Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Court File No. 27-CR-20-12646

State of Minnesota,

Plaintiff,

vs.

Derek Michael Chauvin,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S POST-VERDICT MOTIONS

TO: THE ABOVE-NAMED COURT; THE HONORABLE PETER A. CAHILL, JUDGE OF HENNEPIN COUNTY DISTRICT COURT; AND MATTHEW FRANK, ASSISTANT MINNESOTA ATTORNEY GENERAL.

INTRODUCTION

On April 20, 2021, Defendant Derek Michael Chauvin was convicted by a jury of one count of second-degree, unintentional murder, one count of third-degree depraved mind murder, and one count of second-degree manslaughter. On May 4, 2021, Mr. Chauvin, through his attorney Eric J. Nelson, Halberg Criminal Defense, moved the Court for a new trial pursuant to Minn. R. Crim, P. 26.04, subd. 1, on several grounds. Mr. Chauvin now submits the following in support of his motions.

ARGUMENT

I. CUMULATIVE ERRORS, ABUSES OF DISCRETION, PROSECUTORIAL AND JURY MISCONDUCT DEPRIVED DEREK CHAUVIN OF A FAIR TRIAL, SUCH THAT A NEW TRIAL MUST BE GRANTED IN THE INTERESTS OF JUSTICE.

After a verdict has been rendered, a new trial may be granted on any of the following grounds: the interests of justice; irregularity of the proceedings, or any order or abuse of discretion that deprived the defendant of a fair trial; prosecutorial or jury misconduct; errors of law at trial; or

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

a verdict or finding of guilty that is contrary to law. Minn. R. Crim. P. 26.04, subd. 1(1). In the present case, a new trial must be granted on the following grounds:

A. Pervasive publicity before and during the trial tainted the jury pool and prejudiced the jury itself, depriving Mr. Chauvin of a fair trial in violation of his constitutional right to due process.

1. *The Court abused its discretion when it denied Defendant's motion for a change of venue.*

On August 27, 2020, Defendant Derek Michael Chauvin moved this Court for a change of venue. The Court agreed to reserve its ruling on the issue of venue until after it had decided the State's motion to join Mr. Chauvin's trial with those of his codefendants. On November 4, 2020, this Court granted the State's motion and joined all defendants for trial. In a separate order issued on the same day, this Court preliminarily denied Mr. Chauvin's motion for a change of venue. In its January 11, 2021, order addressing motions for continuance from both the State and Mr. Chauvin, however, this Court *sua sponte* amended its previous motion and severed Mr. Chauvin's trial from those of his codefendants. After leaks by "law enforcement officials" regarding the details of plea negotiations between counsel for Mr. Chauvin and prosecutors were printed in the *New York Times* and the *Star Tribune* on the eve of trial, and after the City of Minneapolis—Mr. Chauvin's former employer—very publicly announced its settlement with George Floyd's family in the midst of *voir dire*, Mr. Chauvin renewed his motions for a change of venue and/or continuance.

The Court denied the motion, and in so doing, stated:

> The purpose of a change of venue is to ensure that the defendant has a fair trial by an impartial jury. The same is true as the basis for the defense's latest motion to continue with the hope that as time passes people forget some of the pretrial publicity. Unfortunately, I think the pretrial publicity in this case will continue no matter how long we continue it, perhaps some of it may with time be forgotten by people.

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

> And as far as change of venue, I do not think that that would give the defendant any kind of a fair trial beyond what we are doing here today. I don't think there's any place in the state of Minnesota that has not been subjected to extreme amounts of publicity on this case. ***Change of venue is an option in the rule when there is extensive pretrial publicity that was prejudicial, and there was prejudicial pretrial publicity***, including the latest actions by the City of Minneapolis in settling the case.

(Tr. Trans., Mar. 19, 2021, at 2-3) (emphasis added).

The United States and Minnesota Constitutions safeguard a criminal defendant's right to a "public trial, by an impartial jury of the State and district" in which the crime was committed. U.S. Const., amend. VI; Minn. Const., Art. I, § 6 (specifying an "impartial jury of the county or district" in which the crime was committed). However, when "a fair and impartial trial cannot be had in the county in which the case is pending…[,] in the interests of justice, [or as] provided by Rule 25.02 governing prejudicial publicity" a case "may be transferred to another county." Minn. R. Crim. P. 24.03, subd. 1.

Here, the Court specifically found that "there was prejudicial pretrial publicity," and the global extent of such publicity, across all media and across the globe, cannot be denied. Once the Court made such a finding, it lacked discretion, under Minn. R. Crim. P. 25.03, subd. 3 to deny Mr. Chauvin's motion. In cases where intense pretrial publicity and/or "prejudicial material creates a ***reasonable likelihood*** that a fair trial cannot be had" a defendant's "motion for… change of venue ***must***[1] be granted." Minn. R. Crim. P. 25.02, subd. 3 (emphasis added). "***Actual prejudice need not be shown.***" *Id.* (emphasis added). In spite of the Court's belief that there was no "place in the state of Minnesota that has not been subjected to extreme amounts of publicity on this case," the language of the rule is plain—and mandatory. The Court clearly abused its discretion when it found that the extensive publicity prejudiced Mr. Chauvin's chances of receiving a fair trial and

[1] "Must" is mandatory. Minn. Stat. § 645.44, subd. 15a.

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

then denied his motion for a change of venue.

Moreover, the Court's reasoning that Mr. Chauvin could not find a venue with a less tainted jury pool is flawed. Although "it is not required…that jurors be totally ignorant of the facts and issues involved" in a trial, *Irvin v. Dowd,* 366 U.S. 717, 722 (1961), sufficient "adverse publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed." *Patton v. Yount,* 467 U.S. 1025, 1031 (1984) (citing *Irvin,* 366 U.S. at 723); *see State v. Beier,* 263 N.W.2d 622, 625-26 (Minn. 1978); *State v. Warren,* 592 N.W.2d 440, 448 n.15 (Minn. 1999); *State v. Fairbanks,* 842 N.W.2d 297, 302 (Minn. 2014) (stating prejudice can be presumed among a jury pool in cases where massive prejudicial publicity surrounds a trial). ***"This is particularly true in criminal cases."*** *Irvin,* 366 U.S. at 723 (emphasis added).

In *Irvin,* the Court observed that, in the six to seven months leading up to trial, "a barrage of newspaper headlines, articles, cartoons and pictures was unleashed against" the defendant. 366 U.S. at 725. Once *voir dire* began in that case, "with remarkable understatement, the headlines reported that 'impartial jurors are hard to find.'" *Id.* at 726. The Court found that the "pattern of deep and bitter prejudice shown to be present throughout the community was clearly reflected in the sum total of the *voir dire* examination." *Id.* at 727 (internal quotation omitted).

"As one of the jurors put it, 'You can't forget what you hear and see.'" *Id.* at 728. Ultimately, the Court concluded that the defendant did not receive a fair trial and reversed his conviction as unconstitutional. "It is not requiring too much that [a defendant] be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of members admit, before hearing any testimony, to possessing a belief in his guilt." *Id.* (internal citations omitted); *see also Rideau v. Louisiana,* 373 U.S. 723 (1963) and *Estes v. Texas,*

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

381 U.S. 532 (1965) (cases in which the Supreme Court overturned state-court convictions "obtained in a trial atmosphere that had been utterly corrupted by press coverage," *Murphy v. Florida,* 421 U.S. 794, 798 (1975)).

It was clear from the outset of this trial that the type of pool-wide taint contemplated in *Patton* existed among the potential jurors of Hennepin County. All jurors had some knowledge of the case. Most had formed an opinion of some sort. In preliminarily denying the Defendant's motion for a change of venue, this Court relied on *State v. Parker,* 901 N.W.2d 917, 922 (Minn. 2017). In that case, the Minnesota Supreme Court upheld a district court's denial of a venue change, where the lower court found that so much pretrial publicity was disseminated over the Internet, that "people in every corner could have been exposed to [pretrial publicity] so I'm not sure where in Minnesota someone would not have been exposed to [it] if the material was prejudicial." *Id.* (*see* Preliminary Order re: Change of Venue, Nov. 4, 2020, at 5). This case, however, is considerably different from *Parker*—or any other case regarding change of venue in Minnesota history. In fact, according to Georgetown Professor Paul Butler, the trial of Mr. Chauvin was "the most famous police brutality prosecution in the history of the United States."[2]

The media coverage in this case is like a bomb explosion: Hennepin and Ramsey counties are ground zero and although felt far and wide, the effects of the explosion diminish as they ripple outward from the Twin Cities. The most intense media coverage in the state clearly appeared here, in the Twin Cities. Although it is more than reasonably probable that Mr. Chauvin cannot receive a completely fair and impartial trial in Hennepin or Ramsey counties, or anywhere in the State, the

[2] Available from https://www.nytimes.com/2021/02/10/us/george-floyd-death.html, last accessed May 25, 2021 (A February 10, 2021, *New York Times* article discussing last year's failed third-degree murder plea agreement—which was, coincidentally, leaked by "three law enforcement officials" while this Court was considering the State's motion to reinstate a third-degree murder charge).

probability that Mr. Chauvin can receive a more-fair and more-impartial trial increases as one travels outward from the Twin Cities.

Ever since the incident, potential jurors in the Twin Cities have been faced with daily, one-sided reminders of the events of May 25, 2020. Signs demanding "Justice for George" are a regular sight in Twin Cities neighborhoods. Crowds have regularly gathered throughout the cities to demonstrate, protest, and remember. George Floyd is memorialized in street art throughout the Twin Cities. At the time of trial, damage from the riots that occurred in May and June 2020 was still apparent in Minneapolis and St. Paul, including the destroyed Third Precinct and 31st Street U.S. Post Office in the former, as well as burnt-out and still-boarded up businesses in both cities. Notably, these sites can all be found within minutes of the downtown courthouses in Hennepin and Ramsey counties.

The site of George Floyd's death is located fewer than four miles from the Hennepin County Government Center, where the trial took place. An individual could drive there by traveling south from downtown on Chicago Avenue or west from the Mississippi River on 38th Street. However, the individual would not be able to reach the site by car. Both streets—formerly thoroughfares in Minnesota's largest city—have been blocked off by protestors, who continue to maintain a sort of "autonomous zone" called "George Floyd Square" in the city blocks surrounding the site.[3] The faces and landscapes of the Twin Cities have been irrevocably changed by those demanding justice for George Floyd, and there is no way a pool of potential jurors could have avoided these reminders. In fact, in order to enter the Hennepin County Government Center, jurors and potential jurors, had to negotiate concrete barriers, topped with fences and razorwire, and walk

[3] *See* https://www.mprnews.org/story/2020/12/11/george-floyds-square-offers-an-alternative-to-police-though-not-all-neighbors-want-one, accessed May 25, 2021.

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

past National Guard members and police officers wearing tactical gear and carrying automatic weapons. The potential for juror intimidation—knowing that the "wrong" verdict would have consequences for the Twin Cities—was undeniable. And in light of the city's settlement announcement, Minneapolis jurors knew that they would be on the hook for its $27 million price tag. On the other hand, a jury pool outside of Hennepin and Ramsey counties is far less likely to live among such prejudicial daily reminders of the George Floyd incident.

Indeed, after jury selection commenced on March 9, 2021, potential jurors were faced with barrages of even more prejudicial information that directly impacted Mr. Chauvin's right to a fair trial. On Friday, March 12, 2021, in the midst of jury selection, City of Minneapolis officials, including Mayor Jacob Frey, the Minneapolis City Attorney, and the president of the Minneapolis City Council, announced the city council's unanimous decision to settle the Floyd family's wrongful death case against the city for the astronomical figure of $27 million in a very public press conference just blocks from where jurors were being interviewed in this matter.[4] The timing of the settlement—in the midst of jury selection—and the very public manner in which it was announced were suspect. For example, in the *Noor* case (Hennepin County Court File No. 27-CR-18-6859), the city did not announce its civil settlement with the victim's family until the day following Mr. Noor's guilty verdict.

In cases with considerably less media attention and fewer inflammatory comments by government officials, district courts have seen fit to grant venue changes. *See, e.g., State v. Poole,* 489 N.W.2d 537, 542-43 (Minn. App. 1992) ("the trial court changed venue to Chippewa County because it found news articles, letters to the editor and public criticism by the county attorney

[4] https://www.startribune.com/minneapolis-to-pay-record-27-million-to-settle-lawsuit-with-george-floyd-s-family/600033541/?refresh=true, accessed May 25, 2021.

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

prevented a fair and impartial trial in Traverse County"), *aff'd,* 499 N.W.2d 31 (Minn. 1993); *see also Fairbanks,* 842 N.W.2d 297; *State v. Thompson,* 123 N.W.2d 385 (Minn. 1963). Again, very early in these proceedings, this Court indicated its concern regarding the "risk of tainting a potential jury pool [that] will impair all parties' right to a fair trial." (Gag Order, Jul. 9, 2020, at 1). It's worth noting, however, the constitutional right to a fair and public trial by an impartial jury belongs to the Defendant, alone—not "all parties." *Waller v. Georgia,* 467 U.S. 39, 46 (1984) (the trial rights guaranteed by the Constitution are "for the benefit of the accused").

To put a finer point on it, the right to a fair trial by an impartial jury is Mr. Chauvin's in this case. In order to succeed on a change of venue motion, all Mr. Chauvin need demonstrate is a potential for prejudice—***not actual prejudice***—that creates a ***reasonable likelihood*** that a fair trial cannot be had in Hennepin County, or, for that matter, in neighboring Ramsey County. Minn. R. Crim. P. 25.02. Based on the foregoing, it is clear that the Twin Cities are the epicenter of publicity and prejudice regarding the George Floyd incident. Twin Cities-based lawmakers and prosecutors have been outspoken regarding this case. The cities, themselves, are damaged and scarred and filled with prejudicial artifacts that recall the death of George Floyd and demand justice—and the Defendant in this matter, Mr. Chauvin, is the clear subject of these demands. Finally, potential jurors who reside in Minneapolis, which is self-insured, were seated with the knowledge that, in addition to the damage caused by last summer's riots and the costs of all the extra security surrounding this trial, they will now have to foot the $27 million cost of their city's admission of wrongdoing. Mr. Chauvin did not receive a fair and impartial trial in the Twin Cities.

When, as demonstrated, "there is massive publicity surrounding the trial," prejudice in the jury pool can be presumed. *Beier,* 263 N.W.2d at 625; *see Warren,* 592 N.W.2d at 448 n.15 (citing *Sheppard,* 384 U.S. at 363). It was apparent during *voir dire* that a significant number of

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

potential jurors who had demonstrated clear, prejudicial, implicit bias could not be stricken for cause because they claim to be impartial. However, "adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed." *Patton*, 467 U.S. at 1031 (citing *Irvin,* 366 U.S. at 723). Due to the "barrage of inflammatory publicity immediately prior to trial"[5] in this case, which created a "huge ... wave of public passion,"[6] similar to or greater than that which the Court found in *Irvin,* a fair trial was simply impossible in Hennepin and Ramsey counties—and jurors who claim to be "impartial" could not be taken at their words. *See Patton,* 467 U.S. at 1031.

In ruling against Mr. Chauvin's change of venue motion, the Court acknowledged as much, when it explained,

> There's a third class of jurors who don't say enough to establish a challenge for cause, yet there are concerns that they still might harbor certain biases and maybe they -- it's rarely that they are lying to the Court or to the parties, it's usually that they just have not done sufficient introspection, to be honest, and see how their biases affect them....
>
> And so when we get at that third group which might have grown in size [due] to the exposure of the settlement, that's the purpose of giving both sides additional peremptory challenges to focus on that third group, which although they heard about the settlement said they could be fair and impartial but we all or some, for the striking party, had concerns that they could, in fact be fair and impartial.

(Trial Tr., Mar. 19, 2021, at 6-7). In spite of the Court's certainty that its remedial measures during the jury selection process would result in a fair trial for Mr. Chauvin, (*see id.* at 6-8), it is clear that the Court subsequently had second thoughts about its approach to empaneling a fair and impartial jury in this trial. In a May 13, 2021, hearing regarding the upcoming trial of Mr. Chauvin's codefendants, the Court stated,

---

[5] *Murphy*, 421 U.S. at 798.
[6] *Irvin*, 366 U.S. at 728.

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

> I still have to hear from both sides as far as any tweaks you wish to make to the questionnaire that went out originally, which you all have copies of. ***I have some of my own from our experience in the Chauvin voir dire that make it a little more focused and will give us a little more information that's relevant.***

(Hrg. Tr., May 13, 2021, Henn. Ct. Case Nos. 27-CR-20-12949, -51, -53, at 65). It is clear that this Court believes the jury selection process in this trial could have been "more focused" and the questionnaires could have been "tweaked" to provide "more information that's relevant" to the selection of fair and impartial jurors in the proceedings against Mr. Chauvin. The Court appears to concede that more could have been done to empanel a fairer jury in Mr. Chauvin's case; yet the one thing that it should have done—was mandated by rule to do—but failed to do, to ensure a fairer jury, was grant Mr. Chauvin's motion for a change of venue. The Court's failure to do so was a prejudicial abuse of discretion that violated Mr. Chauvin's constitutional due rights, and a new trial must be granted.

2. *This Court abused its discretion when it denied Mr. Chauvin's motion for a continuance or new trial.*

In the wake of its reversals in *Irvin, Rideau,* and *Estes,* the Supreme Court admonished that "we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception." *Sheppard v. Maxwell,* 384 U.S. 333, 363 (1966). Due to the "carnival atmosphere" underlying the case in *Sheppard,* the Supreme Court held that

> where there is a ***reasonable likelihood*** that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity.... ***If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered.***

Id. (emphasis added).

The circumstances in this case clearly echoed those in *Irvin*: "Impartial jurors were hard to find" because of the near-daily international broadcasting of the bystander video since the May 25, 2020 incident, across all forms of media, and jurors "can't forget what [they] hear and see"—a

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

remark similar to those made by potential venire members, here. As one potential juror put it, he could not start the trial with a presumption of innocence. As the potential jurors made clear time and time again, the burden was squarely on the shoulders of the defense to prove Mr. Chauvin's lack of guilt and not on the State, where it belonged. Minnesota has never seen a trial like this. The Congdon and Blom murder trials, along with the Noor trial are probably about as close as this State has come. However, the notoriety surrounding the Chauvin proceedings far eclipses anything publicity surrounding those matters. There was more than a reasonable likelihood that the publicity attendant to this case threatens the fairness of the trial—this Court found as much when it inexplicably denied Mr. Chauvin's motion for a continuance. And mere weeks after Mr. Chauvin's conviction, this Court continued the trial of his codefendants from August 2021 to March 2022 because

> if nothing else, we need some distance from all of the publicity that has occurred and is going to occur this summer. And if I'm not changing venue, ***I think I at least owe it to the defendants to put some space, whereas the case law is case law a continuance is also a way to ameliorate the effect of prejudicial pretrial publicity.*** And so under the rule on pretrial publicity, the Court has a right on its own motion to continue to trial date and I am so doing.

(Hrg. Tr., May 13, 2021, Henn. Ct. Case Nos. 27-CR-20-12949, -51, -53, at 66) (emphasis added). It is baffling that this Court, when Mr. Chauvin's proceedings were certainly surrounded by more publicity than the trial of his codefendants will garner—in fact, some of the publicity from which this Court hopes to gain distance by continuing the trial of his codefendants, is the publicity surrounding Mr. Chauvin's sentencing (*see id.* at 63)—continued the trial of his codefendants for seven months *on its own motion,* while consistently denying Mr. Chauvin's motions for continuance, a new trial, or a mistrial on the same grounds.

In *Fairbanks,* due to extensive pretrial publicity, the district court continued the case, granted a change of venue, and granted additional peremptory challenges to both sides. 842

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

N.W.2d at 301-02. In spite of considerable prejudicial, nonfactual[7] press coverage, the supreme court held that "any potential prejudice from nonfactual material was mitigated because a considerable period of time passed between much of the publicity and Fairbanks' trial." *Id.* at 303. In that case, most of the 119 articles submitted in support of the defendant's change of venue motion were published at least 11 months before the trial took place.

Here, there was no continuance, no change of venue, and daily prejudicial media reports numbering in the thousands had been published since the date of the incident and continued to be published during jury selection and throughout the trial. Because "a reasonable likelihood" existed that the barrage of "prejudicial news" would "prevent a fair trial," and proceedings had already commenced,[8] "a new trial should [have been] ordered." *Sheppard,* 384 U.S. at 363. Although this case will likely continue to garner substantial publicity—and a new trial may result in a new barrage of negative publicity—there are benefits to ordering a new trial.

Some of the most prejudicial publicity, such as the $27 million settlement, and the renewed leak regarding the failed plea agreement, was disseminated just before trial or during jury selection, and after jury questionnaires had been mailed out and returned. However, during trial, the police shooting of Daunte Wright in Brooklyn Center, where at least one of the jurors resided, occurred, resulting in riots, protests, and curfews in Hennepin County.[9] Protestors regularly made appearances in the area of the Hennepin County Government Center, where the trial took place. The defense's case and the potential outcome of the proceedings were mocked on the opening

---

[7] "Factual" pretrial publicity is not considered to be prejudicial. *Fairbanks,* 842 N.W.2d at 302.
[8] As the State hammered home in a string cite in its last memorandum to the court of appeals, *voir dire* is considered part of the trial proceedings. *See, e.g.,* Minn. R. Crim. P. 26; *Gomez v. United States,* 490 U.S. 858, 873 (1989); *State v. Peterson,* 933 N.W.2d 545, 550 (Minn. App. 2019).
[9] *See* https://www.nytimes.com/article/daunte-wright-death-minnesota.html, accessed May 25, 2021.

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

sketch of Saturday Night Live during the trial.[10] Representative Maxine Waters of California, who attended a protest in Brooklyn Center just before the parties delivered their closings, warned that if Mr. Chauvin was acquitted, protestors must "stay on the street" and "get more confrontational."[11] In additional, during the trial, jurors may have been subjected to negative publicity regarding Mr. Chauvin's medical expert, Dr. David Fowler, who media claimed was being sued over a "chillingly similar" [12] case; as well as news reports regarding an attempted reprisal against the Defendant's use of force expert, Barry Brod, whose former home was vandalized with pig's blood.[13]

The Court denied the Defense's request for additional *voir dire* to determine the extent to which jurors were exposed to such information—and the extent to which it affected their ability to be impartial. It is clear that, had the Court granted the Defense motion for a change of venue, juror exposure to and concern about the riots, demonstrations, and curfews surrounding the Daunte Wright killing, as well as Rep. Waters exhortation of higher levels of "confrontation" on the streets of Hennepin County, would have been mitigated. However, because the change of venue motion was not granted, a continuance or new trial to put temporal distance between this prejudicial publicity and the trial of Mr. Chauvin—as this Court did in the proceedings against his codefendants—should have been granted.

The Court may still grant a new trial, here, on Mr. Chauvin's post-verdict motions. The new trial should take place, as shown *supra*, outside of Hennepin and Ramsey Counties. The

---

[10] *See* https://www.chicagotribune.com/entertainment/tv/ct-ent-snl-sketch-derek-chauvin-trial-20210411-6tlxj6ijavdtzejhhkpo46qlyu-story.html, accessed May 25, 2021.

[11] *See* https://www.cnn.com/2021/04/24/politics/maxine-waters-judge-chauvin-appeal-cnntv/index.html, accessed May 25, 2021.

[12] *See* https://www.washingtonpost.com/nation/2021/04/13/chauvin-trial-expert-maryland-medical-examiner/, accessed May 25, 2021.

[13] *See* https://www.cnn.com/2021/04/18/us/chauvin-witness-barry-brodd-pigs-blood-santa-rosa/index.html, accessed May 25, 2021.

particularly egregious publicity—the leaks, the settlement, the Daunte Wright killing and its attendant circumstances—would all be mitigated by physical and temporal distance, and could also be accounted for in "more focused," and "tweaked" jury questionnaires sent out before the new trial is scheduled.

Absent any new "bombshells," additional temporal distance from those matters will mitigate their potential for tainting the jury pool—as would a change of venue away from the city that entered into and announced the civil settlement during jury selection and whose citizens must eventually foot the $27 million bill. Further, the supreme court is scheduled to hear arguments in *Noor* this June. A new trial set for January 2022 should give that court sufficient time to render its opinion in the matter and settle the currently-unsettled law surrounding third-degree murder in this state, and possibly eliminate another potential appellate issue. Finally, by early next year, there is a good likelihood that the COVID-19 pandemic will have abated, allowing for more "normal" proceedings. For these reasons, this Court should vacate Mr. Chauvin's convictions and order a new trial in a different venue.

3. *The Court abused its discretion when it denied Mr. Chauvin's motion to sequester the jury.*

During the course of the proceedings, the Defense moved this Court, on multiple occasions, to sequester the jury. (*See, e.g.,* Trial Tr., Apr. 12, 2021, at 32). In each instance, the Court denied Mr. Chauvin's motion, instead choosing to caution the jury almost-daily to "avoid news about this case," or later, "don't watch the news." The Court's failure to sequester the jury was an abuse of discretion in violation of Mr. Chauvin's constitutional rights to a fair trial by an impartial jury.

Jury sequestration occurs at the discretion of the Court. Minn. R. Crim. P. 26.03, subd. 5(1); *State v. Morgan,* 246 N.W.2d 165, 168 (Minn. 1976). However, on a party's motion, "***[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 by the United States Supreme Court in *Sheppard v. Maxwell,* this state's high court explained, "Thus, 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 the Court has found that jurors had been exposed to prejudicial materials—the rule only requires a *likelihood* such matters "come to jurors' attention"—as it did in this case, *see* supra, its discretion with respect to sequestration was removed. *See State v. Mastrian,* 171 N.W.2d 695, 707 (Minn. 1969) ("The extremely high cost to both the defendant and the state of retrying the case if on appeal sequestration is found to have been necessary clearly weighs heavily in favor of incurring the lesser cost of sequestration" (citing *Sheppard*)). The rule's mandatory[14] language makes clear that "sequestration ***must*** be ordered." Indeed, in a case such as this, without a doubt, the case surrounded by 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—this Court had a duty to raise sequestration *sua sponte. See Sheppard,* 343 U.S. at 363 ("where there is a reasonable likelihood that prejudicial news… will prevent a fair trial… sequestration of the jury [is] something the judge should have raised sua sponte with counsel"); *Nebraska Press Ass'n v. Stuart,* 475 U.S. 539, 553 (1975). Because this Court failed to *sua sponte* raise sequestration of the jury or grant Defendant's motion to do so after finding that jurors were likely exposed to extensive prejudicial publicity, it abused its discretion in violation of Mr. Chauvin's constitutional rights to a fair trial by an impartial jury. A new trial must be granted.

[14] "Must" is mandatory. Minn. Stat. § 645.44, subd. 15a.

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

B. The State committed pervasive, prejudicial misconduct in violation of Mr. Chauvin's constitutional rights to a fair trial by an impartial jury.

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).

To begin, the State's discovery violations and numerous failures to disclose—or disclosures of evidence in forms other than the original or discovery "dumping,"—of which this Court has been made 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 clearly violated Minn R. Crim. P. 9.01 and 9.03, as well as this Court's order. *Spann,* 704 N.W.2d at 493. The record is rife with examples. Mr. Chauvin directs the Court, in particular, to the exchange that occurred at the end of the day on April 14, 2021, when the Court threatened the State with a mistrial unless

prosecutors disclosed the Defense 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. 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).

"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.

Here, during cross examination, Dr. Andrew Baker, who was a witness for the State, made unsolicited reference to the fact that he had testified before a federal grand jury regarding

the death of George Floyd. It was improper for Dr. Baker to make such reference to the grand jury. *See, e.g., State v. Sewell,* 595 N.W.2d 207, 213 (Minn. App. 1999), *review denied* (Aug. 25, 1999). Because the State failed to adequately prepare Dr. 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, Dr. Baker altered his findings and conclusions regarding the death of George Floyd.[15] Attempts to influence testimony by the prosecution is unethical and amounts to misconduct. *See, e.g., In re Disciplinary Action Against Backstrom,* 767 N.W.2d 453 (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 which 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.

Id. (quotation omitted).

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.

While a prosecutor may argue that a defense is meritless, he cannot "belittle the defense,

[15] *See* 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).

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

either in the abstract or by suggesting that the defense was raised because it was the only defense that might succeed." *Id.* (citations omitted). The State belittled Mr. Chauvin's defense as nothing but "a story" throughout its closing and rebuttal. It began early in the closing when Mr. Schleicher told the jury that the Defense's opening statement was "simply wrong. That's just a story." (Trial Tr., Apr. 19, 2021, at 12). The State went on to use the word "story" or "stories" ***more than twenty times*** in its closing and rebuttal, even over Defense objections and an admonition from this Court, which finally had to direct the jury to "disregard the use of the word stories" by Mr. Blackwell. (*Id.* at 86). Although Defense counsel had previously objected to Mr. Blackwell's characterization, it was not until shortly before the end of his rebuttal that the Court instructed the jury to disregard his use of the word "stories," after jurors had already been subjected to derogation of the Defense multiple times.

In addition to his reference to Mr. Chauvin's defense as mere stories, Mr. Schleicher also had occasion to characterize Defense evidence as "nonsense" (*id.* at 26, 27, 28) on numerous occasions before repeating it like a mantra for the jury. (*Id.* at 39). This, alone, constitutes misconduct. *State v. Romine,* 757 N.W.2d 884, 894 (Minn. App. 2008) (characterization of the defense as "nonsense" was misconduct). Mr. Blackwell found his own words to slander the Defense theory of the case when he referred to it as "shading the truth." (Trial Tr., Apr. 19, 2021, at 97-98). This was prosecutorial misconduct, plain and simple, and it pervaded the closing and the rebuttal. *Jones,* 753 N.W.2d at 691; *see State v. Wright,* 719 N.W.2d 910, 919 (Minn. 2006); *State v. Pendleton,* 759 N.W.2d 900, 912-13 (Minn. 2009).

Misstatement or distortion of the burden of proof during closing arguments is "highly improper." *State v. Coleman,* 373 N.W.2d 777, 782 (Minn. 1985). During closing and rebuttal, the prosecution made several references to the existence "two sides" to the story on several occasions,

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

implying that the jury had to weigh each side in order to determine which was correct. (Trial Tr., Apr. 12, 2021, at 81, 82, 96, 97). Asking a jury to "weigh the story" of one side or the other, or words to that effect, improperly shifts and distorts the burden of proof, and constitutes prosecutorial misconduct. *State v. Strommen,* 648 N.W.2d 681, 690 (Minn. 2002). The State further distorted the burden of proof when, after attempting to explain what proof beyond a reasonable doubt means, Mr. Schleicher took considerable time explaining to the jury what the State *did not have to prove.* In so doing, the Mr. Schleicher implied to the jury that Mr. Chauvin bore the burden of disproving certain allegations made by the State. (*See* Trial Tr., Apr. 12, 2021, at 26, 43, 44, 50). This was "highly improper" prosecutorial misconduct. *Coleman,* 373 N.W.2d at 782.

Inviting jurors to put themselves in the shoes of another improperly inflames passion by personalizing emotions, such as anger and fear, and encourages improper speculation. *See, e.g., State v. Williams,* 525 N.W.2d 548, 549 (Minn. 1994); *State v. Thompson,* 578 N.W.2d 734, 742 (Minn. 1998). Yet, on rebuttal, Mr. Blackwell did just that when he said to the jury of the bystanders at the scene, "If you love life, you get excited when you see life being taken when that's your perception… So you felt their pain, you felt the sense of helplessness." (Trial Tr., Apr. 12, 2021, at 86). And, "You felt the anguish even a year after the fact." (*Id.* at 84). Asking the jurors to step into the shoes of the witnesses and to feel what they felt as they saw George Floyd die appealed to the passions of the jury and was improper prosecutorial misconduct. *Nunn v. State,* 753 N.W.2d 657, 662-63 (Minn. 2008). Likewise, a prosecutor cannot ask jurors to look their own experiences when weighing credibility of evidence. *Williams,* 525 N.W.2d 548, 549 Yet, Mr. Schleicher did just this when said to the jury, "Everybody knows what happens when you push

somebody against the pavement. You learned this pretty early on. We learned this pretty early on." (Trial Tr., Apr. 12, 2021, at 45).

Similarly, a prosecutor's use of the words "us" and "we" amount to an improper attempt to align the prosecutor with the jury and constitute prosecutorial misconduct. Both Mr. Schleicher in his closing and Mr. Blackwell in his rebuttal engaged in such misconduct. (*See* Trial Tr., Apr. 12, 2021 at 8, 10, 66, 72, 76, 88 ("us") and 5, 8, 32, 33, *et seq.* ("we")). Examples include exhorting the jury, "Because we know how George Floyd died" (*id.* at 32), "And we know that happened" (*id.* at 33), and "We know it was deadly force…" (*id.* at 76). Use of the word "we," in fact, pervades the State's closing and rebuttal—Mr. Schleicher and Mr. Blackwell, combined, used the word more than 80 times, largely in reference to the prosecution together with the jury, "us" a total of 9 times, and "we're" another 8 times. This is improper because "it does not follow that a prosecutor may describe [himself] and the jury as a group of which the defendant is not a part." *State v. Mayhorn,* 720 N.W.2d 776, 7989-90 (Minn. 2006), *accord Nunn,* 753 N.W.2d at 663. "[A] prosecutor is not a member of the jury, so to use "we" and "us" is inappropriate and may be an effort to appeal to the jury's passions." *Id.* at 790.

A prosecutor's use of phrases such as "I suggest to you" and "I think" to interject personal opinion into a closing argument is improper. *See Ture v. State,* 681 N.W.2d 9, 20 (Minn.2004). Prosecutors must not interject their personal opinions into a case. This is so in order to prevent "exploitation of the influence of the prosecutor's office." *State v. Everett,* 472 N.W.2d 864, 870 (Minn.1991) (citing ABA Standards Relating to the Prosecutor's Function, 3–5.8(b) and Commentary (1979)). Mr. Blackwell, in his relatively-brief rebuttal, used the phrase "I think" eight times. (*See* Trial Tr., Apr. 12, 2021, at 67-99). At least five of the instances were in direct reference

to his personal opinion that his view of the evidence was the correct one. (*See id.* at 81, 86). To-wit:

> So I want to address kind of several other points on the heading of what ***I think*** are stories that you've heard versus ***I think*** the truths here....
>
> I'll be clear ladies and gentlemen, I will tell you if ***I think*** there's a fact that has been altered, I will tell you what it is, and that's all I mean when I say story.

Id. (emphasis added). By prefacing large portions of his rebuttal with these generalized statements regarding his opinion of what the "truth" is—as opposed to "stories," which is how he referred to the defense theory of the case—Mr. Blackwell committed prosecutorial misconduct by interjecting his opinion into the closing argument, which amounts to improper attorney testimony. *State v. Gerald,* 486 N.W.2d 799, 83 (Minn. App. 1992); *see State v. James,* 520 N.W.2d 399, 405 (Minn. 1994); *State v. Parker,* 353 N.W.3d 122, 128 (Minn. 1984).

Mr. Blackwell, in fact, inserted his opinion regarding the evidence and disparaged the defense several other times throughout his rebuttal. He did so when he told the jury "what you've gotten here is a number of what I call stories" (Trial Tr., Apr. 12, 2021, at 75). He did so again when he twice implied that "facts" had been "altered"—and explained to the jury that he would be the arbiter of "truth." (*See id.* at 70, 86). Mr. Blackwell took one last bite disparagement apple when he ended his rebuttal with gratuitous character attack on Mr. Chauvin, implied facts not in evidence, and engaged in further improper opinion testimony, saying to jurors, "And the truth of the matter is that the reason George Floyd is dead is because Mr. Chauvin's heart was too small." *See Francis v. State,* 729 N.W.2d 584, 591 (Minn. 2007) ("Gratuitous character attacks are improper during closing argument").

Mr. Schleicher also tried his own hand at attacking Mr. Chauvin's character by insinuating facts not in evidence. During his closing argument, Mr. Schleicher told the jury,

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

> The defendant abandoned his values, abandoned the training and killed a man. And why? Right out in the public. Right out in broad daylight in front of several bystanders as they looked on in shock and horror. Why? Well, this all started over a call of an alleged counterfeit $20 bill, but George Floyd's life was taken for something worth far, far less, far less. You saw the photo. You saw the body language. You can learn a lot about someone by looking at their body language. Defendant facing down that crowd. They were pointing cameras at him, recording him, telling him what to do, challenging his authority. His ego, his pride. Not the kind of pride that makes you do better, be better, the kind of ego-based pride that the defendant was not going to be told what to do, he was not going to let these bystanders tell him what to do. He was going to do what he wanted, how he wanted, for as long as he wanted, and there was nothing, nothing they could do about it because he had the authority. He had the power of the badge, and the other officers. And the bystanders were powerless, they were powerless to do a thing. The defendant, he chose pride over policing.

(Trial Tr., Apr. 19, 2021 at 14). Mr. Chauvin did not testify. Neither his state of mind, nor his thoughts, nor his pride, nor his ego was in evidence. This was prosecutorial misconduct, plain and simple. The State cannot "be permitted to 'deprive a defendant of a fair trial by means of insinuations and innuendos which plant in the minds of the jury a prejudicial belief in the existence of evidence which is otherwise inadmissible.'" *State v. Harris,* 521 N.W.2d 438, 354 (Minn. 1994) (quoting *State ex rel. Black v. Tahash,* 158 N.W.2d 504, 506 (Minn. 1968).

A prosecutor engages in misconduct by engaging in conduct that materially undermines the fairness of a trial. *Fields*, 730 N.W.2d at 782. Thus, it is unethical for the State to successfully move to exclude evidence and then to argue that the other party failed to produce such evidence. *State v. Thompson,* 617 N.W.2d 609, 613 (Minn. App. 2000). Here, as shown *infra,* the State successfully opposed introduction of a police interview with Morries Hall, who was in the car with Mr. Floyd at the time of his arrest, in which he described how he and George Floyd had spent the day together leading up to the May 25, 2020, encounter with police. He described Mr. Floyd's use of drugs, specifically pills. Yet, after successfully having the police report excluded, Mr. Blackwell, in his rebuttal, said to the jury, "And you keep hearing drugs in the car. And the drugs

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

were one pill. One. One pill. It was not in George Floyd." (Trial Tr., Apr. 19, 2021 at 91). He also downplayed Mr. Floyd's use of methamphetamine, saying, "Ladies and gentlemen, what meth?" (*Id.* at 90). Mr. Blackwell's "conduct here bordered on unethical." *Thompson,* 617 N.W.2d at 613.

Finally, in his closing argument, Mr. Schleicher said to the jury, "You don't look at this from George Floyd's perspective, okay. It's not what a reasonable victim would do." (*Id.* at 54). The State's reference to Mr. Floyd as a victim during closing naturally implied Mr. Chauvin's guilt, which is improper in a prosecutor's argument. *State v. Hall,* 764 N.W.2d 837, 845 (Minn. 2009).

Another potential instance of prosecutorial misconduct is still being investigated and may not be resolved before the Court makes its ruling on these motions. However, it must be considered. As this Court is aware, the State previously leaked information regarding Mr. Chauvin's settlement with prosecutors to local news, which, of course, was picked up by national media a short time later. On the eve of this trial, another leak occurred, resulting in an article in the *New York Times*, which contained considerably more detail regarding the settlement. (*See* footnote 2). It has been alleged that the State is the source of this leak. This matter is currently before the court in the case of Mr. Chauvin's codefendants. (*See, e.g.,* Hrg. Tr., May 13, 2021, Henn. Ct. Case Nos. 27-CR-20-12949, -51, -53, at 61). This is yet another example of impropriety on behalf of State actors—whether prosecutors or investigative agencies—with which Mr. Chauvin and his defense team have had to contend throughout the course of these proceedings.

"A prosecutor may not seek a conviction at any price." *Porter,* 526 N.W.2d at 366. Unfortunately, in the State's headlong rush to convict in this case, it took many shortcuts, many of which amount to misconduct, and all of which amounted to injustice. Taken as a whole, the cumulative, prejudicial effect of the multiple, pervasive instances of prosecutorial misconduct, this

Court must grant Mr. Chauvin a new trial. *See Mayhorn,* 720 N.W.2d at 791 (supreme court reversed conviction even with the State's strong case against the defendant because the "prosecutor's misconduct was a pervasive force at trial").

C. The State violated Mr. Chauvin's constitutional right to due process and to present a complete defense when it did not order Morries Hall to testify or admit into evidence Mr. Hall's statements to law enforcement.

In the State of Minnesota,

> Every criminal defendant has a right to fundamental fairness and to be afforded a meaningful opportunity to present a complete defense. The Due Process Clauses of the Federal and Minnesota Constitutions require no less. 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) (quoting *California v. Trombetta,* 467 U.S. 479, 485 (1984); *see State v. Crims*, 540 N.W.2d 860, 865 (Minn. App. 1995), *review denied* (Minn. Jan. 23, 1996). 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); *Crims,* 540 N.W.2d at 865. "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), *review denied* (Minn. Jan. 15, 1988) (citing *Chambers v. Mississippi,* 410 U.S. 284, 294 (1973).

Here, Mr. Chauvin sought to compel Morries Hall to testify in his behalf and to develop his theory that he was not the cause of Mr. Floyd's death. Mr. Hall, however, invoked his right against self-incrimination under the Fifth Amendment and the Minnesota Constitution. (*See* Trial Tr., Apr. 14, 2021, at 13). The Court found that Mr. Hall had "a complete fifth amendment privilege" and quashed the Defense subpoena compelling him to testify. In so doing, the Court

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

found that any testimony regarding Mr. Hall's presence in the same vehicle as George Floyd would be incriminating. (*Id.* at 10-13).

A witness becomes "unavailable" if, as here, he invokes his Fifth Amendment privilege against self-incrimination. *State v. Irlas,* 888 N.W.2d 709, 712-13 (Minn. App. 2016) (collecting cases); *see* Minn. R. Evid. 804(a)(1)-(2) ("'Unavailability as a witness' includes situations in which the declarant… is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or… persists in refusing to testify concerning the matter of the declarant's statement despite an order of the court to do so").

If the declarant witness is unavailable, a statement "which at the time of its making so far… tended to subject the declarant to civil or criminal liability… that a reasonable person in the declarant's position would not have made the statement unless believing it to be true" is an exception to the rule against hearsay. Minn. R. Evid. 804(b)(3). Earlier in the proceedings, here, anticipating that Mr. Hall would invoke his privilege and make himself unavailable, the Defense moved to admit a police report of an interview Mr. Hall had given shortly after Mr. Floyd's death regarding his interactions with Mr. Floyd up to the point of the police encounter on May 25, 2020, pursuant to Minn. R. Evid.804(b)(3). (*See* Trial Tr., Apr. 12, 2021).

The Court denied Mr. Chauvin's motion, however, finding that Mr. Hall's statements to police were not "so far contrary to the declarant's penal interest" as to subject him "clearly to criminal liability." (*Id.* at 43). 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

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

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.

D. The Court abused its discretion, in violation of Mr. Chauvin's constitutional rights to due process and a fair trial, when it permitted the State to present cumulative evidence with respect to 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." See *State v. Hahn*, 799 N.W.2d 25, 33 (Minn. Ct. 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).

Here, despite several defense objections, the State was permitted to elicit testimony from ***seven*** witnesses regarding their opinion on Mr. Chauvin's use of force: (1) Sgt. David Pleoger; (2) Captain Richard Zimmerman; (3) Chief Medaria Arradondo; (4) Inspector Katie Blackwell, (5) Lt.

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

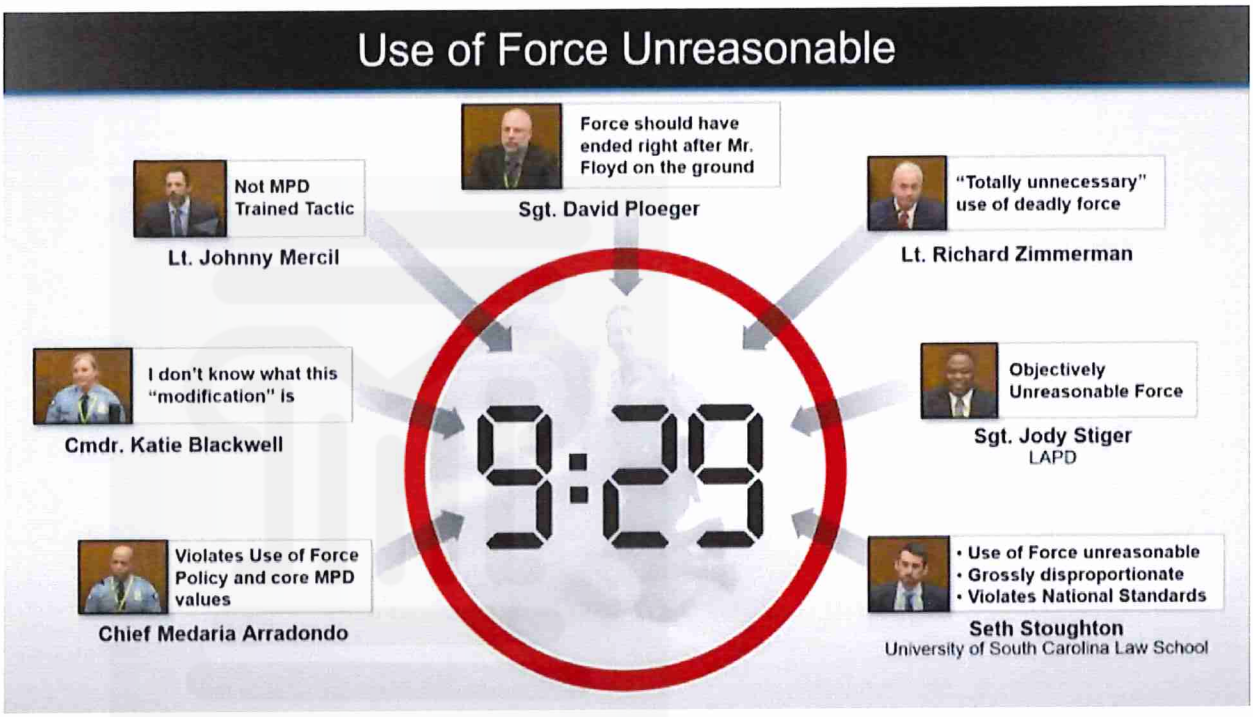
Johnny Mercil; (6) Sgt. Jodi Stiger, and (7) Seth Stoughton. In Mr. Chauvin's case, the testimony regarding the reasonableness of use of force was certainly probative, however, the Court failed to adhere to the general principle of cumulative evidence: that each opinion given completely diminishes the probative value of the next. The first officer to opine on Mr. Chauvin's use of force was Sgt. Pleoger—which the defense argues in itself was inappropriate. Sgt. Pleoger opined that he believed Mr. Chauvin's use of force was excessive. Five more officers were allowed to testify on the same issue over defense objections, and absolutely no limitation was given until the final use of force witness. Near the end of the State's case, and after several objections by the defense, the Court limited the testimony of Seth Stoughton to only "national standards." Although the Court attempted to mitigate the cumulative nature of Stoughton's testimony by only allowing him to testify as to "national standards," his opinion regarded the use of force and had the same effect as the six others: that Mr. Chauvin's conduct was excessive and against police policy. 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 Mr. Chauvin's use of force.

The State was given an unfair advantage resulting solely from the capacity of witnesses allowed to opine that Mr. Chauvin's use of force was unreasonable. By consistently having witness after witness provide the same scripted opinion, the jury was impermissibly persuaded as to this fact—not because of the proactive value of the opinions, but because of the number of times they were permitted to hear it. This is illegitimate persuasion at its core, which is the exact danger that *Hahn*, *Bolte*, and Rule 403 seek to prevent. *See* Minn. R. Evid. 403; *Hahn*, 799 N.W.2d 25; *Bolte,* 530 N.W.2d 191.

Furthermore, not only did the state use such opinions cumulatively, but also utilized the

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

fact that they were permitted to do so during closing arguments. "Officer after officer after officer got on that stand, raised their hand, and told you." (*See* Trial Tr., Apr. 19, 2021). To further drive this point home, the State created a demonstrative exhibit to persuade the jury, which showcases all seven witnesses.



This presentation of evidence unquestionably gave the State unfair advantage that resulted from the capacity of the evidence to persuade by illegitimate means, and as such overwhelmed its legitimate probative force. Therefore, the Court impermissibly allowed the State to use cumulative evidence to illegitimately persuade the jury that Mr. Chauvin's force was unreasonable, instead of forcing the State to meet their burden using other probative sources of evidence.

E. The Court abused its discretion, in violation of Mr. Chauvin's constitutional rights to due process and a fair trial, when it ordered the State to lead witnesses on direct examination.

Permitting a party to ask leading questions of its own witness "is largely within the discretion of the trial court, and is not ordinarily a ground for a new trial." *Couch v. Steele*, 65

N.W. 946, 946 (1896). However, such an allowance of leading questions by a trial court can be grounds for a new trial if there has been "a gross abuse of discretion." *Kugling v. Williamson*, 42 N.W.2d 534, 538 (1950). In general, the Minnesota Rules of Evidence state: "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." Minn. R. Evid. 611. In fact, "leading questions should not be permitted when the witness is sympathetic to the examiner." *See* Minn. R. Evid. 611, cmt. 611(c).

Here, a gross abuse of discretion occurred when, during various chambers and sidebar discussions, the Court permitted the State to lead sympathetic witnesses on direct examination. The defense first raised this objection during the March 30, 2021 morning chambers meeting, wherein upcoming young witnesses were discussed: Darnella Frazier, Alyssa Funari, Kaylyn Gilbert, and Judeah Raynolds. The Court instructed the State to lead these young witnesses. (*See* Ex. 1). While it is true that leading questions for sympathetic witnesses are appropriate for "the occasional situation in which leading questions are necessary to develop testimony because of temporary lapse of memory, mental defect, immaturity of a witness, etc.," the Court incorrectly applied this exception to these young witnesses. *See* Minn. R. Evid. 611, cmt. 611(c).

While it was appropriate for the State to lead nine-year-old Judeah Reynolds through direct examination, Darnella Frazier, Alyssa Funari, and Kaylyn Gilbert were all adults at the time of their testimony. None of these women demonstrated lapse of memory, mental defect, or immaturity to testify; all three women demonstrated competence and the mental capacity to follow the State's line of questioning. Yet, the Court permitted the State to lead all three women simply to avoid any outbursts. Specifically, during the testimony of Ms. Frazier, the defense objected to the leading questions posed by the State; after initiating a sidebar, the Court overruled the objection

and told the defense that the State must be more leading ***to keep witnesses under control***. (*See* Ex.1).

The Rules of Evidence do not permit leading questions to a sympathetic witness simply because a party cannot keep them under control. To the contrary, Minnesota law imposes a strict duty on prosecutors to control their witnesses: "Minnesota law is crystal clear [that] the state has an ***absolute duty*** to prepare its witnesses to ensure that they are aware of the limits of permissible testimony." *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. Ct. App. 2003) (citing *State v. Hogetvedt,* 623 N.W.2d 909, 914 (Minn.App.2001)). Nowhere in the rules is a party afforded a break simply because they fail this duty.

Here, the State gravely failed this duty with Ms. Frazier, Funari, and Gilbert, and the Court enabled such failure by allowing them to impermissibly lead witnesses. The Court even went as far as to extend the State's ability to ask leading questions of sympathetic witnesses beyond that of young witnesses. Donald Williams, who was thirty-three years old at the time of his testimony, continuously failed to answer questions, and began a narrative of his own thoughts and feelings. Upon objection by the defense, the Court initiated a sidebar and instructed the State to lead Mr. Williams "to avoid rambling". (*See* Ex. 1).

Furthermore, the defense filed a motion *in limine*, subsequently granted by the Court, ordering the State to "ensure that its witnesses know the limits of permissible testimony" under *State v. Underwood*, 281 N.W.2d 337, 342 (Minn. 1979). However, the Court failed to enforce this motion *in limine* throughout the civilian witness portion of the State's case.

The rule is simple: The State had the absolute duty to ensure that their witnesses, notwithstanding Ms. Reynolds, were fully prepared and aware of the limits of their testimony. The Court had the duty to ensure the rules of evidence were closely followed. Allowing the State to

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

simply lead their witnesses to avoid rambling and maintain control simply gave permission to the State to ignore well-established rules of evidence. Therefore, it was an abuse of discretion for the Court to remedy the State's failure to prepare their witnesses by allowing them to lead sympathetic witnesses on direct examination. Such practice resulted in a gross abuse of discretion, which completely deprived the defense of a fair and meaningful opportunity to cross-examine witnesses.

F. The Court abused its discretion, in violation of Mr. Chauvin's constitutional rights to due process and a fair trial, when it failed to order that a record be made of the numerous sidebars that occurred during the trial.

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." The statute further demands that the court reporter "shall take down all questions in the exact language thereof, and all answers thereto precisely as given by the witness or by the sworn interpreter." *Id.* 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.*

Here, per the Court's March 1, 2021, Trial Management Order, objections were to be made without argument unless invited by the Court. (*See* Trail Mgmt. Order, (6)(f)). 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." (See Trail Management Order (6)(g)). At several times during Mr. Chauvin's trial, defense requested that a record of the sidebar conferences and objections be made. This request was pushed until the end, wherein the Court merely invited both parties to submit notes that outline their recollection of objections and

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

grounds thereof. This record has never been officially made because despite defense reaching out to 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.

Regardless, such an order and practice placed the burden on the parties to make the record at a later time, as opposed to conforming to Minn. Stat. § 486.02's strict rule requiring a verbatim record to be taken of objections and grounds thereof. Inevitably, the State and Mr. Chauvin will likely dispute each other's recollection of these off-the-record objections. Therefore, 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. Instead, only uncertified notes commemorate sidebar conferences, and it thus impossible for a reviewing court to obtain a complete record of Mr. Chauvin's trial.

G. The Court abused its discretion when it permitted the State to amend its complaint to add a charge of third-degree murder.

After the Court of Appeals' holding in *State v. Noor,* 955 N.W.2d 644 (Minn. App. 2021), *review granted* (Minn. Mar. 1, 2021) and the State's pretrial appeal in this matter, *State v. Chauvin,* 955 N.W.2d 684 (Minn. App. 2021), *review denied* (Minn. Mar. 10, 2021), this Court found that *Noor* was binding authority in this case, and reinstated the third-degree murder charge it had previously dismissed. In spite of the court of appeals' holding that *Noor* is *generally* precedential authority, that case is inapposite here.

The court of appeals clarified in *Chauvin* that its "precedential opinions are binding authority immediately upon filing, which must be applied consistently ***in factually similar cases.***" 955 N.W.2d at 694; *see State v. M.L.A.,* 785 N.W.2d 763, 767 (Minn. App. 2010), *review denied* (Minn. Sep. 21, 2010). Because this case is neither factually nor procedurally similar to *Noor,* its application is precluded in this matter. Importantly, since the supreme court "has granted the

petition for further review [in *Noor*],… the case is[] of minimal precedential value" at this time. *Fabio v. Bellomo,* 489 N.W.2d 241, 245 n.1 (Minn. App. 1992), *affirmed* 504 N.W.2d 758 (Minn. 1993).

The long line of supreme court cases on which this Court initially relied in concluding that a third-degree murder charge is inappropriate on the facts of this case continues to hold that "[t]hird degree murder ***cannot occur when the defendant's actions were focused on a specific person.***" *State v. Zumberge,* 888 N.W.2d 688, 698 (Minn. 2017) (emphasis added); *accord State v. Hanson,* 176 N.W.2d 607, 614-15 (Minn. 1970); *State v. Stewart*, 276 N.W.2d 51 (Minn. 1979); *State v. Wahlberg,* 296 N.W.2d 408, 417 (Minn. 1980); *State v. Barnes,* 713 N.W.2d 325, 331 (Minn. 2006); *State v. Hall,* 931 N.W.2d 737, 743 n.9 (Minn. 2019) (stating the court's conclusion is "not inconsistent with" *Hanson,* which held that murder in the third degree "excludes a situation where the animus of the defendant is directed toward one person") (citations omitted).

In its opinion, the court of appeals distinguished *Noor* procedurally from this line of precedent, stating that those cases "do not involve posttrial appellate review of whether evidence was sufficient to sustain a conviction of third-degree murder…. Specifically, the defendants in those cases argued that they were entitled to an instruction on a lesser offense of third-degree murder." *Noor,* slip op. at 13. The *Noor* panel, instead, relied on a much narrower set of third-degree murder caselaw centered around the supreme court's half-century-old decision in *State v. Mytych,* 194 N.W.2d 276, 282 (Minn. 1972). After that decision, the supreme court, itself, subsequently cautioned that *Mytych* was not a "typical application of [third-degree murder]." *State v. Leinweber,* 228 N.W.2d 120, at 123 n.3 (Minn. 1975); *Wahlberg,* 296 N.W.2d at 417.[16]

[16] *Noor* is not the only recent decision in which a panel of the court of appeals seems to disregard the supreme court's admonishment regarding *Mytych. See State v. Hall,* 2019 WL 5885081, at *3

Moreover, in an opinion issued after the court of appeals' *Noor* decision, the supreme court reiterated its holding in *Barnes,* favorably quoting the portion of the case emphasizing that third-degree, "depraved mind murder… cannot occur where the defendant's actions were focused on a specific person." *State v. Coleman,* 957 N.W.2d 72, 80 (Minn. 2021).

Unlike *Noor,* however, the present case ***did not*** "involve posttrial appellate review of whether evidence was sufficient to sustain a conviction of third-degree murder." Rather, this case involved a ***pretrial*** motion to amend the Complaint to add or reinstate an already-dismissed charge. Thus, it is a matter of this Court's pretrial discretionary act, *State v. Baxter,* 686 N.W.2d 846, 852 (Minn. App. 2004), and not a review of a factfinder's verdict. This Court's task in deciding whether the evidence presented by the State supports a third-degree murder charge is, therefore, a more akin to deciding whether a lesser offense instruction should be submitted to a jury than it is to reviewing a defendant's direct challenge to a factfinder's verdict.

When an appellant challenges the sufficiency of the evidence used to convict him or her, the appellate court "reviews the evidence in the light most favorable to the verdict to determine if the evidence was sufficient to permit the jury to reach the verdict it did." *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). The relevant standard of review depends on whether the factfinder reached its conclusion based on direct or circumstantial evidence. *State v. Harris*, 895 N.W.2d 592, 598 (Minn. 2017). Both circumstantial and direct evidence are given the same weight, but a conviction based on circumstantial evidence requires a higher level of scrutiny. *Bernhardt v. State*, 684 N.W.2d 465, 477 (Minn. 2004). The court then utilizes a two-part test in its analysis, requiring it to: (1) identify the circumstances proved by the State, with deference to the factfinder's

---

(Minn. App. Nov. 12, 2019) ("Although the supreme court subsequently acknowledged that [*Mytych*] is not a typical application of third-degree murder… we nevertheless find the supreme court's analysis in *Mytych* persuasive"), *review denied* (Jan. 29, 2020).

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

acceptance of the State's evidence and rejection of any evidence in the record that is inconsistent; and (2) "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt." *Loving,* 891 N.W.2d at 643.

On the other hand, like a pretrial motion to amend a complaint, the matter of whether a lesser-offense instruction should be submitted to a jury, is a discretionary decision for this Court. *See Zumberge,* 888 N.W.2d at 697; *Baxter,* 686 N.W.2d at 852. It must determine whether the facts presented to this point support a charge of third-degree murder. Thus, this Court's decision to permit or deny leave to amend the Complaint to add a lesser offense is an exercise of the same discretion involved when determining whether to submit a lesser-offense instruction to a jury.

Similarly, when determining whether a new charge is appropriate, or whether probable cause exists to sustain the charge, this Court must determine whether the evidence before it presents "a fact question for the jury's determination" on each element of the crime charged. *State v. Lopez,* 778 N.W.2d 700, 704 (Minn. 2010). In the same vein, when determining whether a lesser-offense instruction should be submitted to a jury, the court must decide whether "the evidence provides a rational basis for convicting the defendant of the lesser-included offense." *Zumberge,* 888 N.W.2d at 697. "In Minnesota, every lesser degree of murder is an included offense." *Id.* (citing *Leinweber*, 228 N.W.2d at 125).

Here, the State moved the Court to amend the Complaint to reinstate or add the lesser offense of third-degree murder. This Court had already determined that sufficient probable cause exists to sustain second-degree murder charges against Mr. Chauvin. However, when this Court dismissed the third-degree murder charges against Mr. Chauvin, it exercised its broad discretion to deny the pretrial motion, concluding that the evidence did not present a fact question—*i.e.*, there would be no rational basis on which to convict Mr. Chauvin—on each element of the crime

charged. This case, therefore, is procedurally distinguishable from court of appeals' *Noor* opinion, which is subject to further review by the supreme court, and far more similar to the well-established *Hanson-Stewart-Wahlberg-Barnes-Zumberge* line of supreme court jurisprudence.

In the pretrial motion at issue here, the State sought to reinstate or add to the Complaint a charge of third-degree murder—perpetrating an eminently dangerous act and evincing a depraved mind, in violation of Minn. Stat. § 609.195(a). As shown *supra,* under the *Hanson-Stewart-Wahlberg-Barnes-Zumberge* line of cases, "[d]epraved mind murder cannot occur where the defendant's ***actions*** were focused on a specific person." *Barnes,* 713 N.W.2d at 331 (citing *Wahlberg,* 296 N.W.2d at 417 (Minn. 1980)) (emphasis added). Importantly, under this line of cases, when determining whether a charge of third-degree murder is sustainable or an instruction should be submitted to a jury, the district court looks to a defendant's ***actions***—not his intent. Thus, where the actions are apparent from the available evidence, as here, the court need look no further. If the actions were clearly directed toward a specific person, a third-degree murder charge cannot be sustained.

As the Minnesota Supreme Court explains, "We have made clear that the statute covers only acts committed without special regard to the effect on any particular person or persons." *Zumberge,* 888 N.W.2d at 698. "***[T]he act must be committed without a special design upon the particular person or persons with whose murder the accused is charged.***" *Id.* (appellant's claims that he shot "toward" not "at" the decedent precluded a third-degree murder instruction) (citation omitted) (emphasis added). Third-degree murder is reserved to cover cases where the act was committed in a "reckless or wanton manner," with the "knowledge that someone may be killed and with a heedless disregard of that happening"—such as firing a gun into a dark alley (*Noor*) or driving a vehicle in excess of 100 miles per hour down a busy street (*Hall*). *See, e.g.,* 10 Minn.

Prac., Jury Instr. Guides—Criminal, 11.38 (6th ed.); *Wahlberg,* 296 N.W.2d at 417. These types of acts necessarily involve danger to other people. This case simply does not involve such circumstances.

The probable cause statement in the Complaint only stated that Defendant "placed his left knee in the area of Mr. Floyd's head and neck" and remained in that position. Evidence proffered by the State shows that Mr. Chauvin had used the same type of restraint previously without causing injury or death. A law officer's restraint of a resisting arrestee is a type of act that is far different from speeding down a busy street or discharging of a firearm into a darkened alley. Not only did it not involve a dangerous instrumentality like a firearm or a vehicle, it did not endanger anybody else, nor was a type of behavior that objectively demonstrates a "knowledge that someone may be killed." As alleged by the State, Mr. Chauvin's acts simply do not support a third-degree murder charge.

To be clear, there was no evidence that anyone else in the vicinity of the incident was concerned for their own safety, as demonstrated by the crowd gathered on the sidewalk and on the street. *See Stewart,* 276 N.W.2d 51 (where victim was shot twice, and no bullets fired at anything or anyone else, ***and no other person in the vicinity was concerned for their own safety***, trial court did not err by refusing to submit third degree murder to the jury). At the time of the incident, Mr. Chauvin was discharging his lawful duties as a licensed peace officer in the State of Minnesota. In light of the circumstances into which he entered—a large, muscular man actively resisting arrest by two other MPD officers—the force Mr. Chauvin used to restrain Mr. Floyd, a body weight restraint, was authorized and justifiable. Under these facts, Mr. Chauvin's actions were neither wanton nor reckless, evinced no knowledge that someone may have been killed, were directed toward no one but Mr. Floyd, and could not have resulted in harm to any person other than George

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

Floyd. Again, "[t]hird degree murder ***cannot occur when the defendant's actions were focused on a specific person.***" *Zumberge,* 888 N.W.2d at 698 (emphasis added). It ***cannot*** occur. The State's version of the facts demonstrate that Mr. Chauvin's alleged actions were specifically focused on George Floyd. Applying the supreme court's unqualified holdings in *Hanson* and its substantial progeny, third-degree murder could not have—and, in fact, ***did not***—occur in this case.

Neither the State's version of the facts nor the evidence it had presented at the time of its motion could sustain a charge of third-degree murder against Mr. Chauvin under Minnesota law, as defined by the *Hanson-Stewart-Wahlberg-Barnes-Zumberge,* and now *Coleman,* line of cases and as recognized in *Hall*. *Noor* is also inapposite and inapplicable because it is factually distinguishable from the present case. In *Noor,* the defendant discharged his weapon inside a squad car, across the body of his partner, firing through the vehicle's lowered, driver-side window, and into the dark toward an unidentifiable and unidentified "silhouette." *Noor,* slip. op. at 4. He did so just after a bicyclist passed in front their squad car. *Id.* Noor's actions may have been focused on the "silhouette," but his act may also have endangered his partner, the bicyclist, the silhouette (which could have been a child and was, in fact, an innocent, unarmed woman), as well as anyone else who may have been present in the darkened alley. Clearly, discharging a firearm[17] into the darkness strongly implies "knowledge that someone may be killed." Because it was not clear that the "silhouette" was, in fact, a "specific" person, a pretrial charge of third-degree murder could arguably have been sustainable in *Noor*. Whereas, here, Mr. Chauvin's actions were clearly and unmistakably directed toward no one other than George Floyd, and his use of a common, law

[17] The facts of both *Noor* and *Mytych* involved the discharge of a firearm. *Hall* involved excessive alcohol use and driving a car in excess of 100 miles per hour down a busy Bloomington street. This matter, clearly, does not involve such recklessness or dangerous instrumentalities, further distinguishing it from those three cases.

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

enforcement body-weight restraint in no way implied "knowledge that someone may be killed" by his actions.

The State's pretrial version of the facts made clear that Mr. Chauvin's actions were directed toward no person other than "the particular person whose death occurred"—Mr. Floyd. Because the facts of this case are clearly distinguishable from *Noor,* which is currently of "minimal precedential value," they do not sustain a charge of third-degree murder under the well-established *Hanson-Stewart-Wahlberg-Barnes-Zumberge* line of supreme court precedent. This Court, therefore, abused its discretion when it reinstate the charge of third-degree murder against Mr. Chauvin. His conviction on that count must, therefore, be vacated.

H. The Court abused its discretion when it submitted instructions to the jury that materially misstated the law.

District courts are allowed "considerable latitude" in phrasing jury instructions. *State v. Baird,* 654 N.W.2d 105, 113 (Minn.2002). Accordingly, "[w]e review a district court's decision to give a requested jury instruction for an abuse of discretion." *State v. Koppi,* 798 N.W.2d 358, 361 (Minn. 2011). A jury instruction is erroneous when it "materially misstates the law." *State v. Kuhnau,* 622 N.W.2d 552, 556 (Minn. 2001). When determining whether they are erroneous, "the jury instructions must be reviewed as a whole." *State v. Flores,* 418 N.W.2d 150, 155 (Minn.1988). An erroneous jury instruction merits a new trial when it cannot be determined "beyond a reasonable doubt that the error had no significant impact on the verdict." *State v. Valtierra,* 718 N.W.2d 425, 433 (Minn. 2006) (quotation omitted); *State v. Hunter*, 857 N.W.2d 537, 541–42 (Minn. App. 2014)

As shown, *supra,* the law on third-degree murder is clear: "[t]hird degree murder ***cannot occur when the defendant's actions were focused on a specific person.***" *Zumberge,* 888 N.W.2d at 698 (emphasis added); *Coleman,* 957 N.W.2d at 80. In spite of the supreme court's unambiguous

and oft-repeated admonition, the Court instructed the jury that "The Defendant's act… ***may not have been*** specifically directed at the particular person whose death occurred." (Jury Inst. at 6). By using the permissive language "may not have been," the Court's jury instructions materially misstated the law regarding third degree murder. It cannot be shown beyond a reasonable doubt that the error did not have a significant impact on the verdict. Therefore, the Court must grant a new trial.

The Court also submitted an instruction to jury on second-degree unintentional murder based on a predicate felony of third-degree assault. The be guilty of assault in Minnesota, the actor must "intentionally inflict[] or attempt[] to inflict bodily harm upon another." Minn. Stat. § 609.224, subd. 1(2). While the Court correctly defined assault in its instructions, it went on to instruct that "it is not necessary for the State to prove that the Defendant intended to inflict substantial bodily harm…." (Jury Inst. at 5). Again, this is a material misstatement of the law, and while the language surrounding this portion of instruction may have been technically correct, this instruction was, in itself, incorrect, ambiguous and misleading. The law is clear: The burden was on the State to prove that ***the Defendant intended to inflict bodily harm on George Floyd.*** Minn. Stat. § 609.224, subd. 1(2). The State also bore the burden of proving that the bodily harm was substantial. The way in which this portion of the jury instruction was written obfuscates the burden of proof and implies that the State need not have proved that Mr. Chauvin intended to inflict bodily harm upon George Floyd. Such a misleading instruction further exacerbates Minnesota's position among a minority of states that permit assault as a predicate offense to felony murder. *See State v. Griggs,* 806 N.W.2d 101, 114 (Minn. App. 2011) (Minnesota courts have rejected the merger doctrine). Moreover, Minnesota law regarding the intent element of assault treads a thin line that comes dangerously close to strict liability. *See State v. Dorn,* 887 N.W.2d 826, 830-31 (Minn.

2016). 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. The Court's jury instructions materially misstated the law regarding third-degree assault predicate to second-degree murder. It cannot be shown beyond a reasonable doubt that the error did not have a significant impact on the verdict. Therefore, the Court must grant a new trial.

Finally, the Court's instruction to the jury regarding authorized use of force by a police officer departed substantially from the language of the statute and materially misstated the law. 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 preventing an escape from custody." (Jury Inst. at 9). This language is materially different from that of the statute, which states "When an officer has informed a defendant that he intends to arrest and the defendant flees or forcibly resists arrest, the officer may use ***all necessary and lawful means to make the arrest***." Minn. Stat. § 629.33 (emphasis added). Also missing from the instruction was the United States Supreme Court's admonition that "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." *Graham v. Connor,* 490 U.S. 386, 396 (1989). Exclusion of this language from the instruction opened the door to juror speculation as to reasonableness and prejudiced the Defendant, while materially misstating the law surrounding authorized use of force.

As clearly demonstrated by the foregoing, the proceedings in this matter were so pervaded by error, misconduct, and prejudice that they were structurally defective. *See 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

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

and prejudicial in denying Mr. 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"). This Court must grant Mr. Chauvin a new trial in a different venue.

II. DUE TO JUROR MISCONDUCT, THE COURT MUST ORDER A *SCHWARTZ* HEARING.

Mr. Chauvin has moved this Court for a hearing to impeach the verdict, pursuant to Minn. R. Crim. P. 26.03, subd. 20(6) and *Schwartz v. Minneapolis Suburban Bus Co.,* 104 N.W.2d 301 (Minn. 1960), on the grounds that the jury committed misconduct, felt threatened or intimidated, felt race-based pressure during the proceedings, and/or failed to adhere to instructions during deliberations, in violation of Mr. Chauvin's constitutional rights to due process and a fair trial. *State v. Larson,* 281 N.W.2d 481, 484 (Minn. 1979); *State v. Kelley,* 517 N.W.2d 905 (Minn. 1994); *State v. Bowles,* 530 N.W.2d 521 (Minn. 1995).

In the days following Mr. Chauvin's guilty verdicts, two jury members released their identities and gave numerous interviews to both national and local news media outlets: Ms. Lisa Christensen, Juror 96, and Mr. Brandon Mitchell, Juror 52. Ms. Christensen was the first alternate and was released from duty prior to jury deliberation; she gave several interviews regarding her experience as a juror in Mr. Chauvin's case. Mr. Mitchell, on the other hand, was a deliberating juror; his interviews have provided the defense with several grounds for a new trial, including a failure to follow jury instructions, lack of candor during jury selection, resulting in severe violations of Mr. Chauvin's state and federal constitutional rights.

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

A. Ms. Christensen's post-verdict media interviews demonstrate a pressure to convict Mr. Chauvin.

Lisa Christensen was the first juror to release her identity and provide interviews to several local and national media sources. Because of her willingness to speak out, it is now clear that Ms. Christensen lacked candor during the jury selection process. In her juror questionnaire, Ms. Christensen selected that she was "not sure" if she wanted to be on this jury, citing safety concerns. Specifically, in an April 22, 2021 press conference, Ms. Christensen stated, "… 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."[18] Upon *voir dire*, when asked if keeping her identity confidential alleviates any safety concerns, Ms. Christensen stated, "It's very reassuring." She also stated that she has concerns "regardless of the verdict." Yet, less than two days after Mr. Chauvin was found guilty, Ms. Christensen appeared no longer concerned for her safety, because she invited several media outlets to her private Brooklyn Center residence to conduct several interviews displaying her face and identity.

Such conduct does not conform to that of a person concerned for their safety; it does, however, indicate that she was only concerned for her safety in the event of ***acquittal***. In the same press conference held at her Brooklyn Park home, Ms. Christensen was asked about her nervousness on verdict day, to which she 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***

---

[18] CNN News, *Alternate juror reveals what convinced her of Chauvin's guilt,* YOUTUBE (April. 22, 2021), https://www.youtube.com/watch?v=ykeOP6Uf3EQ.

again and protests and this mayhem that happened before.' [19] 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."[20]

During *voir dire*, Ms. Christensen agreed—under oath—that she could be impartial and put aside any bias or pressure when considering this case. However, her post-verdict conduct clearly indicates that otherwise, and that she did in fact feel pressure to convict Mr. Chauvin. Ms. Christensen stated that she felt "relieved" that "mayhem" was avoided by the jury's verdict.[21] Ms. Christensen's account of what it was like to be a juror on this case also highlights the pressures and concerns felt by other members of the jury, which is already evident in the *voir dire* record. Mr. Chauvin had to question well over one-hundred jurors before he was able to obtain a panel, several of which were excused by the Court or parties by agreement because of safety concerns. The fact that Ms. Christensen did not deliberate does not relieve her of any responsibility for misleading the parties regarding her safety concerns during jury selection, nor should this fact lessen any concerns regarding pressures evidently felt by the jury regarding safety. Ms. Christensen's words demonstrate, at a minimum, a clear violation of Mr. Chauvin's right to a fair, impartial jury.

B. Mr. Mitchell's post-verdict interviews indicate that he and other members of the jury failed to apply the objective definitions given to them by the Court, and instead offered their own interpretations of important definitions.

Mr. Mitchell's post-verdict interviews first indicate that neither he nor other jurors conformed to the ***objective*** definitions in the jury instructions. On *CBS This Morning*, Mr. Mitchell stated, "The preliminary vote was eleven of us were already on board for the guilty for the

---

[19] *Id.*
[20] *Id.*
[21] *Id.*

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

manslaughter, one person was unsure."[22] Mr. Mitchell further explained that this individual was confused about "legal jargon" in the jury instructions, of which "can be interpreted amongst people."[23] Mitchell then stated as a group, they read the definitions provided to them, and that each juror then explained what it meant to each juror from their perspective.[24] Mr. Mitchell indicated that this is how they were able to get a dissenting juror "on board" with the rest.[25]

Jury instructions are intended to be an objective, strict set of laws to which the jury is must apply facts. Jury instructions are not guidelines for the jury to loosely follow and interpret as they please; they are intended to eliminate any subjectivity of the law. It is not a jury's role to offer their opinions and interpretation of the law, but to apply the law as given. In Mr. Chauvin's case, where he is charged under Minnesota's most complicated statutes, it was paramount for the jury to follow the definitions that apply to those statutes. To not do so could change the meaning of an entire offense, lessening the State's burden. Therefore, based on Mr. Mitchell's various public statements, it is evident that the jury failed to conform to the jury instructions provided, and that they instead applied subjective interpretation of the law to Mr. Chauvin's case.

C. Mr. Mitchell's post-verdict interviews indicate that he failed to follow jury instructions and instead came to a verdict to further political and social causes.

Mr. Chauvin's jury instructions explain the "Duties of a Jury. In that, they state: "You must follow and apply the rules of law as I given them to you, even if you believe the lase is or should

---

[22] CBS This Morning, *Juror 52 of the Chauvin trial speaks out*, CBS (April 28, 2021), https://www.cbs.com/shows/cbs_this_morning/video/5VROVVg2eEhtuGu1BIjSrnpw5ULA2jTZ/derek-chauvin-trial-juror-52-speaks-out-about-proceedings-deliberating-a-guilty-verdict/.

[23] *Id.*

[24] Good Morning America, *Juror in Derek Chauvin trial breaks silence*, GOOD MORNING AMERICA (April 28, 2021), https://www.goodmorningamerica.com/news/video/juror-derek-chauvin-trial-breaks-silence-77362563.

[25] *See Id.*

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

be different." (*See* Jury Instructions). Additionally, the "Implicit Bias" section further reads: "The law demands that you make a fair decision, based solely on the evidence, your individual evaluations of that evidence, your reason and common sense, and these instructions." (*See* Jury Instructions). The instructions further state: "During deliberations, ***you must not let bias***, ***prejudice***, ***passion***, **sympathy**, or ***public opinion*** influence your decision." *Id.* "You must not consider any consequences or penalties that might follow your verdict . . . reach a verdict, regardless of what the consequences might be." *See Id.*

Mr. Mitchell's interviews make it clear that he based his decision on outside influence and want of political change. On *Get Up! Mornings* with Erica Campbell, Mr. Mitchell stated, "I mean, it's important. If we want to see some change, want to see some things going differently, we've got to get out there get into these avenues, get int these rooms, to try and spark some change."[26] On *Good Morning America*, Mr. Mitchell additionally stated, that "jury duty is definitely one of those things, especially with, you know, the insane number of black men being incarcerated."[27] In the same interview, Mr. Mitchell furth states "[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."[28] In an interview with Lou Raguse of Kare11, Mr.

---

[26] *See* Get Up! Mornings with Eric Campbell, *Listen: Black Juror In Derek Chauvin Trial Speaks Out [EXCLUSIVE]*, GET UP! MORNINGS (April 27, 2021), https://getuperica.com/334572/listen-black-juror-in-derek-chauvin-trial-speaks-out-exclusive/.

[27] Good Morning America, *Juror in Derek Chauvin trial breaks silence*, GOOD MORNING AMERICA (April 28, 2021), https://www.goodmorningamerica.com/news/video/juror-derek-chauvin-trial-breaks-silence-77362563.

[28] *Id.*

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

Mitchell also refers to Mr. Floyd as a "martyr" and a "legend."[29]

While a juror is entitled to any political beliefs, such beliefs have no place in a deliberation room; the Court, parties, and jury instructions were clear about this. Mr. Mitchell's language is simply not that of an impartial juror that swore under oath to put all politics surrounding this case aside; his speech instead indicates that he used political motivation to come to a verdict. These motives are made even more clear in light of information that has come out regarding Mr. Mitchell's conduct prior to trial discussed *infra* in section (D). Thus, Mr. Mitchell violated Mr. Chauvin's right to a fair impartial trial and should be subject to a *Schwartz* hearing.

D. Mr. Mitchell's post-verdict interviews indicate that he had no intention of engaging in meaningful deliberation, but instead believed that no deliberation was necessary.

Under the "Implicit Bias" section of the jury instructions, the jury was told: "As jurors you are being asked to make an important decision in this case. You must take the time you need to reflect carefully and thoughtfully about the evidence." (*See* Jury Instructions). Mr. Mitchell's various public interviews next make it clear that he was ready to convict Mr. Chauvin, and willing to forgo what is often a lengthy deliberation process. On *Get Up! Mornings* with Erica Campbell, Mr. Mitchell was questioned about deliberation:

> Ms. Campbell: "After hearing their side, because you have to hear both sides. We know what we hear in the media. After hearing them talk about what he had to do, did you guys ponder?"
>
> Mr. Mitchell: 'So it wasn't like we just walked right in the room and everybody was just like, 'let's just get it done,' it's always one person that's like, 'well what about this?' and 'what about that?' So, we sat in the room and argued for a few hours pretty much with just one person! Just trying to get them—to see where they are coming from and just try to get them on board with where everybody else was. So yeah, we probably deliberated total for like

[29] Kare11, *FULL INTERVIEW: Juror in Derek Chauvin trial hopes verdict will drive reforms*, YOUTUBE (May 3, 2021), https://youtu.be/FJrQ1AZMrPw.

> four-five hours, where we were just going back and forth. And I felt like it should have been twenty minutes."[30]

But Mr. Mitchell's belief was not just a personal one, his interviews also make it clear that he felt dedicated to getting everyone "on board" with him. During his interview with Erica Campbell, Mr. Mitchell clearly makes light of the fact that there was a single dissenting juror. He also made light of the fact that deliberation was longer than twenty minutes. Such conduct demonstrates, at least, an unwillingness to consider evidence carefully, and it instead shows that Mr. Mitchell rendered a verdict based on his own opinion formed prior to the trial. Mr. Mitchell's conduct prior to trial only makes his biases clearer, discussed *infra* in section (D).

E. Mr. Mitchell's post-verdict interviews indicate that he severely lacked candor in the jury selection process regarding his opinion of the case and his participation in protests.

As discussed *supra*, the Court's jury instructions clearly stated: "During deliberations, ***you must not let bias***, ***prejudice***, ***passion***, **sympathy**, or ***public opinion*** influence your decision." *Id.* "You must not consider any consequences or penalties that might follow your verdict . . . reach a verdict, regardless of what the consequences might be." (*See* Jury Instructions).

In the jury questionnaire, Mr. Mitchell was asked "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?" Mr. Mitchell answered "No." However, subsequent investigation by the media revealed that Mr. Mitchell had participated in an August 2020 march in Washington D.C., where Mr. Floyd was a focal point, and where the Floyd family also spoke.[31]

---

[30] *See* Get Up! Mornings with Eric Campbell, *Listen: Black Juror In Derek Chauvin Trial Speaks Out [EXCLUSIVE]*, GET UP! MORNINGS (April 27, 2021), https://getuperica.com/334572/listen-black-juror-in-derek-chauvin-trial-speaks-out-exclusive/.

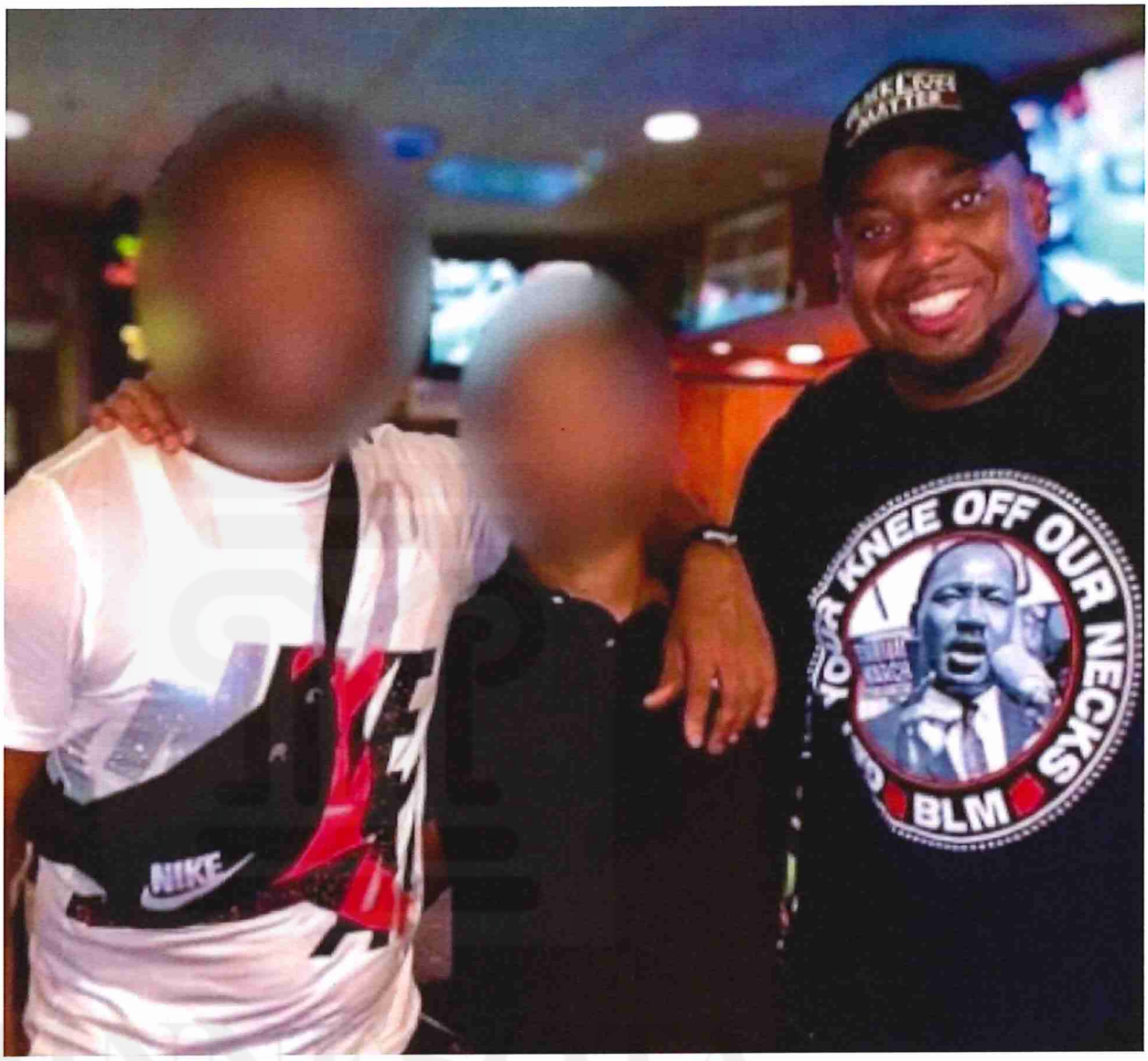
[31] *See* https://minnesota.cbslocal.com/2021/05/04/derek-chauvin-juror-brandon-mitchells-participation-in-d-c-march-could-help-appeal-legal-experts-say/ (accessed May 27, 2021).

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

While this march did not occur in Minneapolis, the same questionnaire also asked, "Is there anything else the judge and attorneys should know about you in relation to serving on this jury?" Mr. Mitchell simply replied: "No." Mr. Mitchell's negative response to this question was both untruthful and evasive. A reasonable person would understand that his participation in a major civil rights march, wherein Mr. Floyd and his family were reportedly a focal point, would need to be disclosed under this question. Furthermore, while at this march, Mr. Mitchell wore a shirt stating, "Get your knee off our necks."

During *voir dire,* Mr. Mitchell claimed he did not remember owning such a shirt, yet he had clearly also worn the same shirt—or a different shirt with the same message—in a video he posted to his YouTube Channel.[32] The episode in which he wore the shirt, Episode 70 of "The Wholesome Podcast," had garnered nearly 5,300 views by June 2, 2021[33]—a viewership ten to twenty-five times larger than the previous or subsequent episodes of his podcast. Interestingly, when asked by prosecutors during *voir dire* whether he shared or publicized his writing, thoughts or opinions anywhere, Mr. Mitchell replied that he did not. Yet, he clearly maintains both a YouTube Channel and publishes a podcast that he kept up to date even after having been empaneled as a juror.

[32] *See* https://www.youtube.com/watch?v=m1Ernahp-v0 (accessed June 2, 2021).
[33] *Id.*



During *voir dire*, Mr. Mitchell gave seeminly mild, neutral responses. He indicated neutral feelings toward Mr. Chauvin and Mr. Floyd. He insisted that he needed to hear Mr. Chauvin's case before rendering any decisions. However, his conduct prior to trial cannot be construed as neutral, and to convey such during jury selection was misleading, unthruthful, and evasive.

F. Mr. Mitchell's interviews indicate that the jury not only failed to follow the jury instructions, but also violated Mr. Chauvin's state and federal constitutional right to

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

remain silent by considering his silence during deliberation.

All criminal defendants have a constitutional right to remain silent and the right to not testify. In addition to that, if a criminal defendant decides not to testify, he or she has the right to request a jury instruction reading:

> The State must convince you by evidence beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant has no obligation to prove innocence. The defendant has the right not to testify. This right is guaranteed by the federal and state constitutions. ***You should not draw any inference from the fact that the defendant has not testified in this case.***

State v. Thompson, 430 N.W.2d 151 (Minn. 1988) (holding that CRIMJIG 3.17 should not be given without the personal and clear consent of the defendant) (emphasis added).

Mr. Chauvin chose not to testify in his case, and a clear record was made of his wish to include CRIMJIG 3.17. However, several interviews given by Mr. Mitchell indicate that he and the jury completely disregarded this instruction. When interviewed by Robin Roberts on *Good Morning America*, Mr. Mitchell spoke at length about Mr. Chauvin's choice to not testify:

> Ms. Roberts: "Derek Chauvin not taking the stand: did that have an impact, not hearing from him, the former officer?"
>
> Mr. 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."[34]

[34] Good Morning America, *Juror in Derek Chauvin trial breaks silence*, GOOD MORNING AMERICA (April 28, 2021), https://www.goodmorningamerica.com/news/video/juror-derek-chauvin-trial-breaks-silence-77362563.

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

In a subsequent interview with *CBS This Morning*, Mr. Mitchell was asked whether Mr. Chauvin's testimony would have made a difference, to which Mr. Mitchell answered: "it possibly could have. ***We did talk about the fact that he didn't. Somebody brought it up that they wished that he would have, they would have liked to have heard from him***…I can't say that it would have changed the outcome, but it is a possibility for sure." [35]

Mr. Mitchell's willingness to publicly speak about the deliberation room has provided a glimpse into the clear misconduct and intentional disregard of the jury instructions during deliberation. They have also shown that at least two of the empaneled fourteen jurors lacked candor during jury selection, and that the entire jury violated Mr. Chauvin's right to not testify. Therefore, the jury clearly violated one of the most important protections afforded to Mr. Chauvin, and as such, he is entitled to a *Schwartz* hearing to determine the extent of said violation.

CONCLUSION

In light of the foregoing, Defendant Derek Chauvin respectfully requests that this Court order a new trial, change the venue, and grant him any other appropriate relief, including a *Schwartz* hearing, to ensure that he receives a fair trial by an impartial jury as required by the constitutions of the United States and the State of Minnesota.

---

[35] CBS This Morning, *Juror 52 of the Chauvin trial speaks out*, CBS (April 28, 2021), https://www.cbs.com/shows/cbs_this_morning/video/5VROVVg2eEhtuGu1BIjSrnpw5ULA2jTZ/derek-chauvin-trial-juror-52-speaks-out-about-proceedings-deliberating-a-guilty-verdict/.

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

Respectfully submitted,

HALBERG CRIMINAL DEFENSE

Dated: June 2, 2021

/s/ *Eric J. Nelson*
Eric J. Nelson
Attorney License No. 308808
Attorney for Defendant
7900 Xerxes Avenue S., Ste. 1700
Bloomington, MN 55431
Phone: (612) 333-3673

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Court File No. 27-CR-20-12646

State of Minnesota,

Plaintiff,

vs.

Derek Michael Chauvin,

Defendant.

DEFENSE MEMORANDUM DOCUMENTING SIDEBAR OBJECTIONS AND RULINGS

Throughout the duration of *State of Minnesota v. Derek Michael Chauvin*, the parties were ordered to argue objections off the record in sidebar conferences or chambers, as opposed to bench conferences, due to COVID-19. Pursuant to this court order, Mr. Chauvin, through his attorney, Eric J. Nelson, wishes to commemorate substantive, off-the-record arguments that were not later made part of the record, the notes of which were taken in real time.

March 30, 2021

Morning Chambers Meeting

The Court directed State to lead the young witnesses in their testimony via leading questions, and the State requested that the young witnesses be off visual. Granted.

The Court also stated that the State may ask witnesses about their feelings during incident but that this testimony should be limited because it becomes irrelevant if witnesses testify too much about their personal feelings.

Testimony of Donald Williams (Part 2)

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

In the first sidebar, Defense objected to Mr. Williams' testimony on "security" because he was not established as an expert on security and thus cannot give an expert opinion on the subject. Sustained.

In the second sidebar, Defense objected to Mr. Williams' opinion that he felt Mr. Floyd "was in danger." The Court initiated a sidebar pursuant to the Defense objection. Sustained. The Court also stated that it is repetitious for the State to keep asking Mr. Williams why he was upset in different ways. The Court also said that the State needs to start posing leading questions to Mr. Williams if they want him to talk about how he believed Floyd was doing to avoid his rambling.

Testimony of Darnella Frazier

Defense objected to the State's leading questions. The Court allowed the State to ask the leading question just before initiating a sidebar. Overruled. The Court ordered that the State needs to be more leading with some of the young witnesses to keep them under control.

Testimony of Alyssa Funari

In a sidebar, Defense objected to the State again seeking to play the entirety of the Milestone footage (Exhibit 246 Funari and Milestone Composite) because it is cumulative; Defense asked to play portions of the composite relating to Ms. Funari's video only. Overruled.

April 1, 2021

Testimony of Courteney Ross

In a sidebar, the State objected arguing that Mr. Nelson was improperly impeaching Ms. Ross. Overruled, but the Court asked Mr. Nelson to "clean up" his method of impeachment.

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

Mid-Morning Break Chambers Meeting

Defense objected to having just received disclosures regarding Seth Bravinder and Derek Smith—the two next witnesses; Defense requested time to review. Sustained. Court told State that "this is not how you run a railroad" and that they should not be disclosing witness preparation notes minutes before testimony. The State said they met with the witnesses the previous night. The Court ordered the parties to meet with witnesses sooner before their testimony and at the very least, provide Defense with disclosures the night before testimony.

Testimony of Seth Bravinder

During the first sidebar, Defense objected to the State keeping exhibits on display to the jury screen when they are finished talking about them. Sustained.

Testimony of Derek Smith

During the first sidebar, Defense objected to use of the phrase by Mr. Smith that Mr. Floyd was "still deceased" because he cannot determine the time of death as a paramedic. Overruled.

Testimony of Jeremy Norton

During the first sidebar, Defense objected to the State asking Norton about what he did after his treatment of Floyd and after his time at HCMC on the grounds of relevance. Sustained.

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

Testimony of Sgt. Pleoger

The State objected to Mr. Nelson's question on cross-examination of Sgt. Pleoger as "compound and unclear." Sustained. The Court asked Mr. Nelson to rephrase.

April 2, 2021

Morning Chambers Meeting

Defense objected to the State asking the upcoming testifying officers to opine on the use of force in this case and how it should have been handled differently, in violation of Defense motion *in limine* #18, which was granted previously by the Court. Coming in to testify in the coming days were Edwards, Zimmerman, Arridondo, Stiger, Blackwell, and more. Defense stated that the jury has already heard Pleoger's opinion, which was not in his scope of his duties to have made that opinion. Defense further stated that preventing this cumulativeness is exactly what the motion *in limine* was intended for. Sustained in part: the State is not permitted to ask Edwards his opinion because he would not ordinarily participate in the force review process. However, the State is permitted to ask Zimmerman, Chief Arridondo, and Blackwell's opinions. The Court further warned the State that it was entering cumulativeness very shortly if the State continues to ask officers to opine on the use of force.

April 5, 2021

Testimony of Dr. Wankhede-Lagenfeld

In the first sidebar, Defense objected to Mr. Blackwell's failure to provide any of the presented exhibits to Defense. Mr. Blackwell stated that the State disclosed the exhibits "days ago and with a list." Defense informed the Court and the State that it has received neither the

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

exhibits nor a list pertaining to such from Mr. Blackwell or any other State representative. Sustained. The Court stated that even if these exhibits are illustrative, Defense needs to be provided with copies. Otherwise, if the State simply put these illustrative exhibits on display before asking questions about it, the State is leading their witness, which will not be permitted.

In the second sidebar, Defense objected to the State asking Dr. Wankhede-Lagenfeld about the mechanism of Floyd's death on the grounds that such an opinion is outside the scope of his involvement as the treating physician. Sustained. Secondarily, Defense objected to the State asking about anything that occurred after treatment of Mr. Floyd. Sustained.

In the third sidebar, the State objected to Mr. Nelson's question regarding occlusion of Mr. Floyd's arteries as beyond the scope of the witness's role in this case. Sustained.

April 6, 2021

Testimony of Ker Yang

In a sidebar, the State objected to Mr. Nelson's question regarding the hypothetical growing intensity of a crowd and what behaviors officers are trained to look for on the grounds that it is beyond the scope of direct and irrelevant. Overruled on relevance, sustained on beyond the scope; the Court asked Mr. Nelson to proceed with this line of questioning as if it is a direct examination.

Testimony of Lt. Johnny Mercil

In the first sidebar, Defense objected to the State's leading questions. Sustained.

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

Testimony of Nicole Mackenzie

In a sidebar, the State objected to Mr. Nelson's questioning about "speedballs" and other drugs on the grounds that it is outside the scope and leading. Sustained. Mr. Nelson was asked to rephrase the form of his questions if he proceeds with this line of questioning.

In another sidebar, the State objected to Mr. Nelson's question regarding how much fentanyl it takes to kill someone on the grounds that it is outside the witness's expertise. Overruled. The Court noted that it thinks it is appropriate for the witness to describe the information on slides that she trained officers with. Defense also reminded court that there was a motion *in limine* regarding the Excited Delirium presentation that was reserved, but that the Court's written order technically grants the State's motion to prohibit the slides. The State said it retracted that agreement and would allow Defense to call the witness back in to discuss the power point.

Testimony of Sgt. Jodi Stiger

In the second sidebar, Defense objected to the State asking Sgt. Stiger what the officers "should have done" on the grounds that it is directly contrary to the *Graham v. Connor* use of force standard, which expressly prohibits the use of 20/20 hindsight. Defense further stated that instead, Sgt. Stiger should only be testifying to what the officers did and whether it was reasonable as it applies to the correct standard under *Graham v. Connor*. Overruled. The Court stated that this is a permissible extension of the expert's opinion based on his experience.

On the second day of Sgt. Stiger's testimony, the State objected to Mr. Nelson's line of questioning regarding the *Graham v. Connor* factors on the grounds that Mr. Nelson needs to clarify that he intends to ask Sgt. Stiger about the factors, not the entire case. Sustained.

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

April 8, 2021

Testimony of Dr. Tobin

In the first sidebar, Defense objected to the admission of Exhibit 951 on the grounds that it is reminiscent of a graphic event in history that took place and that Dr. Tobin's point can be made without the use of this exhibit. Sustained.

In the second sidebar, Defense objected to Dr. Tobin telling jury to do demonstrations on their own bodies on the grounds that it is improper. Sustained. The Court instead instructed the jury that these demonstrations were not required, but they may do them if they wish.

In a sidebar initiated by the Court, the Court ordered Mr. Blackwell to stop referring to exhibits as "State exhibits."

April 9, 2021

Morning Chambers Meeting

Defense objected to the testimony of Seth Stoughton on the grounds that his opinion on the use of force will be wholly cumulative. Sustained in part: The Court stated that no more use of force experts will be permitted to talk about whether the officers' violated the policies of MPD. The Court stated that it does not want to sit through the MPD policies again. The Court stated that Seth Stoughton will be narrowly limited to only talk about the "National Standards" in use of force.

Testimony of Dr. Lindsey Thomas

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

In a sidebar, Defense objected to the use of Exhibit 952 as anything other than demonstrative on the grounds that it contains the medical definition of homicide and would confuse the jury. Sustained.

Testimony of Dr. Andrew Baker

During a sidebar, Defense objected to Dr. Baker stating that he testified in a grand jury during cross-examination by Mr. Nelson, but that Defense did not object to it at the time it was said to avoid bringing attention to it. The Court noted the objection.

April 12, 2021

Testimony of Seth Stoughton

During the second sidebar, Defense objected to the State asking Seth Stoughton about his history testifying in court, to which he replied: "Federal Court in North Carolina, Federal Court in South Carolina, criminal court in Georgia…I think that is it for trial testimony. As you know, most of these, um, most cases don't make it to a trial" on the grounds that Seth Stoughton inappropriately commented on and implied that criminal cases, such as the present case, often settle out of court. The State told the Court that Stoughton meant his comment in the context of "depositions." Overruled. The Court stated that, however, the State has the duty to make that clear to the jury.

In another sidebar, the State objected to Mr. Nelson's question regarding an officer's ability to use greater force to overcome a subject's use of force on the grounds that Mr. Nelson is opening the door to the ability for the State to further question the witness regarding matters

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

other than the national standards that he was originally limited to by the Court. Defense withdrew question.

April 13, 2021

In a sidebar prior to the testimony of Scott Creighton, Defense asked to reserve a motion for judgment of acquittal, and the Court granted such preservation.

Testimony of Former Officer Scott Creighton

In the first sidebar, the State objected to Exhibit 1051 alleging that Defense had modified the footage because it appeared "zoomed in." Defense noted that the footage was not modified and that the State must have examined the wrong body worn camera. Overruled.

In the second sidebar, which was initiated by the Court, the Court warned the State that it was opening the door to allowing Defense to admit the remainder of the video.

April 14, 2021

Testimony of Dr. Fowler

In the first sidebar, the State objected to Defense referring to the panels as "peer reviewers" per the State's motion *in limine*. Overruled. The Court stated that Mr. Nelson is allowed to ask about the Forensic Panel's process but that he cannot talk about the other opinions specifically, or that any others "signed on" to the report.

In the second sidebar, the State objected to Defense's line of questioning about how a car exhaust works on the grounds that Dr. Fowler is a forensic pathologist and thus, it was outside

Filed in District Court
State of Minnesota
6/2/2021 2:57 PM

the scope of his opinion. Defense stated that Dr. Fowler would not be giving an opinion beyond the collection of fluid under the squad car. Overruled. The Court stated that he is a forensic pathologist and that he is not required to have expertise on this subject to testify about it.

During the third sidebar, the State objected to the Defense's presentation of an expert opinion that was not previously disclosed. Overruled. The Court said that State can call a rebuttal witness.

During another sidebar, Defense objected to the State's questions regarding how Dr. Fowler never performed testing of the squad car or air quality himself on the grounds that the State is burden shifting. Sustained. The Court stated that the State is implying burden shifting on Defense and thus should only be asking the witness about the validity of his opinion.

In another sidebar, Defense objected to Mr. Blackwell attorney testifying. The Court then warned Mr. Blackwell to stop shaking his head at the Court when it is giving a ruling.

In another sidebar initiated by the Court, the Court warned the State to stop stating that the witness is trying to confuse the jury on the grounds that it is argumentative.

Respectfully submitted,

HALBERG CRIMINAL DEFENSE

Dated: April 28, 2021

/s/ *Eric J. Nelson*
Eric J. Nelson
Attorney License No. 308808
Attorney for Defendant
7900 Xerxes Avenue S., Ste. 1700
Bloomington, MN 55431
Phone: (612) 333-3673