

STATE OF MICHIGAN  
WAYNE COUNTY CIRCUIT COURT  
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-vs-

Case # 00-11111

Hon. Timothy Kenny

DAVID KOWALSKI,

Defendant.

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Patricia Leonard, Assistant Prosecutor  
Wayne County Prosecutor's Office  
12<sup>th</sup> floor – Frank Murphy Hall of Justice  
1441 St. Antoine  
Detroit, MI 48226  
(313) 224-5777

Steven Fishman (P23049)  
Attorney for Defendant  
615 Griswold, Suite 1125  
Detroit, MI 48226  
(313) 962-4090

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**MOTION TO ADMIT EXPERT TESTIMONY**

Now comes David Kowalski, Defendant herein, by and through his attorney Steven Fishman, and in support of his motion to admit expert testimony states as follows:

1. Defendant Kowalski is a Detroit police officer charged with involuntary manslaughter as a result of the fatal shooting of Earl Short on August 29, 2000.
2. A jury trial is scheduled for March 27, 2001.
3. The shooting of Mr. Short arose out of events that occurred after police officers, including Officer Kowalski, were called to Mr. Short's home at 16887 Gilchrist in the city of

Detroit.

4. On information and belief, the prosecution's theory of the case is that Officer Kowalski used excessive force by discharging his firearm while it was intentionally pointed or aimed at Mr. Short.

5. The defense theory of the case is that Officer Kowalski acted in legitimate defense of another person, specifically Officer Bernard Howell, when he fired the shots at Mr. Short.

6. It is also part of the defense theory of the case that Officer Kowalski's actions were consistent with his police training and proper police procedures.

7. Consistent with the defense theory of the case, it is the intention of the defense to call an expert witness to testify to the procedures that should be followed by police officers in situations similar to the instant case.

8. An expert witness may properly be called if the expert is educated in a field or has practical experience that will aid the jury in understanding an issue related to that field. MRE 702; People v Boyd, 65 Mich App 11 (1975).

9. In the instant case, the testimony of an expert witness will aid the jury in understanding the issue of defense of others as it relates to police officers in the lawful performance of their duty.

Wherefore, Defendant Kowalski requests that this Court grant his motion to admit expert testimony.

**MEMORANDUM OF LAW IN SUPPORT  
OF MOTION TO ADMIT EXPERT TESTIMONY**

**Statement of Facts**

David Kowalski is a Detroit police officer assigned to the 8<sup>th</sup> Precinct. On August 29, 2000, Officer Kowalski was on routine patrol in uniform and a marked scout car. He and his partner responded to a radio run to 16887 Gilchrist. Another scout car responded to the same address at almost the same time. The run indicated that a man with a knife was threatening other family members.

Upon arriving at the scene, all four officers approached the house. At that time, the deceased, Earl Short, was chasing his son in the area of the front lawn. Upon seeing the officers, Mr. Short immediately ran toward the back yard of the house, returning a short time later with a rake in his hand. While the testimony concerning the positioning of the rake and the manner in which it was held by Mr. Short was conflicting to say the least, it was generally agreed that he continued to hold the rake as he approached the officers. At some point in time during the confrontation, Officer Kowalski fired two shots that killed Mr. Short.

The testimony of the witnesses as to what Mr. Short was doing at the time he was shot was also wildly conflicting. The civilian witnesses basically claimed that he was no threat at all; the officers, on the other hand, testified that he advanced toward them, raised the rake as if to use it as a weapon, and was shot as a result of his own actions. In particular, Officer Bernard Howell testified that Mr. Short advanced directly toward him with the rake in his hand, refused to drop it when directed to do so, and raised the rake over his head and began to bring it down toward the officer. Officer Howell also testified that he drew his own weapon as Mr. Short advanced, and

was about to shoot Mr. Short himself at the time Officer Kowalski fired the shots.

Because the main issue in the case appears to be whether Officer Kowalski was justified in shooting Mr. Short in lawful defense of another, specifically Officer Howell, the defense intends to call an expert witness to testify as to proper police procedure that should be followed in situations like the instant case.

### **Argument**

MRE 702 provides for the admission of expert testimony “if the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” An expert witness is defined as a person who is educated in a field or has practical experience that would aid the jury in understanding an issue relating to that field. People v Boyd, 65 Mich App 11 (1975). A person does not have to have formal education to qualify as an expert, but may acquire special knowledge of the subject by other means. People v Towlen, 66 Mich App 577 (1976).

The trial court has the discretion to admit expert testimony where it determines that the subject matter involves special skill and training beyond the experience of the average person, that the testimony will aid the trier of fact in deciding the ultimate issue, and that the testimony’s probative value is not outweighed by the likelihood of prejudice, confusion, or waste of time. People v Smith, 425 Mich 98 (1986). The admissibility of expert opinion is not subject to challenge on the ground that the ultimate determination of guilt or innocence may turn on whether the expert is believed or disbelieved. People v Robinson, 417 Mich 231 (1983).

In the instant case, it is undisputed that the fatal shooting of Earl Short occurred as the result of a confrontation between Mr. Short and on-duty police officers, including Officer

Kowalski. It is also undisputed that the officers, including Officer Kowalski, responded to Mr. Short's home as a result of a complaint made to the police about Mr. Short's behavior. By charging Officer Kowalski with involuntary manslaughter, the prosecution obviously contends that his actions in shooting Mr. Short were not justified or excused as self-defense or the lawful defense of others. In attempting to show that his actions were not legally justified, the prosecution will undoubtedly also contend that Officer Kowalski did not respond properly to the threat presented by Mr. Short. Implied in that contention is that Officer Kowalski's actions were outside the scope of his training and proper police procedure.

To defend against the prosecution's theory at trial, the defense intends to call an expert witness in the field of law enforcement training. The expert witness, who not only has extensive personal experience in law enforcement but also has an instructional career of over twenty years, will assist the jury in understanding not only the facts at issue, but also the significance of those facts to the issues in the case. As contemplated by the court rule and the case law, the expert is educated and has past experience in the field of law enforcement that would aid the jury in understanding issues relating to the field of law enforcement. People v Boyd, supra.

WHEREFORE, Defendant Kowalski requests that this Court grant him motion to admit expert testimony.

Respectfully submitted,

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Steven Fishman (P23049)  
Attorney for Defendant Kowalski  
615 Griswold, Suite 1125  
Detroit, MI 48226