

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

**MOTION TO REINSTATE
THIRD-DEGREE MURDER
CHARGE OR, IN THE
ALTERNATIVE, TO AMEND
THE COMPLAINT**

Derek Michael Chauvin,

Court File No.: 27-CR-20-12646

J. Alexander Kueng,

Court File No.: 27-CR-20-12953

Thomas Kiernan Lane,

Court File No.: 27-CR-20-12951

Tou Thao,

Court File No.: 27-CR-20-12949

Defendants.

TO: The Honorable Peter Cahill, Judge of District Court, and counsel for Defendants; Eric J. Nelson, Halberg Criminal Defense, 7900 Xerxes Avenue South, Suite 1700, Bloomington, MN 55431; Robert Paule, 920 Second Avenue South, Suite 975, Minneapolis, MN 55402; Earl Gray, 1st Bank Building, 332 Minnesota Street, Suite W1610, St. Paul, MN 55101; Thomas Plunkett, U.S. Bank Center, 101 East Fifth Street, Suite 1500, St. Paul, MN 55101.

INTRODUCTION

In light of the Minnesota Court of Appeals' decision in *State v. Noor*, __ N.W.2d __, 2021 WL 317740 (Minn. App. Feb. 1, 2021), the State moves to reinstate the third-degree murder charge against Defendant Derek Chauvin or, in the alternative, to file an amended complaint that includes this charge. The State also moves for leave to amend the complaints against Defendants J. Alexander Kueng, Thomas Lane, and Tou Thao to add a third-degree murder charge.

This Court granted Chauvin's motion to dismiss the third-degree murder charge for lack of probable cause because it concluded based on the case law that "a third-degree murder charge can be sustained only in situations in which the defendant's actions . . . were not specifically directed

at the particular person whose death occurred.” Order and Mem. Op. on Def. Mots. to Dismiss for Lack of Probable Cause 67 (Oct. 21, 2020) (“Probable Cause Op.”). Three days ago, however, the Minnesota Court of Appeals reached the opposite conclusion in *Noor*. It held that “a conviction for third-degree murder under Minnesota Statutes section 609.195(a) may be sustained even if the death-causing act was directed at a single person.” *Noor*, 2021 WL 317740, at *7.

Because the decision in *Noor* is precedential and now provides this Court with clear guidance regarding the elements of third-degree murder, the State respectfully requests that the Court reinstate the third-degree murder charge against Chauvin or, in the alternative, that it permit the State to file an amended complaint that includes this third-degree murder charge. In addition, the State respectfully requests that the Court permit it to file amended complaints that add a third-degree murder charge against Defendants Kueng, Lane, and Thao.

PROCEDURAL BACKGROUND

A. This Court Dismisses The Third-Degree Murder Charge Against Defendant Chauvin Because It Concludes There Is No Evidence That His Actions Were Specifically Directed At Persons Besides George Floyd.

On June 3, 2020, the State filed a complaint against Defendant Chauvin, charging him with (i) second-degree unintentional murder, in violation of Minn. Stat. § 609.19, subd. 2(1); (ii) third-degree murder, in violation of Minn. Stat. § 609.195(a); and (iii) second-degree manslaughter, in violation of Minn. Stat. § 609.205, subd. 1. The State also filed a complaint against Defendants Kueng, Lane, and Thao, charging them with (i) aiding and abetting second-degree unintentional murder, in violation of Minn. Stat. § 609.19, subd. 2(1), with reference to Minn. Stat. § 609.05, subd. 1; and (ii) aiding and abetting second-degree manslaughter, in violation of Minn. Stat. § 609.205, subd. 1, with reference to Minn. Stat. § 609.05, subd. 1.

All four Defendants moved to dismiss the complaints against them. This Court denied all four Defendants’ motions with respect to the second-degree unintentional murder and second-

degree manslaughter charges. Probable Cause Op. 8. The Court, however, dismissed the third-degree murder charge against Defendant Chauvin for lack of probable cause. *Id.* at 53.

With respect to the third-degree murder charge against Chauvin, the Court explained that third-degree murder requires proof of (i) “Floyd’s death”; (ii) “that Chauvin caused Floyd’s death”; and (iii) that Chauvin’s conduct “was eminently dangerous to other persons and was performed without regard for human life.” *Id.* at 53 (internal quotation marks omitted). The Court determined that probable cause existed for the first two elements. *Id.* at 54 n.31. With respect to the third element, however, this Court held based on a survey of the case law that the State must show that Chauvin’s conduct was eminently dangerous to someone other than Floyd and was not specifically directed at Floyd. *Id.* at 67. Because the Court concluded that Chauvin’s actions were “specifically directed at” only Floyd, it dismissed the third-degree murder charge. *Id.*

B. The Minnesota Court of Appeals Rejects The Harm-To-Others Theory In *Noor*.

On February 1, 2021, the Minnesota Court of Appeals held in *Noor* that “third-degree murder may occur even if the death-causing act endangered only one person.” *Noor*, 2021 WL 317740, at *5. In reaching that conclusion, the court surveyed over “100 years” of precedent. *Id.* at *4-*5. The court pointed, for example, to the decision in *State v. Mytych*, 194 N.W.2d 276 (Minn. 1972). There, the defendant was indicted for shooting and injuring her ex-lover and his wife. The defendant argued that because the shots “were directed with particularity,” she could not be found guilty of third-degree murder. *Noor*, 2021 WL 317740, at *5 (quoting *Mytych*, 194 N.W.2d at 281). The Minnesota Supreme Court disagreed, explaining that the fact that the defendant shot and injured one person and killed another did not preclude a third-degree murder conviction. *Id.* at *5 (citing *Mytych*, 194 N.W.2d at 277).

The Court of Appeals also specifically distinguished the cases discussing “third-degree murder in the context of jury instructions.” *Id.* at *6. In each, “the defendant acted with an element of intent not contained in the third-degree murder statute.” *Id.* As the Court of Appeals explained, these cases therefore stand for the proposition that third-degree “murder does not occur if the death-causing act was directed at a particular person *with intent to kill.*” *Id.* (emphasis added). These cases, the Court of Appeals clarified, do not stand for the proposition that third-degree murder is inapplicable merely because the death-causing act is directed at a *particular person.* *Id.*

In reaching this conclusion, the Court of Appeals also relied on the language of the third-degree murder statute. That statute provides that “[w]hoever, without intent to effect the death of any person, causes the death of another by perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human life, is guilty of murder in the third degree.” Minn. Stat. § 609.195(a). The Court of Appeals recognized that the statute speaks in terms of harm to *others*, as opposed to the death of a *person*, but declined to attach any meaning to these differences. With respect to the use of the plural “others,” the court explained that it is a principle of statutory construction that “the singular includes the plural and the plural includes the singular.” *Noor*, 2021 WL 317740, at *6 (citing Minn. Stat. § 645.08(2)). The Court of Appeals also noted that a “leading legal scholar” has adopted the view that third-degree “murder can be based on conduct endangering a group of persons or only a single person.” *Id.* (citing 2 Wayne R. LaFare, *Substantive Criminal Law* § 14.4(a) (3d ed. 2018)). As for the phrase “without intent to effect the death of any person,” the Court of Appeals relied on a recent Minnesota Supreme Court decision to conclude that this language does not “create[] an element of third-degree murder that the state must prove,” but rather “serves to distinguish unintentional third- from intentional second-degree murder.” *Id.* at *7 (citing *State v. Hall*, 931 N.W.2d 737, 741 n.6 (Minn. 2019)). “The phrase

does not preclude the possibility of a third-degree murder conviction if an unintentional death is caused by an act directed at a single person.” *Id.*

In sum, the Court of Appeals held that “a conviction for third-degree murder under Minnesota Statutes section 609.195(a) may be sustained even if the death-causing act was directed at a single person.” *Id.* Applying that standard to the facts at hand, the Court of Appeals then held that the evidence was sufficient to sustain a third-degree murder conviction in *Noor* even if “Noor directed his death-causing act at” a particular person. *Id.*

Judge Johnson dissented. *Id.* at *15-*20. Relying on the same cases as Chauvin and this Court, he concluded that “a defendant cannot be convicted of [third-degree] murder if his or her conduct was directed at *the particular person* who was killed.” *Id.* at *15.

ARGUMENT

This Court should reinstate the third-degree murder charge against Defendant Chauvin or, in the alternative, grant the State leave to amend the complaint to add that charge. The Court should also grant the State leave to amend the complaints against Defendants Kueng, Lane, and Thao to add a third-degree murder charge against those Defendants.

I. THIS COURT SHOULD REINSTATE THE THIRD-DEGREE MURDER CHARGE AGAINST CHAUVIN OR, IN THE ALTERNATIVE, GRANT THE STATE LEAVE TO AMEND THE COMPLAINT TO ADD THAT CHARGE.

To prove third-degree murder here, the State must show (i) “Floyd’s death”; (ii) “that Chauvin caused Floyd’s death”; and (iii) that Chauvin’s conduct “was eminently dangerous to other persons and was performed without regard for human life.” Probable Cause Op. 53 (internal quotation marks omitted). As this Court has already ruled, probable cause exists for the first two elements. *Id.* at 54 n.31. That remains true today. And now, in light of the Court of Appeals’ decision in *Noor*, probable cause exists for the third element, too. This Court should therefore

reinstate the third-degree murder charge against Chauvin or, in the alternative, permit the State to amend the complaint to add that charge.

A. In *Noor*, the Court of Appeals held that a defendant is guilty of third-degree murder even when “the death-causing act endangered only one person” and “was directed at a single person.” *Noor*, 2021 WL 317740, at *6, *7. In so holding, it expressly rejected the idea that, to show third-degree murder, the State must prove the defendant’s actions “were eminently dangerous to other persons and were not specifically directed at the particular person whose death occurred.” Probable Cause Op. 67 (internal quotation marks omitted). In other words, the Court of Appeals has now clarified the law. Applying that law, this Court should now permit the State to reinstate the third-degree murder charge against Chauvin.

The Court of Appeals, moreover, made clear that its holding in *Noor* was not limited to the specific facts of that case. The Court held without qualification that “a conviction for third-degree murder under Minnesota Statutes section 609.195(a) may be sustained even if the death-causing act was directed at a single person.” *Noor*, 2021 WL 317740, at *7.

To be sure, there are differences between the facts of *Noor* and this case. As this Court previously explained, *Noor*’s actions arguably put others at risk in addition to the victim, whereas Chauvin’s conduct only directly endangered Floyd. *See* Probable Cause Op. 66-67. But this distinction made no difference to the Court of Appeals. That court has now clarified that it is immaterial whether the death-causing conduct in *Noor* may have been directed at, or may have endangered, others. It found that “the evidence could be sufficient to sustain the jury’s finding of guilt even though *Noor* directed his death-causing act at the person outside of the squad-car’s window.” *Noor*, 2021 WL 317740, at *7. That holding applies with full force to this case.

The Court of Appeals' decision in *Noor* is precedential. This Court concluded back in October that the district court's decision in *Noor* did "not support a finding of probable cause for the third-degree murder charge against Chauvin here." Probable Cause Op. 66. It expressly noted that, at the time, there was "no precedential appellate court opinion in *Noor*." *Id.* That, of course, is no longer true. Indeed, although the formal judgment has not yet issued, *see* Minn. R. Civ. App. P. 136.02, the Court of Appeals itself has already identified *Noor* as a "precedential opinion," *Court of Appeals Opinions: Precedential Opinions*, Minn. App., <https://mncourts.gov/CourtOfAppeals/RecentOpinions.aspx> (last visited Feb. 4, 2021).

There is also no procedural impediment to reinstating the third-degree murder charge, as this Court's prior decision dismissing the third-degree murder charge does not qualify as "law of the case." The law-of-the-case doctrine "ordinarily applies where an *appellate court* has ruled on a legal issue and has remanded the case to the lower court for further proceedings." *State v. Bailey*, 732 N.W.2d 612, 623 (Minn. 2007) (internal quotation marks omitted) (emphasis added). But the trial court "is not firmly bound by its own prior decision in the same way" that it "is bound by the decision of a higher court of review." *Emps. Nat'l Ins. Co. v. Breaux*, 516 N.W.2d 188, 191 (Minn. App. 1994). Moreover, "[w]hen there has been a change in the law by a judicial ruling entitled to deference," as is true here, "law of the case does not typically apply." *Peterson v. BASF Corp.*, 675 N.W.2d 57, 65 (Minn. 2004), *vacated on other grounds*, 544 U.S. 1012 (2005); *see Cibulka v. State*, No. A19-2057, 2020 WL 5757476, at *3 (Minn. App. Sept. 28, 2020).¹

¹ In any event, the Court could also construe this as a motion for reconsideration of the Court's order dismissing the third-degree murder charge in light of the Court of Appeals' intervening decision in *Noor*. *Cf.* Minn. R. Gen. Prac. 115.11, Advisory Committee Comment—1997 Amendment (noting the propriety of a motion to reconsider "where intervening legal developments have occurred (e.g., enactment of an applicable statute or issuance of a dispositive court decision)"). Reconsideration motions are not generally foreclosed by the law-of-the-case doctrine. *See Breaux*, 516 N.W.2d at 191.

Thus, consistent with *Noor*, the Court should grant the State's motion and reinstate the third-degree murder charge. *See, e.g., State v. Spaulding*, 296 N.W.2d 870, 872-875 (Minn. 1980) (explaining that, where State and the defendant negotiated the dismissal of certain charges and the conviction was set aside on appeal, the district court properly granted the State's motion to "reinstate the previously dismissed counts"); *State v. Moe*, 498 N.W.2d 755, 759 (Minn. App. 1993) (reversing dismissal of complaint, "reinstat[ing] the remaining charges in the complaint," and "remand[ing] for trial"). Granting the motion would not prejudice Chauvin: If the Court grants the motion and the jury convicts him of third-degree murder, Chauvin will be able to appeal that conviction, much as *Noor* did. Denying the motion, by contrast, would prejudice the State: If the Court denies the motion and the Minnesota Supreme Court accepts review and affirms in *Noor*, the State will have been deprived of its opportunity to prosecute him for that offense.

B. Alternatively, even if this Court concludes that it cannot reinstate the third-degree murder charge, it should grant the State leave to amend the complaint to include that charge. "Prior to trial, Minn. R. Crim. P. 3.04, subd. 2 authorizes the trial court to freely permit amendments to the complaint so as to charge additional offenses." *State v. Pettee*, 538 N.W.2d 126, 131-132 (Minn. 1995) (holding that the State "was free to amend the complaint" to "charge[] an additional offense, greater in degree than those offenses originally charged"). In deciding whether to permit an amended complaint, the trial court should consider whether the added charge "ar[ises] from the same conduct as the other . . . offenses for which [the defendant] had been previously charged." *Nelson v. State*, 407 N.W.2d 729, 731 (Minn. App. 1987). If so, the decision to amend the complaint shortly before trial generally does not "prejudice[]"the defendant. *Id.* (affirming decision to amend complaint "on the day of trial"). And even if granting leave to amend might

prejudice the defendant, the court is still “relatively free to permit” amendment, provided that it “allows continuances where needed.” *State v. Bluhm*, 460 N.W.2d 22, 24 (Minn. 1990).

Here, these factors favor granting leave to amend the complaint. The State originally charged Chauvin with third-degree murder in June 2020. That charge rests on the same facts and circumstances as the second-degree murder charge and second-degree manslaughter charge. Moreover, the State’s motion to amend the complaint is timely; it comes just three days after the *Noor* decision, and more than a month before the March trial date. *Cf. State v. Aguilar Garcia*, No. A18-0484, 2018 WL 4688513, at *4 (Minn. App. Oct. 1, 2018) (holding that court did not abuse its discretion in denying a motion to amend the complaint where the State “waited over four months, until three days before the jury trial was scheduled to begin, to amend the complaint”). Nor are there any speedy trial concerns associated with amending the complaint, as Defendant Chauvin has not made a speedy trial demand. *Cf. State v. Heck*, No. A04-475, 2004 WL 2283513, at *3-4 (Minn. App. Oct. 12, 2004) (affirming denial of motion to amend complaint where the State unduly delayed its motion to amend, then sought to add ten additional charges “just days before the trial was to begin,” because defendant’s “right to a speedy trial would be unduly infringed by a continuance”). Leave to amend is thus appropriate here. *See State v. Vernon*, No. A03-348, 2004 WL 1191675, at *1 (Minn. App. June 1, 2004) (affirming trial court’s decision to grant the State’s motion to amend the complaint by “reinstating the original . . . charge on the first day of trial” because there was no evidence the defendant would be prejudiced by the amendment).

Moreover, because Chauvin will not suffer any prejudice from an amended complaint, this Court should grant the motion regardless of whether it grants a continuance. Although the State continues to believe a continuance is necessary because of the significant public health concerns associated with proceeding to trial on March 8, it does not believe that a continuance is necessary

based solely on the State's amendment of the complaint. Should this Court or Chauvin disagree, however, the State would not oppose a reasonable continuance until the summer of 2021 if this Court deems a continuance necessary to allow Defendant Chauvin adequate time to prepare for trial in light of the amended complaint.

II. THIS COURT SHOULD GRANT THE STATE LEAVE TO AMEND THE COMPLAINTS AGAINST DEFENDANTS KUENG, LANE, AND THAO TO ADD A THIRD-DEGREE MURDER CHARGE.

The State also respectfully requests that the Court grant the State leave to amend the complaints against Defendants Kueng, Lane, and Thao to add a third-degree murder charge—including any relevant theories of liability, such as accomplice liability—against those Defendants.

As noted, “Minn. R. Crim. P. 3.04, subd. 2 authorizes the trial court to freely permit amendments to the complaint so as to charge additional offenses.” *Pettee*, 538 N.W.2d at 131-132. Here, all of the relevant factors favor allowing the State to amend the complaints against Defendants Kueng, Lane, and Thao. *See supra* pp. 8-9. This added charge “ar[ises] from the same conduct as the other . . . offenses for which” Defendants have “been previously charged.” *Nelson*, 407 N.W.2d at 731. This added charge also will not “prejudice[]” the Defendants: It comes just three days after the decision in *Noor* and more than six months before their scheduled August 2021 trial. *Id.* The State's motion to amend therefore will not impair Defendants' ability to prepare for trial. Accordingly, the Court should grant the State leave to amend their complaints.

CONCLUSION

For the foregoing reasons, the Court should grant the State's motion to reinstate the third-degree murder charge or, in the alternative, to amend the complaint against Defendant Chauvin. The Court should also grant the State's motion for leave to amend the complaints against Defendants Kueng, Lane, and Thao to add a third-degree murder charge against each Defendant.

Dated: February 4, 2021

Respectfully submitted,

KEITH ELLISON
Attorney General
State of Minnesota

/s/ Matthew Frank
MATTHEW FRANK
Assistant Attorney General
Atty. Reg. No. 021940X

445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 757-1448 (Voice)
(651) 297-4348 (Fax)
matthew.frank@ag.state.mn.us

NEAL KUMAR KATYAL (*pro hac vice*)
SUNDEEP IYER (*pro hac vice*)
DANIELLE DESAULNIERS STEMPEL
(*pro hac vice*)
Special Attorneys for the State of Minnesota
Hogan Lovells U.S. LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600 (Voice)
neal.katyal@hoganlovells.com

ATTORNEYS FOR PLAINTIFF