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OFFICE OF APPELLATE COURTS

No. A21-1228

STATE OF MINNESOTA

IN COURT OF APPEALS

State of Minnesota,

Respondent,

vs.

Derek Michael Chauvin,

Appellant.

APPELLANT'S BRIEF

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- *Issues subsequently preserved:* Post-Verdict Motion—*Dkt-520.*
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- *Issues subsequently preserved:* Memorandum—*Dkt-520.*
- *Apposite law:* Minn. Stat. §486.02; *State v. Lee,* 494 N.W.2d 475 (Minn. 1992).

STATEMENT OF THE CASE

This criminal case was tried before Judge Peter Cahill, Fourth Judicial District. George Floyd ("Floyd") died while resisting Minneapolis Police Officers ("MPD") arresting him. Appellant Derek Chauvin ("Chauvin"), an MPD officer, was convicted of second degree felony-murder in Floyd's death.

STATEMENT OF FACTS

A. The Arrest of George Floyd.

On May 25, 2020, Floyd used a counterfeit $20 bill at Cup Foods in Minneapolis. *TT-3198.* Cup Foods reported Floyd to MPD including that was intoxicated. *TT-3200-3207.* MPD Officers Alexander Kueng and Thomas Lane arrived and confronted Floyd behind a Mercedes steering wheel. *Trial Exhibit ("TE") 43.* Floyd attempted to hide fentanyl tablets by swallowing them. *TE-1059; TT-5550-5553.* After Floyd refused to comply with officer directions, Lane drew his firearm and ordered Floyd to leave the vehicle. *TE-47.* Floyd refused. Lane pulled Floyd from the vehicle and handcuffed him. *Id.* The officers directed Floyd to the sidewalk. *Id.* Kueng told Floyd he was "very erratic" and asked if Floyd ingested drugs. *Id.* Floyd, starting to foam from his mouth, stated he had been "hooping" – taking drugs through his anus. *Id.* The officers arrested Floyd and directed Floyd to their police SUV. *Id.* Floyd resisted claiming he was claustrophobic, anxious and could not breathe. *Id.* Officers Tou Thao and Derek Chauvin arrived to assist. *TE-49.* Kueng struggled to get Floyd into the police SUV. *TE-47.* Chauvin tried to get Floyd to sit up in the vehicle. *Id.* Floyd continued to state he could not breathe. *Id.* Lane and Kueng then pulled Floyd out of the police SUV and

Floyd fell to the street. *TE-49.* Because Floyd continued to resist, Chauvin placed Floyd in a "maximal restraint technique" ("MRT")—an MPD approved technique to control suspects resisting arrest. *TE-49.* Lane laid Floyd on his stomach and Floyd continued to complain he could not breathe. *Id.* While Kueng and Lane held Floyd's legs, Chauvin knelt on Floyd's back. *Id.*

A crowd gathered and began yelling at the officers. *Id.* Floyd continued complaining he could not breathe. *TE-47.* Because of Floyd's complaints, the officers called for paramedics as a Code 3 emergency. *TT*-3483. Because of the threatening crowd, the paramedics performed a "load and go"–they loaded Floyd in the ambulance and drove three blocks away before providing treatment to Floyd. *TT-3410-3411.* The ambulance then took Floyd to the Hennepin County Medical Center ("HCMC") where Floyd died. *TT-3447.*

The next day, MPD Chief Medaria Arradondo met with several "local faith leaders... from the African American community" and, after conferring with them, terminated all four officers from MPD. *Dkt—105-bates-8816-17;* https://www.startribune.com/minneapolis-police-protesters-clash-almost-24-hours-after-george-floyd-s-death-in-custody/570763352/. The press began continuously publishing articles stating that more was at stake in the Chauvin's trial then merely his guilt or innocence:

> "Everything is riding on the outcome of the trial," said Keith Mayes, an associate professor at the University of Minnesota's Department of African American and African Studies. "Yes, Chauvin is on trial, and it's about the Floyd murder. … But an argument can be made it's about all the other folks that didn't receive justice, too. That's why a

> conviction is necessary for us to reimagine what a future can look like, because these cases continue to happen until the police are thoroughly reformed."

https://www.startribune.com/derek-chauvin-trial-represents-a-defining-moment-in-america-s-racial-history/600039431/?refresh=true

B. Riots Occur in Minneapolis and St. Paul After Publication of the Arrest.

Individuals at the scene filmed Floyd's arrest posting internet videos that went "viral" (https://www.startribune.com/pulitzer-board-awards-special-citation-to-darnella-frazier-who-shot-viral-video-of-george-floyd-s-de/600067273/) and were shown on local news TV stations and print media. https://www.startribune.com/george-floyd-death-ignited-protests-far-beyond-minneapolis-police-minnesota/569930771/. News media falsely reported Chauvin had his knee on Floyd's neck causing Floyd to suffocate. https://www.startribune.com/rubber-bullets-chemical-irritant-water-bottles-in-air-as-thousands-march-to-protest-george-floyd-s-d/570786992/. On May 26, 2020, protests began at the MPD Third Precinct. The protests turned into riots with protestors chanting "I can't breathe," burning a squad car and damaging the Third Precinct. MPD officers used tear gas and rubber bullets on the rioters. *Id.*

On May 27, 2020, the riots significantly worsened. Minneapolis Mayor Frey called for Governor Walz to deploy the National Guard which Walz refused. The rioters burned down numerous buildings in Minneapolis and looted numerous stores. https://www.startribune.com/minneapolis-mayor-frey-calls-for-peace-as-looting-flames-erupt-around-police-station/570816112/. On May 28, rioting continued spreading to St. Paul and neighboring cities. https://minnesota.cbslocal.com/2020/06/16/minneapolis-issues-map-showing-extent-of-buildings-damaged-in-unrest-over-george-floyds-death/.

Late May 28th, Governor Walz activated the National Guard. https://www.startribune.com/gov-tim-walz-laments-abject-failure-of-riot-response/570864092/. Nonetheless, rioting continued on May 29 causing the Governor Walz to order curfews for Minneapolis and St. Paul. In addition, Dakota and Anoka counties and the cities of Bloomington, Brooklyn Park, Edina, Maple Grove, Richfield and Roseville issued curfew orders on May 29th. https://www.startribune.com/suburbs-join-st-paul-mpls-in-ordering-curfews-starting-at-8-p-m-friday/570873142/. Despite this, rioting continued. https://www.startribune.com/walz-minn-officials-call-on-people-to-follow-curfew/570892512/. On May 30th, rioting continued despite the deployment of thousands of National Guard troops. https://www.startribune.com/walz-praises-citizens-help-in-stemming-mpls-violence/570904922/. Finally, the riots began to die down on May 31 and June 1. https://www.startribune.com/tensions-on-streets-ebb-in-wake-of-george-floyd-s-death/570942192/. When the riots ended, buildings were destroyed throughout the metropolitan area. https://www.startribune.com/a-deeper-look-at-areas-most-damaged-by-rioting-looting-in-minneapolis-st-paul/569930671/. Two individuals died. https://www.startribune.com/bystanders-scrambled-to-rescue-person-in-burning-mpls-pawnshop/571864701/. Property damage exceeded $500,000,000–the second most destructive riots in American history. https://www.startribune.com/twin-cities-rebuilding-begins-with-donations-pressure-on-government/571075592/.

In addition to the riots, protests were held on August 15, 2020 at the home of MPD Police Union President's home in Hugo with chants to burn down Hugo.

https://www.startribune.com/gop-calls-candidate-s-comments-at-hugo-protest-reprehensible/572133352/.

C. Chauvin is Charged with Third Degree Murder and then Second Degree Murder.

The State initially charged Chauvin with Third Degree Murder and Second Degree manslaughter. *Dkt-1.* On May 31, 2020, Governor Walz appointed Attorney General Ellison to prosecute Chauvin. The Attorney General added a second degree murder charge. *Dkt-4.*

D. The Hennepin County Attorney Improperly Meets with the Hennepin County Medical Examiner Before He Completed His Investigation.

Hennepin County Attorney Michael Freeman and his attorneys prosecuting the case met with Hennepin County Medical Examiner Dr. Andrew Baker the day after Floyd died and after Baker had completed his autopsy but prior to Baker issuing his medical findings. *Dkt-101.* Baker told the attorneys there was no physical evidence Floyd died of asphyxiation. *TT-4929.* Baker said Floyd's heart condition was a major contributing factor in his death. Baker said outside the circumstances of this case, he would have concluded that the manner of death was a fentanyl overdose. *TT-4932.* Finally, Baker admitted that the placement of Chauvin's knees on Floyd's back would not have cut off Floyd's airway–i.e., Floyd did not die from Chauvin cutting off Floyd's airway. *TT-4935-36.* Because third party witnesses were not present when the Hennepin County Attorneys met with Baker, the Court prohibited them from representing the State at trial because they made themselves witnesses in the case (because of the potential they exercised improper influence over Baker). *Dkt-195.*

E. Baker Issues His Final Report After the Meeting with Hennepin County Attorneys.

Baker issued his findings on Mary 26, 2020. In his autopsy, Baker found In addition, Floyd's lungs were two to three times their normal weight. *Id.* Floyd had cannaboids, fentanyl and methamphetamine in his system. *Id.* Floyd had recently been ill with COVID-19 and tested positive in his autopsy. *TT-4879.* Floyd had arteriosclerotic and hypertensive heart disease, hypertension, and sickle cell trait. *TT-4880.* Floyd's had an enlarged heart due to high blood pressure and 90% and 75% constriction of his right and left coronary arteries–all of which Baker admitted could cause sudden death. *TT-4904-05.* Floyd had no neck injuries. *TT-4919-4920.* The fentanyl amount in Floyd (11.3 nonograms) was three times the amount considered fatal. *TT-4926-4929.* Baker admitted the methamphetamine in Floyd's toxicology report caused Floyd's heart to work harder thereby increasing risk of heart failure. *TT-4909.* Baker admitted Floyd had no evidence of asphyxia and ***no*** neck or back injuries ***at all***–i.e., no strangulation. *TT-4818-20;4929.* Despite these admissions, Baker concluded the cause of Floyd's death was cardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression"–i.e., Floyd's heart stopped due to the officers arresting him including compressing his neck even though there was no evidence Floyd suffered any neck injuries. *TT-4888.*

F. Pre-Trial Publicity Was More Extensive Than in Any Trial Ever in Minnesota.

Floyd's arrest and death, Chauvin's identification and the riots had more media coverage in the Minneapolis/St. Paul area than any event in its history. There was saturation

news coverage in the Star Tribune and Pioneer Press and the three TV networks – WCCO, KARE-11 and. Nationwide, news coverage was more extensive than any story in fifty years. *https://www.washingtonpost.com/politics/2020/07/06/george-floyd-protests-generated-more-media-coverage-than-any-protest-50-years/.* More importantly, with respect to the riots, the news coverage was oddly favorable to the rioters. *Id.*

From May 25, 2020 to March 8, 2021—287 days—local media published stories having Chauvin's name either in the heading or the body almost every day. Google's search engine returned 242 Star Tribune results and 267 Pioneer Press results. The four major networks ranged from 915 to 1,160 results as set forth below:

News Outlet	Search Term	Results
Star Tribune	"Chauvin" and www.startribune	242 articles
Pioneer Press	"Chauvin" and "Twincities.com"	267 articles[1]
WCCO	"Chauvin" and "https://minnesota.cbslocal.com/"	1,090 stories and articles[2]
KARE 11	"Chauvin" and https://www.kare11.com/"	1,160 stories and articles[3]

[1] https://www.google.com/search?q=Chauvin+and+%E2%80%9CTwincities.com%E2%80%9D&rlz=1C1GCEU_enUS926US926&sxsrf=APq-WBs9kIBHcbZhmzIfbaQLc8beTeq1Tw%3A1644431217249&source=lnt&tbs=cdr%3A1%2Ccd_min%3A5%2F25%2F2020%2Ccd_max%3A3%2F8%2F2021&tbm

[2] https://www.google.com/search?q=Chauvin+and+https%3A%2F%2Fminnesota.cbslocal.com%2F&rlz=1C1GCEU_enUS926US926&biw=1254&bih=525&sxsrf=APq-WBtV7ibcujYNfzEbD0uZpVP2Hn6WLg%3A1644430339076&source=lnt&tbs=cdr%3A1%2Ccd_min%3A5%2F25%2F2020%2Ccd_max%3A3%2F8%2F2021&tbm

[3] https://www.google.com/search?q=Chauvin+and+https%3A%2F%2Fwww.kare11.com%2F&rlz=1C1GCEU_enUS926US926&sxsrf=APq-WBucOYAJRwcaoauhX_-

KSTP	"Chauvin" and "https://kstp.com/"	927 stories and articles[4]

See also, Dkt-408-409.

This same media published headlines or articles having Floyd's name either in the heading or body literally every day. The Star Tribune had 3,430 results and Pioneer Press 936 results–more than 13 stories per day. The four major networks ranged from 326 to 2,080 results as set forth below:

News Outlet	Search Terms	Results
Star Tribune www.startribune	"George Floyd" and "www.startribune"	3,430[5]
Pioneer Press Twincites.com	"George Floyd" and "Twincities.com"	936[6]

CMSTFX7pRgg%3A1644428614159&source=lnt&tbs=cdr%3A1%2Ccd_min%3A5%2F25%2F2020%2Ccd_max%3A3%2F8%2F2021&tbm=

[4] https://www.google.com/search?q=Chauvin+and+https%3A%2F%2Fkstp.com%2F&rlz=1C1GCEU_enUS926US926&sxsrf=APq-WBttdVMjNAoEbjjHG5WKcN3pvT_DXQ%3A1644430712808&source=lnt&tbs=cdr%3A1%2Ccd_min%3A5%2F25%2F2020%2Ccd_max%3A3%2F8%2F2021&tbm=(last visited Feb. 9, 2022).

[5] https://www.google.com/search?q=%22george+floyd%22+and+%E2%80%9Cwww.startribune%E2%80%9D&rlz=1C1GCEU_enUS926US926&tbs=cdr%3A1%2Ccd_min%3A5%2F25%2F2020%2Ccd_max%3A3%2F8%2F2021&sxsrf=APq-WBsHMiiRKz4JtPL9GPAoWJlByHG-Tw%3A1644438464419&ei=wCMEYtL7GKynptQPg86SiAc&ved=0ahUKEwjS25rUuvP1AhWsk4kEHQOnBHEQ4dUDCA8&oq=%22george+floyd%22+and+%E2%80%9Cwww.startribune%E2%80%9D&gs_lcp=Cgdnd3Mtd2l6EAw6BwgjELADECc6BwgjELACECdKBAhBGAFKBAhGGABQ2CBYyGpg8YkBaAFwAHgAgAFliAHEDpIBBDIwLjGYAQCgAQHIAQHAAQE&sclient=gws-wiz

[6] https://www.google.com/search?q=%22George+Floyd%22+and+%E2%80%9CTwincities.com%E2%80%9D&rlz=1C1GCEU_enUS926US926&sxsrf=APq-

WCCO minnesota.cbslocal.com	"George Floyd" and “https://minnesota.cbslocal.com/”	1,640[7]
KARE-11 www.kare11.com	"George Floyd" and “https://www.kare11.com/”	2,080[8]
KSTP	"George Floyd" and “https://kstp.com/”	1,550[9]

WBuies2Ksir3zKNwwfQqdt6x9ck9ag%3A1644438620950&source=lnt&tbs=cdr%3A1%2Ccd_min%3A5%2F25%2F2020%2Ccd_max%3A3%2F8%2F2021&tbm=

[7] https://www.google.com/search?q=%22George+Floyd%22+and+https%3A%2F%2Fminnesota.cbslocal.com%2F&rlz=1C1GCEU_enUS926US926&sxsrf=APq-WBuXKXB-NyA50kc9wRs7M36z9HowYg%3A1644438899754&source=lnt&tbs=cdr%3A1%2Ccd_min%3A5%2F25%2F2020%2Ccd_max%3A3%2F8%2F2021&tbm=

[8] https://www.google.com/search?q=%22George+Floyd%22+and+https%3A%2F%2Fwww.kare11.com%2F&rlz=1C1GCEU_enUS926US926&tbs=cdr%3A1%2Ccd_min%3A5%2F25%2F2020%2Ccd_max%3A3%2F8%2F2021&sxsrf=APq-WBvY2x3PVayj7ze_R45nyKm1TDgmAA%3A1644439244519&ei=zCYEYqX8HuKaptQP3M6_iAo&ved=0ahUKEwilkpjIvfP1AhVijYkEHVznD6EQ4dUDCA8&oq=%22George+Floyd%22+and+https%3A%2F%2Fwww.kare11.com%2F&gs_lcp=Cgdnd3Mtd2l6EAw6CAgAELADEIYDOgQIIxAnOgQILhBDOgUIABCRAjoECAAQQzoLCAAQgAQQsQMQgwE6EQguEIAEELEDEIMBEMcBENEDOggIABCABBCxAzoHCCMQ6gIQJ0oECEEYAUoECEYYAFCyCVjAIGCVM2gCcAB4AYABfogBuxKSAQQxNi45mAEAoAEBoAECsAEKyAEDwAEB&sclient=gws-wiz

[9] https://www.google.com/search?q=%22George+Floyd%22+and+https%3A%2F%2Fkstp.com%2F&rlz=1C1GCEU_enUS926US926&tbs=cdr%3A1%2Ccd_min%3A5%2F25%2F2020%2Ccd_max%3A3%2F8%2F2021&sxsrf=APq-WBt9l1OOT93a0z6SZNN34vS-IK8AeA%3A1644439055149&ei=DyYEYvmjCNekqtsPgs2S-AU&ved=0ahUKEwi55_HtvPP1AhVXkmoFHYKmBF8Q4dUDCA8&uact=5&oq=%22George+Floyd%22+and+https%3A%2F%2Fkstp.com%2F&gs_lcp=Cgdnd3Mtd2l6EAM6BwgjELADECc6BwgjELACECc6BAgAEA06BggAEA0QHkoECEEYAUoECEYYAFD4HljLVGCeYGgEcAB4AIABZogB6g-SAQQyMi4xmAEAoAEByAEBwAEB&sclient=gws-wiz

This same media published headlines or articles with “riots” either in the heading or body every day as set forth below:

News Outlet	Search Term	Results
Star Tribune	"riots" and “www.startribune”	260[10]
Pioneer Press	"riots" and “Twincities.com”	224[11]
WCCO	“riots” and “https://minnesota.cbslocal.com/	415[12]
KARE-11	“riots" and “https://www.kare11.com/”	662[13]

[10] https://www.google.com/search?q=%22riots%22+and+%E2%80%9Cwww.startribune%E2%80%9D&rlz=1C1GCEU_enUS926US926&sxsrf=APq-WBsaiTf7mR9KU4TJpEhBUk5dZwg49g%3A1644442646277&source=lnt&tbs=cdr%3A1%2Ccd_min%3A5%2F25%2F2020%2Ccd_max%3A3%2F8%2F2020&tbm=

[11] https://www.google.com/search?q=%22riots%22+and+%E2%80%9CTwincities.com%E2%80%9D&rlz=1C1GCEU_enUS926US926&sxsrf=APq-WBuc6aPKxJFpFRHkII1AQoEFKBQckA%3A1644444689219&source=lnt&tbs=cdr%3A1%2Ccd_min%3A5%2F25%2F2020%2Ccd_max%3A3%2F8%2F2021&tbm=

[12] https://www.google.com/search?q=%22riots%22+and+https%3A%2F%2Fminnesota.cbslocal.com%2F&rlz=1C1GCEU_enUS926US926&sxsrf=APq-WBu5P0oYbDkeWSF6Slnh1WhO8grFRw%3A1644443846705&source=lnt&tbs=cdr%3A1%2Ccd_min%3A5%2F25%2F2020%2Ccd_max%3A3%2F8%2F2021&tbm=

[13] https://www.google.com/search?q=%22riots%22+and+https%3A%2F%2Fwww.kare11.com%2F&rlz=1C1GCEU_enUS926US926&tbs=cdr%3A1%2Ccd_min%3A5%2F25%2F2020%2Ccd_max%3A3%2F8%2F2021&sxsrf=APq-WBuuMkgMDSfBSKrbAq-TgEmXBq9j1A%3A1644439408022&ei=cCcEYrVBrK6m1A_flJu4DQ&ved=0ahUKEwi1uZOWvvP1AhUsl4kEHV_KBtcQ4dUDCA8&oq=%22riots%22+and+https%3A%2F%2Fwww.kare11.com%2F&gs_lcp=Cgdnd3Mtd2l6EAw6BggAEA0QHkoECEEYAUoECEYYAFCMDFjWRmDGY2gCcAB4AIABaIgBhQ6SAQQxNy4zmAEAoAEBwAEB&sclient=gws-wiz

KSTP	"riots" and "https://kstp.com/"	490[14]

This coverage glorified Floyd and demonized Chauvin. *https://www.startribune.com/memorial-for-george-floyd-looks-ahead-to-what-s-next/571016152/*. *https://www.startribune.com/those-who-know-derek-chauvin-say-they-would-not-have-predicted-his-killing-of-george-floyd/572054552/*. The Minneapolis Police Chief and Minnesota's head of the Department of Public Safety called the incident a "murder" on June 4, 2020. *https://m.startribune.com/police-chief-derek-chauvin-knew-what-he-was-doing/571443282/*. Numerous news stories said Chauvin had his knee on Floyd's neck and Floyd could not breathe. In fact, Black Lives Matter began campaign protests using the slogans "get your knee off our neck" and "I can't breathe" insinuating Chauvin caused Floyd's death by suffocating Floyd. *https://www.startribune.com/memorial-for-george-floyd-looks-ahead-to-what-s-next/571016152/*. Stories also emphasized the "menacing" look on Chauvin's face in the "viral" videos. *https://www.cnn.com/2021/04/24/us/derek-chauvin-eyes-indifference-blake/index.html*. In fact, it was menacing-as MPD officers testified was proper in order to intimidate the crowd threatening to interfere with the officers. *TT-3978-3982*. In fact,

14 https://www.google.com/search?q=%22riots%22+and+https%3A%2F%2Fkstp.com%2F&rlz=1C1GCEU_enUS926US926&sxsrf=APq-WBvQrXS6nkOdp08Xdh3Vd9W-J7d0iQ%3A1644444062701&source=lnt&tbs=cdr%3A1%2Ccd_min%3A5%2F25%2F2020%2Ccd_max%3A3%2F8%2F2021&tbm=

Chauvin deployed his mace and told the crowd to "don't come over here" because of the threats. *TT-5180-5181.*

Court TV televised the trial live—the first time a Minnesota court had allowed "cameras in the courtroom." Court TV reported that its viewership for the trial was the highest it had ever recorded. *https://www.prnewswire.com/news-releases/over-400-000-viewers-tune-in-to-court-tv-for-chauvin-trial-verdict-301275548.html.*

Chauvin and the other officers moved to change venue on August 28, 2020. *Dkt-93.* Chauvin renewed the motion on March 18, 2021 and submitted an expert report on the effects of the pretrial publicity and the riots would have on Hennepin County residents along with exhibits of media coverage. *Dkt-406-411.* The Court denied the change of venue motion and ordered the jury sequestration *only during deliberations. Dkt-192;194.*

G. Protestors Assault Defendants' Attorneys Outside the *Family* Courthouse.

On September 11, 2020, the Court held a hearing on all four officers' cases at the Hennepin County Family Court because the Hennepin County Government Center ("HCGC") could not provide adequate security from violence. Nonetheless, security failed. Chauvin was subjected to a degree of humiliation by being paraded in public dressed in jail cloths, body armor and waist and leg chains. Protestors harassed the officers and their attorneys outside the courthouse physically assaulting the Officer Lane and his attorney, jeering at Officer Thao's attorney and causing $2,000.00 of property damage. *Defendant Kueng's October 1, 2020 memorandum and Exhibit A and October 20, 2020 memorandum filed in Hennepin County Court File No. 27-CR-20-12953 and*

https://www.startribune.com/defense-attorney-in-george-floyd-case-renews-callto-move-trial-after-protester-arrests/572774111/. See also, Dkt-194.

H. Security at the Courthouse.

Because of the pretrial publicity, the Court implemented unprecedented security measures for trial. The Court closed HCGC surrounding it with barbed wire fencing and concrete block and stationing National Guard troops along with two armored personnel carriers. *https://www.startribune.com/chauvin-trial-cost-hennepin-county-3-7-million-for-security-other-expenses/600078744/*. No one was allowed in HCGC except for trial participants and Chief Judge Todd Barnette and Deputy Chief Judge Kerry Meyer. *https://www.startribune.com/hennepin-county-courthouse-locked-down-days-before-chauvin-trial-set-to-begin/600029784/*. With respect to the jurors, the Hennepin County Sheriff's Office assembled seated jurors in undisclosed locations each morning and drove them to the courthouse. *https://www.startribune.com/chauvin-trial-cost-hennepin-county-3-7-million-for-security-other-expenses/600078744/*. Finally, the Supreme Court had suspended in person jury trials until March 15, 2021-except this one-due to Covid-19. *Minnesota Supreme Court Order ADM20-8001*.

I. Every Potential Juror and Seated Juror Admitted Detailed Knowledge of Both Floyd's Death, Chauvin's Involvement and the Riots.

Because of the pervasive pretrial publicity, the 326 potential jurors and seated jurors had detailed knowledge of Floyd's death, Chauvin's involvement and the riots. *Juror Questionnaire Responses.* Numerous potential jurors stated Chauvin "choked" Floyd. *Id., e.g., Juror 14, 22, 72, 73, 159, 193, 225, 273.* Numerous jurors expressed

concerns for their and the City's safety if they acquitted Chauvin. *Id., Jurors 73, 79, 85, 91, 93, 135, 147, 190, 211.* Juror 183 stated it best: "Who doesn't know about this case! You'd have to live in a cave not to know what happened." *Juror No. 183 response to juror questionnaire question no. 1.* The pretrial publicity was overwhelming, saturated the community and was impossible for anyone residing in Hennepin County to ignore.

Numerous jurors expressed concern for their safety. Juror No. 87 stated that she was "nervous" because this was a high profile case and Minneapolis "blew up after the incident." *TT-1864.* Juror 28 stated "the decision the jury makes has maybe broader implications, reactions from the general public," and "knowing that the people, general public, is paying attention to the decision and more pressure, I guess, to get it right" – i.e., find Chauvin guilty. *TT-550-552.* Juror No. 109 expressed concern for the community along with his personal safety: "if chaos in the city happened again, would I be safe?" *TT-2224.*

Many jurors also expressed fear that rioting would occur in the event they acquitted Chauvin. Juror No. 87 stated she was afraid of "both" her "personal safety" and that of "the city." *TT-1864.* She went on: "I was just afraid of what might happen being part of the trial." *Id.* The chart below details the jurors' *voir dire* testimony:

Juror	**Page**	**Testimony**
8	TT-224	Concerns about safety for "this particular case."
	TT-225	HCGC security measures made him "more concerned for my safety"
	TT-241-242	"I just wouldn't want any, you know, any issues or harm to come to my wife or my family" and "for the safety of those

	TT-242-243	family members" led to "hesitation about serving on the jury." Expressed concerned about "harm" or "destruction to property"
10	TT-298-299	Concerns about safety that resulted in his dismissal from the jury in part because of those "safety concerns."
17	TT-304	HCGC barricades that made him "anxious."
26	TT-481	Concerned for mental safety
28	TT-549-552	"nervous" about this case because of "pressure of doing the right thing" considering "broader implications, reactions from the general public."
30	TT-635	"heightened level of security … puts someone a little bit un-at-ease."
37	TT-755-756	Concerned for safety. Military, police and fence "also raised my concerns" for herself and her kids.
38	TT-784-785	"I did have concerns just for the safety of … my family."
39	TT-837-838	"concern for your personal safety? It caused my wife concern." "She definitely was afraid."
40	TT-885	Was "nervous" and it was "nerve wracking"
48	TT-1084-1085 TT-1086	Was concerned about the "security" of being a juror. The "safety of my family comes first," and was concerned by seeing all the security around HCGC, which was "eye-opening" and reminded him of "Iraq." There was "always" a concern about safety.
60	TT-1313-1314	Concerned about the "safety of my family," which would make it hard for him to be impartial. "[T]here's a lot at

		stake here. And I want to be truthful to myself and not be naïve with if certain outcomes were what that would mean for our country."
63	TT-1380-1381	She was "shocked" to be notified of potential jury duty in this case, and "it made me a little bit worried just for, you know, safety …".
67	TT-1417	Concern about safety
69	TT-1448	Concerns about safety
71	TT-1504-1505 TT-1505	"concerns about my family's safety," when he found out about being a potential juror. Wondered whether he would "need to be worried about my kids or my wife or my family … after this … people find out who was on the jury." Further, even after hearing the evidence "it's [safety] going to be in the back of my head."
78	TT-1722	"Personal safety, anonymity, yes, I had those concerns"
87	TT-1863-1865 TT-1864	Was concerned for "both" her own "personal safety" and the safety of "the city." "I was just afraid of what might happen being part of the trial." "…being on a jury or being involved with it [trial] might have a little bit of reason to worry for their privacy and safety."
89	TT-1928	"[Safety after the trial would be my concern."
90	TT-1978	"has made me feel somewhat concerned for my well-being."
95	TT-2098-2099	"Safety of myself and my family." Would prevent him from focusing on the evidence.
109	TT-2224	Was concerned about "personal safety." "If chaos in the city happened again, would I be safe?"
116	TT-2378	"safety is obviously a concern for my family."

121	TT-2493	It was a "little intimidating" and all the security "made me just a little nervous."
127	TT,2546	"It does concern me after viewing Lake Street and all that and, you know, what happened post what happened, it's concerning, you know."
129	TT-2582-2583 TT-2584	Did not want to be on the jury because of fear for his family's safety. He was "very nervous" about his identity becoming known. The "fortifications" around the Government Center made him feel safer here at the Government Center "but not out there [back in his neighborhood]."

The seated jurors expressed similar concerns:

Juror	**Page**	**Testimony**
9	TT-263 TT-263-264	Concerns about her safety, "yes and no," and "it could be at risk." Was "surprised" and "shocked" by the protesters present for the jury selection which was more than two weeks prior to the start of the trial."
27	TT-514	Was "anxious" when he found out he could be a juror.
44	TT-1004 TT-1005	"terrified" of begin a juror in this case. "I think anyone who said they wouldn't be concerned with that [the possibility of being harassed or harangued] would be lying."
55	TT-1227	"I do [have concerns for personal safety] for afterwards because I know it would be public information, and it really depends on how the trial—the end results."
79	TT-1748	"Safety-wise, I was concerned … the first person that came to me was a policeman or Army so I was like shocked" upon entering HCGC.

85	TT-1798 TT,1810	"I would say some concern [for personal safety] … for when the juror names are eventually released." Also concerned for the physical safety of friends who worked downtown.
92	TT-2054-2055	"personal safety matter … what would happen to me if I was a juror after? If somebody found out or—that was my main concern."
118	TT-2414	"a little bit of my own safety …"

In fact, eleven days after his selection, Seated Juror 27 emailed the Court that "he wanted off the jury" due to safety concerns resulting in the Court ordering the juror back for further *voir dire*. *TT-2450-2452.* Juror 27 testified:

> I found out that a lot of people at my job have listened to me through the news [because of his noticeable accent]… and I don't feel comfortable … my wife doesn't feel safe and people have called me out of state." *** I just don't want my identity to be … [discovered].

TT-2455-2457.

The Court refused to remove Juror 27 despite stating "every juror" "shared" and "understood" his concerns. In fact, the Court stated "*your concerns are perfectly understandable. All of us on this case whose names are out in the public understand the concerns. TT-2457-2461 (emphasis added).* The Court told Juror 27 that while his name was anonymous, it would be released later "when it is safe to do so." The Court said if anyone harassed Juror 27, he would order the Hennepin County Sheriff to "rattle their cage." Finally, the Court said if it removed Juror 27, the Court would have to remove all the jurors. *TT-2457-2461.*

Chauvin immediately moved again to change venue or continue the trial. *TT-2461-2462.* The Court denied the motion stating that because of the City announcing the $27,000,000 settlement, the issue of continuance or change of venue was still "open." *TT-2463.*

Many potential jurors expressed concerns with their identity becoming public after the trial as set forth in the chart below:

Juror	**Page**	**Testimony**
88	TT-1929	"I don't know how comfortable I am with my name being out there afterwards." "I wouldn't want any part of that [being interviewed by Dateline]".
90	TT-1979 TT-1978-1979	"no electronic record is completely safe." He also "assume[d] my identity is stored" somewhere.
8	TT-225 TT-242	Would be concerned if his "name were ever released to the public." "Individuals would—would end up knowing, you know, who I am or where I live or my family lives."
10	TT-296	Even the after the trial publication of the juror's names "is an issue with me," and made him feel "uneasy."
17	TT-309	"I just don't want them [general public] to know I was a juror on the case," and was concerned about what his "life is going to be like after the case."
37	TT-756	When "everything becomes public," she had concern for her safety and that of her kids.
40	TT-886-887	"a little bit of concern … if names are released." Release of information or identity "can potentially draw some unwanted attention," and "my wife has more concerns about physical safeties."

48	TT-1086	"concerned" about possibility of name being released.
71	TT-1506	Knowing that someday his name would be released publicly "makes me feel a little uncomfortable."
78	TT-1723-1724	How does it make you feel to know that "at some point your identification would at some point become public? A: Not well." The disclosure of his identity would be a "consideration" of his as he was "deliberating" the case.
87	TT-1865	It "makes me nervous" to think my identity might be released to the public.
90	TT-1981-1982 TT-1979	Concerned that the government will release his identity someday. "A lot of people are going to be very angry."
95	TT-2098	Concerned about identity being released.
116	TT-2379	"I would hope it's not right away [that his identity is made public]."
118	TT-2435	"mostly concerned about public information being released including address."

Seated Jurors expressed similar concerns:

Juror	**Page**	**Testimony**
44	TT,1006-1007	Concerned about juror identity being released.
55	TT-1228	Concerned about her identity becoming known some day.
92	TT-2054-2055	"what would happen to me if I was a juror after? If somebody found out."

Several jurors expressed specific concerns if the jury acquitted Chauvin. Juror 78 testified he believed "a particular verdict would involve a bigger response one way or another" *TT-1723*. His safety concerns were "through actions from May through actions in January, it's hard to predict people's response, stuff like that. Doesn't take much for things to turn violent." *TT-1722*. Juror 69 stated what everybody knew: he would be more concerned about his safety "if it was not guilty" verdict. *TT-1449-1451*.

Finally, jurors expressed concerns their fears would put pressure on their impartiality. Juror 60 "would have a hard time being impartial" because of his concern for the "safety of my family." "If the outcome were to go a certain way and the general public didn't like that" it "would cause a definite concern from me regarding our family." *TT-1313-1314*. Juror 60 stated "one verdict is a path of less resistance," and it would be "less controversial" to rule one way. The one way "may involve more controversy, more concern for your family," to the degree that "it would be hard [to be impartial]." "One party is not going to get a fair trial." *TT-1315-1316*. Juror 78 stated that he would be thinking about his safety and hoped-for anonymity "as [he was] deliberating in this case." *TT-1724*. Juror 10 had concerns about focusing on the trial because of safety. *TT-298-299*. Juror 37 felt nervous about herself and her kids "depending on what is ruled, that could be a problem down the line or even in the process." *TT-756*. Finally, Seated Juror No. 55 believed that her personal safety "really depends on how the trial—the end results." *TT-1227*.

Jurors expressed such concerns in their responses to the jury questionnaires. The Court tried to allay such concerns by telling the jurors they would be anonymous–but

only until the trial ended. "This trial, including jury selection, is being televised. But no video of you or any other juror will be taken at any time now or during the trial if you are selected. Also, your name will not be used in the courtroom at any time. You will only be referred by your--referred to by your random number to protect your privacy." *TT-1173-1174.* However, as the Court admitted to Juror 27, who specifically wanted off the jury, and after it was too late to get off of the jury: "Your identity, I will do everything possible to keep it safe, *but word spreads* …." *TT-2459*.

J. The City of Minneapolis Announces During the Fifth Day of *Voir Dire* its Agreement to Pay Floyd's Estate $27,000,000 to Settle Their Claims Against the City and Chauvin–The Announcement Necessitates the Removal of Two Seated Jurors for Cause.

On March 12, 2020, during jury *voir dire*, the City of Minneapolis announced it paid $27,000,000 to settle Floyd's Estate's claims against the City and *Chauvin* (U.S. District Court Case No. 20-cv-1577). https://www.startribune.com/minneapolis-to-pay-record-27-million-to-settle-lawsuit-with-george-floyd-s-family/600033541/. The City made the announcement at a press conference with Floyd's family and City Council members. *Id.;Court Exhibit 1* There was no reason to announce the settlement–or even settle the civil case–as the federal court had stayed the case pending conclusion of Chauvin's trial. *ECF No. 53 - U.S. District Court Case No. 20-cv-1577*.

Chauvin immediately moved to change venue because of the announcement. *TT-1154-1165;Dkt-406-411*. The Court admitted the announcement was "unfortunate" and a "legitimate concern." *TT-1160*. On March 16, 2020, Chauvin learned that the news media reported that Chief Judge Barnette had consulted with the officials from the City

and authorized the City to announce the settlement. *TT-1362-1365.* The Court denied another motion to change venue or sequestration. *TT-1470.* However, the Court ordered the seven prior jurors be re-examined regarding the settlement. *TT-1470-96.* Despite MRCP 26.02 subd. 4 requirement that the parties examine the jurors, the Court conducted the examination. Four of the seven jurors heard of the settlement despite the Court's prior order to avoid media about the case. The Court excused Jurors 20 and 36. *TT-1596-1598;1603-1607.* The Court did not excuse Juror 27 or Juror 44 despite the fact that they heard about the settlement. *TT-1607-1609;TT-1611-1613.* In fact, Juror 44 testified: "It wasn't surprising that the City made this settlement." *TT-1611.* The only reason it would not be surprising is the *presumption* Chauvin and the other officers did something wrong.

K. Brooklyn Center Officer Kim Potter Shoots and Kills Daunte Wright Leading to Renewed Anti-Police Riots While Chauvin's Trial is Pending and the Jury Is Not Sequestered.

On April 11, 2020, a Brooklyn Center police officer killed Daunte Wright as Wright resisted arrest leading to a renewal of anti-police riots. The next day the National Guard was activated, the mayor ordered a curfew and the Governor implemented a curfew for Hennepin, Ramsey, Anoka and Dakota counties. https://minnesota.cbslocal.com/2021/04/12/national-guard-activated-after-night-of-looting-protests-in-brooklyn-center/; *https://www.msn.com/en-us/news/us/nighttime-curfew-going-into-effect-in-ramsey-hennepin-anoka-counties-after-brooklyn-center-officer-fatally-shoots-man/ar-BB1fzUzC.* Riots continued during the week of April 11 leading the National Guard to double its troop strength. https://news.yahoo.com/national-

guard-presence-increases-response-070437905.html. The Brooklyn Center Police Station was fenced and guarded by National Guard troops. https://www.startribune.com/fewer-arrests-calmer-scene-on-fourth-night-of-brooklyn-center-protests/600046035/.

On April 12, Chauvin moved to sequester the jury and for further *voir dire* because Hennepin County was now under curfew and Juror 96 lived in Brooklyn Center. *TT-4975-1477.* The Court denied the motion finding that sequestration would make the jury more "ill at ease." *TT-4981*. More specifically, the Court once again acknowledged the jurors' concern for their safety:

> The jurors all are aware and were concerned about their safety because of what happened in May of 2020, the civil unrest that followed there. Not a big surprise that there's now civil unrest in response to this case, but I don't think that should heighten the juror's concern, I think it's probably the same as it was before. They all have the concern that they expressed and were very honest about. And so I'm not going to sequester them. We'll sequester them on Monday when we anticipate doing closings, so I will proceed accordingly.

TT-4981-4982.

L. The Media Reports on Security Arrangements at the Courthouse.

On March 17, 2021, the Court learned news media publicly reported on security arrangements at HCGC and had revealed the attorneys' private notes. The Court did not do anything other than admonish the media. *TT-1593-1594.*

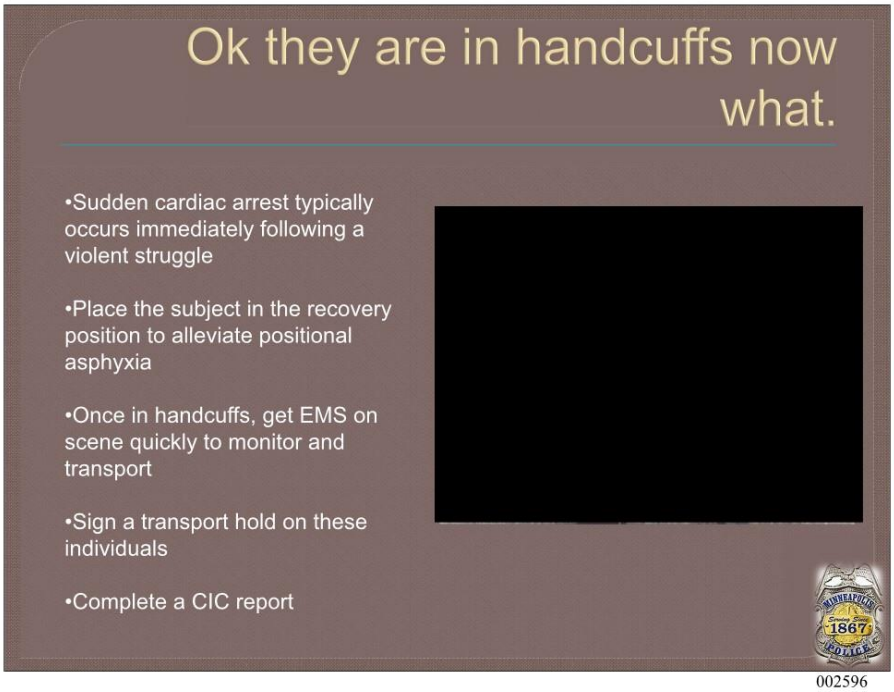
M. The Court Excluded Evidence of Floyd's Prior Arrest on May 6, 2019 Where Floyd Made the Same Complaints He Made When Arrested on May 25, 2020.

Floyd was arrested by MPD on May 6, 2019. During the arrest, Floyd acted in virtually the same manner he did on May 25, 2020. MPD approaches Floyd in a vehicle. Floyd refuses to show his hands or multiple requests from officers to comply. Officers

draw firearms. Floyd swallows narcotics as he is arrested. Floyd is erratic-crying and making complaints that he wanted his "mama." Chauvin moved to admit this evidence under Minn. R. Evid. 404(b) to show a *modus operandi* of Floyd when subject to arrest. *Dkt-182 and Officer Lane's motion to admit evidence related to Mr. Floyd's May 6, 2019 arrest in 27-CR-20-12951 at index numbers 172-177; TT-57-66.* The Court denied the motion with respect to Floyd's reactions. *Dkt-422; TT-2110-2119.*

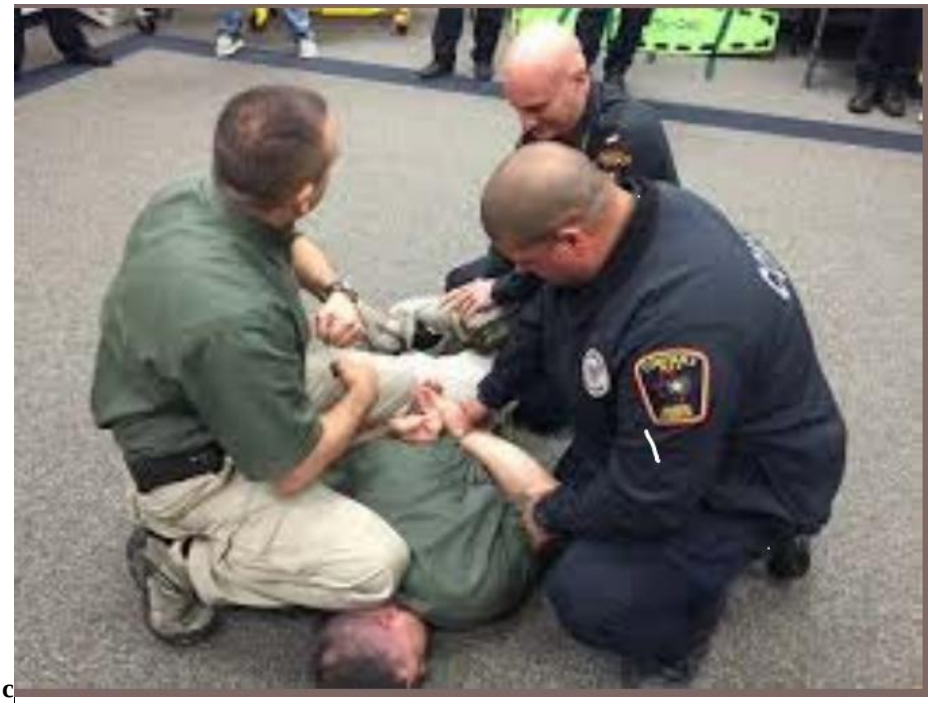
N. The Court Excluded Evidence of MPD Training Materials Establishing That MPD Trains Officers to Put Suspects Into MRT With One Officer Putting his Knees on the Suspect's Back.

The MPD Training Manual contained several pages describing what officers should do when confronted with arresting a suspect who engages in erratic actions including a photograph demonstrating officers using MRT with an officer placing his knees on the back of a suspect. *TE-1053; Dkt-106-bates p.2596.* The State moved to exclude the evidence arguing Chauvin never saw the training. *Dkt-316,¶6; Dkt-317-p.33-35.* The Court granted the motion. *Dkt-421.* However, the Court later allowed introduction of the manual redacting the photograph and only to explain Officer's Lane's actions and not Chauvin's actions because there was no evidence Chauvin was actually trained in this technique. *TT-3685-3694;5276-5277.* Below is the page from the exhibit introduced at trial with the redacted photo:



002596

Below is the redacted photograph:



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TE-1053 at bates p.2596.

MPD Officer Zimmerman testified that putting a knee on the neck "is not trained." *TT-3652-3653.* Despite this, the Court would not allow training materials into evidence unless Chauvin was trained on the materials. *TT-3694-3695.* The Court had granted the State's motion in limine but allowed Officer McKenzie to testify regarding the manual in an unrecorded sidebar. *Dkt-330; 440.*

O. The State Presented Seven Witnesses Who Testified on Unreasonable Use of Force.

Despite several defense objections, the Court permitted the State to elicit opinion testimony from ***seven*** witnesses regarding the reasonableness of Chauvin's use of force: (1) Sgt. David Pleoger (*TT-3489-3533-3541-3542 – objection 3532-3541)*; (2) Capt. Richard Zimmerman (*TT-3627-3639)*; (3) Chief Medaria Arradondo (*TT-3742-3841)*; (4) Inspector Katie Blackwell (*TT-3897-3923),* (5) Lt. Johnny Mercil (*TT-3987-4033)*; (6) Sgt. Jodi Stiger (*TT-4125-4189),* and (7) Seth Stoughton (*TT-5079-5151).* Chauvin successfully moved to prevent such cumulative testimony prior to trial. *Dkt-248;Dkt-329;TT-87-89.* However, the Court later allowed the testimony despite noting it may be cumulative. *TT-3685-3701*. Chauvin objected in a sidebar conference *not recorded*. *Dkt-570.*

Further compounding this problem, the State then presented two experts on use of force: Los Angeles Police Sgt. Jodi Stiger and Seth Stoughton. Stiger testified:

> Q. All right. And based upon your review of these materials, and in light of the Graham factors, what is your opinion as to the degree of force used by the defendant on Mr. Floyd on the date in question?
>
> A. My opinion was that the force was excessive.

TT-4140.

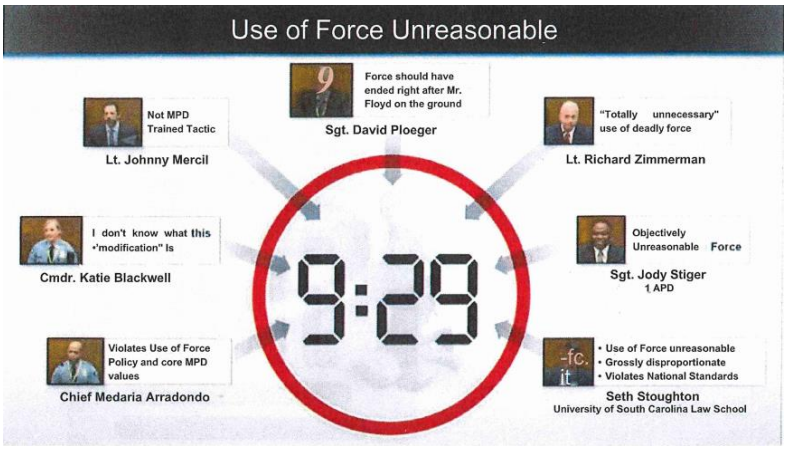
Stoughton provided the exact same opinion:

> Q. Do you have an opinion to a reasonable degree of professional certainty as to whether the type of force used by the defendant on George Floyd on May 25, 2020, was reasonable as viewed by a reasonable police officer on the scene?
>
> A. I do have such an opinion, yes.
>
> Q. What is that opinion?
>
> A. Both the knee across Mr. Floyd's neck and the prone restraint were unreasonable, excessive, and contrary to generally accepted police practices.

TT-5150.

The Court also allowed a lay witness, Donald Williams, who had engaged in martial arts training, to testify Chauvin "blood choked" Floyd over Chauvin's objection. *Dkt-309,¶22*. The Court allowed Williams to testify Chauvin performed a "blood choke" on Floyd's neck which would cause Floyd to die–even though this was not consistent with the State's evidence of death. *TT-362-374*; *2864-2869.*

Finally, the State emphasized the cumulative testimony in closing arguments using the following demonstrative exhibit:



TT-5772; Dkt-570.

P. National Guard Called Out After Testimony Concludes on April 16 To Prevent Riots Post Verdict and a U.S. Congressperson Calls for Protestors to "Fight" if the Jury Renders a Not Guilty Verdict.

In anticipation of the verdict, Governor Walz began deploying National Guard troops around Minneapolis and St. Paul as early as Wednesday, April 14, 2020-before jury sequestration-in the event riots occurred post verdict. *https://www.startribune.com/as-chauvin-verdict-looms-military-presence-in-twin-cities-unsettles-some-reassures-others/600047529/*. On April 18, National Guard troops were shot at in Minneapolis. *https://www.startribune.com/minnesota-national-guard-says-members-sustained-minor-injuries-in-sunday-morning-drive-by-shooting-i/600047408/?refresh=true*. The State of Minnesota spent $25,000,000 deploying the National Guard. *https://www.mprnews.org/story/2021/04/28/national-guard-presence-during-chauvin-trial-cost-25m*

Moreover, the protests regarding Wright's death continued in Brooklyn Park the weekend of April 16th. U.S. Congressperson Maxine Waters gave a speech at the protest, which was reported in the media, telling the protestors:

> We're looking for a guilty verdict and we're looking to see if all of the talk that took place and has been taking place after they saw what happened to George Floyd. If nothing does not happen, then we know that we got to not only stay in the street, but we have got to fight for justice," she added.

Asked what protesters should do if there is no guilty verdict, Waters said "protests" should continue. "We got to stay on the street. And we've got to get more active, we've got to get more confrontational. We've got to make sure that they know that we mean business," she said. Asked about the curfew put in place, Waters continued: "I don't think anything about curfew. Curfew means I want you all to stop talking. I want you to stop meeting. I want you to stop gathering. I don't agree with that." *https://www.cnn.com/2021/04/19/politics/maxine-waters-derek-chauvin-trial/index.html*.

All of this happened before the Court sequestered the jury after closing arguments on April 19. *TT-5685-5687.*

In addition, "Minneapolis Public Schools announced that all after-school activities will be canceled in anticipation of the verdict being announced in the Derek Chauvin trial." "A number of downtown Minneapolis businesses are closing in anticipation of the verdict being read in the Derek Chauvin trial." *https://www.kare11.com/article/news/local/george-floyd/live-updates-some-downtown-businesses-closing-in-anticipation-of-verdict-announcement/89-cc2e6d13-1099-4739-abd4-1b196f1019d8*. "Store owners in Minneapolis are boarding up ahead of the Derek Chauvin murder-trial verdict, fearing unrest." *https://www.businessinsider.com/minneapolis-businesses-shops-board-up-prepare-derek-chauvin-trial-2021-4.*

On April 20, the jury rendered a guilty verdict on all counts. Consistent with juror testimony, Minneapolis "celebrated"-there were no riots. *https://www.startribune.com/minneapolis-streets-erupt-in-elation-over-guilty-verdicts-for-derek-chauvin/600048215/.*

Q. Prosecutorial Misconduct.

1. Discovery.

Under MRCP 9.01 subd. 1, the State must disclose "all matters within the prosecutor's possession, or control that relate to the case. Chauvin also filed a Notice of Disclosure on June 8, 2020 demanding disclosure under MRCP 9.01, Minn. Stat. §169.14 subds. 9 and 10, *Brady v. Maryland,* 373 U.S. 83 (1963) and *State v. Agurs,* 427 U.S. 97 (1976). *Dkt-8.* The Court's scheduling order required all disclosures be completed by August 14, 2020 and provided "failure to make timely discovery will presumptively result in the preclusion of any matter not disclosed" and discovery "received after the deadline shall be disclosed within 24 hours to the opposing party". *Dkt-44.*

The State failed to comply with Rule 9.01 and the Court's Scheduling Order. As detailed in Eric Nelson's Affidavit (*Dkt-219),* the State failed to complete disclosures by August 14, 2020. Nelson identifies eight dates after August 14, 2020 on which the State made additional disclosures. *Dkt-219-¶6.* The State produced 27,060 pages of documents before August 14 and 15,131 pages after August 14. *Id.* The State produced 139 gigabytes of audio video files before August 14 and 172 gigabytes of audio video files after August 14. *Id.* The State's disclosures were made in manner consistent with civil attorneys in "bet the business" litigation including producing thousands of pages as a

single .pdf file rather than each document as a single file. *Dkt-219*-¶*7*. Approximately 75% of .pdf documents were not computer searchable requiring Nelson's staff to go through a time consuming process of converting and reconverting files to make them searchable. *Id.* The documents were in no discernible order, "shuffled like a deck of cards." *Id.* The State produced a video on June 8, 2020; however, the State did not disclose instructions to open and play the video until August 20 as part of a single file .pdf containing 1,834 pages. *Id.* The State "hay stacked".pdf files so that relevant material (MPD reports identifying Floyd) were sandwiched within 1,973 pages of MPD training materials. 75% of the documents the State produced prior to August 14 were MPD training materials dating back to 2005 including 5,000 pages of irrelevant MPD Taser training materials. *Id.* The State's bate stamp numbers do not accurately reflect the number of pages produced as often one page of information was actually over 5,000 pages leading Nelson to estimate that the State actually produced over 80,000 pages. *Id.* Finally, the amount of audio and video files totaled 300 gigabytes. As a result of the manner in which the State produced records, Nelson and his staff had to review every single page of records to catalog and organize the records. *Id.*

Nelson details numerous instances in which the State possessed a document well before the August 14 deadline but produced it well after August 14. *Dkt-219*-¶*8.* Furthermore, the State produced information from the Bureau of Criminal Apprehension ("BCA") inconsistent with how BCA had produced such information to Nelson in past cases and in a manner seemingly calculated to make Chauvin's review difficult. Chauvin

moved for a continuance and exclusion of the evidence. *Dkt-218.* The Court denied the motion. *Dkt-253.*

The most egregious example is the State producing on the last day of trial testimony—April 15—and after the defense had rested, Floyd's blood gas levels showing a level of 1.5% carbon monoxide. *TT-5650.* The day prior, Chauvin's expert, Dr. Fowler, testified that Floyd was exposed to carbon monoxide during the restraint because Floyd's head was near the exhaust of the running Squad car. Fowler testified that Floyd's exposure to the carbon monoxide would have caused Floyd's oxygen level in his blood to further drop causing Floyd to suffer a cardiac arrhythmia. Dr. Fowler specifically testified that the State did not test Floyd's carbon monoxide levels. *TT-5514.*

The State blamed the failure on HCMC. *TT-5653.* The State argued that Baker had been watching the trial on Court TV and knew that Floyd's blood gas levels were critical because the State's theory on cause of death was Floyd slowly lost oxygen in his bloodstream due to positional asphyxiation. While the Court did not allow the introduction of the new report, the Court did allow the State's expert, Dr. Tobin, to present rebuttal testimony regarding the carbon monoxide levels but not mention the newly disclosed report. Despite this, Dr. Tobin did mention the report in his testimony.

> Q. Would you tell the ladies and gentlemen why that statement [Dr. Fowler's opinion] is not reliable?
>
> A. I base it on the arterial blood gas that was obtained when Mr. Floyd was in Hennepin County.

TT-5678.

2. Preparation of Witnesses.

In spite of a Court order barring clothing with logos or slogans in the courtroom during the trial, during the second day of the proceedings, the State called a witness who was clearly wearing a "Black Lives Matter" t-shirt under his white dress shirt.

Dkt-570.

In addition, Baker made unsolicited reference to the fact that he had testified before a federal grand jury regarding the death of Floyd. *TT-4936.*

Finally, there is also evidence that, under pressure from the State, Baker altered his findings and conclusions regarding the death of Floyd. *Motion for Sanctions for Prosecutorial Misconduct Stemming from Witness Coercion, State v. Thao, Henn. Cty. Dist. Ct. No. 27-CR-20-12949 (May 13, 2021).*

3. Belittling the Defense in Closing Arguments.

In closing argument, the State constantly belittled the defense referring to its arguments as a "story" on numerous occasions. *TT-5723;5751; 5752; 5882; 5887.* The Court overruled Chauvin's objections. *TT-5887.* Nonetheless, the State continued. *TT-5893-5895-5898.* The Court finally sustained Chauvin's objections. *TT-5898.* Nonetheless, the State continued to use the word "story" to describe the defense. *TT-5907-5909.* The State also argued that Chauvin was "shading the truth" and referred to Chauvin's arguments as "nonsense." *TT-5910; 5737-5739; 5751; 5773.*

R. After the Trial, A Seated Juror and an Alternate Juror Admitted to Providing False Testimony in their *Voir Dire* and Jury Questionnaires On Issues Directly Prejudicial to Chauvin – Bias and Concerns for Safety if Jury Found Chauvin Not Guilty.

Chauvin learned after the trial that seated Juror 52, Brandon Mitchell, wanted to be on Chauvin's jury and wanted to convict Chauvin *before being seated*. Mitchell, in responding to his jury questionnaire (Juror No. 52), answered "no" to the following questions:

i. Did you, or someone close to you, participate in any of the demonstrations or marches against police brutality that took place in Minneapolis after George Floyd's death? *Juror 52 Questionnaire, p.4;*
ii. Have you, or someone close to you, ever helped support or advocated in favor of or against police reform? *Id., p.6*
iii. The defendants in this case were officers for the Minneapolis Police Department. Is there anything about their employment with the MPD that would prevent you from rendering a fair and impartial verdict in this case? *Id;*
iv. Other than what you have already described above, have you, or anyone close to you, participated in protests about police use of force or police brutality? *Id., p.8;*
v. Is there is anything else the judge and attorneys should know about you in relation to serving on this jury?" *Id., p.14.*

At the end of the questionnaire, Mitchell stated he wanted to be on the jury "[b]ecause of all the protests and everything that has happened after the event, this is the most historic case of my lifetime and I would love to be part of it." *Id.* Mitchell went on to explain that, "Me stating that is possibly a historic moment is just based on the different movements that have come from this. *Id.*[15] In addition, the questionnaire asked Mitchell if he police officers make him feel safe and he responded "somewhat agree." During *voir dire*, Mitchell was asked to explain his response and Mitchell identified an encounter somebody else had with police – not Mitchell. *TT-1204-1205.* Finally, Mitchell testified he had a neutral opinion of Floyd. *TT-1194.*

All of Mitchell's responses cited above were false.

Immediately after the trial, Mitchell contacted the media. In an April 27 radio interview:

i. Mitchell stated in his life he "had been pulled over by Minneapolis police regularly—probably 50 times—for no good reason," and one time having a "cop…pull[ ] a gun on him while he was changing a tire on the freeway;"
ii. In answering what message he would give to those asked to participate on a jury, Mitchell answered "we would have a chance to make history…I knew from the gate what it was and could be."[16] Mitchell saw jury duty as one of those "avenues to correct some wrongs and try and spark change."[17]
iii. Mitchell stated that he thought the verdict could have been rendered in "20 minutes," but for one juror.[18]

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[15] Perhaps further confirming his bias, Mitchell was one of the few jurors to state that he had no fears for his own security being on the jury. *TT-1186.*
[16] "Get Up! Mornings," *supra* n. 1.
[17] *Id.* at 11:59.
[18] "Derek Chauvin trial juror says deliberations 'should have been 20 minutes'", The Associated Press, (April 28, 2021), https://www.inquirer.com/news/nation-world/derek-chauvin-trial-juror-speaks-brandon-mitchell-20210428.html; "Inside the Chauvin Jury Room: 11 of 12 Jurors Were Ready to Convict Right Away," Nicholas Bogel-Burroughs,

iv. Mitchell stated he "really under[stood] how important [his] role was as a juror especially being the only African-American male on the jury panel."[19]

Prior to trial, but after Floyd's death, Mitchell traveled from Minneapolis to Washington D.C. the weekend of August 28, 2020 to participate in the National Action Network's "Commitment March: Get Your Knee Off our Necks." The National Action Network required individuals to register for this march. National Action Network's website states the march was:

> Instigated from the protest movement that has risen up since the police killing of George Floyd, the 'Get Off Our Necks' Commitment March on Washington will be a day of action that will demonstrate our commitment to fighting for policing and criminal justice.[20]

Below is a photograph from the march:

New York Times, (Apr. 29, 2021), https://www.nytimes.com/2021/04/29/us/chauvin-jury-brandon-mitchell.html.

[19] "Get Up! Mornings," Erica Campbell interview (Apr. 27, 2021) at 6:22, https://getuperica.com/334572/listen-black-juror-in-derek-chauvin-trial-speaks-out-exclusive/.

[20] Commitment March: Get Your Knee Off Our Necks," National Action Network, https://nationalactionnetwork.net/register-for-nans-march-on-washington-get-your-knee-off-our-necks/(last visited Feb. 7, 2022). *See also*, "Thousands Gather for March on Washington to Demand Police Reform and Racial Equality," NPR (Aug. 28, 2020); https://www.npr.org/2020/08/28/905914974/thousands-gather-for-march-on-washington-to-demand-police-reform-and-racial-equality (Last visited Feb. 7, 2022).

People attend the Commitment March on Friday at the Lincoln Memorial in Washington, D.C., on the 57th anniversary of the March on Washington and the Rev. Martin Luther King Jr.'s "I Have a Dream" speech.

Dee Dwyer/DCist for NPR

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Finally, a picture was posted on social media of Mitchell at the march in Washington D.C. wearing a t-shirt stating "Get Your Knee Off Our Necks- BLM" and a "Black Lives Matter" cap:[22]

[21] "Thousands Gather for March on Washington to Demand Police Reform and Racial Equality," Brankkton Booker, NPR (Aug. 28, 2020), https://www.npr.org/2020/08/28/905914974/thousands-gather-for-march-on-washington-to-demand-police-reform-and-racial-equality (last visited Feb. 7, 2022).

[22] "New Photo Shows Derek Chauvin Juror Bandon Mitchell Wearing Black Lives Matter Shirt at March Prior to Trial," Bernie Zilio (May 4, 2021), https://radaronline.com/p/derek-chauvin-juror-52-brandon-mitchell-blm-mlk-march-photo-george-floyd/ (last visited Feb. 7, 2022). *See also*, "Chauvin juror defends participation in March on Washington after social media post surfaces," Chao Xiong, Star Tribune (May4, 2021), https://www.startribune.com/chauvin-juror-defends-participation-in-march-on-washington-after-social-media-post-surfaces/600053102/ (last visited Feb. 7, 2022).

Mitchell has his own YouTube Channel-"The Wholesome Podcast"-with 88 episodes posted prior to March 15, 2021. https://www.youtube.com/user/kidMitch11/videos. In Episode 70 created on October 19, 2020, Mitchell is wearing this t-shirt. During *voir dire,* when asked if he had any hobbies, Mitchell failed to identify hosting a YouTube Channel. *TT-1197-1198.* Interestingly, Episode 50 was created on May 25, 2020 and Episode 52 was created on June 7, 2020 – Episode 51 is now missing from the YouTube page.

Moreover, Chauvin chose not to testify in his case and the jury was instructed not to draw any inference from his refusal to testify. When interviewed by Robin Roberts on *Good Morning America* on April 28, 2021, Mitchell said it was to Chauvin's "detriment" that he did not testify:

> Roberts: "Derek Chauvin not taking the stand: did that have an impact, not hearing from him, the former officer?"

> Mitchell: ***"Yeah, definitely it did. When we were in the deliberation room, you know, a few people wondered, like they wanted to actually hear from him.*** They were curious on, you know, just what his thoughts might have been throughout. You know, ***it probably was to his detriment that he didn't take the stand*** because people were curious what his thoughts were throughout the entire incident."

https://www.goodmorningamerica.com/news/video/juror-derek-chauvin-trial-breaks-silence-77362563.

In the same interview, Mitchell stated:

> [Mr. Floyd's] name is going to live on. His legacy is now cemented in history. It's now become so much bigger than him as individual. He's now become almost—he's become a legacy, and it's a legacy that will forever be here, and it will hopefully create some change within society.

Id.

In an interview with KARE 11, Mitchell described Floyd as a "martyr" and a "legend." KARE 11, *Juror in Derek Chauvin trial hopes verdict will drive reforms,* YoUTUBe (May 3, 2021), https://youtu.be/FJrO 1 AZMrPw.

Mitchell said he would not hold it against Chauvin if Chauvin did not testify during *voir dire* but admitted after trial he did hold it against Chauvin in post-trial interviews. *TT-1195.*

In addition, Juror 96, Lisa Christensen, the first alternate and released from duty prior to jury deliberation, when asked why she answered "not sure" to "want[ing] to serve as a juror on this case," Christensen answered:

> Because it's a high profile case that comes with a lot of responsibility. Nervous about the verdict and the reaction of the public, protesters, rioters inciting violence, damage and destruction all over again.

Juror 96 Questionnaire at p. 14.

During *voir dire*, Christensen testified when asked if keeping her identity confidential alleviates any safety concerns, Christensen testified, "It's very reassuring." *TT-2135.* Christensen was specifically asked if she felt her "safety would be in jeopardy if one verdict was rendered over the other?" and she answered "I do not." *Id.* She also stated that she has concerns "regardless of the verdict." *Id.*

Yet, less than two days after Chauvin was found guilty, Christensen appeared no longer concerned for her safety or anonymity, because she invited several media outlets to her private Brooklyn Center residence to conduct several interviews displaying her face and identity. Christensen stated during an interview, contrary to her *voir dire* testimony:

> "... we filled out questionnaires, and one of the questions were: 'Do you want to be on this jury?' and I stated I wasn't sure. I didn't know. I was concerned for my safety to a point, depending on, you know, we hadn't heard any facts or anything yet, so ***depending on which way it went,*** I felt like some people—you can't please everybody all the time, so I felt certain groups might feel certain ways. So, I was a little concerned about that."

https://www.youtube.com/watch?v=ykeOP6Uf3EQ.

Christensen continued in the interview being asked about her nervousness on verdict day, to which Christensen replied:

> Before [Judge Cahill] did read [the verdict], yes I was. In my mind, I was going through, like, you know ***"I hope there is not going to be rioting again and protests and this mayhem that happened before."*** My place of business got broken into prior. So, I was just hoping that wasn't going to happen again and ***I was relieved that they came to the verdict they did.*** I think it was the right verdict to come to."

Id.

ARGUMENT

A. Standard of Review.

The standard of review for a motion to change venue, sequester the jury or delay the trial is abuse of discretion. *State v. Blom*, 682 N.W.2d 578, 596 (Minn. 2004). However, claims of presumed prejudice are reviewed *de novo. U.S. v. McVeigh*, 153 F.3d 1166, 1179 (10th Cir. 1998). The standard of review from denial of a *Schwartz* hearing is abuse of discretion. *Frank v. Frank*, 409 N.W.2d 70, 72–73 (Minn. App. 1987). The standard of review from an evidentiary ruling is abuse of discretion. *State v. Kelly*, 435 N.W.2d 807, 813 (Minn. 1989). However, if exclusion of the evidence violated defendant's constitutional right to present a defense, the decision will be reversed unless it is found to be harmless beyond a reasonable doubt – i.e., there is a reasonable possibility the error complained of may have contributed to the conviction. *State v. Larson*, 389 N.W.2d 872, 875 (Minn. 1986).

B. The Pervasive Prejudicial Pretrial Publicity, Jurors' Concerns for Their Safety If They Did Not Convict Chauvin and Physical Threats to the Courthouse Required the Court To Change Venue, Continue the Trial, or *Fully* Sequester the Jury Under MRCP 25 and the 6th and 14th Amendments.

1. Under Both MRCP 25.02 and the United States Constitution, the Court Erred by Denying Chauvin's Motion To Change Venue.

MRCP 25.02 subd. 1(d) provides a district court must grant a motion for a continuance or a change of venue "whenever potentially prejudicial material creates a reasonable likelihood that a fair trial cannot be had. Actual prejudice need not be shown."

In addition, the Sixth Amendment "secures to criminal defendants the right to trial by an impartial jury." *Skilling v. United States*, 561 U.S. 358, 377 (2010).

Courts reviewing the prejudicial effect of pretrial publicity engage in a two tier analysis: "At the first tier, the question is whether pretrial publicity was so extensive and corrupting that a reviewing court is required to *presume* unfairness of constitutional magnitude." *United States v. Petters*, 663 F.3d 375, 385 (8th Cir. 2011) (emphasis supplied). "In all other cases, the change-of-venue question turns on the second tier of our analysis, whether the *voir dire* testimony of those who became trial jurors demonstrated such actual prejudice that it was an abuse of discretion to deny a timely change-of-venue motion." *Id*.

With respect to the presumption of prejudice requiring a transfer of venue, the Supreme Court has long and consistently held that when the community from which jurors are drawn is sufficiently poisoned either by adverse publicity, or by the effects of the very events at issue, or both, a presumption of prejudice among potential jurors arises that requires a change of venue because *voir dire* cannot perform its usual function of securing a fair and impartial jury. *Mu'Min v. Virginia*, 500 U.S. 415, 429-30 (1991); *Patton v. Yount*, 467 U.S. 1025, 1031-33, 1040 (1984); *Murphy v. Florida*, 421 U.S. 794, 799 (1975); *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966); *Estes v. Texas*, 381 U.S. 532, 550-51 (1965); *Rideau v. Louisiana*, 373 U.S. 723, 726-27 (1963); *Irvin v. Dowd*, 366 U.S. 717, 725-28 (1961).

The overwhelming media coverage exposed the jurors—literally every day—to news demonizing Chauvin and glorifying Floyd which was more than sufficient to

presume prejudice. However, the real problem is the jurors expressed concern for (i) they and their families' personal safety and (ii) riots breaking out in the event they acquitted Chauvin. There are few cases involving such violent threats by the community in the event the jury finds the defendant not guilty. Those cases—which all involved defendant police officers—required transfer of venue. *Lozano v. State*, 584 So. 2d 19, 22–23 (Fla. Dist. Ct. App. 1991) (Miami police officer killed two black males fleeing police); *Nevers v. Killinger*, 990 F. Supp. 844 (E.D. Mich. 1997) (police officer killed a suspect). As the *Nevers* put it:

> The Court cannot imagine a more prejudicial extraneous influence than that of a juror discovering that the City he or she resides in is bracing for a riot—including activating the National Guard and closing freeways—in the event the defendant on whose jury you sit is acquitted.

Id. at 871.

2. The Pretrial Publicity Surrounding the Case, Combined with the Riots, Announcement of the Settlement in the Middle of *Voir Dire* and Further Riots During the Trial, Results in a Presumption of Prejudice.

Under Supreme Court precedent, if pretrial publicity is so overwhelming, a presumption of prejudice arises. *Irvin v. Dowd*, 366 U.S. 717, 725 (1961); *State v. Thompson*, 123 N.W.2d 378, 381 (Minn. 1963). A showing of actual prejudice is not required. *State v. Blom*, 682 N.W.2d 578, 607 (Minn. 2004). As set forth below, the pretrial publicity, combined with riots—both after the incident and during trial—coupled with the announcement of the $27,000,000 settlement, constitutes a presumption of prejudice.

a. The Media Publicity Was Pervasive and it Was Overwhelmingly Hostile to Chauvin and Law Enforcement in General.

The first factor to examine in determining whether prejudice is presumed is the extent and nature of the pretrial publicity. The pretrial publicity was constant and overwhelming from May 25, 2020 through trial. The major media outlets in the Twin Cities had coverage regarding the case literally every day from May 26, 2020 until trial concluded. The coverage glorified Floyd and demonized Chauvin. *https://www.startribune.com/memorial-for-george-floyd-looks-ahead-to-what-s-next/571016152/.* The Minneapolis Police Chief and Minnesota's head of the Department of Public Safety called the incident a murder on June 4, 2020 in conjunction with announcing the firing of Chauvin. *https://m.startribune.com/police-chief-derek-chauvin-knew-what-he-was-doing/571443282/.* Pretrial publicity of the firing of a police officer on the heels of an event giving rise to criminal charges is a significant factor in finding that prejudice is presumed. *Nevers v. Killinger*, 990 F. Supp. 844 (E.D. Mich. 1997). Numerous news stories detailed that Chauvin had his knee on Floyd's neck and Floyd could not breathe. Black Lives Matter began a campaign based on the slogans "get your knee off our neck and "I can't breathe" all suggesting that Chauvin caused Floyd's death by cutting off the airway in his neck and causing Floyd to suffocate. *https://www.startribune.com/memorial-for-george-floyd-looks-ahead-to-what-s-next/571016152/.* Chauvin became a widely reported symbol of police brutality.

Moreover, the fact that Hennepin County is the most populous in Minnesota does not mitigate the problem in this case. *Skilling* noted that the size of Houston, Texas, 4,500,000 people, mitigated against finding jurors not subject to the publicity. However, at footnote 15, *Skilling* noted that in a survey, over 66% of the respondents had not heard of the defendant Skilling. Here, every seated juror, and virtually every juror involved in *voir dire*, knew of Chauvin, Floyd and the riots.

b. The Threat of Violence Resulting from Acquittal Were Plain—As Demonstrated by the Deployment of the National Guard Days Prior to Jury Deliberation.

More importantly to this case is beyond pretrial publicity, cases involving an atmosphere of community violence directed at a defendant require a transfer of venue. In *Lozano v. State*, 584 So. 2d 19 (Fla. Dist. Ct. App. 1991), a Miami police officer killed two black males fleeing police. Riots erupted in Miami. https://en.wikipedia.org/wiki/1989_Miami_riot. The officer was tried in Miami and convicted of murder. The appellate court reversed:

> Applying these principles, we must conclude that even the limited, yet uncontroverted, evidence presented by Lozano required a holding that the case could not then be fairly tried in Dade County. We simply cannot approve the result of a trial conducted, as was this one, in an atmosphere in which the entire community—including the jury—was so obviously, and, it must be said, so justifiably concerned with the dangers which would follow an acquittal, but which would be and were obviated if, as actually occurred, the defendant was convicted. Surely, the fear that one's own county would respond to a not guilty verdict by erupting into violence is as highly "impermissible [a] factor," *Estelle v. Williams,* 425 U.S. at 505, 96 S.Ct. at 1693, as can be contemplated. Surely too, there was an overwhelmingly "unacceptable risk," *Turner v. Louisiana*, 379 U.S. 466, 473, 85 S.Ct. 546, 550, 13 L.Ed.2d 424, 429 (1965), of its having adversely affected Lozano's—and every citizen's—most basic right under our system: the one to a fair determination of his guilt or innocence based on the evidence alone. The trial court's failure to grant the motion for a change of venue, therefore, mandates

reversal for a new trial.

Lozano v. State, 584 So. 2d 19, 22–23 (Fla. Dist. Ct. App. 1991).

Likewise, the *Nevers* court released on a *habeus* petition a white Detroit police officer convicted of murdering a black man because of prejudicial publicity coupled with threats of rioting from a not guilty verdict. "The Court cannot imagine a more prejudicial extraneous influence than that of a juror discovering that the City he or she resides in is bracing for a riot—including activating the National Guard and closing freeways—in the event the defendant on whose jury you sit is acquitted." *Id*. at 871. *See also, United States v. McVeigh*, 918 F. Supp. 1467, 1474 (W.D. Okla. 1996)(*McVeigh* trial moved from Oklahoma City to Denver because of community hostility to McVeigh).

The threat of violence here was real in the extreme. The courthouse was surrounded by barbed wire and soldiers during the trial. Prior to jury deliberations, National Guard troops were deployed throughout Minneapolis, businesses boarded up their buildings and schools were closed "bracing for a riot" in the event Chauvin's acquittal. . The jurors, because they were not sequestered, saw this every day.

c. The City of Minneapolis Announcement of the $27,000,000 Settlement Exasperated the Prejudice.

Nevers, in reversing the police officer's conviction, also relied on the fact that Detroit publicly suspended the officer and "approximately one month after the incident, [Detroit] agreed to settle a lawsuit filed by Green's estate for $5.25 million. Both the amount of the settlement and the quickness with which it was reached was shocking." *Nevers,* at 863. "As if the petitioner's immediate suspension did not clearly communicate

city official's belief that Nevers was guilty before he was even charged, the substantial and swift settlement removed any doubt." *Id.*

In this case, the City of Minneapolis decided to settle the claims of Floyd's estate against not only the City, but also Chauvin, in the middle of jury *voir dire* for $27,000,000—the largest settlement in history of the City—and held a joint press conference with Floyd's family to announce the settlement ensuring the community, and the jurors and potential jurors, knew of the settlement. As set forth in *Nevers,* "the amount of the settlement and the quickness with which it was reached was shocking." The Court knew this was a problem as it conducted additional *voir dire* of the selected jurors and released two of them. Moreover, during the examination of the three jurors who claimed they did not hear of the settlement, these jurors were nonetheless told by the Court that there had been a "developments" in the civil lawsuit between the City of Minneapolis and George Floyd's family." Even this statement suggested to the jurors that a settlement had occurred. Finally, the Court did not even need to explain to the jurors how Chauvin was connected with this lawsuit – it was presumed.

d. Numerous Jurors Expressed Concerns for Their Own Personal Safety.

Juror concerns for safety are grounds for removal. *People v. Burse,* 749 N.Y.S.2d 350, 352 (N.Y. App. 2002). Despite this, as set forth above, not only did numerous jurors express concerns for their own personal safety if the jury acquitted Chauvin, the Court itself stated that these concerns were legitimate. Most troubling, Seated Juror No. 55 believed that her personal safety "really depends on how the trial—the end results." *TT-1227.*

The Court's solution to this problem—juror anonymity—was no solution at all. The jurors concerns were not for their personal safety during the trial. Rather, it was after the trial in the event of an acquittal when their identity became public as the Court told them.

Most troubling is Juror 27 who told the Court that he was concerned about his safety after his friends and work colleagues learned of his identity from his distinctive voice on Court TV. Given the pretrial publicity, the fact that the Court decided to allow this trial to be televised *live*—which had never occurred before in a Minnesota trial court—is inexplicable given juror's concerns with safety. Even though the jurors were anonymous, the jurors' family, friends and even acquaintances could recognize their voice on Court TV.

Moreover, when an anonymous jury is used, the court must instruct the jury that the use of their anonymity does not affect the defendant's presumption of innocence. *State v. Bowles*, 530 N.W.2d 521, 531 (Minn. 1995)("Those precautions must, at a minimum, include extensive *voir dire* to expose juror bias *and instructions designed to eliminate any implication as to the defendant's guilt*." (emphasis supplied)). The Court here failed to instruct the jury that the use of anonymity should not affect Chauvin's presumption of innocence either during *voir dire* or in the instructions. *TT-106-115; Dkt-493.*

Finally, as Professor Alan Dershowitz has astutely observed, the Court's decision to keep the jurors' names nominally secret did itself serve to communicate to the jurors that they were in danger, but without actually protecting their identities:

> The judge in the Chauvin case recognized that jurors could well be influenced by the danger they might face if they rendered an unpopular verdict: He took the unusual step of keeping the jurors' names secret. This sent a message to jurors that publicizing their names might endanger their safety. Yet the media provided demographic profiles of these jurors nonetheless, clearly allowing them to be identified by friends and neighbors.[23]

In this case, concealment of the jurors' names not only failed to shield the jurors from intimidation, but actually constituted part of the intimidation.[24]

e. Media Interfered with Courtroom Proceedings by Spying on the Attorneys and Disclosing Courthouse Security Measures.

On March 17, 2021, the Court reprimanded the media for spying on the attorney's documents and announcing details of courthouse security measures in news media. *TT-1593-1594*. Worse still, media reporting on courthouse security measures demonstrated the media was willing to report trial details even if doing so posed a risk to public safety and trial participants. This willingness implied a menace for the jurors because it meant that the media would not hesitate to "out" them either directly through naming them or indirectly through publishing information from which they could be identified.

f. The Riots After the Duante Wright Killing Required a Transfer.

As if things could not get worse, anti-police riots exploded again in Brooklyn Center, the residence of an alternate juror, after the Wright shooting during the last week of trial. Presumably not wanting to see a repeat of the previous year's anti-police riots,

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[23] Alan Dershowitz, *The Jury Was 'Under Extraordinary Pressure' To Convict Chauvin*, Newsweek (April 22, 2021, 7:30 AM ET), https://www.newsweek.com/jury-was-under-extraordinary-pressure-convict-chauvin-opinion-1585494.

[24] *See id*.

the Governor ordered a curfew for the metropolitan counties including Hennepin County where the jurors all resided.

On April 12, Chauvin moved to immediately sequester the jury and for further jury *voir dire*. *TT-4975-1477.* The Court inexplicably refused believing that the jury would be oblivious to these events actually stating sequestration would put them more "ill at ease." *TT-4981.* Each day after leaving the courthouse, Governor Walz's curfew order required each juror to stay in their home *for their own safety* because of anti-police riots. Presumably they would wonder why. The Court's Order required the jurors to avoid news about *Chauvin's* trial – not news in general. *TT-112-113.* If the jurors read about the anti-police riots or, worse, U.S. Representative Waters calling for rioters to "get more confrontational" and "make sure that they know that we mean business" if Chauvin was acquitted, Chauvin could not possibly get a fair trial. If the Court had already concluded the jury was already "ill at ease," venue should have been transferred.

3. Jurors Demonstrated Actual Bias Against Chauvin.

Deliberate concealment of information at *voir dire* is sufficient to require a mistrial, even absent a showing of actual bias*:*

> [A] party must first demonstrate that a juror failed to answer honestly a material question on *voir dire,* and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556 (1984).

As set forth above, Juror 57–Brandon Mitchell–lied in repeatedly in *voir dire*. Mitchell denied in *voir dire* having negative views of the MPD yet gave a radio interview

after trial stating he had over 50 encounters with MPD including one involving an MPD officer pointing his sidearm at Mitchell as he changed a tire. Mitchell denied in *voir dire* having attended protests of police brutality when he had attended an anti-police brutality rally in response to Floyd's death entitled "Get Your Knee Off our Necks" in August, 2020. If Mitchell had answered truthfully, he would have been removed for cause.

In addition, Juror 96 – Christianson, testified in *voir dire* that she had concerns for her safety regardless of the verdict. However, appearing in an interview after the trial, Christianson said that she was only concerned if the verdict was not guilty.

4. In the Alternative, the Jurors Should Have Been Sequestered Upon Their Selection.

Jury sequestration occurs at the discretion of the Court. MRCP 26.03, subd. 5(1); *State* v. *Morgan*, 246 N.W.2d 165, 168 (Minn. 1976). However, "[s]equestration must be ordered if the case is of such notoriety or the issues are of such a nature that, in the absence of sequestration, highly prejudicial matters are likely to come to the jurors' attention." *Id.* at subd. 5(2) (emphasis added). Relying on the standard enunciated in *Sheppard* v. *Maxwell*, *Morgan* explained, "[t]hus, whether the trial court abused its discretion... depends on whether the trial court properly assessed the likelihood that prejudicial publicity would affect the impartiality of the jurors and thereby prevent a fair trial." *Morgan*, 246 N.W.2d at 168 (citing *Sheppard).*

Once a court has found that jurors have been exposed to prejudicial materials, the rule only requires a *likelihood* such matters "come to jurors' attention"— discretion is removed and must be ordered *sua sponte. State v. Mastrian,* 171 N.W.2d 695, 707

(Minn. 1969); *Sheppard*, 343 U.S. at 363. In a case involving the most notoriety this state has ever seen, dealing with issues of an explosive nature—the very foundations of law enforcement and race relations in the United States, sequestration was required. While the Court ordered sequestration *only for deliberations*, this accomplished nothing—in fact, at common law, juries were always sequestered for deliberations. *Dietz v. Bouldin*, 579 U.S. 40, 52 (2016). In fact, it backfired—jurors were exposed to the $27,000,000 settlement and Brooklyn Center riots. Sequestration should have been ordered in this case.

5. The Court Should Have Delayed the Trial – Particularly Because No Jury Trials Had Been Conducted In Minnesota Due to Covid-19.

One mechanism courts use to overcome a presumption of prejudice is to delay the trial to allow strong community feeling to "cool". *Skilling, at* 383 (2010). Here, the Court accelerated the trial. The Minnesota Supreme Court had suspended in person jury trials due to Covid-19. It was not until March 15, 2021 that the Supreme Court allowed in person jury trials to continue. Remarkably, Chauvin's trial actually started on March 8, 2021 and jurors began *voir dire* on March 9, 2021. Chauvin's trial should have been continued until the prejudicial effect of media coverage and anti-police had "cooled."

C. The Court Should have Held a *Schwartz* Hearing.

A *Schwartz* hearing allows the Court to investigate and establish a record of juror misconduct. *Frank v. Frank*, 409 N.W.2d 70, 72–73 (Minn. App. 1987); *Schwartz v. Minneapolis Suburban Bus Co.*, 104 N.W.2d 301 (Minn. 1960). The Court denied Chauvin's *Schwartz* hearing motion without analysis. *Dkt-580-Addendum-27-28.*

Mitchell's statements directly contradicting his *voir dire* testimony and responses to juror questionnaires required a *Schwartz* hearing. Negative impressions of the MPD and involvement in anti-police protests arising from Floyd's death would have justified removal for cause. If this Court does not reverse, the Court should remand for a *Schwartz* hearing.

D. The Third Degree Murder Charge Against Chauvin Must be Dismissed and a New Trial Ordered Because this Charge Allowed the State to Introduce Evidence of Chauvin's "Depraved Mind" Which Is Irrelevant to *Unintentional* Second Degree Murder.

Chauvin was tried and convicted of third degree murder. This conviction must be overturned based on the Supreme Court's decision in *State v. Noor*, 964 N.W.2d 424, 438 (Minn. 2021) because Chauvin's actions were directed against one person—Floyd. The Third Degree Murder charge allowed the State to introduce evidence of Chauvin's "depraved mind" which was not relevant to the *unintentional* Second Degree Murder charge. The State introduced evidence of the look on Chauvin's face in the video and evidence of Chauvin's statements to Floyd to show he had a depraved mind. This

E. Chauvin's Conviction Should Be Reversed Because Police Officer Cannot Be Convicted for Felony-Murder Under Minnesota Law.

Chauvin was convicted of second degree felony-murder. Minn. Stat. §609.19. The predicate felony was third degree assault. Minn. Stat. §609.223 subd. 1. Assault is defined as "the intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. §609.02 subd. 10 (2). Third degree assault is "[w]hoever assaults another and inflicts substantial bodily harm." Minn. Stat. § 609.223 subd. 1. Under *State* v. *Dorn*, 887 N.W.2d 826, 830-31 (Minn. 2016), the intent element for assault is the intent to

commit the act – i.e., the intent to physically touch someone and not the intent to commit injury.

Chauvin is a police officer statutorily authorized to commit "assaults" to effect an arrest under Minn. Stat. §629.33—"the officer may use all necessary and lawful means to make the arrest but may not use deadly force unless authorized to do so under section 609.066." Under Minn. Stat. §609.066, "deadly force" is defined as "force which the actor uses with the purpose of causing, or which the actor should reasonably know creates a substantial risk of causing, death or great bodily harm."

Because police officers are duty bound to "assault" suspects resisting arrest, Minnesota's assault statute becomes a strict liability statute for a police officer because the officer always "intends" to physically touch the suspect. Thus, Chauvin was convicted under a strict liability standard because the State was not required to prove any intent—i.e., the State was not required to prove Chauvin intended to inflict bodily injury on Floyd. Strict liability offenses are disfavored and the legislative intent to impose strict liability must be clear. *In re Welfare of C.R.M.,* 611 N.W.2d 802, 805 (Minn. 2000). Also, courts must apply the rule of lenity in construing any penal statute. *Id.* Applying lenity to each of these statutes would require the State prove Chauvin intended to inflict "substantial bodily injury" on Floyd when Chauvin placed his knees on Floyd's back to restrain Floyd. Because the jury was not instructed that regarding Chauvin's "intent" to inflict bodily injury on Floyd, Chauvin's conviction must be reversed.

Moreover, in order for a police officer to be convicted of murder, Minnesota statutes require the officer to be using "deadly force"—force one knows will cause either

death or "great bodily harm." Putting your knees on the back of a suspect does not create a "substantial risk of causing, death or great bodily harm."

Finally, the U.S. Supreme Court has placed a further requirement on convicting police officers of crimes committed while effecting an arrest under the Fourth Amendment:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *** With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," *Johnson v. Glick*, 481 F.2d, at 1033, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

Graham v. Connor, 490 U.S. 386, 396–97 (1989).[25]

Based on these standards, Chauvin cannot be convicted of felony-murder because he was authorized to arrest Floyd and therefore "touch" Floyd when Floyd resisted arrest. Because *State v. Dorn* held the intent necessary to commit an assault is the intent to "touch," and police officers must always "touch" suspects who resist arrest, the State has converted the second degree murder statute into a strict liability offense where the underlying offense is an assault because the State did not have to prove any "intent" with respect to Chauvin other than the intent to "touch" Floyd which Chauvin was authorized and duty bound as a police officer to do.

[25] In 2020, the Minnesota Legislature incorporated this standard by statute into Minn. Stat. §609.066.

F. The Court's Jury Instructions Failed to Properly Set Forth the *Graham v. Connor* Standards.

The Court instructed the jury that "it is not necessary for the State to prove that [Chauvin] intended to inflict substantial bodily harm...." *Dkt-493.* This is a material misstatement of the law. Minn. Stat. §609.223 subd. 1. The jury instruction obfuscates the burden of proof and implied that the State need not prove that Chauvin intended to inflict substantial bodily harm upon George Floyd. The instruction exacerbates Minnesota's position among a minority of states that permit assault as a predicate offense to felony-murder. *See State* v. *Grigsby*, 806 N.W.2d 101, 114 (Minn. App. 2011) (Minnesota courts have rejected the merger doctrine).[26] Moreover, as set forth above, the State has converted this into a strict liability offense. The Court's instruction regarding the burden of proof obscured the intent element and invited the jury to apply strict liability to the offense of third-degree assault and thereby convict Chauvin of *second degree murder*. It cannot be shown beyond a reasonable doubt that the error did not have a significant impact on the verdict.

Furthermore, the Court's instruction to the jury regarding authorized use of force by a police officer departed substantially from Minn. Stat. §629.33. The Court instructed the jury that "No crime is committed if a police officer's actions were justified by the police officer's use of reasonable force in the line of duty in effecting a lawful arrest or

[26] Although this Court cannot reverse Supreme Court precedent regarding the merger doctrine with respect to using assault as the predicate offense for felony-murder, Chauvin preserves the issue if this case is reviewed by the Supreme Court to argue that police officers should not be subject to felony-murder charges arising out of an arrest.

preventing an escape from custody." *Dkt-493.* However, as set forth above, an officer "may use all necessary and lawful means to make the arrest." Minn. Stat. §629.33. Moreover, the Court failed to incorporate into the instructions *Graham v. Conner's* admonition that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Exclusion of this language from the instruction opened the door to juror speculation as to reasonableness and prejudiced Chauvin, while materially misstating the law surrounding authorized use of force.

Finally, the Court refused to incorporate the "special danger to human life" instruction Chauvin requested to support a second degree murder charge. *Dkt-311.* In a second degree murder trial, the jury must be instructed that for the underlying felony (in this case assault) "to serve as a predicate offense for second-degree unintentional felony-murder, an offense must involve a special danger to human life." *State v. Anderson*, 666 N.W.2d 696, 700–01 (Minn. 2003). "The special danger to human life must be established both as the offense is committed *and* in the abstract. *Id.* This instruction was not given.

G. Chauvin's Conviction Should Be Reversed Because the Judge Allowed Cumulative Opinions on the Use of Force.

Pursuant to Minn. R. Evid. 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or ***needless presentation of cumulative*** evidence." Minn. R. Evid. 403 (emphasis added). Although

Rule 403 is discretionary in nature, it "sets forth the appropriate considerations that must be addressed in resolving challenges to the admissibility of relevant evidence." Minn. R. Evid. 403. "Unfair prejudice" does not simply mean "the damage to the opponent's case that results from the legitimate probative force of the evidence; rather, it refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means." *State* v. *Hahn*, 799 N.W.2d 25, 33 (Minn. App. 2011) (quoting *State v. Bolte*, 530 N.W.2d 191, 197 n. 3 (Minn. 1995)). However, probative evidence "will still be admitted ***unless*** the tendency of the evidence to persuade by illegitimate means overwhelms its legitimate probative force." *Id.* (emphasis added). This is particularly true with regard to expert testimony. *State v. DeShay*, 669 N.W.2d 878, 888 (Minn. 2003) (concluding that it was error to admit expert testimony when "much of the ... expert's testimony was duplicative and of little real assistance to the jury in evaluating the evidence"). *DeShay* stated the Minnesota Supreme Court has "consistently expressed [its] concern that expert testimony be carefully monitored in criminal cases so that a jury is not dissuaded from exercising its own independent judgment." *Id.* at 885.

On the central issue in the case, unreasonable use of force, the Court permitted the State to elicit testimony from ***seven*** witnesses regarding their opinion on Mr. Chauvin's use of force. The testimony was certainly probative, however, the Court failed to adhere to the general principle of cumulative evidence: that each opinion given completely diminishes the probative value of the next. Near the end of the State's case, and after several objections by the defense, the Court limited the State's second expert on reasonable force, Stoughton, to opine only on "national standards" as if "national

standards" mattered. Regardless of this effort at mitigating the harm by limiting Stoughton's testimony to national standards, his opinion had the same effect as the six other opinions: Chauvin's conduct was excessive and against police policy.

As a result the Court allowing these seven witnesses to testify, the State in closing was able to argue "officer after officer" testified Chauvin's force violated MPD policy (*TT-5771-5772*) and argued the State's "experts agree" the use of force was unreasonable. *TT-5773.* Attorney in closing should never be able to state their "experts agree" because they should only have one expert. The fact that Stoughton was testifying only regarding national standards is simply mincing words, as on its most basic level, it is still yet another officer giving his opinion regarding the reasonableness of Chauvin's use of force.

Furthermore, not only did the State use such opinions cumulatively, but also utilized the fact that they were permitted to do so during closing arguments a set forth above. Given the significance of this issue, allowing this cumulative testimony was not harmless error.

H. The Court Improperly Excluded Evidence of MPD Training Materials Establishing That MPD Trains Officers to Putting their Knees on the Suspect's Back.

The Court's exclusion of the photo from the MPD training manual showing an officer doing what Chauvin did was highly prejudicial. The central issue in this case was whether it was reasonable for Chauvin to restrain Floyd by putting his knees on Floyd's back. The Court excluded this photo from the training manual because there was no evidence Chauvin ever received this training. Regardless of whether Chauvin was

trained on this technique or not, the issue is whether it was "*objectively* reasonable" for him to restrain Floyd by putting his knees on Floyd's back. Whether Chauvin saw the training materials is not relevant—the issue is whether Chauvin's use of his knee on Floyd's back was reasonable and the fact that MPD training materials actually contained the above picture approving such a technique is evidence tending to show Chauvin's use of his knee was reasonable. Once again, this is not harmless error.

I. Morries Hall's Testimony or Statement Should Have Been Admitted.

Every criminal defendant has a right to be afforded a meaningful opportunity to present a complete defense under the Constitution. The right to present a defense includes the opportunity to develop the defendant's version of the facts, so the jury may decide where the truth lies. *State* v. *Richards,* 495 N.W.2d 187, 191 (Minn. 1992).

The Confrontation Clauses of the Federal and Minnesota Constitutions serve the same purpose, affording a defendant the opportunity to advance his or her theory of the case by revealing an adverse witness's bias or disposition to lie. *State* v. *Pride,* 528 N.W.2d 862, 867 (Minn. 1995). "The right to call witnesses in one's behalf is an essential element of a fair trial and due process." *State* v. *King,* 414 N.W.2d 214, 220 (Minn. App. 1987).

Chauvin subpoenaed Morries Hall, a passenger in Floyd's Mercedes to provide important evidence to support Chauvin's theory of the case. First, Chauvin argued that force needed to be applied to Floyd because he was in a state of excited delirium. Second Chauvin argued Floyd died because of his ingestion of fentanyl. *TT-5433-5434*. These

two issues were so important that the State introduced experts on these issues who denied fentanyl or controlled substances caused Floyd's death. *TT-5434*;*TT-4962*.

Hall invoked his Fifth Amendment right to not testify and successfully moved to quash the subpoena. *Dkt-488.* Prior to trial, BCA Agent Doug Henning interviewed Hall and Hall told Henning Floyd ingested drugs upon his arrest and was intoxicated. *TT-4959-4961*. Because Hall was now unavailable under Minn. R. Evid. 804(a)(l)-(2) and his statements to Henning admissible as an exception to the hearsay rule, Chauvin moved to subpoena Agent Henning to testify to Hall's statements. Minn. R. Evid. 804(b)(3). Despite this, the Court also quashed Henning's testimony finding, contrary to the Hall ruling, that Hall's statements to police were not "so far contrary to the declarant's penal interest" as to subject him "clearly to criminal liability." *TT-5060-5064.* However, as noted *supra,* two days later the Court found that testimony regarding Mr. Hall's *mere presence* in the vehicle was sufficient to subject him to criminal liability and concluded that Hall enjoyed a complete privilege. This was a plain contradiction of the Court's earlier ruling with respect to admissibility of the police interview of Mr. Hall. As such, the Court clearly abused its discretion when it found that admission of the police interview was not permissible under Minn. R. Evid. 803(b), in violation of Mr. Chauvin's constitutional rights to present a complete defense. "When an error implicates a constitutional right," reversal is required "unless the State shows beyond a reasonable doubt that the error was harmless." *State* v. *Morrow,* 834 N.W.2d 715, 729 n. 7 (Minn. 2013) (emphasis added). Because the State cannot show that the Court's error was harmless beyond a reasonable doubt, a new trial must be granted.

J. Chauvin's Conviction Should Be Reversed Because of Prosecutorial Misconduct.

A prosecutor commits misconduct if he "contravenes case law, a rule, or a standard of conduct." *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Once this is demonstrated, the burden shifts to the State to show ***beyond a reasonable doubt*** that the misconduct did not affect a defendant's substantial rights. *See id.* (quotation omitted).

The right to due process of law includes the right to a fair trial, which in turn, means a trial devoid of prosecutorial misconduct. *Spann* v. *State,* 704 N.W.2d 486, 493 (Minn. 2005). A prosecutor engages in misconduct by violating rules, laws, court orders, or Minnesota case law, or by engaging in conduct that materially undermines the fairness of a trial. *State* v. *Fields,* 730 N.W.2d 777, 782 (Minn. 2007). Prosecutorial misconduct is a grave concern because of a prosecutor's "special responsibilities as a representative of the people." *State* v. *McDaniel,* 777 N.W.2d 739, 752 (Minn. 2010).

The State's discovery violations and numerous failures to disclose—or disclosures in forms other than the original or discovery "dumping,"—of which the Court was aware throughout the proceedings, beginning with the State largely ignoring the Court's initial discovery deadline and up through the end of parties' cases in chief, amounted to prosecutorial misconduct. Such conduct violated MRCP 9.01 and 9.03, as well as the Court's order. *Spann,* 704 N.W.2d at 493. The record is rife with examples as set forth above. Most importantly is the exchange that occurred on April 14, 2021 when the Court threatened the State with a mistrial unless prosecutors disclosed the nature of their planned rebuttal testimony, which had been buried within thousands of pages of

disclosure on the day before the rebuttal was to occur. *TT-5668-5670.* Defense counsel also filed an affidavit detailing the State's numerous discovery violations to date on December 14, 2020. The State's pervasive, intentional discovery violations, alone, were sufficiently prejudicial as to require a new trial. *See State* v. *Ture,* 353 N.W.2d 502, 515 (Minn. 1984).

In addition, "the State has a duty to prepare its witnesses, prior to testifying, to avoid inadmissible or prejudicial statements." *State* v. *McNeil,* 658 N.W.2d 228, 232 (Minn. App. 2003). In spite of a Court order barring clothing with logos or slogans in the courtroom during the trial, during the second day of the proceedings, the State called a witness who was clearly wearing a "Black Lives Matter" t-shirt under his white dress shirt. The fact that the prosecution permitted such prejudicial messaging from one of its witnesses was clearly improper and a violation of the Court's order, which constitutes misconduct. *Fields,* 730 N.W.2d at 782. Hennepin County Medical Examiner Baker improperly made an unsolicited reference to the fact that he had testified before a federal grand jury regarding the death of Floyd. *State v. Sewell,* 595 N.W.2d 207, 213 (Minn. App. 1999). Because the State failed to adequately prepare Baker in a way that would have prevented his reference to the grand jury, it committed prosecutorial misconduct. *McNeil*, 658 N. W.2d at 232. There is also evidence that, under pressure from prosecutors, Baker altered his findings and conclusions regarding the death of Floyd. Attempts to influence testimony by the prosecution is unethical and amounts to misconduct. See, e.g., *In re Disciplinary Action Against Backstrom,* 767N.W.2d453 (Minn. 2009).

The State also committed significant prosecutorial misconduct during closing and rebuttal. In final argument to the jury, a prosecutor is governed by a unique set of rules that differ significantly from those governing counsel in civil suits, and even from those governing defense counsel in the very same criminal trial. These special rules follow directly from the prosecutor's inherently unique role in the criminal justice system, which mandates that the prosecutor not act as a zealous advocate for criminal punishment, but as the representative of the people in an effort to seek justice. When evaluating a closing argument for prosecutorial misconduct, this Court must examine the argument as a whole, rather than individual "phrases or remarks that may be taken out of context or given undue prominence." *State v. Jones*, 753 N.W.2d 677, 691 (Minn. 2008). When looked at as whole, however, the binding sinew of the State's entire closing—that the Defense was merely a "story" or "stories"—was based entirely on prejudicial, prosecutorial misconduct.

K. Chauvin's Conviction Must Be Reversed Because of the Court's Failure to Transcribe the Entire Proceedings.

Under Minn. Stat. §486.02, the Court has a duty to make "a complete stenographic record of all testimony given and all proceedings had before the judge upon the trial of issues of fact, with or without a jury, or before any referee appointed by such judge." Most importantly, the court reporter is required to record ***"verbatim, all objections made,*** and ***the grounds thereof*** as stated by counsel, ***all rulings thereon,*** all exceptions taken, all motions, orders, and admissions made and the charge to the jury." *Id.*

The Court's Trial Management Order stated objections were to be made without argument unless invited by the Court. *Dkt-354.* At trial, the parties were informed that when invited to make such an argument by the Court, it would be done in a sidebar. According to the Trail Management Order, sidebar conferences were to be conducted using wireless headsets, and such conferences shall be "off the record." *Id., at (6)(g).* Several times Chauvin requested to make a record of the sidebar conferences and objections be made. The Court refused and held that such a record would be created at the end of the trial wherein the Court merely invited both parties to submit notes that outline their recollection of objections and grounds thereof. This record has never been officially made because despite Chauvin requesting the State several times to coordinate this record, the State has failed to reply or provide defense with any documentation of their version of events. *Dkt-570.*

As a result, Chauvin submitted his version of the sidebars to the Court on June 2, 2021 and moved that the Court adopt Chauvin's submission as a record of the sidebars. *Dkt-570.* The Court denied the motion without explanation. *Addendum-27-28.* As a result, no verbatim record of objections and the arguments thereof were ever made, can never be made and can now never be made as promulgated under Minn. Stat. §486.02. On this basis alone, a new trial should be ordered.

L. The Cumulative Errors Rendered the Trial "Structurally Defective."

As set forth above, the proceedings in this matter were so pervaded by error, misconduct and prejudice that they were structurally defective. *United States v. Hasting,* 461 U.S. 499, 508-09 (1983) (certain errors involve "rights so basic to a fair trial that

their infraction can never be treated as a harmless error"). The cumulative errors were so pervasive and prejudicial in denying Chauvin his constitutionally guaranteed rights to due process and a fair trial that none of them can be said to have been harmless. *See State* v. *Duncan*, 608 N.W.2d 551, 551-58 (Minn. App. 2000), *review denied* (Minn. May 16, 2000) ("when the cumulative effect of numerous errors"—even if, alone, the errors are harmless—"constitutes the denial of a fair trial, the defendant is entitled to a new trial"). As here, *Duncan* noted numerous instances of erroneous admission of evidence and prosecutorial misconduct as rendering the trial structurally defective. As a result of this trial being structurally defective, a new trial must be ordered.

M. Chauvin's Sentence Should be Reduced to the Presumptive Range.

The presumptive sentence for Chauvin with a criminal history score of zero is 150 months. The Court imposed an upward departure in sentencing Chauvin to 270 months. *Addendum-1-26.* Imposition of an upward departure involves a two stage process: (i) there must be a factual finding that there are one or more aggravating factors present in the commission of the crime apart from the prima facie elements of the charged crime and (ii) the court must explain why the presence of any aggravating factors creates a substantial and compelling reason to impose a sentence outside the presumptive guidelines range. Here the court found two aggravating factors: (i) Chauvin abused a position of trust and authority and (ii) Chauvin treated Floyd with particular cruelty. *Dkt-455.*

The Minnesota Sentencing Guidelines do not recognize "abuse of a position of authority" as an aggravating sentencing factor. Minn. Sent. Guidelines §2.D.3(b). While

the list of aggravating factors is "nonexclusive," courts in certain limited circumstances have upheld the abuse of position of authority as an aggravating factor in sentencing a defendant when proven beyond a reasonable doubt. *State v. Lee*, 494 N.W.2d 475, 482 (Minn. 1992); *State v. Rourke,* 681 N.W.2d 35, 41 (Minn. App. 2004); *State v. Cermak*, 344 N.W.2d 833, 839 (Minn. 1984). However, these cases involved criminal sexual conduct, domestic abuse, or both, where the victim had a pre-existing relationship with the offender. None involved a police officer. Moreover, given the resistance that Floyd was exhibiting at the time Chauvin arrived, Chauvin's authority as a police officer was ***entirely irrelevant*** to Floyd. From the onset of the May 25, 2020 encounter, when Officers Lane and Kueng had ordered Floyd to place his hands on the steering wheel of his vehicle, Floyd ignored the authority of the officers over him compelling the officers to engage in force to arrest him.

With respect to vulnerability, this case is considerably different from cases holding a victim was particularly vulnerable when bound. In cases where the victim was bound or handcuffed or knocked to the ground, the victim's vulnerability occurred as ***part of the offense***. *Dillon v. State,* 781 N.W.2d 588, 600 (Minn. App. 2010) (defendant assaulted victim, knocking her to the floor, unconscious, and continued to assault her); *State v. Bock*, 490 N.W.2d 116, 121 (Minn. App. 1992) (victim fell to the ground after being assaulted, and was dazed, as the assault continued); *State v. Winchell*, 363 N.W.2d 747, 751 (Minn. 1985) ("Binding victims is not a normal occurrence in an aggravated robbery"). Here, Chauvin was authorized and required to both handcuff Floyd and

restrain him as part of his lawful duties. In fact, Chauvin did not place the handcuffs on Floyd.

Cases in which courts have found particularly vulnerability that was not caused by an offender as part of the offense typically involve victims of a young age or victims who were sleeping. *State v. Yaritz,* 791 N.W.2d 138, 145 (Minn.Ct.App.2010); *State v. Skinner*, 450 N.W.2d 648, 654 (Minn. App.1990); *State v. Bingham*, 406 N.W.2d 567, 570 (Minn. App.1987) *Winchell*, 363 N.W.2d at 751 The facts here are dissimilar to those of other cases in which a victim has been determined to be particularly vulnerable. As such, the State cannot prove beyond a reasonable doubt that facts existed, of which Chauvin was aware or should have been aware, rendering Floyd particularly vulnerable at the time of the assault that gave rise to the Defendant's conviction— especially in light of the facts that the initial handcuffing and restraint were clearly legal, and no clear determination was ever made as to ***when*** the assault began.

There are only two cases where the defendant's criminal history score is zero, and both "abuse of a position of trust or authority" and "particular cruelty" were cited as aggravating factors. Unlike the instant case, however, those cases involved particularly vulnerable victims - three-year-old children. The defendant in 27-CR-18-18213 was originally charged with Murder in the First Degree and pleaded guilty to Murder in the Second Degree (Unintentional Killing during a Felony) for an agreed-upon range of 300 to 420 months and was sentenced to 384 months. The defendant in 27-CR-15-25934 pleaded guilty to the charge with an agreed-upon sentence of 300 months. In both cases,

the cruelty inflicted on the children was horrific, and, as the Court agreed, even more severe than the cruelty inflicted on Floyd.

If this Court affirms the conviction, the Court should remand for sentencing in the presumptive range.

CONCLUSION

For the reasons set forth above, Chauvin requests that this Court either reverse his conviction, reverse and remand for a new trial in a new venue or remand for re-sentencing.

Dated April 25, 2022.

MOHRMAN, KAARDAL & ERICKSON, P.A.

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Certificate of Compliance with Minn. R. App. P. 132.01

I certify that this brief contains 16,797 words and thus complies with this Court's April 18, 2022 Order authorizing the filing of a principal brief with no more than 17,000 words. In making this certificate, I relied on the word-count function of Microsoft Word 2016, which is the word-processing software that I used to prepare this brief.

This brief was produced with a proportional typeface and complies with Minn. R. App. P. 132.01's typeface requirements.

Dated April 25, 2022.

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Certificate of Service

I hereby certify that I served a copy of the following Appellant's Brief on the following parties, by using the Court's e-filing and e-service function. :

Minnesota Attorney General's Office
Keith Ellison
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Saint Paul, MN 55101-2131.

I also state that I did not serve a paper copy of the brief on Respondent's counsel as the Minnesota Supreme Court Order foregoing the requirement to serve and file appellate briefs is still suspended due to Covid-19.

/s/ William F. Mohrman
William F. Mohrman

Subscribed and affirmed before me
this 25th day of April, 2022.

/s/Mary Gynild, comm. expires 1/31/2025
Notary Public