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STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF HENNEPIN	FOURTH JUDICIAL DISTRICT
State of Minnesota, Plaintiff, vs. Derek Michael Chauvin, Defendant.	Court File No. 27-CR-20-12646 **DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF NEW TRIAL AND CHANGE OF VENUE**

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 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. In light of this ruling and the massive, prejudicial publicity surrounding this trial, Mr. Chauvin, through his attorney Eric J. Nelson, Halberg Criminal Defense, now moves this Court to order a new trial and renews his motion for a change of venue, as it is clear that a fair trial cannot be had for Mr. Chauvin in Hennepin or Ramsey counties.

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ARGUMENT

I. THE 'BARRAGE' OF PREJUDICIAL PUBLICITY SURROUNDING THIS CASE HAS CREATED 'SO HUGE A PUBLIC PASSION' THAT A FAIR TRIAL IS IMPOSSIBLE, AND A NEW TRIAL MUST BE ORDERED.

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

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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,* 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)).

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 here echo those in *Irvin*: "Impartial jurors are 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 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 have made clear time and time again, if this trial moves forward, the burden will be on the defense to prove Mr. Chauvin's lack of guilt and not on the State, where it belongs. 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 present proceedings far eclipses anything surrounding those matters. There is a reasonable likelihood that the publicity attendant to this case threatens the fairness of the trial.

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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 N.W.2d at 301-02. In spite of considerable prejudicial, nonfactual[1] 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 has been no continuance, no change of venue, and daily prejudicial media reports numbering in the thousands have been published since the date of the incident and continue to be published during jury selection. Because "a reasonable likelihood" exists that the barrage of "prejudicial news" will "prevent a fair trial," and proceedings have already commenced,[2] "a new trial should be 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. These matters could be accounted for in any 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

[1] "Factual" pretrial publicity is not considered to be prejudicial. *Fairbanks*, 842 N.W.2d at 302.
[2] 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).

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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 halt the proceedings and take the remedial measure of ordering a new trial in order to prevent the prejudice that Defendant currently faces.

II. THE NEW TRIAL MUST BE HELD IN A NEW VENUE.

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. 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***[3] be granted." Minn. R. Crim. P. 25.02, subd. 3 (emphasis added). "***Actual prejudice need not be shown.***" *Id.* (emphasis added).

Here, as shown, *supra*, and as this Court has witnessed over the last two weeks of jury selection, much more than a "reasonable likelihood" exists that "a fair and impartial trial cannot be had" in either Hennepin or Ramsey County due to the intense, prejudicial publicity to which

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

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potential jurors have been subjected. Mr. Chauvin's change of venue motion "must," therefore be granted. *Id.*

This Court noted that Mr. Chauvin's case

> hold[s] the interest of the press and the general public on an international scale. Virtually every filing by the parties in these cases is reported in the media, both locally and nationally. This Court's substantive orders also receive local and national news coverage. Protests demanding justice for George Floyd continue.

(Order Allowing Audio and Video Coverage of Trial, Nov. 11, 2020, at 8). As early as July 9, 2020, this Court expressed its concern that the amount of publicity this case was garnering would "increase the risk of tainting a jury pool and… impair all parties' right to a fair trial." (Gag Order, Jul. 9, 2020 at 1). Frankly, by the time this Court expressed such concern, the potential for a fair and impartial trial for Derek Chauvin in either Hennepin or Ramsey County had long passed. A survey of local media between May and August of 2020 revealed more than 1,500 stories regarding this case. (*See* Exs. 1 and 2). This figure does not include the untold number of national and international media stories that were disseminated during the same period or the thousands of stories that have appeared since.

Dr. Bryan Edelman, with over 20 years of experience, evaluated the extent and nature of the publicity surrounding the death of George Floyd and its potential impact on Mr. Chauvin's codefendant, Mr. Kueng's, due process rights. To the extent that such publicity would affect Mr. Kueng's rights, the same is even more true with respect to Mr. Chauvin. As part of his analysis, Dr. Edelman reviewed relevant newspaper coverage, television publicity, and social media content. (*See* Exhibit 1).

It is Dr. Edelman's opinion that the jury pool in Hennepin County has been saturated with extensive prejudicial news coverage, and voir dire has, thus far, borne this out. The publicity surrounding this trial incorporates powerful and emotional language surrounding the death of

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George Floyd, minute-by-minute accounts of how the tragic incident unfolded, shocking video footage of the encounter, and details from pretrial filings (*e.g.*, autopsy reports and attempts to resuscitate Mr. Floyd in the ambulance after the incident). (*See* Exhibit 1). The coverage references prejudicial statements from prominent public figures. (*See id. and infra*). Dr. Edelman explains that these types of statements have the capacity to undermine the burden of proof by creating a presumption of guilt within members of the jury pool. (*See id.*). The coverage in this matter is starkly different from the media coverage in *Warren*, in which most of the publicity consisted of factual accounts that would not affect the minds of a jury. *See id*. at 447-48, or even *Fairbanks*, wherein the nonfactual publicity was temporally distant from the trial. Here, a massive amount of the media coverage surrounding this case editorialized and rushed to adjudge Mr. Chauvin guilty, and continues to do so to this day.

Dr. Edelman explains that when a venue is inundated with media coverage surrounding a crime, prospective jurors develop entrenched case-specific attitudes that can have an impact on their evaluations of the evidence and arguments presented at trial. (*See* Ex. 1). When this occurs, attitudinally supporting arguments are more closely attended to, evaluated as persuasive, integrated into the juror's existing network of attitudes and beliefs, and more easily recalled during deliberations. (*See id.*). In contrast, counterarguments and evidence that conflicts with such well-established attitudes may lead to cognitive dissonance. As a result, jurors will either ignore such evidence or make cognitive efforts to refute it. (*See id.*). Conflicting evidence will not link to preexisting attitudes and may be discounted—or not even recalled—during deliberations. (*See id.*). These psychological processes put the defendant at a significant disadvantage, undermine the presumption of innocence, and shift the prosecution's burden of proof. (*See id.*). Simply put, Twin Cities jurors will disregard defense arguments and await the State's arguments that support the

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opinions they have already developed based on the barrage of negative media coverage surrounding this case.

In its preliminary order denying a change of venue, this Court relied on *State v. Blom*, 682 N.W.2d 578, 626 (Minn. 2004) and *State v. Morgan*, 246 N.W.2d 165, 169 (Minn. 1976). The Court's reliance on those cases is misplaced, particularly in light of Exhibits 1 and 2, which confirm that this jury pool has been subjected to an unprecedented amount of media coverage that is both inadmissible and likely to have an adverse effect on juror opinions—as this Court has already seen during voir dire. The Defense notes that the 1552[4] news articles, filling 4123 pages collected by Dr. Edelman, along with other media reviewed in preparation for his Declaration, is unlike anything else that has ever surrounded a trial in this state. Dr. Edelman concludes that the Hennepin County jury pool has been saturated with prejudicial publicity. (*See* Exhibit 1). This trend has continued as trial approached and throughout jury selection, so far, which clearly threatens any presumption of innocence that may have existed in this case.

In addition, an informal Google News Alert initiated in late July 2020 shows that the name "Derek Chauvin" has received—and continues to receive—daily mentions in media across the world. (*See* Ex. 3). Millions of posts on the social media platform Instagram, alone, are tagged with some iteration of "#justiceforgeorgefloyd"—and certainly millions more exist on other platforms like Twitter and Facebook.[5] This may, in fact, indicate that a truly fair and impartial trial for Mr. Chauvin cannot be had anywhere. 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

[4] The figure of 1730 found in Exhibit 1 at pg. 8 was prior to culling unrelated matters from the list.

[5] *See* https://www.instagram.com/explore/tags/justiceforgeorgefloyd/, last accessed March 18, 2021.

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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, "This is the most famous police brutality prosecution in the history of the United States."[6]

The media coverage in this case is like a bomb explosion: Hennepin and Ramsey counties were ground zero and although felt far and wide, the effects of the explosion diminished as they rippled 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 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. Damage from the riots that occurred in May and June 2020 is still apparent in

[6] Available from https://www.nytimes.com/2021/02/10/us/george-floyd-death.html, last accessed Mar. 15, 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).

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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 voir dire is now taking 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.[7] 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. And in light of last week's settlement announcement, Minneapolis jurors now also know that they will 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, since jury selection commenced on March 9, 2021, potential jurors have faced a barrage of even more prejudicial information that directly impacts 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

[7] *See* https://www.mprnews.org/story/2020/12/11/george-floyds-square-offers-an-alternative-to-police-though-not-all-neighbors-want-one, accessed Mar. 15, 2021.

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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.[8] The timing of the settlement—in the midst of jury selection—and the very public manner in which it was announced are 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. At some point, coincidences cease to be coincidental.

Not only has Mr. Chauvin been prejudiced by ***one*** would-be inadmissible piece of evidence—his pre-trial plea negotiations—but he is further prejudiced by the international publicity surrounding the city's tacit admission to wrongdoing. Seated jurors have already been excused because of the extreme, prejudicial effect this announcement has had on the proceedings. Even in the absence of such information, the prospects of empaneling an impartial jury were already grim, at best. The effects of the continuous one-sided media barrage and suspiciously-timed releases of otherwise inadmissible information throughout the this case were already evident from the 326-member jury pool's questionnaire responses:

- *two* potential jurors feel "very positively" about Mr. Chauvin;
- *eight* potential jurors feel "somewhat positively" about Mr. Chauvin;
- 75 potential jurors feel "neutral" about Mr. Chauvin;
- 110 potential jurors feel "somewhat negative" about Mr. Chauvin; and
- 104 potential jurors feel "very negative" about Mr. Chauvin.

Thus, 65.64 percent (214 out of 326)—nearly two-thirds of the entire pool—viewed Mr. Chauvin in a negative light before this trial began and *before* the City of Minneapolis all but

[8] https://www.startribune.com/minneapolis-to-pay-record-27-million-to-settle-lawsuit-with-george-floyd-s-family/600033541/?refresh=true, accessed March 15, 2021.

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acknowledged its own wrongdoing with one of the largest police misconduct settlements in United States history. Meanwhile, more than half of potential jurors said they felt neutral (173 out of 326) toward George Floyd, while fewer than a quarter (23 percent) felt similarly about Mr. Chauvin.

The foregoing does not even account for other potential juror disqualifications; however, it does ensure that the State has a much greater chance for empaneling a jury that is biased significantly in its favor. Clearly, the general public—and specifically, this jury pool—was primed by the media and other out-of-court sources to convict Mr. Chauvin before the presentation of any evidence has even begun. The jury questionnaire responses, alone, demonstrate that, at a minimum, Mr. Chauvin faces significant undue hardship in maintaining the presumption of innocence among potential venire members. Most likely, however, he faces impossibility when confronted with the task of attempting to empanel an impartial jury.

As shown *supra*, when "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). While Mr. Chauvin and the State have successfully seated nine jurors thus far, the defense has been required to use a considerable number of peremptory strikes in the course of ten days. It has become apparent that a significant number of potential jurors who have demonstrated clear, prejudicial, implicit bias cannot 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"[9] in this case, which created a "huge ... wave of public passion,"[10] similar

[9] *Murphy*, 421 U.S. at 798.
[10] *Irvin*, 366 U.S. at 728.

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to or greater than that which the Court found in *Irvin*, a fair trial is simply impossible in Hennepin and Ramsey counties—and jurors who claim to be "impartial" cannot be taken at their words. *See Patton*, 467 U.S. at 1031.

Mr. Chauvin has frequently been called a "murderer"[11] or "killer"[12] in the press, and the death of George Floyd has been referred to as a "murder" in global media[13] and across news headlines countless times. Perhaps more importantly, those charged with prosecuting, investigating, and overseeing this case do not have clean hands when it comes to stirring up prejudicial pretrial publicity. Since the week of the incident, Attorney General Keith Ellison, who was charged with prosecuting this case, has appeared in the local and national press, making statements like, "Nor would I be part of a prosecution unless I believed the person was guilty and… needed to be held accountable"[14] and "This case is unusual because of the way Mr. Floyd was killed and who did it: at the hands of the defendant, who was a Minneapolis Police officer."[15] The Hennepin County Attorney's Office, which initially charged Mr. Chauvin, unethically[16] leaked plea negotiation information to the media, which was reported locally, at first, and then picked up by the national news media[17]—and again, as noted *supra*, leaked and picked up last month during

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[11] *See, e.g.*, https://www.washingtonpost.com/opinions/2020/05/31/filing-charges-george-floyds-death-was-easy-part/, accessed Mar. 15, 2021.
[12] *See, e.g.*, https://www.bet.com/news/national/2020/06/13/derek-chauvin-could-receive-pension.html, accessed Mar. 15, 2021.
[13] *See e.g.*, https://www.newyorker.com/news/daily-comment/the-death-of-george-floyd-in-context; https://www.aljazeera.com/news/2020/07/officer-lawyer-seeks-dismissal-george-floyd-murder-charges-200708204031706.html; https://abcnews.go.com/US/minority-jail-officers-barred-guarding-cop-charged-george/story?id=71370624, all accessed Jan. 26, 2021.
[14] https://www.nbcnews.com/podcast/into-america/american-uprising-keith-ellison-george-floyd-s-death-n1222271, accessed Mar. 15, 2021.
[15] https://minnesota.cbslocal.com/2020/05/31/attorney-general-keith-ellison-to-take-over-george-floyd-case/, accessed Mar. 15, 2021.
[16] *See* Minn. R. Prof. Resp. 3.6 and 3.8.
[17] https://abcnews.go.com/US/derek-chauvin-guilty-plea-deal-fell-prosecutors-office/story?id=71180109, accessed Mar. 15, 2021.

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the pendency of the State's motion to reinstate third-degree murder charges.

Minneapolis Police Chief Medaria Arradondo[18] and Commissioner of Public Safety John Harrington,[19] who oversees the BCA, have both called George Floyd's death a "murder" in the press. On June 8, 2020, Minnesota Governor Tim Walz issued a proclamation, declaring a statewide 8 minutes and 46 seconds of silence to honor George Floyd, noting that the "world watched in horror as George Floyd's humanity was taken away from him."[20] St. Paul Mayor Melvin Carter called the death of George Floyd "nauseating" and said that rioters' rage was "understandable," because they saw "George being killed the way that he was, by people who we've paid to protect us."[21] Mayor Frey also called the death a "murder" in the national news media[22]—and then admitted wrongdoing on the city's part by signing off on last week's settlement. Finally, the Minnesota Attorney General's son, Jeremiah Ellison, who is a Minneapolis City Council member—and who voted in favor of the large, public settlement of the Floyd family's wrongful death suit during jury selection in this case—referred to Floyd's death in at least one interview, saying, "I think it was murder. I think that's evident from the video. And not only on officer Chauvin's part[.]"[23] From the perspective of a potential venire member, the city of Minneapolis, who employed Mr. Chauvin, may be viewed as a codefendant—and two of its most

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[18] https://www.cnn.com/2020/06/24/us/minneapolis-police-chief-comment-george-floyd-trnd/index.html, accessed Mar. 15, 2021.
[19] https://bringmethenews.com/minnesota-news/dps-commissioner-calls-george-floyd-death-a-murder-thats-what-it-looked-like-to-me, accessed Mar. 15, 2021.
[20] *See* https://mn.gov/governor/assets/Moment%20of%20Silence%20for%20George%20Floyd_tcm1055-435186.pdf, accessed Mar. 15, 2021.
[21] https://www.cnn.com/us/live-news/george-floyd-protest-updates-05-28-20/h_3926a2462737a4bdba25bb8d644f495a, accessed Mar. 15, 2021.
[22] https://www.nytimes.com/2020/06/03/podcasts/the-daily/jacob-frey-george-floyd-protests-minneapolis.html, accessed Mar. 15, 2021.
[23] https://www.democracynow.org/2020/5/29/minneapolis, accessed Mar. 15, 2021.

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prominent leaders have called the incident a "murder" and signed off on a $27 million *mea culpa*. In criminal law, news of a codefendant's admission of guilt can be extremely prejudicial. *See, e.g., State v. Cernak*, 365 N.W.2d 243, 247 (Minn. 1985); *Skilling v. United States*, 561 U.S. 358, 385 (2010). As this Court has seen, that is exactly how potential jurors are reacting to news of the settlement.

Since the George Floyd incident, Ellison has been spearheading an effort to dismantle and defund the Minneapolis Police Department, while his father prosecutes this case. All of the officials mentioned above live and work in the Twin Cities. It is unlikely that local officials outside of the Twin Cities have been as vocal in speaking to their own citizens about the George Floyd incident, if they have done so, at all.

Frankly, Minnesota has never before seen a trial that has garnered this level of publicity—or an incident that has resulted in so much destruction and change in the city where it occurred, as well as in neighboring municipalities. Former president Trump weighed in, saying he "couldn't really watch" the bystander video and that "it doesn't get any more obvious or it doesn't get any worse than that."[24] Then-Senate Majority Leader Mitch McConnell referred to "the murder of George Floyd" in a public statement.[25] International leaders and activists have commented on the incident. The press, popular figures, high ranking politicians, and the attorneys leading this prosecution—as well as a city councilman scion—have all publicly rendered their verdicts in this case and on the most public stages possible: And they have all deemed Mr. Chauvin guilty. On the other hand, one would be hard pressed to locate any pretrial publicity referring extensively to Mr.

[24] https://www.cbsnews.com/news/donald-trump-george-floyd-death-video/, accessed Mar. 15, 2021.
[25] *See* https://www.nytimes.com/2020/06/17/us/politics/congress-police-reform-bill.html, accessed Mar. 15, 2021.

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Chauvin's presumption of innocence or hinting that his alleged actions may have been justifiable in the line of his duties as a licensed peace officer in the State of Minnesota—certainly not in national or global media, and certainly not in proportion to reports and opinions to the contrary. Further, to the extent that any medium has shared or shown only the bystander video, it cannot be said to be "purely factual" publicity: The video is a discrete portion of the incident that fails to show any of the context surrounding the incident or any different angles or perspectives of the incident. It would not past journalistic muster as "unbiased reporting." The video is simple editorialization. It was shared to support and bolster the witness's own opinion and narrow perspective of what had occurred.

In cases with considerably less media attention and fewer inflammatory comments by State actors, 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 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

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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, now take the stand 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 cannot and will not receive a fair and impartial trial in the Twin Cities. A change of venue or venire must be granted. *See* Minn. R. Crim. P. 25.02, subd. 3.

CONCLUSION

As such, Defendant Derek Chauvin respectfully requests that this Court order a new trial, change the venue, and grant him any other appropriate relief to ensure that he receives a fair trial by an impartial jury as guaranteed by the constitutions of the United States and the State of Minnesota.

Respectfully submitted,

HALBERG CRIMINAL DEFENSE

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