

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,
Plaintiff,

vs.

**DEREK MICHAEL CHAUVIN,
TOU THAO,
THOMAS KIERNAN LANE,
J. ALEXANDER KUENG,**

Defendants.

**ORDER AND MEMORANDUM
OPINION DENYING STATE'S
MOTION TO REINSTATE OR
ADD THIRD-DEGREE
MURDER CHARGE**

Dist Ct. File No. 27-CR-20-12646
Dist Ct. File No. 27-CR-20-12949
Dist Ct. File No. 27-CR-20-12951
Dist Ct. File No. 27-CR-20-12953

This matter came before the Court on the State's motion, filed February 4, 2021, asking the Court to reinstate the Murder in the Third Degree charge in 27-CR-20-12646 and to add Aiding and Abetting Murder in the Third Degree in 27-CR-20-12949, 27-CR-20-12951, and 27-CR-20-12953 in light of the Minnesota Court of Appeals' decision in *State v. Noor*, ___ N.W.2d ___, 2021 WL 317740 (Minn. App. Feb. 1, 2021).

Matthew Frank, Assistant Attorney General; and Neal Katyal, Sundeep Iyer, and Danielle Desaulniers Stempel, Special Assistant Attorneys General, appeared in writing on behalf of the State of Minnesota. Eric J. Nelson, Attorney at Law, filed a memorandum on February 8, 2021 opposing the State's motion in *State v. Chauvin*, 27-CR-20-12646.

Based on all the files, records, and proceedings, the Court makes the following:

ORDER

1. The State's motion to reinstate the charge of Murder in the Third Degree in *State v. Chauvin*, Court File No. 27-CR-20-12646 is **DENIED**.

2. The State's motion to add the charge of Aiding and Abetting Murder in the Third Degree in *State v. Thao*, Court File No. 27-CR-20-12949, *State v. Lane*, Court File No. 27-CR-20-12951, and *State v. Kueng*, Court File No. 27-CR-20-12953, is **DENIED**.

3. The attached Memorandum is incorporated herein.

BY THE COURT:

Peter A. Cahill
Judge of District Court

MEMORANDUM

On February 1, 2021, in a published split decision, the Minnesota Court of Appeals held that “a conviction for third-degree murder under Minnesota Statutes section 609.195(a) [depraved-mind murder] may be sustained even if the death-causing act was directed at a single person.” *State v. Noor*, ___ N.W.2d ___, 2021 WL 317740, at *7 (Minn. App. Feb. 1, 2021). The dissent came to the opposite conclusion, reasoning that in fourteen reported opinions covering 120 years from 1896 through 2017, the Minnesota Supreme Court has interpreted this statute “to mean that a defendant cannot be convicted of depraved-mind murder if his or her conduct was directed at the *particular person* who was killed.” *Noor*, 2021 WL 317740 at *15 (Johnson, J., dissenting; citations omitted; emphasis in original).

Several months before the Court of Appeals’ decision in *Noor*, this Court dismissed the Murder in the Third Degree (depraved-mind murder) charge in *State v. Chauvin*, 27-CR-20-12646, employing the same analysis and coming to the same conclusions of law as the dissenting opinion in *Noor*. *See id.*, Order and Memorandum Opinion on Defense Motions to Dismiss for Lack of Probable Cause (filed Oct. 21, 2020), at pp. 53-67 [Dk No. 183] (PC Order).

The State is correct that if the Court of Appeals’ published February 1, 2021 *Noor* opinion is precedential, this Court is now duty-bound to follow it and grant the State’s motions to reinstate the Murder in the Third Degree charge in *State v. Chauvin* and to allow an amendment to the complaints adding aiding and abetting Murder in the Third Degree in the codefendants’ cases, *State v. Thao*, *State v. Lane*, and *State v. Kueng*.¹ *State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010) (“The district court . . . is bound by supreme court precedent and the

¹ While being denied today, the State’s motions to reinstate and/or to amend to add the Murder in the Third Degree charges may be renewed if and when the decision in *Noor* becomes precedential. Also, the Court is not addressing any other objections defendants might make to reinstating or adding Murder in the Third Degree charges in their respective cases.

published opinions of the court of appeals . . .”). However, the *Noor* opinion, while published and labeled as “precedential,”² does not become final and have precedential effect until the deadline for granting review by the Minnesota Supreme Court has expired. *State v. Collins*, 580 N.W.2d 36, 43 (Minn. App. 1998), *rev. denied* (Minn. July 16, 1998); *see also Hoyt Investment Co. v. Bloomington Commerce and Trade Center Assocs.*, 418 N.W.2d 173, 176 (Minn. 1988) (Court of Appeals’ decision became final and binding upon trial court upon denial of petition for further review by Supreme Court); Minn. R. Civ. App. P. 136.02. If a petition for review is filed, the State will have twenty days to respond, Minn. R. Crim. P. 29.04 subd. 5, and the Supreme Court will have sixty days from the date the petition for review was filed to grant or deny review. Minn. R. Crim. P. 29.04 subd. 7.

Noor’s window to file a petition for review will not close until March 3, 2021. Minn. R. Crim. P. 29.04 subd. 2 (“A party petitioning for review to the Supreme Court from the Court of Appeals must serve and file the petition for review within 30 days after the Court of Appeals files its decision.”). Thomas Plunkett, counsel for Kueng here is also counsel for Noor. He advised this Court, in writing on Feb. 5, 2021, that Noor intends to file a petition for review with the Minnesota Supreme Court.³ If a timely petition for review is filed and the Supreme Court grants review, the Court of Appeals’ opinion will not obtain precedential status. At best, from the State’s perspective – that is, so long as a petition for review is timely filed in *Noor* on or before March 3, 2021-- the *Noor* decision would obtain precedential status only if and when the Supreme Court denies the petition for review, and such an order virtually certainly would not be

² *See* State’s Motion, at p. 7 (citing <https://mncourts.gov/courtofappeals/recentopinions.aspx>).

³ *See also* Defendant Chauvin’s Memorandum of Law Opposing State’s Motion to Reinstate Third Degree Murder Charges, p. 3. 27-CR-20-12646, Dk No. 312.

issued until sometime after March 8, 2021, when the trial in *State v. Chauvin*, 27-CR-20-12646, is currently scheduled to commence.

Although the Court of Appeals' opinion in *Noor* is not currently precedential, this Court could immediately accept it as persuasive. *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993). Although the *Noor* majority opinion is thorough, it is not persuasive in this Court's view because it departs from the Minnesota Supreme Court's long adherence to the no-particular-person requirement embedded in the depraved mind element of Minn. Stat. § 609.195(a). See *State v. Noor*, ___ N.W.2d ___, 2021 WL 317740, Parts A & B, at *15-*18 (Minn. App. Feb 1, 2021) (Johnson, J., concurring in part and dissenting in part).

This Court believes its earlier decision in the PC Order dismissing the charge of Murder in the Third Degree was correct and nothing in the majority opinion in *Noor* persuades the Court otherwise. For example, in its PC Order, this Court extensively discussed eight of the Minnesota Supreme Court opinions cited by the dissent – *Weltz* (1923); *Hanson* (1970); *Stewart* (1979); *Wahlberg* (1980); *Carlson* (1982); *Stiles* (2003); *Harris* (2006); and *Zumberge* (2017) – as well as one additional Minnesota Supreme Court, *State v. Barnes*, 713 N.W.2d 325 (Minn. 2006) (in contrasting third-degree, depraved mind murder from domestic abuse murder, Supreme Court reasoned that whereas domestic abuse murder “requires that the extreme indifference be directed at the specific person,” depraved mind murder “cannot occur where the defendant’s actions were focused on a specific person” and “the act must be committed without a special design upon the particular person or persons with whose murder the accused is charged”). Order & Mem. Op., at pp. 55-65. The *Noor* majority never addresses *Stewart*, *Carlson*, *Stiles* or *Harris*. The *Noor* majority does address *Weltz*, but only in the context of the issue of the *mens rea*/recklessness standard required for third-degree depraved mind murder, not the issue whether a third-degree

murder charge is properly submitted to a jury when the evidence shows that the defendant's actions were specifically directed at the particular person whose death occurred. 2012 WL 317740, at * 8, 10. Although the *Noor* majority does address *Hanson*, *Wahlberg*, and *Zumberge*, albeit only in a single paragraph, it seeks to distinguish those opinions on the ground that the issue in those appeals from first-degree premeditated and/or second-degree intentional murder convictions was whether the trial court's declination to charge the jury on a lesser-included charge of third-degree murder was error. 2012 WL 317740, at *6. For the reasons explained by the *Noor* dissent, 2012 WL 317740, at *16-*17, this Court finds the *Noor* majority's efforts to distinguish those three cases unpersuasive.

In a nutshell, this Court agrees with the analysis in the *Noor* dissent. For that reason, the Court declines to adopt the *Noor* majority opinion's holding that a Murder in the Third Degree charge may be submitted to a jury under a fact pattern in which the death-causing act was solely directed at a single person and was not eminently dangerous to others, as is the case here, as persuasive and a basis upon which to grant the State's motion to reinstate the Murder in the Third Degree charge in *Chauvin* and to amend the complaints to add Aiding and Abetting Murder in the Third Degree charges in *Thao*, *Lane*, and *Kueng*.

PAC