyoya, stepped out of the Nissan.² Defendant shouted at him several times to get back in the vehicle and Lyoya did not comply. Defendant asked him if he spoke English, to which Lyoya responded, “yes”. Defendant asked Lyoya if he had a driver’s license. Lyoya indicated that he did and told the passenger in the Nissan to hand him the license.

Lyoya did not wait for the passenger to hand him the license. Instead, Lyoya abruptly closed the door of the vehicle and walked towards the front of the car in what appeared to be an attempt to get away from the officer. Defendant responded by telling Lyoya to stop, and reached out to restrain and handcuff Lyoya. Defendant was unable to immediately restrain Lyoya and after a struggle, Lyoya was able to break free from defendant and ran around the back of the Nissan into the adjacent residential front yard.

Defendant pursued Lyoya, yelling at him to stop, and is heard radioing out “we’ve got one running”. Defendant reached Lyoya in the side yard of a neighboring house. Defendant was able to grab Lyoya from behind. While this prevented Lyoya from running, Defendant struggled to fully restrain and take control of Lyoya. Defendant continued to yell commands at Lyoya to “stop” and to put his hands behind his back. While Lyoya said “ok”, he continued to struggle and was not complying with the police officer’s commands. Defendant is seen striking Lyoya’s abdomen with a knee multiple times, with no apparent effect on Lyoya. Lyoya appears completely impervious to the officer’s attempts to subdue and restrain him.

By this time, the homeowner in the adjacent house, Wayne Butler, came outside to observe what was occurring. Butler testified that he didn’t want to see anyone get hurt and so he felt compelled to plead 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.” Butler testified that he was also encouraging Lyoya’s passenger to tell Lyoya to comply and get on the ground.

Defendant then pulled his Taser from his utility belt. Lyoya grabbed the front of the Taser with his left hand. Defendant immediately commanded Lyoya to “let go of the Taser.” Lyoya did not comply. The Taser discharged one of its two cartridges, which lodged in the ground without striking anyone. The two continued to struggle over the Taser. Defendant and Lyoya struggled to the ground with Lyoya underneath Schurr attempting to take exclusive control of the Taser. During the struggle, the Taser’s second cartridge was discharged. Lyoya attempted to get up, raising his legs and arms in an apparent attempt to throw defendant off of his back. At one point, defendant’s arms and legs are seen fully suspended in air as Lyoya pushed up from beneath him. Ultimately, Lyoya gained exclusive control of the handle of the Taser and was able to transfer it to his other hand. All the while this went on, defendant continued to shout the commands, “drop the Taser” and “let go of the Taser”.

² 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) cellphone 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.

Being unable to retain any control of the Taser and with Lyoya continuing to attempt to force himself up, defendant used his right hand to draw his service firearm and aimed it at Lyoya's head. Defendant then straightened his left arm while keeping the gun in his right hand pointed at Lyoya's head. Defendant yelled one final time, "drop the Taser!" Seconds latter, defendant fired his weapon, shooting Patrick Lyoya in the head.

The Kent County medical examiner, Dr. Stephen Cohle, testified as to his opinion that Patrick Lyoya's death was homicide caused by a gunshot wound to the back of the head.³

The Court also heard the testimony of Bryan Chiles, a representative of the manufacturer of the Taser. He explained that the Taser involved here contained two cartridges capable of projecting electrical probes up to about 20 feet. If the probes on the cartridges make contact with a person, they will deliver electrical energy that will cause the person temporary neuromuscular incapacitation or "NMI". A person struck with the probes is rendered completely unable to move for around five seconds. He explained that once both cartridges have been deployed, the "base" or "handle" of the Taser is still capable of delivering a "drive stun". A drive stun delivers localized pain to the part of the body touching the front of the Taser; however, a drive stun does not result in NMI. Once ejected, the probes can be retrieved and reactivated. However, unless the probe has made sufficient contact with a person, or unless the conductive material on the wire has been exposed as a result of damage to the wire, the Taser is only capable of delivering the more benign "drive stun" that will not result in NMI.

The Court also heard from Captain Chad McKersie of the Grand Rapids Police Department. Captain McKersie trains police officers and is certified as a master Taser instructor. He opined that defendant followed policy and procedure in this case and that use of deadly force was justified under the totality of the circumstances. He explained the criteria that is considered when evaluating questions concerning the use of force. He also cautioned about the importance of evaluating questions from the circumstances as they appeared to the officer, not with the benefit of hindsight.

He also testified that a number of alternative techniques and responses were available to defendant; but that the policy recognizes the discretion the police officer has to make those decisions in the heat of the moment. Captain McKersie offered an example of other tools and techniques that were available to defendant at the time of the incident, including pepper spray, or the use of the flashlight, baton, or radio to strike the suspect. He explained that even in using the firearm, an officer is taught that they may aim at different parts of the body depending on the level of force that is necessary. He also indicated that it is impossible to know whether Lyoya simply intended to break the grasp of the officer or to actually affirmatively attack him. Ultimately, Captain McKersie is of the opinion that defendant followed his training and policy based on what the totality of the circumstances required.

³ 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.

After hearing counsels' arguments, the Court took the matter under advisement to review the testimony and law in greater detail. Having had the opportunity to review the record, and after an extensive review of the applicable legal authority, for the reasons discussed below the Court now concludes the record supports a finding of probable cause that a crime has been committed and that defendant was the one who committed it. Therefore, defendant will be bound over to the Circuit Court on the charges contained in the complaint.

II. ANALYSIS

A. NATURE OF THE PRELIMINARY EXAMINATION AND LEGAL STANDARD FOR BINDOVER

In Michigan, the preliminary examination serves the public policy of ceasing judicial proceedings where there is a lack of evidence that a crime was committed or that the defendant committed it. *People v Walker*, 385 Mich 565, 573; 189 NW2d 234 (1971). Recognizing the risk associated with standing trial for a felony, the preliminary examination, like the grand jury, serves as a check on the power of the executive branch of government to proceed with a criminal prosecution. *United States v Dionisio*, 410 US 1, 17; 93 S Ct 764, 773; 35 L Ed 2d 67 (1973) (describing the historic role of the grand jury as “a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor”).

However, the scope of judicial review of a criminal prosecution at the preliminary examination is very limited. The judicial officer at the preliminary examination is tasked with making the *legal* determination of whether there exists the minimal amount of evidence the law requires to justify continuing the criminal prosecution. While the Court makes that *legal* determination independent of the prosecutor's decision to bring criminal charges, the Court is prohibited from second-guessing the prosecutor's charging decision. Rather, if the magistrate determines that probable cause exists to support the charge under the law, he is *obligated* to bind the defendant over for trial. See *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996) (recognizing that a court is without authority to review or second guess the charging decisions of the prosecuting attorney if there is sufficient evidence to support the charge). A failure by the Court to bind the defendant over in that instance would amount to nothing less than the court's unconstitutional usurpation of power otherwise belonging exclusively to the executive branch of government, and more specifically to the county prosecutor. *Id.*⁴

⁴ Stated more plainly, while the court operates as a “check” on the prosecutor's power to bring criminal charges, it is a very limited “check”. A court does not have the authority to “veto” the prosecutor's charging decision in the same way that the governor or president can veto a bill passed by the legislature proposing a law or policy that the governor or president does not like, does not think will work, or does not think is fair. A court can only determine whether the charge is founded upon probable cause. If it is legally sound, the court cannot stand in the way of the criminal prosecution regardless of what the court may think about the prosecutor's decision to bring the charges or even the likelihood of conviction by a jury. In other words, the limited question for this Court is whether the criminal prosecution *can* continue as a matter of law without any regard for whether the criminal prosecution *should* proceed based on anything other than the law.

At a preliminary examination, a court is tasked with “determin[ing] whether a felony was committed and whether there is probable cause to believe the defendant committed it.” *People v Yost*, 468 Mich 122, 125–126; 659 NW2d 604 (2003). Probable cause exists where the evidence is “sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt.” *Id.* at 126. The evidentiary standard is far less rigorous than that required for a conviction following a trial:

At the examination, evidence from which at least an inference may be drawn establishing the elements of the crime charged must be presented. The probable-cause standard of proof is, of course, less rigorous than the guilt-beyond-a-reasonable-doubt standard of proof. Probable cause requires a quantum of evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt. Yet, to find probable cause, a magistrate need not be without doubts regarding guilt. The reason is that the gap between probable cause and guilt beyond a reasonable doubt is broad, and finding guilt beyond a reasonable doubt is the province of the jury. [*Id.*]

“In order to establish that a crime has been committed, the prosecution need not prove each element beyond a reasonable doubt, but must present some evidence of each element.” *People v Redden*, 290 Mich App 65, 84; 799 NW2d 184 (2010). And, probable cause may be established purely by circumstantial evidence and reasonable inferences arising from the evidence. *People v Lowery*, 274 Mich App 684, 686; 736 NW2d 586 (2007).

During the preliminary examination, “the magistrate ha[s] not only the right but, also, the duty to pass judgment not only on the weight and competency of the evidence, but also [on] the credibility of the witnesses.” *People v Anderson*, 501 Mich 175, 184; 912 NW2d 503, 508 (2018) quoting *People v Paille #2*, 383 Mich 621, 627; 178 NW2d 465 (1970). At the preliminary examination, however, the court is not to apply the same measure as a jury because of the differences in the standard for bindover and for ultimate guilt. Our Supreme Court explained:

“[T]he gap between probable cause and guilt beyond a reasonable doubt is broad,” *Yost*, 468 Mich at 126, 659 NW2d 604, and therefore, unlike a jury, “a magistrate may legitimately find probable cause while personally entertaining some reservations regarding guilt,” *Id.* at 133-134. Accordingly, in considering the credibility of witnesses, a magistrate may only decline to bind over a defendant if a witness's lack of credibility, when considered together with the other evidence presented during the examination, would preclude “a person of ordinary prudence and caution [from] conscientiously entertain[ing] a reasonable belief of the accused's guilt.” *Id.* at 126 (quotation marks and citation omitted). [*Anderson*, 501 Mich at 188.]

Indeed, the magistrate or judge may very well be left with reasonable doubt that defendant committed the crime charged and yet, at the same time, find probable cause to bind over a defendant on the charge. *Anderson*, 501 Mich at 186, quoting *Yost*, 468 Mich at 133.

B. ELEMENTS OF THE CHARGED OFFENSE

The elements of second-degree murder 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).

As a necessary element of second-degree murder, malice reflects the principle that criminal culpability must be tied to the actor's state of mind. *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980). 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. *Goecke*, 457 Mich at 463. Second-degree murder is a general intent crime and does not require a finding of specific intent to harm or kill. *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996). The intent to do an act in obvious disregard of life-endangering consequences is a malicious intent. *Goecke*, 457 Mich at 463.

There is no real question concerning the first three elements of the charged crime. There is little doubt that Loyola's death was caused by the gunshot wound to the head inflicted by defendant. The clear depiction of the incident in the video strongly infers that defendant knew he was pointing the gun and firing it at close range to Loyola's head, which, in turn, is sufficient to establish probable cause to conclude that defendant acted with malice. See *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999) (explaining that the facts and circumstances of the killing may give rise to an inference of malice).

The only real debatable question here is whether defendant's actions were justified under the law.

C. JUSTIFICATION DEFENSES

A person is not guilty of a crime even though the person committed the illegal act if a legally recognized justification is factually supportable. At trial, the prosecution has the burden of disproving justification beyond a reasonable doubt once evidence is introduced. *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). For purposes of bindover, the Court must determine whether there is evidence that is "sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief" that the homicide of Patrick Lyoya was not justified under the law.

Defendant presents three theories that he argues establishes clear justification as a matter of law such that no probable cause exists for bindover: (1) that he used force reasonably necessary in defense of himself or others; (2) that he used appropriate force in response to force used by Lyoya to avoid arrest; and (3) that he used reasonable force to prevent a felon from fleeing to avoid capture.

1. SELF-DEFENSE

While modified by statute in certain respects in recent years, Michigan law governing self-defense remains primarily a creature of common law. See *People v Conyer*, 281 Mich App 526, 529; 762 NW2d 198 (2008); MCL 780.951, et seq.; MCL 780.971, et. seq. At common law, a

claim of self-defense, which “is founded upon necessity, real or apparent,” may be raised by a nonaggressor as a legal justification for an otherwise intentional homicide. *People v Riddle*, 467 Mich 116, 126–127; 649 NW2d 30 (2002) quoting 40 Am Jur 2d, Homicide, § 138, p. 609. The ultimate question requires a factual determination of whether “the accused, under all the circumstances of the assault, as it appeared to him, honestly believed that he was in danger of [losing] his life, or great bodily harm, and that it was necessary to do what he did in order to save himself from such apparent threatened danger”. *Riddle*, 467 Mich at 127 quoting *People v Lennon*, 71 Mich 298, 300-301; 38 NW 871 (1888).

Thus, the homicide of Patrick Lyoya would be justified under the law of self-defense “only if the defendant honestly and reasonably believe[d] his life [was] in imminent danger or that there [was] a threat of serious bodily harm and that it [was] necessary to exercise deadly force to prevent such harm to himself.” *Riddle*, 467 Mich at 127 citing *People v Daniels*, 192 Mich App 658, 672; 482 NW2d 176 (1991). Our Supreme Court made it clear that “the touchstone of *any* claim of self-defence, as a justification for homicide, is *necessity*.” *Riddle*, Mich at 127 (emphasis in the original). See also *People v Doe*, 1 Mich 451, 456 (1850) (recognizing the right to use deadly force in self defense “provided he use all the means in his power, otherwise, to save his own life or prevent the intended harm; such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power.”). And, indeed, the Court confirmed that generally questions concerning the existence or “lack of reasonableness or necessity in resorting to deadly force in self-defence” are for the jury to decide after considering all the circumstances. *Id.*; *Riddle*, 467 Mich at 128. See also *People v Doss*, 406 Mich 90, 103; 276 NW2d 9 (1979).

Some conclusions concerning the use of deadly force can be made as matters of law. For example, the general rule under the common law was that a person first attempt to retreat and avoid the danger before being justified in using deadly force in self-defense. *Riddle*, 467 Mich at 128. However, by operation of law, both common law and more recently by statute, the duty to retreat is completely excused under certain circumstances.⁵ For purposes of this case, there is no dispute that defendant was legally pursuing Patrick Lyoya and was therefore legally on the front lawn of a private residence at the point of the shooting. Therefore, under MCL 780.972, defendant did not have any obligation to retreat rather than use force.

Nonetheless, factual questions remain as to whether defendant *reasonably* believed that his life was in imminent danger (or that he was in imminent danger of suffering great bodily harm) and that deadly force was *reasonably necessary*. These are questions of fact that the jury must

⁵ Common law recognizes that a person has no obligation to retreat before using deadly force where: (1) the attack is so sudden, fierce and violent, that a retreat would not diminish, but increase his danger; (2) the defendant is engaged in mutual nondeadly violence that escalates to deadly violence without warning; (3) the defendant is in his own dwelling at the time of the attack (the “castle doctrine”). *Riddle*, 467 Mich at 128-134. In 2006, the Michigan Legislature expanded the circumstances in which the duty to retreat is excused. MCL 780.972. Under that statute, a person “who honestly and reasonably believes that deadly force is necessary to prevent the imminent death or imminent great bodily harm to himself or herself or to another individual” has no duty to retreat from a place he or she otherwise has the right to be (presuming the person is not engaged in the commission of a crime at the time).

decide based on the totality of the circumstances as presented by the evidence at trial. *Doss*, 406 Mich at 103.⁶

And, indeed, our jury instructions recognize that the ultimate determination of reasonableness and necessity are questions for the jury to decide based on all of the circumstances. Among the standard instructions that would likely be read at trial, the jury would be told:

...The defendant must have been afraid of [death or serious physical injury]. When you decide if the defendant was afraid of one or more of these, you should consider all the circumstances: [the condition of the people involved, including their relative strength / whether the other person was armed with a dangerous weapon or had some other means of injuring the defendant / the nature of the other person's attack or threat / whether the defendant knew about any previous violent acts or threats made by the other person].

...at the time [he] acted, the defendant must have honestly and reasonably believed that what [he] did was immediately necessary. Under the law, a person may only use as much force as [he] thinks is necessary at the time to protect [himself]. When you decide whether the amount of force used seemed to be necessary, you may consider whether the defendant knew about any other ways of protecting [himself], but you may also consider how the excitement of the moment affected the choice the defendant made. [M Crim JI 7.15]

While defendant has made strong arguments that the circumstances establish reasonableness and necessity, this Court cannot make that determination here at the preliminary examination as a matter of law. The evidentiary record from the preliminary examination contains enough to allow a person of average intelligence to conclude that defendant's fear was not reasonable or that the defendant's shooting of Lyoya in the back of the head was not reasonably necessary.

Captain McKersie testified that it's not clear to him whether Patrick Lyoya was merely trying to get away or was prepared to offensively attack defendant. Captain McKersie also recounted a number of examples of alternative techniques that may have been available to defendant. Based on the testimony, the threat or danger that the Taser presented may not be the same depending on whether it was only capable of delivering a "drive stun" at the time of the shot without resulting in NMI. And, it is not clear whether defendant knew, or should have known, that both of the Taser's cartridges had been discharged.

These are all circumstances that *might* affect how a factfinder would assess the necessity question. While the Captain is of the opinion that the techniques and actions defendant applied

⁶ See also Perkins & Boyce, *Criminal Law* (3d ed.), p. 1116 ("The law of self-defense makes use of (1) rules, and (2) the reasonable person standard. The court determines what the rules are, but it is for the jury to determine whether the standard has been met by the evidence in the particular case.").

were appropriate, a juror would be free to conclude that under the circumstances the use of deadly force in the manner it was used by defendant was not reasonably necessary.⁷

Accordingly, for purposes of the probable cause standard, there is sufficient evidence from which a jury could conclude that defendant did not reasonably believe that his life was immediately at risk or could otherwise conclude that the use of the particular force was not reasonably necessary.

2. FORCE IN RESPONSE TO FORCE USED BY PERSON BEING ARRESTED

Defendant's remaining two theories of justification concern the use of force in making an arrest of a suspected criminal. Defendant points out that the defense in that context can be divided into two categories: (1) the use of deadly force when a person making the arrest is met with force from the person arrested, and (2) the use of deadly force when necessary to prevent the person who is to be arrested from fleeing. *People v Whitty*, 96 Mich App 403, 411; 292 NW2d 214 (1980).

The first category, however, is not a distinct theory of justification from that of self-defense. *Whitty*, 96 Mich App at 411. Rather, it is sometimes highlighted as its own theory because it always excuses any obligation to retreat. *Id.* citing *State v Dunning*, 177 NC 559; 98 SE 530 (1919); Perkins & Boyce, *Criminal Law* (3d ed.), p. 1097.⁸ Our Supreme Court has explained:

‘The officer has discretion, within reasonable limits, to determine the amount of force which the circumstances require, and he is not guilty of wrong unless he arbitrarily abuses the power confided in him.’ Likewise, police officers making a lawful arrest may use that force which is reasonable under the circumstances in self-defense, and unlike the private citizen a police officer, by the necessity of his duties, is not required to retreat before a display of force by his adversary. See 40 Am Jur 2d, *Homicide*, s 137, pp. 427-428. *However, 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*

⁷ The Court does not raise these examples to suggest that defendant's actions exceeded what was reasonably necessary. To be clear, this Court expresses no opinion on that matter or the ultimate guilt or innocence of defendant (as explained previously, that is not the question before this Court). Law enforcement officers are required to make split-second decisions of life and death which cannot be judged through 20/20 vision of hindsight from the vantage point of the judge's bench. See *Graham v Connor*, 490 US 386, 396 (1989). It is precisely for this reason that defendant must be bound over for trial to allow a jury to make that factual determination taking into account all of the evidence produced at a full and fair trial.

⁸ The author indicates:

Of chief concern in this regard is the privilege of using deadly force in making or attempting an arrest, and for the moment there will be an exclusion of all cases in which the arrestee resists by the use of force because the problem there is self-defense, to be considered later. [emphasis added.]

to save himself therefrom. [*Doss*, 406 Mich at 102; quoting, in part, 5 Am Jur 2d, Arrest, s 81, p. 768.]⁹

Therefore, for the purposes of this case, this theory is completely duplicative of, and indistinct from, the justification theory of self-defence.¹⁰

And for the same reasons discussed above, for purposes of the probable cause standard there is some evidence from which a jury could conclude that defendant's belief was not reasonable or that his response was not reasonably necessary.

3. FLEEING FELON

The most complex of the three defenses raised is the so-called fleeing felon rule which, under certain circumstances, justifies the use of deadly force to prevent a felon from escaping arrest. The complexity is not in its application. To the contrary, if applicable in its purest form the rule is as draconian and unforgiving as it sounds.¹¹ Rather, as defendant suggests, there is a lack of complete clarity as to some aspects of the rule under Michigan law. Despite calls for legislative reform or clarification, the defense remains in Michigan as a creature of common law. *People v Couch*, 436 Mich 414, 419; 461 NW2d 683, 685 (1990).

Importantly, this Court's task, and the extent of any court's authority, is the determination of what the law *actually is*, not what it or anyone else thinks the law *ought to be*.¹² As a matter of public policy, reasonable minds can disagree about the extent to which police officers should be free to make judgment calls without the potential for criminal culpability. This Court must simply find what the law is now without any consideration of how it might be changed one way or another.

The 1990 Michigan Supreme Court case of *People v Couch*, 436 Mich 414, controls the question of what the law is in Michigan today. And, while there may be nuances that remain, the primary components are readily discernable and are, at least for purposes of making the probable cause determination required here, more than clear. Under *Couch*, the common law fleeing felon

⁹ See also Michigan Non-Standard Jury Instr Criminal § 13:10

¹⁰ As indicated above, MCL 780.972 independently excuses any obligation to retreat.

¹¹ Blackstone observes: “[a]ny 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....” 4 Blackstone, Commentaries, p. 293 (emphasis in original). In 1985, the U.S. Supreme Court observed that Michigan was only one of four states that still followed the rule. *Tennessee v Garner*, 471 US 1, 17 n.16; 105 S Ct 1694, 1704; 85 L Ed 2d 1 (1985).

¹² See *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 66; 718 NW2d 784 (2006) citing *Marbury v Madison*, 5 US (1 Cranch) 137, 177, 2 L Ed 60 (1803).

defense, as it existed in 1846 at the time that the crimes of murder and manslaughter were codified in this state's first Penal Code, continues to be the governing law of this state.¹³

Under that common law fleeing felon rule, the use of deadly force 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*, unpublished per curiam opinion of the Court of Appeals, issued April 24, 2007 (Docket No. 267572); *Couch, supra*.

For purposes of the questions before us today, it is clear that even under this broad and rather forgiving rule of justification, the question of "necessity" remains tightly wound around its core: requiring an answer to the question of whether the use of deadly force was "necessary to ensure the apprehension of the felon." And, no different than the "necessity" component at the core of self-defense, "necessity to ensure the apprehension of the felon" is a question of fact for the jury to decide. *Id.* citing *People v Hampton*, 194 Mich App 593, 596; 487 NW2d 843, 845 (1992).

And, 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. As the prosecutor suggests, at the instant that 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.

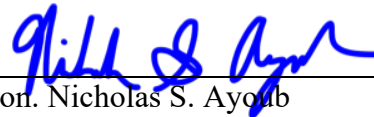
III. CONCLUSION

For the forgoing reasons, the Court concludes that, as a legal matter, probable cause has been presented to support the charge in the criminal complaint. Accordingly, it is the Court's obligation to bind defendant over to the 17th Circuit Court to stand trial on that charge.

An order binding defendant over for trial on the charges will be separately entered by the Court.

October 31, 2022

Date



Hon. Nicholas S. Ayoub
61st District Court Judge

¹³ It has been suggested that Michigan is the only state that continues to adhere to the rule in its strictest common law form. See Flanders & Welling, *Police Use of Deadly Force: State Statutes 30 Years after Garner*, 35 St Louis U Pub L Rev 109, 122 (2015).