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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT
Criminal/Traffic Division

Derek Michael Chauvin, Petitioner, v. State of Minnesota, Respondent.	)))))))))	**PETITION FOR POST-CONVICTION RELIEF** Minn. Stat. § 590.01 District Court File #27-CR-20-12646

TO: HENNEPIN COUNTY DISTRICT COURT, Hennepin County Government Center, 300 South 6th Street, C-11, Minneapolis, MN 55487.

For his Petition for Post-Conviction Relief under Minn. Stat. § 590.01, Petitioner Derek Michael Chauvin alleges the following:

FACTS AND GROUNDS FOR RELIEF

In addition to the record in this case, the following facts and grounds for relief are based upon the Pro Se MOTION TO VACATE CONVICTION AND SENTENCE UNDER 28 U.S.C. SECTION 2255, filed in United States District Court for the District of Minnesota, and attached hereto as Exhibit A. While the facts and grounds in the Federal Motion speak to the voluntariness of the guilty plea in Petitioner's Federal Civil Rights case, the same factual basis and grounds for relief in this Motion establish actual innocence, ineffective assistance of counsel, discovery violations under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny by the State of Minnesota, and related violations of due process and a fair trial under the United States Constitution, amends. VI and XIV, and Minnesota Constitution art. 1, § § 6, 7:

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- The Hennepin County Medical Examiner's Office Autopsy Report and NMS Labs Toxicology Reports were not provided to Petitioner until late July, 2023, more than two years after the jury verdict.
- The Medical Examiner's Report revealed the presence of a tumor, referred to in the Report as "incidental." Dr. Andrew Baker, the Hennepin County Medical Examiner who performed the autopsy of George Perry Floyd, the decedent in this case, engaged in no testing of this tumor to determine whether it was active.
- A tumor was also referred to in a November 5, 2020 memorandum, disclosed to defense counsel in February, 2021, detailing a conference between several Assistant Attorneys General and Dr. Roger Mitchell, a former Deputy Mayor, Washington D.C. – based Chief Medical Examiner, and Chief of the Department of Pathology at Howard University Medical School. Dr. Mitchell described the tumor recognized by Baker as "a possible carcinoid tumor," but he "does not know whether the tumor was active."
- Dr. Mitchell explained that an active tumor of this type can cause carcinoid syndrome, a symptom of which is "sudden cardiac death."
- Petitioner further alleges that, according to Dr. William Schaetzel, a forensic pathologist who came into contact with Petitioner in early 2023, the tumor is believed to be a paraganglioma. A second individual who contacted Petitioner in July, 2023, Dr. Paul Haney, also corroborated the Report's omission of "sickling and paraganglioma conditions," and that "subsequent testing to

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further rule out other causes [of the death of George Floyd] were not done." Ex. A.

- It is no longer possible to conduct an examination of this tumor to determine if it was active at the time of George Floyd's death.
- It has since been discovered that Dr. Schaetzel contacted trial counsel for Mr. Chauvin, Hennepin County Judge Peter Cahill, and a member of the prosecution team, on April, 17, 2021, days prior to the rendering of a verdict by the jury. Dr. Schaetzel offered to testify as to the lethal effects of the paraganglioma condition found in George Floyd. This email contact was not disclosed to Petitioner at any point prior to August, 2023.
- According to the November 5, 2020 memorandum, Dr. Roger Mitchell had at least two conversations with Dr. Andrew Baker, the Hennepin County Medical Examiner who performed the autopsy on George Floyd. One of these conversations took place immediately after the autopsy was performed, and the second took place just 2-3 days later and before the final Report was issued on June 1, 2020.
- After the conversations with Dr. Mitchell, Dr. Baker added language to the final Report concerning "neck compressions" and "homicide," which were not present in his initial assessments, and were not revealed through the forensic examination of the body of George Floyd.
- The November 5th memo also details that Dr. Mitchell told Dr. Baker during a telephone call that he was prepared to publish an op-ed critical of Dr. Baker's findings in the Washington Post newspaper on Monday afternoon, before the

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final autopsy Report was completed. This op-ed has never been disclosed to Petitioner or defense counsel at any time.

- It is unknown at this time whether Dr. Mitchell was acting at the direction or suggestion of the State, how he came to contact Dr. Baker, or how or why he opined on the cause of death of George Floyd without any direct observations of the autopsy itself.
- These allegations were also recited in a Motion for Sanctions for Prosecutorial Misconduct Stemming From Witness Coercion filed on May 12, 2021, by attorneys for Officer Tou Thao in Hennepin County Court File No. 27-CR-20-12949. Officer Thao was a codefendant in Petitioner's case who now stands convicted of aiding and abetting Petitioner in the murder of George Floyd.
- So far as Petitioner is aware at this time, no merits decision has ever been reached by any Court on the Motion made by attorneys for Tou Thao.

The above facts, if proven, demonstrate the actual innocence of Petitioner. Further, to the extent that the above information was unlawfully withheld from the defense by the State of Minnesota, its agents, or those acting at its direction, it constitutes a *Brady* violation. To the extent that trial and/or appellate counsel failed to investigate or diligently pursue these defenses, which would have established actual innocence and other Constitutional violations if proven, it constitutes ineffective assistance of counsel because they demonstrate performance which falls below an objective standard of reasonableness for counsel in a criminal case. Additional clarity will be brought before the Court on these matters and several others in an Amended Petition for Post-Conviction

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Relief, once counsel has had an opportunity to research and review the voluminous record in this case, including trial transcripts.

RELIEF REQUESTED

At this time, and without waiving any rights to the same, and until such time as Petitioner files an Amended Petition for Post-Conviction Relief, Petitioner does not request an evidentiary hearing pursuant to Minn. Stat. § 590.04, subd. 1 for determination of the issues raised in this Petition. However, upon filing of the Amended Petition, Petitioner will request such an evidentiary hearing to determine the issue presented in that document, as well as a subsequent Order directing that Petitioner's conviction(s) be set aside or, in the alternative, that he be granted a new trial. If no Amended Petition for Post-Conviction Relief is filed prior to August 1, 2025 (well within the 2-year period imposed by Minn. Stat. § 590.01 Subd. 4(a)(2)), Petitioner asks for an evidentiary hearing on the merits of this Petition, and that after conducting such a hearing on the merits, the Court issue an Order directing that Petitioner's conviction(s) be set aside or, in the alternative, that he be granted a new trial.

PROCEDURAL HISTORY

Derek Michael Chauvin was found guilty by jury verdict on April 20, 2021 on Count I, unintentional second-degree murder while committing a felony in violation of Minn. Stat. § 609.19 subd. 2(1), Count II, third-degree murder, perpetrating an eminently dangerous act evincing a depraved mind, and Count III, second-degree manslaughter,

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culpable negligence creating an unreasonable risk. He was adjudged guilty of Count I and sentenced to 270 months imprisonment on June 25, 2021.

Notice of Appeal to the Minnesota Court of Appeals was filed on September 23, 2021. Grounds for relief asserted by Petitioner in direct appeal are outlined in Petitioner's Pro Se Statement of the Case, and include:

(1) The District Court abused its discretion when it denied Appellant's motion for change of venue or a new trial;

(2) The District Court abused its discretion when it denied Appellant's motion for a continuance or a new trial;

(3) The District Court abused its discretion when it denied Appellant's motions to sequester the jury throughout trial;

(4) The State committed prejudicial prosecutorial misconduct;

(5) The District Court prejudicially erred when it concluded that the testimony of Morries Hall, or in the alternative Mr. Hall 's statements to law enforcement, did not fall under Minn. R. Evid. 804(b)(3) and was not a violation Appellant's constitutional confrontation rights;

(6) The District Court prejudicially erred when it permitted the State to present cumulative evidence with respect to use of force;

(7) The District Court abused its discretion when it ordered the State to lead witnesses on direct examination;

(8) The District Court abused its discretion when it failed to make an official record of the numerous sidebar conferences that occurred during trials;

(9) The District Court abused its discretion when it failed to allow Appellant to exercise several cause strikes for clearly biased jurors during voir dire;

(10) The District Court abused its discretion when it permitted the State of Minnesota to amend its complaint to add the charge of third-degree murder;

(11) The District Court abused its discretion when it strictly limited and undercut the admissibility of George Floyd's May 6, 2019 arrest;

(12) The District Court abused its discretion when it submitted instructions to the jury that materially misstated the law;

(13) The District Court abused its discretion when it denied Appellant's motion for a *Schwartz* hearing;

(14) The District Court abused its discretion when it denied Appellant's post-verdict motion for a new trial due to juror misconduct.

The decision of the trial court was affirmed by the Minnesota Court of Appeals on April 17, 2023. A Petition for Review of this case by the Minnesota Supreme Court was filed on May 17, 2023, and it was denied by that Court on July 18, 2023. A Petition for a writ of certiorari to the United States Supreme Court was filed on October 16, 2023, denied on November 20, 2023, and said denial was filed with the Office of Appellate Courts on November 27, 2023.

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MEMORANDUM

The primary purpose of this Petition, which will be amended at a later date with permission of the Court and after a full review of Constitutional and trial issues by counsel, is to ensure that the Federal timeline concerning writs of habeas corpus under 28 U.S.C. § 2254 is tolled until a final determination on the merits is made by the Minnesota State Courts. Both the Federal one-year timeline in 28 U.S.C. § 2244(d)(1)(A) and the State two-year timeline in Minn. Stat. § 590.01 Subd. 4(a)(2) began on November 27, 2023, when direct appeal of this case concluded with the decision of the United States Supreme Court to deny the petition for a writ of certiorari and the subsequent filing of this decision with the Appellate Court.

The following is based on the single formal attorney phone call that counsel for Petitioner has had in the short time he has been retained. This call took place yesterday, on November 22, 2024. This information will be placed in affidavit form given additional time to prepare the Amended Petition:

Petitioner's conditions of incarceration have been abhorrent by any standard. Almost precisely one year ago on Friday, November 24, 2023, Petitioner was stabbed 22 times in the Federal Correctional Institution in Tucson.[1] This horrific attack took place in the law library just four days after the U.S. Supreme Court denied a writ of certiorari in his case, and three days before this denial was filed with the Minnesota Appellate Courts. Because of his nearly nonexistent access to a computer, Petitioner had assembled numerous paper documents during calendar year 2023 to aid in his defense in post-

[1] *See* https://apnews.com/article/derek-chauvin-stabbing-suspect-d458e9c8fba02a98d5dbabb1884dc1cc, last accessed November 23, 2024.

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conviction matters. These documents included potential physician witnesses and extensive information about the paraganglioma condition.

Most of these documents were destroyed due to contamination with Mr. Chauvin's blood during the attack. Those which were not destroyed were confiscated and held as evidence in the prosecution of his attacker, and have not been seen since.

In the wake of his stabbing, he spent two weeks in two different hospitals with one night in the Tucson facility in the middle. He was then returned to the Tucson Prison on or about December 8th, 2023, where he was placed on constant, 24/7 monitoring until the third week of March, 2024. This holding area is referred to as the "suicide cells," although it is not clear in what sense this is meant. During this time, he was given no computer or internet access whatsoever and perhaps 2 to 3 phone calls per week which he used to assure his family that he was still alive. To date, Mr. Chauvin remains of sound mind and has never exhibited any suicidal ideation or actions. After a brief reprieve at the end of March, 2023, he was returned to the suicide cells for another 6 weeks.

He was ultimately moved from this area in mid-May, 2023. When he emerged, nearly six months of his one-year Federal Habeas Corpus window were gone. Altogether, in combination with a period in August – September of this year when he was transferred to the FCI – Big Spring facility and subsequently deprived of computer access and phone calls altogether, Mr. Chauvin has had no ability to aid in his own defense for more than seven months since November, 2023.

In the time he has been able to do so, Mr. Chauvin has diligently searched for an attorney to represent him in this post-conviction relief matter, and to "stop the clock" in Federal Court. Many, many attorneys were contacted by Petitioner, his family, and his

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friends, without success. Counsel for Mr. Chauvin in this State Post-Conviction Relief matter was secured on November 16, 2024, only days before this Petition was filed.

The purpose of the foregoing is to make the judiciary aware of the circumstances leading up to the filing of this Petition, and to make a record for any interest-of-justice and/or equitable relief in the future should it be necessary, whether in this Court or a Court of Federal jurisdiction.

Date: November 23, 2024

JOSEPH LAW OFFICE PLLC

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EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

Case No. 0:21-CR-108-PAM

DEREK MICHAEL CHAUVIN,

EVIDENTIARY HEARING REQUESTED

Defendant-Movant.

MOTION TO VACATE CONVICTION AND SENTENCE UNDER 28 U.S.C. SECTION 2255

The Defendant, respectfully moves the Court under 28 U.S.C. Section 2255 for issuance of a writ of habeas corpus ad subjiciendum that vacates the May 9, 2023 judgment of conviction and sentence. In support thereof, defendant declares under the penalty of perjury, 28 U.S.C. Section 1746, the following particulars are true and correct:

JURISDICTIONAL STATEMENT

The Court's jurisdiction is founded upon 28 U.S.C. Section 2255 per U.S. Constitution, Article I, Clause 9, Sec 2. Defendant has not previously filed any petitions or motions seeking collateral review and vacatur of the judgment.

STATEMENT OF THE FACTS

Per the advice of former counsel, Mr. Eric J. Nelson, on December 15, 2021, defendant entered into a binding plea agreement under Fed. R. Crim. P. 11(c)(1)(C) that covers two violations 18 U.S.C. Section 2 and Section 242, and projected a sentencing cap of 300 months imprisonment concurrent to defendant's state sentence, respectively. ECF No. 142.

On July 7, 2022, the Court imposed a sentence of 252 months imprisonment followed by by 5 years supervised release, while reserving judgment on restitution. On May 9, 2023, the Court reduced the sentence to from 252 months to 245 months imprisonment followed by 5 years of supervised release, and entered judgment with no restitution. ECF No. 529.

In late-July 2023, defendant learned of the Court's May 9, 2023 judgment for the first time by way of a legal call regarding post-conviction relief per newly discovered evidence showing actual innocence with attorney, Mr. Paul D. Petruzzi, and immediately filed a notice of appeal pursuant to Garza v. Idaho, 139 S. Ct. 738, 744-745 (2019). See, Appeal No. 23-2756.

In early-August 2023, Nelson filed a motion to withdraw from representing defendant both in response to the notice of appeal in this court and in the court of appeals. However, defendant filed a Response In Opposition to certain parts of Nelson's Motion To Withdraw in the court of appeals because defendant sought to challenge the guilty plea on the appeal.

Before the Response In Opposition could arrive by U.S. Mail to the court of appeals, on August 14, 2023 the court of appeals dismissed the appeal as untimely. See, Appeal No. 23-2756, Id. After that dismissal, defendant's Response In Opposition was filed and construed as a Petition For Panel Rehearing by the court of appeals.

On September 19, 2023, the court of appeals denied the so-construed petition for rehearing. This motion follows.

GROUND ONE

Under Murray v. Carrier, 477 U.S. 478, 496 (1986), a "miscarriage of justice" exists as defendant is "actually innocent" of

causing the death of Mr. George Perry Floyd, Jr., and likewise "actually innocent" of depriving Floyd of his constitutional rights - to be free from an unreasonable seizure and to be free from the use of unreasonable force by a police officer.

Supporting Facts:

In February 2023, defendant began corresponding with Dr. William Schaetzel, D.O. M.S. FCAP, a forensic pathologist. Dr. Schaetzel indicated that he had reviewed the Hennepin County Medical Examiner's Office Autopsy Report and NMS Labs Toxicology Report dated May 25, 2020, and came to the conclusion that defendant did not cause Floyd's death. See, Exhibit-A, 02/23/23 - 08/14/23 E-Mails.

On March 10, 2023, Dr. Schaetzel attempted to contact Nelson after several unsuccessful attempts by defendant to reach Nelson, both by e-mail and telephone, directly and through third parties, but Nelson never responded. Defendant had never been provided a copy of the Autopsy and Toxicology Report by Nelson, the State of Minnesota, or the government prior to his December 15, 2021 guilty plea, and sought copies of both reports to corroborate Schaetzel's findings. Exhibit-A

On June 8, 2023, Dr. Schaetzel forwarded a copy of his (3) Page explanation of Floyd's actual cause of death to co-defendants Lane and Keung. Exhibit-A. On July 19, 2023, Dr. Schaetzel further explained to defendant in writing why the Medical Examiner's Autopsy Report is inaccurate according to its "body of the report". Exhibit-A.

On July 21, 2023, defendant received an e-mail from Dr. Paul Haney confirming that the Medical Examiner's Report omitted Floyd's sickling and paraganglioma conditions, and that "hypoxia was not present before death because of the lack of sickling [and] [t]here is no clear cut evidence for asphyxia as well as evidence of no major or minor trauma about the neck. There is clear evidence that subsequent testing to further rule out other causes were not done." Exhibit-A.

In late-July 2023, defendant received a copy of the Autopsy (Exhibit-B) and Toxicology Report (Exhibit-C) and the Minneapolis Police Department (MPD) Use of Force, 5-300 Policy (Exhibit-D) for the first time from defendant's state appellate counsel, Mr. William F. Mohrman, per defendant's July 19, 2023 request for those documents. Exhibit-A.

On August 14, 2023, defendant requested Dr. Schaetzel to produce any evidence that he contacted Nelson during the state court trial to provide him with his expert conclusions and willingness to testify. On August 14, 2023, Dr. Schaetzel provided defendant with the exact email he tendered to Nelson, Hennepin County Judge Cahill, and district attorney Jung on April 17, 2021. Exhibit-A.

Prior to August 14, 2023, Nelson never informed defendant of Schaetzel's communications at any time whatsoever. That is, Schaetzel expressed in writing his willingness to testify as a defense witness to the conclusions he made regarding the actual cause of death, and Nelson did not even notify defendant of Schaetzel's existence or allow defendant to make an informed decision on whether to call Schaetzel as a defense witness or to plead guilty in this case.

Prior to late-July 2023, Nelson never provided defendant with a copy of the MPD, Use of Force, 5-300 Policy, which shows defendant correctly performed the Conscious Neck Restraint and Maximal Restraint Technique on Floyd pursuant to Section 5-311, 5-316. See Exhibit-D. Specifically, "[t]he subject is placed in a neck restraint with intent to control, and not to render the subject unconscious, by only applying light to moderate pressure." Exhibit-D, Id. at 5-311; accord 5-316.

Had defendant been provided Dr. Schaetzel's and Dr. Haney's conclusions (Exhibit-A), the Autopsy Report (Exhibit-B), Toxicology Report (Exhibit-C), and the MPD Use of Force, 5-300 Policy (Exhibit-D) prior to his December 15, 2021 guilty plea, defendant would not have pled guilty, and would have insisted on going to trial. That is, had Nelson not withheld the above stated Exhibits from defendant while simultaneously advising defendant to accept the plea agreement, the outcome of the proceeding would be drastically different in this case.

ARGUMENT AND POINTS OF LAW (GROUND ONE)

It is well established that "[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in McMann." Tollett v. Henderson, 411 U.S. 258, 267 (1973).

Those standards "set forth in McMann" are in the main that "defendants facing felony charges are entitled to the effective assistance of competent counsel [and] if the right to counsel guaranteed by the Constitution is to serve its purpose defendants

cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." McMann v. Richardson, 397 U.S. 759, 771 (1970).

Moreover, "the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial - a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397U.S. 742, 748 (1970).

Therefore, "if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts ... Requiring this examination of the relation between the law and facts the defendant admits having committed is designed to protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." McCarthy v. United States, 394 U.S. 459, 466-467 (1969).

Next, in order to demonstrate prejudice where, as here, defendant challenges the validity of his guilty plea, defendant must show "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985). And, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." Cullen v. Pinholster, 131 S. Ct. 1388, 1403 (2011)(citing Strickland v. Washington, 466 U.S. 668, 694 (1984)).

Here, defendant has shown actual innocence because "in light of all the evidence" - "it is more likely than not that no reasonable juror would have convicted him," Schlup v. Delo, 513 U.S. 298, 327-328 (1995), knowing that Floyd's paraganglioma, sickling, and toxicology were his actual cause of death. No reasonable juror would have convicted defendant knowing the actual cause of death as well as the fact that defendant performed the Conscious Restraint Technique and Maximal Restraint Technique in accordance with MPD Use of Force, 5-300, Id. at 5-311, 5-316.

GROUND TWO

Under Garza v. Idaho, 139 S. Ct. 738, 744-745 (2019), Nelson performed unconstitutionally deficient by failing to file a direct appeal to "challenge the Government's power to criminalize [defendant's] (admitted) conduct [to] thereby call into question the Government's power to constitutionally prosecute him" under Class v. United States, 138 S. Ct. 798, 805 (2018), and thus caused the prejudice of depriving defendant of a vacatur and/or reversal of his convictions and sentence on constitutional grounds by the court of appeals.

Supporting Facts:

Between December 15, 2021 - May 25, 2023, defendant consistently and adamantly expressed to Nelson that extensive probable cause of Floyd's criminal activity existed according to eyewitnesses at the scene, video surveillance, cell phone, and body cam footage. See, Exhibit-E. Nelson did not file a direct appeal or any briefing in an appeal challenging the constitutionality of the charges brought against defendant on Fifth Amendment Due Process Clause grounds. See, ECF No. 142 - 529; and, Appeal No. 23-2756, Id. As a result, defendant's convictions and sentence remain in place.

ARGUMENT AND POINTS OF LAW (GROUND TWO)

The constitutionality of the charges brought against defendant for depriving Floyd of his right to be free from a purportedly unreasonable seizure, ECF No. 1, Id., is patently dubious. Specifically, published precedent existed for Nelson to rely on in a constitutional challenge to the prosecution showing that the independent probable cause of Floyd's criminal activity precluded prosecuting defendant for an "unreasonable seizure".

In United States v. Blakeney, 876 F.3d 1126 (8th Cir. 2017), the court of appeals took up this identical question, and concluded that a defense of independent probable cause could only be defeated "[w]hen an officer, knowing a warrant to be illegal, groundless, or fictitious, willfully uses his authority, and/or such an instrument to arrest and incarcerate the accused." Id. at 1132 (quoting United States v. Ramey, 336 F.2 512, 514 (4th Cir. 1964)).

Here, it is undisputed that probable cause of Floyd's criminal activity existed both prior to, and after, defendant arrived to the scene. However, because of the sensationalism created by the media, political, and social pressures it appears the government simply bootstrapped an "unreasonable seizure" to an "unreasonable use of force" without addressing the basis for probable cause at the outset, and during the course of, the Floyd incident.

Furthermore, the criminal prosecution of state actors for causing an unreasonable seizure risks violating the constitutional principle that criminal laws must give fair warning of what they prohibit. United States v. Lanier, 520 U.S. 259, 266 (1997). Indeed, "due process bars court from applying a novel construction of a criminal statue to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." Id. at 266.

The unconstitutionality of this prosecution for an unreasonable seizure is glaring because it bodes the questions:

Is the government now free to charge every police officer criminally under 18 U.S.C. Section 242 every time a motion to suppress evidence is granted because of an unreasonable seizure?

Is the government free to bypass sovereign immunity under the Eleventh Amendment and jump straight to criminal liability under 18 U.S.C. Section 242 without affording police officers their qualified immunity and day in court in a civil proceeding beforehand?

It should have been unequivocally clear to Nelson that the charges here imposed criminal liability for conduct which, "in the light of pre-existing law, the unlawfulness under the Constitution is apparent." Lanier, Id. at 271-272.

Accordingly, despite Blakeney and Class, no appeal was filed by Nelson to raise these important issues. Nelson and the government may complain that the appellate waiver in the plea agreement prohibited an appeal and thus this ground lacks merit because any appeal might have been dismissed. However, Class explicitly held defendant could "challenge the

Government's power to criminalize [defendant's] (admitted) conduct [and] [a] guilty plea does not bar a direct appeal in these circumstances." Class, Id. at 805. Nelson's failure to appeal caused the prejudice of the convictions and sentence.

RELIEF REQUESTED

Defendant respectfully requests issuance of a writ of habeas corpus ad subjiciendum that vacates the May 9, 2023 judgment, ECF No. 529, and orders a new trial where defendant may file dispositive pretrial motions and/or subsequently proceed to a jury trial. Alternatively, defendant respectfully requests an evidentiary hearing and/or appointment of counsel (preferably Mr. William F. Mohrman due to his familiarity of the case), or any other relief the Court may deem fair and just.

CONCLUSION

Wherefore defendant prays the Court grants this motion and the relief requested for the foregoing reasons.

Respectfully Submitted,

x _____ Date: 11/02/2023

Mr. Derek Michael Chauvin