

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,
Plaintiff,

vs.

DEREK MICHAEL CHAUVIN,
Defendant.

**ORDER DENYING DEFENSE MOTION SEEKING
ATTORNEY'S FEES ON DEFENSE PETITION
FOR FURTHER REVIEW OF COURT OF APPEALS
MARCH 5, 2021 OPINION REGARDING REINSTATE-
MENT OF THIRD-DEGREE MURDER CHARGE**

Court File No. 27-CR-20-12646

This matter is before the Court on Defendant Derek Michael Chauvin's (Chauvin) motion, filed August 20, 2021, for attorney's fees pursuant to Rule 29.04 subd. 10(3) of the Minnesota Rules of Criminal Procedure and Minn. Stat. § 611.27 subd. 16 for work performed by his counsel on a petition for further review of the Minnesota Court of Appeals' opinion in *State v. Chauvin*, 955 N.W.2d 684 (Minn. App. March 5, 2021), *review denied*, 2021 WL 921288 (Minn. March 10, 2021).¹ That opinion will be referred to throughout this Order as the "*Court of Appeals Chauvin M3 Opinion*."

Matthew Frank appeared on written filings for the State, a letter dated August 25, 2021. [Dk No. 604] Eric Nelson appeared on written filings for the Defense, including the motion

¹ The *Court of Appeals Chauvin M3 Opinion* addressed an interlocutory appeal (Appeal) the State filed on Feb. 12, 2021 [Dk No. 331] from this Court's Feb. 11, 2021 Order [Dk No. 328] denying the State's Feb. 4, 2021 Motion [Dk No. 303] to reinstate the third-degree murder charge in the wake of *State v. Noor*, 955 N.W.2d 644 (Minn. App. Feb. 1, 2021), *rev'd*, 964 N.W.2d 424 (Minn. Sept. 15, 2021). On Sept. 20, 2021, this Court filed an Order granting the Defense motion for attorney's fees in the amount of \$5,000 incurred in connection with that Appeal. [Dk No. 610]

papers filed on August 20, 2021 [Dk Nos. 601, 602] as well as a supplemental letter brief dated September 13, 2021. [Dk No. 608] The motion was taken under advisement on the parties' written filings, without oral argument, on September 13, 2021.

The history of the Appeal is summarized in this Court's Sept. 20, 2021 Order [Dk No. 610] and that history is incorporated by this reference. On March 5, 2021, the *Court of Appeals Chauvin M3 Opinion* was filed deciding the Appeal. That opinion, *State v. Chauvin*, 955 N.W.2d 684 (Minn. App. March 5, 2021), reversed this Court's Feb. 11, 2021 Order and remanded for reconsideration of the State's motion to reinstate the third-degree murder charge. Because the Minnesota Supreme Court had earlier that week² granted review of the Court of Appeals' Feb. 1, 2021 opinion in *Noor* to consider the applicability of Minnesota's third-degree murder statute in a similar factual context in which another Minneapolis police officer's actions had also been specifically directed at the victim who died, Chauvin elected to file a petition for further review (PFR) of the *Court of Appeals Chauvin M3 Opinion*.

Mr. Nelson indicates he commenced drafting the PFR on March 5 after reviewing the *Court of Appeals Chauvin M3 Opinion*. He filed the PFR on March 8. The Supreme Court denied Chauvin's PFR by order filed March 10, 2021.

By the pending motion, Chauvin seeks attorney's fees of \$4,031.25 for Mr. Nelson's work on the PFR, based on 32.25 hours work³ at the rate of \$125/hour established by Chief Judge

² The Court of Appeals heard oral argument on the Appeal on Monday afternoon, March 1. *Noor* had filed his petition for further review (*Noor* PFR) the prior Thursday, Feb. 25. The Supreme Court granted the *Noor* PFR later in the afternoon of March 1, after the oral argument in the Appeal in this case, without waiting for the State to file a response to the *Noor* PFR.

³ Mr. Nelson filed an Affidavit and supporting time records detailing the time he spent reviewing the *Court of Appeals Chauvin M3 Opinion*, conducting legal research, preparing the

Barnette's standing order for 2021 pursuant to Minn. Stat. § 611.27 subd. 16(b).

Minn. Stat. § 611.27 subd. 16(a) provides, in pertinent part:

When a prosecuting attorney appeals to the court of appeals, in any criminal case, from any pretrial order of the district court, reasonable attorney fees and costs incurred shall be allowed to the defendant on the appeal which shall be paid by the governmental unit responsible for the prosecution involved

The State objects to the Defense motion for attorney's fees performed on the PFR on the ground that Minn. Stat. § 611.27 subd. 16(a) by its plain language only authorizes the payment of attorney fees to defense counsel in an appeal by the prosecutor to the Court of Appeals. This Court agrees.

As noted above, this Court previously filed an order directing the State to pay Chauvin \$5,000 in attorney's fees in connection with the Appeal, as required by this statute (as well as by Rule 28.04 subd. 2(6) of the Minnesota Rules of Criminal Procedure). In the motion under consideration here, though, Chauvin is not seeking attorney fees for work performed in connection with the State's appeal to the Court of Appeals from this Court's Feb. 11, 2021 order. Rather, he seeks attorney fees for work performed in connection with a PFR he elected to file with the Supreme Court from the *Court of Appeals Chauvin M3 Opinion*. That is a discretionary decision on Chauvin's part, and is not part and parcel with the State's appeal to the Court of Appeals from this Court's Feb. 11, 2021 order denying the State's motion to reinstate the third-degree murder charge in the wake of the Court of Appeals' Feb. 1, 2021 *Noor* opinion.

While Chauvin's decision to seek Supreme Court review of the *Court of Appeals Chauvin M3 Opinion* is understandable, given the circumstances and procedural posture in this case and

PFR, reviewing the State's response, and conferring with Chauvin between March 5, 2021 and March 9, 2021. See Aug. 19, 2021 Nelson Aff. (attached to the motion at Dk No. 601).

the ongoing appellate litigation in *Noor* -- particularly the Supreme Court's decision to grant Noor's petition for review raising a substantially identical issue of statutory construction of Minnesota's third-degree murder statute in the context of precedential caselaw dating back to the 1800s four days prior to the filing of the *Court of Appeals Chauvin M3 Opinion* -- Minn. Stat. § 611.27 subd. 16(a) by its plain terms does not authorize this Court to order the State to pay Chauvin attorney fees for defense counsel's work in filing the PFR with the Minnesota Supreme Court. As the State points out, authority to order payment of attorney fees is a matter of substantive law, controlled by statute, not a matter of procedural law, controlled by court rules under the courts' inherent judicial powers. *See, e.g., Fownes v. Hubbard Broadcasting, Inc.*, 246 N.W.2d 700, 702 (Minn. 1976) ("The general American rule is that attorney fees may not be awarded to a successful litigant without explicit statutory or contractual authorization. . . . [I]t is the settled general rule in this state . . . that 'attorney's fees are not recoverable . . . unless there is a specific contract permitting such recovery or such fees are authorized by statute.'") (citations omitted); *accord Baker Botts L.L.P. v. Asarco LLC*, 576 U.S. 121, 126 (2015) (noting general "American rule" that each litigant pays its own attorney's fees absent explicit statutory language that authorizes award of reasonable attorney's fees); *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240 (1975) (courts may not invade the legislature's province by awarding attorney's fees under court's equitable powers in absence of explicit statutory authorization); *see also State v. Johnson*, 514 N.W.2d 551, 554 (Minn. 1994) (addressing entitlement to attorney fees as a substantive matter controlled by statute, not a procedural matter controlled by court rule).

The same result obtains under Minn. R. Crim. P. 29.04 subd. 10(3) which provides:

Reasonable attorney fees and costs incurred must be allowed to the defendant on an appeal to the Supreme Court by the prosecutor in a case originally appealed by the prosecutor to the Court of Appeals under Rule 28.04.

There is no conflict between Minn. Stat. § 611.27 subd. 16(a) and Minn. R. Crim. P. 29.04 subd. 10(3). Rule 29.04 subd. 10(3) by its plain terms does not authorize this Court to order the State to pay Chauvin attorney fees for work performed by Mr. Nelson on the PFR. That rule authorizes an award of attorney fees to a defendant on an appeal to the Supreme Court by the prosecution. But here, although the State did file the original appeal with the Court of Appeals, the Defense motion for attorney's fees here concerns not that appeal, nor any appeal by the State to the Supreme Court, but rather the Defense's own discretionary filing of a PFR with the Supreme Court.

In summary, this Court has no authority granted by either the statute or the rule Chauvin invokes to order the State to pay Chauvin attorney's fees for work performed by his counsel in seeking Supreme Court review of the *Court of Appeals Chauvin M3 Opinion*.

Accordingly, **IT IS HEREBY ORDERED** that:

- (1) Chauvin's motion seeking attorney's fees for work performed by Defense Counsel Eric Nelson on the petition for further review of the *Court of Appeals Chauvin M3 Opinion* filed by Chauvin with the Minnesota Supreme Court on March 8, 2021 is **DENIED**.

BY THE COURT:

Peter A. Cahill
Judge of District Court