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Criminal

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## Instructions given to Chauvin jurors are vital

**It is often said that picking a jury is the most important part of the trial. In the case of the Minnesota v. Chauvin, the second most important part could be which jury instructions they are provided.**


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What do we want? JUSTICE! When do we want it now? NOW! Last year, millions participated in protests across America in support of George Floyd and Black Lives Matter. And in Minneapolis, Minnesota, the pressure of public opinion had an impact as, less than 10 months after the May 25, 2020, death of George Floyd, Derek Chauvin is on trial for second- and third-degree murder and second-degree manslaughter. Opening statements are scheduled to begin on March 29 as the jury will be seated, following a comprehensive questionnaire and probing questions by the defense attorney and prosecutor.

After the first week of voir dire, it was clear that the Black Lives Matter movement permeated the jury pool, with several of the jurors revealing a favorable opinion of BLM and most admitting to a negative opinion of Chauvin. The impaneled jurors had to commit to being able to set aside their opinions and apply the facts to Minnesota state law.

As trial is commencing, there is uncertainty as a recent appellate decision caused the reinstatement of the murder in the third degree charge. (Minnesota Statute 609.195 reads, in relevant part: "MURDER IN THE THIRD DEGREE. (a) Whoever, 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 and may be sentenced to imprisonment for not more than 25 years.") The decision, in *State v. Noor*, held that the statute applied where an eminently dangerous act is directed at one person, instead of towards a group of people, as had been previously held in other Minnesota cases interpreting third-degree murder. The issue is on appeal to the Minnesota Supreme Court, with oral arguments set for June. The uncertainty motivated the prosecution to seek a trial continuance, which was denied by the steady and decisive Judge Peter Cahill.

The reinstatement of the third-degree murder charge, in which the defendant does not have to have the intent to effect the death of any person, but requires an "evincing of a depraved mind, without regard for human life," is seen as a major victory for the prosecution, because the success of the second-degree felony charge may turn on whose jury instructions Judge Cahill selects, those of the prosecution or of the defense.

Under second-degree felony murder, the prosecution must prove that Chauvin caused the death of George Floyd, without intent to cause his death, but while Chauvin was committing or attempting to commit a felony. The prosecution is basing this charge on felony assault in the third degree. While Minnesota law allows that assault can mean, "an act done with intent to cause fear in another of immediate bodily harm or death," the prosecution's proposed jury instruction concedes that "assault as used in this case, is the intentional infliction of bodily harm upon another." *See* Minn. Stat. 609.02, Subd. 10.

But here is where the prosecution and defense diverge. The prosecution wants the jury to be instructed: "'Intentional infliction of bodily harm' means that the defendant intentionally applied force to George Floyd without George Floyd's consent, and that this physical act resulted in bodily harm. This requires proof that the defendant's application of force to George Floyd was not accidental. It does not require proof that the defendant intended to cause bodily harm or violate the law, and it does not require proof that the defendant knew he would cause bodily harm or violate the law."

Setting causation aside -- which will be a major battle of the expert witnesses if Judge Cahill adopts this instruction -- it increases the likelihood of a guilty verdict for second-degree murder. There is little doubt that Chauvin intended to apply the force of his knee on George Floyd's neck and that the force caused Floyd to suffer bodily harm. And it avoids the challenging prospect of getting inside Chauvin's mind to analyze his intent in a case where the defendant is extremely unlikely to testify.

But Chauvin's defense counsel has other ideas and requests that the requirement be added to the felony murder charge: "a 'special danger to human life' must have been caused by the underlying felony, in turn determined by the circumstances under which the felony was committed." Nothing like a little confusion injected into the instructions to increase the chances of a hung jury or defense verdict. While Judge Cahill is unlikely to allow that to happen, it is less clear as to how the word "intentional" will be defined to the jury. The defense submitted this definition: "The word intentional' means 'the actor either has a purpose to do the thing or cause the result specified, or believes that the act performed by the actor, if successful, will cause that result.' The defendant must have knowledge of those facts which are necessary to make the defendant's conduct criminal."

Again, the suggested instruction is confusing, perhaps intentionally so. What is the "result specified"? -- the knee in the neck, the infliction of bodily harm, or the death of George Floyd? And how could the prosecution prove Chauvin has knowledge of facts necessary to make his conduct criminal where he is involved in arresting a man suspected of a crime?

Given what the video depicts, Chauvin callously refusing to remove his knee from Floyd's neck, with bystanders imploring him to do so, and even after Floyd stops speaking or, apparently, breathing, perhaps it does not matter what instruction is given.

But unless the instructions are clear, the concern is that the jury will convict only on a manslaughter charge. (Second-degree manslaughter is defined as a "person's culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another." Minn. Stat. 609.205.) For the third-degree murder charge, the prosecution must prove Chauvin acted with a "depraved mind, without regard for human life." Neither side has submitted a definition for the phrase "depraved mind," and where a phrase is not defined the jury "should apply the common, ordinary meaning of that word or phrase." And what does depraved mind mean? The prosecution will probably assert that you should read the entire phrase together, that if someone acts without regard for human life, it shows they have a depraved mind.

The defense, who did not submit an instruction for third-degree murder in its initial submissions, will likely introduce a commonly accepted legal definition for "depravity of mind" as "characterized by an inherent deficiency of moral sense and integrity. "It consists of

evil, corrupt and perverted intent which is devoid of regard for human dignity, and which is indifferent to human life. It is a state of mind outrageously horrible or inhuman." Chauvin's legal team will emphasize the training he received and show training photos and materials in which officers are trained to place a knee on the neck to control an uncooperative suspect. How could Chauvin be acting with evil, corrupt, and perverted intent if he is following training?

Again, expert testimony will be key to explain the limited circumstances where placing a knee on the neck is permissible. In most jurisdictions, any type of neck compression is only allowed if the subject presents an imminent threat of bodily harm or death to the officer or others. It is hard to argue that the handcuffed Floyd, begging for breath, water and his mother, posed a threat to anyone. It will be very interesting to hear expert testimony on how Minneapolis police officers are trained on this topic.

Meanwhile, the attorneys are jockeying for position on how the jury is instructed on the role of police officers using force. The prosecution, understandably, wants this conduct to be evaluated using the "objective reasonableness" standard, and that if the force is not necessary, it's not reasonable. Its proposed instruction, states, in part, "Any use of force beyond ... [what is necessary] is not reasonable. To determine if the actions of the police officer were reasonable, you must look at those facts known to the officer at the precise moment he acted with force. You must decide whether the officer's actions were objectively reasonable based on the totality of the facts and circumstances confronting the officer, without regard to his own state of mind, intention, or motivation."

Once again, the defense wants to add another element utilizing, it asserts, Minnesota case law analyzing the *Graham v. Connor* standard, "[i]n considering the reasonableness of the use of force, the jury may consider whether the force was applied in good faith by the defendant." (Chauvin's defense lawyers also submitted the jury instruction that is often used in Section 1983 excessive force cases "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer at the moment he is on the scene, rather than with the 20/20 vision of hindsight. The reasonableness inquiry extends only to those facts known to the defendant, and not the other officials on the scene or their perception or preference of what should have occurred, at the precise moment the defendant acted with the force he did. The determination of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments about the amount of force that is necessary in a particular situation under circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor*, 490 U.S. 386, 396 (1989). The prosecution objects to this as not appropriate in a criminal case and especially not given the facts of this case.) Good faith is a subjective standard and poses the challenge of proving the mind-set of an individual who will likely only be seen in a video where he barely speaks.

Prosecuting police officers is notoriously difficult, given that jurors who remain on a jury panel are often those who do not have a strong opinion on police violence. While the George Floyd video galvanized a nation and may result in the passage of nationwide legislation, the jury will be left to decide the case on the evidence presented in court and the application of that evidence to the law which is presented in the jury instructions the judge provides to them.

While Chauvin is likely to be found guilty of something, a manslaughter conviction alone -- where he is likely to get out of prison in four years -- will disappoint activists and sympathizers alike. Whether Chauvin is found guilty of one of the more serious murder charges, with 25 years for third degree and 40 years for second degree, will likely turn on the instructions that are provided to the jury. The closer those instructions adhere to the "objective reasonableness" standard, the higher the likelihood of a guilty verdict on one of the murder charges.

But if the jury is asked to evaluate Chauvin's mens rea, and that he had the intent to commit a crime, was evil, or acted in bad faith, it will be harder to achieve a unanimous verdict with the beyond a reasonable doubt burden of proof.

Civil rights advocates strongly believe that police officers should be judged on an objective standard based on the law and on police training that emphasizes a reverence for life. Police officer advocates emphasize the inherent danger of the job and the subjective fear that often accompanies it. It is often said that picking a jury is the most important part of the trial. In the case of the *Minnesota v. Chauvin*, the second most important part could be which jury instructions they are provided.

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