No. 19-7587

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

LANNON LAVAR BURDUNICE – PETITIONER (pro se)

VS.

STATE OF MINNESOTA – RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

MINNESOTA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Lannon Lavar Burdunice (O.I.D. #234804)

MCF-STILLWATER

970 Pickett Street North

Bayport, Minnesota 55003

Questions Presented

1. MUST MY CONVICTION FOR SECOND DEGREE INTENTIONAL MURDER BE VACATED AND A JUDGEMENT OF ACQUITTAL ENTERED INSTEAD WHERE THE JURY'S GUILTY VERDICT GOES AGAINST THE WEIGHT OF THE EVIDENCE?

2. IS THE STATE'S CIRCUMSTANTIAL INTENT TO KILL EVIDENCE LEGALLY SUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE CONVICTION FOR SECOND DEGREE INTENTIONAL MURDER? AND AM I CONSTITUTIONALLY ENTITLED TO A JUDGEMENT OF ACQUITTAL?

3. DID THE DISTRICT COURT VIOLATE MY FEDERAL CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE BY EXCLUDING EVIDENCE SHOWING HOFMANN'S VIOLENT AND AGGRESSIVE CHARACTER AND PAST PATTERN OF AGGRESSIVE AND THREATENING BEHAVIOR?

4. DID THE DISTRICT COURT COMMIT REVERSIBLE ERROR BY ALLOWING THE STATE TO SPECIFY THE NATURE OF MY PRIOR CONVICTIONS FOR VIOLATION OF AN NO-CONTACT ORDER AND THREATS OF VIOLENCE WHEN IMPEACHING MY CREDIBILITY?

5. AM I ENTITLED TO A NEW TRIAL BECAUSE THE PROSECUTOR'S PURPORTED REASON FOR REMOVING A BLACK JUROR WAS AN OBVIOUS PRETEXT FOR RACIAL DISCRIMINATION?

6. AM I ENTITILED TO A NEW TRIAL DUE TO THE PREJUDICIAL AFFECT OF CUMULATIVE PROSECUTORIAL MISCONDUCT?

7. DID CUMULATIVE JUDICIAL ERRORS AND MISCONDUCT VIOLATE MY CONSTITIUTIONAL PROTECTIONS AND RIGHTS TO A FAIR TRIAL, DOUBLE JEOPARDY, DUE PROCESS, AND EQUAL PROTECTION OF THE LAW?

8. MUST MY CONVICTION FOR INELIGIBLE POSSESSION OF A FIREARM BE VACATED AND MY CASE REMANDED FOR RESENTENCING ON THE MURDER COUNT, WHERE THE DISTRICT COURT DISCHARGED THE JURY WITHOUT COMPLETING THE GUILTY VERDICT AND WITHOUT PROVIDING ME A REASONABLE OPPORTUNITY TO INDIVIDUALLY POLL THE JURORS?

LIST OF PARTIES

[_] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgement is the subject of this petition is as follows:

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RELATED CASES

- State vs. Burdunice, No. 27-CR-16-19342, Hennepin County Fourth Judicial District Court. Judgement entered May 8, 2018.
- State vs. Burdunice, No. A18-1269, Minnesota Court of Appeals. Judgement entered affirming district court decision July 8, 2019.
- State vs. Burdunice, No. A18-1269, Minnesota Supreme Court. Petition for review denied on September 17, 2019. Judgement affirming MN Court of Appeals decision entered September 26, 2019.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished.

The opinion of the Minnesota Supreme Court appears at Appendix C to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided my case was September 26, 2019. A copy of that decision appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause or the Fourteenth Amendment forbids discrimination on account of race in selection of the petit jury.

The Due Process Clause of the Fourteenth Amendments requires the prosecutor must prove beyond a reasonable doubt every fact necessary to constitute the crime charged.

The Fourteenth Amendment also provides every criminal defendant has the right to be treated with fundamental fairness and afforded a meaningful opportunity to present a complete defense. *See also*; Minn. Const. Art. I §7.

The Double Jeopardy Clause of the Fifth Amendment no person shall be subject for the same offense to be twice put in jeopardy of life or limb, nor be deprived of life, liberty, or property without due process of law

The Confrontation Clause of the Sixth Amendment in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been ascertained by law, and to be informed of the nature and cause of the accusation , to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense

United States Constitution Fifth Amendment Fair Trial Clause every accused shall enjoy the right to a jury trial that is fundamentally fair.

STATEMENT OF THE CASE

On July 19, 2016, I shot and killed Joshua Hofmann on accident, but in self-defense after attempting to sell him marijuana.

On August 11, 2016 a grand jury indicted me for first-degree intentional (felony) murder while committing an attempted aggravated armed robbery and ineligible possession of a firearm. I plead not- guilty to the indictment and asserted self-defense, accidental homicide, and duress.

A jury trial commenced on September 18, 2017, with the Honorable Regina Chu presiding. On October 2, the jury notified the court it was deadlocked on the murder counts and produced a signed guilty verdict on the ineligible possession of a firearm charge. Judge Regina M. Chu discharged the jury and set a date for a second trial. The second trial commenced on February 26, 2018 I was tried again on the murder counts. That jury found me guilty of second-degree intentional murder. On May 8, 2018, Judge Chu denied a defense motion for judgement of acquittal and sentenced me to 60 months in prison for ineligible possession of a firearm and 480 months in prison for second-degree murder.

On August 6, 2018 I appealed the district court's judgement and the court of appeals, Bjorkman, J., issued an opinion on July 8, 2019, affirming my convictions. I filed a petition for review of the lower courts' decisions to the Minnesota Supreme Court. The Minnesota Supreme Court rejected my petition and affirmed the judgement of the Minnesota Court of Appeals on September 26, 2019. This petition for writ of certiorari follows:

REASONS FOR GRANTING REVIEW

This Court should exercise its' discretionary review of the decision filed by the Minnesota Court of Appeals affirming the judgement of the Hennepin County District Court filed on May 8, 2018 and make the proper and appropriate corrections to these errors in the interest of justice. Here are the following reasons:

1. The decision of the Minnesota Court of Appeals presents important constitutional and judicial questions on which this Court should rule;

2. The Minnesota Court of Appeals has decided questions of material law and of material fact in direct conflict with applicable precedent of Minnesota Appellate Courts and appellate courts in other jurisdictions;

3. The lower courts have so far departed from the acceptable and usual course of justice set forth in the United States Constitution, Minnesota State Constitution, and by this Court that this Court should exercise its' supervisory powers to correct;

4. The resolution of the questions presented has both statewide and nationwide impact on other cases similar to this one; and

5. These questions will likely recur unless resolved by this court.

I. **Insufficient Evidence and Inconsistent Guilty Verdict**

a) **The State's Circumstantial Intent Evidence is Insufficient:** There must be sufficient evidence to constitutionally support a criminal conviction. United States v. Reyes, 660 F 3d. 454 (9th Cir.2011). In the first trial, half of the jury members found the state's evidence insufficient to convict me and the second jury explicitly and unequivocally acquitted me of the charges that the state's evidence sought to prove. The records of both murder trials indicate that the evidence presented for the two different degrees of intentional murder was the same, and at a prior omnibus hearing the prosecutor made this very clear to the court when asked why the state hadn't fulfilled discovery obligations the defense. The key element in contention at trial was the state of mind element of intent and the only evidence in the record as to my state of mind was my direct testimony. Any evidence presented by the State relating to the element of intent was completely contextualized in the theory of the aggravated robbery and presented by circumstantial evidence. In cases like this the Due Process Clause of Fourteenth Amendment of the U.S.

Constitution requires that in cases where a conviction rests largely or wholly on circumstantial evidence, in order for the state to meet its burden of proof and the conviction be sustained, the circumstantial evidence must prove guilt and exclude all other reasonable inferences of innocence. United States v. Mulderig, 120 F 3d. 354 (5th Cir.1997). The state did not meet its burden of proof. *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975).

b) **The Jury's Guilty Verdict For Second Degree Intentional Murder Goes Against the Weight of the Evidence:** The Minnesota Court of Appeals held that the state 'proved' the circumstances relevant to Burdunice's intent. The jury rejected the state's theory in both trials. For the Minnesota Court of Appeals to hold that the state proved those circumstances is improper and a miscarriage of justice. The record makes it obvious that the Court of Appeals did not review the record and the evidence in this case carefully to the appellate standard, and if they did then they are clearly lying about the validity of the state's circumstantial evidence. The district court, at sentencing, and the Minnesota Court of Appeals, on appellate review, continue to rely on irrelevant evidence presented by the state to prove its' factual theory of the case being an attempted aggravated robbery turned angry intentional killing. Because the jury rejected the state's theory of this case the guilty verdict is against the weight of the evidence. *People v. Bailey*, 94 A.D. 3d 904, 905, 942 N.Y.S. 2d 165, 167-68 (2d Dept. 2012); *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S. Ct. 2211, 2218, 72 L. Ed. 2d 652 (1982); *see also United States v. Gonzales*, 136 F.3d 6, 12 (1st Cir. 1998) at 12.

This Court should exercise its discretionary review to determine whether the state's circumstantial intent to kill evidence passes constitutional muster to sustain the conviction of second degree intentional murder, whether the jury's guilty verdict on this count goes against the weight of the evidence, and whether I am constitutionally entitled to a judgement of acquittal

II. **Evidentiary rulings:** The lower courts' evidentiary rulings are in conflict with federal rules of evidence and they abridged my federal and state constitutional rights to a fair trial, due process, to present a complete defense, and equal protections of the law.

a) **Exclusion of Hofmann's character evidence:**

Prior to trial, I sought permission to introduce evidence of Hofmann's past acts of violent and aggressive character and pattern of acting in an aggressive and threatening manner through the cross-examination of Kaitlyn Schroeder, a witness the state intended to call as a witness.

The evidence was admissible to rebut Schroeder's testimony that Hofmann was not the aggressor and that he only used his airsoft guns for "recreational use". After denying the pretrial motion for this evidence to come in the district court denied my request to reconsider its ruling after hearing my testimony. This evidence was admissible under State and Federal Rules of Evidence 403, 404(a)(2), 404(b), 405, and 406. An incorrect application of the law constitutes an abuse of the district court's discretion. *Clark v. Clark, 642 N.W. 2d 459, 465 (Minn.App.2002)*. The district court abused its discretion when excluding this evidence.

Under our system of jurisprudence, every criminal defendant has the right to be treated with fundamental fairness and 'afforded a meaningful opportunity to present a complete defense'. *California v. Trombetta, 467 U.S. 479, 485 (1984).* This includes the opportunity to develop the defendant's version of the facts, so the jury may decide where the truth lies. *Id.* at 194 (quoting *Washington v. Texas, 388 U.S. 14, 19 (1967)*. In *Chambers v. Mississippi, 410 U.S. 248, 302 (1973)*, this Court recognized: a defendant's right to present evidence is not absolute; the defendant "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. But evidentiary rules "may not be applied mechanistically to defeat the ends of justice." *Id.* Nor can a defendant's "weighty interest" in presenting a complete defense be abridged by evidence rules that are "arbitrary or disproportionate to the purposes they are designed to serve." *Holmes v. South Carolina, 547 U.S. 319, 324-25 (2006)* (quotations omitted). Obviously, defendants have "a weighty interest" in presenting "the most convincing" evidence available to prove their self-defense claim. *Holmes, 547 U.S. at 325*. Relying on supreme court precedent, the district court nonetheless excluded evidence of Hofmann's past acts because I had no knowledge of those acts. Reliance on Minn. R. Evid. 405 to exclude the evidence in this case was, notwithstanding the supreme court's past reliance on the rule, improper. The Committee Comment to Rule 405 recognized that "of all three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing." Rule 405, Committee Comment—1977 (quoting Supreme Court Advisory Committee note to Federal Rule of Evidence 405). Rule 405 clearly impinges on a defendant's "weighty interest" by denying defendant's the opportunity to present the "most convincing evidence" they can garner to support their defense. It does so under the rationale that allowing inquiry into the "victim's" specific instances of conduct can arouse prejudice, cause confusion and surprise, and consume time.

The rule itself recognizes, however, that these concerns are not weighty enough to preclude a party from proving a relevant character trait with specific instances of conduct when character is directly at issue and deserving of a searching inquiry. And, despite these concerns, the rule allows inquiry into specific instances of conduct on cross-examination of character witnesses.

My self-defense defense hinged on whether the jury believed I was, or Hofmann was the aggressor. Evidence that Hofmann had a propensity for violent and aggressive behavior was accordingly a critical issue that in this case was "deserving of a searching inquiry." And admitting the evidence in this case would not have implicated the rationale underlying Rule 405's ban on specific instances of conduct. This Court should review the district court's improper reliance on supreme court precedent and it's misapplication of Rule 405.

Although the court of appeals claims "Burdunice does not articulate any basis for disregarding the plain language of rule 405(a) and binding supreme court case law", on this issue a good portion of my argument was devoted to explaining how exclusion of this evidence served no valid state interest and violated my federal constitutional right to present a complete defense. See Appellant's Brf.26-29. I argued that the evidence of Hofmann's past acts was admissible under Rule 404(b) (which is "an exception to the limit of Rule 405 on the use of evidence of specific acts in a self-defense case" *State v. Bland, 337 N.W. 2d. 378, 383 (Minn.1983)*) because it showed a pattern of aggressive behavior markedly similar to how I explained Hofmann had acted on this occasion. See Appellant's Brf at 29-31. The court of appeals rejected this argument on the grounds that "specific prior conduct" is not admissible to show action in conformity therewith.

The mere danger of the jury misusing evidence of Hofmann's prior similar acts of violence as propensity evidence was no greater than the danger of the jury misusing evidence of my prior convictions for "violation of a no-contact order" and "threats of violence" as propensity evidence. Yet, the court of appeals had no problem affirming the district court's decision to let the state specify the nature of these two convictions when admitting the evidence under Rule 609.

This Court must "be satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, an average jury (i.e., a reasonable jury) would have reached the same verdict." *Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).* I testified that I shot Hofmann in self-defense without the intent to kill him and only after Hofmann struck me with the car and "pinned me against the garages", and threatened me while reaching for what I thought was his gun. If fully credited by the jury, I acted in self-defense.

The prosecutor spent a vast majority of his closing argument trying to convince the jury not "to buy" my "uncorroborated testimony" or my "bogus self-defense claim," but instead to credit Schroeder's version of events. The jury may well have, as the prosecutor argued it should, found my uncorroborated version of events implausible. However, the evidence that the district court excluded, had it been admitted and its damaging potential fully realized, would have shown that my description of Hofmann's character and the pattern of behavior he has exhibited in other similar situations where he wanted drugs and couldn't get them was correct. This undoubtable would have made my version of events much more credible, and could reasonably have led the jury to conclude the state had failed to prove beyond reasonable doubt that I did not act in self-defense.

The burden is on the state to prove the exclusion of my evidence was harmless beyond a reasonable doubt. *Chapman v. California, 386 U.S. 18, 24 (1967)*. The state simply cannot meet that burden. "Because the crux of the defendant's defense rested on [his] credibility and because [his] credibility could be directly corroborated through the excluded evidence, exclusion of the [evidence] was prejudicial and more probably than not affected the verdict." *DePetris v. Kuykendall, 239 F. 3d 1057, 1064 (9th Cir. 2001)*

This Court should grant review to ensure that rules of evidence are administered even-handedly in a manner that does not prejudice a defendant, and in a manner that gives proper deference to a defendant's constitutional rights to present a complete defense.

b) Allowing the state to specify the nature of my prior convictions:

The state sought to impeach me with my three prior convictions: violation of a No-Contact Order; Second degree Assault; and Terroristic Threats. I opposed and asked the court, if it allowed the impeachment, to prevent the state from specifying the nature of the convictions. The court allowed the state to inform the jury I had convictions for "violation of a no-contact order" and "threats of violence", and a third unspecified conviction. The court's refusal to sanitize all three of my convictions was prejudicial error. Identifying the nature of my prior convictions had no probative value whatsoever. None of my prior convictions involved offenses that by definition involved dishonesty or false statements, so telling the jurors the nature of those convictions did nothing to further their assessment of my credibility. Telling the jury that I had convictions for violation of a no-contact order and threats of violence on the other hand, was wrought with prejudice.

I testified that I shot Hofmann in self-defense. By identifying the nature of my prior convictions the state successfully portrayed me as someone who is prone to violence and who was an on-going danger to someone a court had determined needed protection from me. Evidence of past criminal activity is inadmissible to show criminal propensity. *United States v. Lattner, 385 F. 3d. 947 (6th Cir. 2004)*. The record indicates that, although introduced under the guise of impeachment, this was the state's real purpose in seeking to introduce evidence of my prior convictions. See State's 8/9/17 Memo in Support of Impeachment Motion, at 5 (arguing it "would be patently unfair for the jury to be unaware the defendant has three convictions for *violent* felonies") (emphasis added). Ordinarily, on cross-examination, details of defendant's prior convictions should not be exposed to the jury. *United States v. Williams, 272 F. 3d. 845 (7th Cir. 2001)*.

The state, in short, did not need to identify the nature of my prior convictions to accomplish its' goal of impeaching my credibility, and doing so did not further the jury's credibility determination in any meaningful way. But identifying the nature of my convictions created an unacceptable risk jurors would misuse the information as propensity evidence when resolving my self-defense claim. This Court should grant review of this issue to determine if the probative value of allowing the state to identify the nature of any of my prior convictions was outweighed by the potential for unfair prejudice.

The district court ruled that the evidence was admissible under Minn. R. Evid. 609 and held that the probative value of allowing the state to identify the nature of these two convictions outweighed any potential prejudice. This Court should grant review of this issue to determine if the district court abused its discretion by refusing to sanitize all three of the convictions it admitted for impeachment.

The jury in this case had to decide whether I acted in self-defense and with the intent to kill. This required the jury to decide whether to credit me or Schroeder's version of events. The wrongly-admitted information about my prior convictions was inconsistent with my version of events and my claim of an unintentional killing in self-defense because it portrayed me as someone who is prone to acts of violence and who the courts perceived to be a threat to others, and for this reason undoubtedly played a significant role in the jury's guilty verdict. The district court's jury instructions did not preclude the possibility the jury would misuse the evidence as propensity evidence.

Nothing about Judge Chu's instruction would have prevented the jury from improperly concluding that my testimony was not credible because "the type of crime[s]" I was convicted of were inconsistent with how I explained that I acted in self-defense in this case. The court should have made clear that while the jury could consider my prior convictions to the extent they demonstrated a general lack of respect for the law when assessing my credibility it could not use the evidence as *propensity* evidence when determining whether I committed the charged crime. This Court should review this issue to determine whether the Rules of Evidence were applied unevenly by the lower courts by excluding my character evidence of Hofmann but allowing the state to specify my prior convictions. This Court should grant certiorari to determine if this error was prejudicial and affected the guilty verdict for Count 2: Second degree intentional murder.

III. ***Batson* Review:** The prosecutor used a peremptory strike to remove Beverly Emerson who, like myself and unlike Joshua Hofmann, is black. Ms. Emerson, when questioned by the defense, affirmed her belief that the justice system was fair "because everyone gets a chance" and is treated as an "equal." Ms. Emerson testified she has never had a bad interaction with police, had no preconceived notions about this case, and was interested in seeing how the system worked. When asked by defense counsel if she had ever made a "really big life decision," Ms. Emerson discussed a very intimate and personal decision she had made as a young woman about whether to abort her child or not. The prosecutor questioned Ms. Emerson along the same lines and got the same results. After a lunch break, the prosecutor informed the district court that Ms. Emerson had stated in her written questionnaire that she did not know anyone "close to her" who had been arrested, charged, or convicted of a crime, but he had discovered that the man he believed to be the father of Ms. Emerson's child "has a fairly lengthy criminal history." The prosecutor asked the district court to question Ms. Emerson about this, and over my objection, the court agreed to do so. When the district court questioned Ms. Emerson about the state's allegations it was revealed by Ms. Emerson that the name the state had provided to the court was incorrect. After verifying the correct name of this man, Ms. Emerson, when questioned by the district court, acknowledged that the father of her child "probably" had a criminal record, but told the court she did not know for what crimes, if any, he had been charged with or convicted of. The district court then lied to Ms. Emerson and told her that the court had made the search and inquiry into her private life, "We kind of looked into Mr. Leboeuf's background a little. 'I made the search' because we do that with all jurors, all potential jurors."

This statement was clearly false because the district court, upon the states contention, made no effort at all to do a fact check on the state's inaccurate information. After the district court finished questioning Ms. Emerson the prosecutor chose to continue grilling Ms. Emerson about her knowledge of this man's criminal history all to get the same answer from Ms. Emerson. The state then moved the district court to remove Ms. Emerson for cause, but the district court denied the for cause strike after observing, "I watched her and I don't think. It didn't look like she was lying about not knowing." The prosecutor exercised a peremptory strike on Ms. Emerson accusing her of lying about not knowing about her child's father's criminal history and we raised a *Batson* challenge. Ms. Emerson was the second black juror that the prosecutor used a peremptory strike on in the second trial. The prosecutor brought forward a race neutral explanation, accusing Ms. Emerson of perjuring herself in her testimony with no clear and concise proof to support his accusation. All of the prosecutor's allegations were sheer speculation. In support of my *Batson* challenge, I argued a prima facie case of racial discrimination existed because Mr. Emerson was black, the jury pool was predominantly white, "Ms. Emerson was subjected to a level of scrutiny that I've not seen any other juror subjected to," and Ms. Emerson said nothing that would give the state reason to question her impartiality. The district court found no prima facie case of purposeful discrimination because "the State has not gone through the process of attempting to eliminate all potential jurors of color" and "because the state has articulated the reason for the strike. And it has nothing to do with race." The court further found that, "even if a prima facie showing had been made, the state provided a race-neutral reason for the strike and the defense had not proven the reason was a pretext for discriminatory intent." The court affirmed its ruling even after defense counsel informed the court that she had not yet had an opportunity to address the pretext issue. "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez v. New York*, 500 U.S. 352, 359 (1991). The district court, despite its determination that a prima facie case had not been established, ruled on the ultimate question of intentional discrimination. The prima facie issue is accordingly moot, and resolution of this case turns on whether the prosecutor's facially-valid reason was a pretext for discrimination. *Hernandez v. New York*, 500 U.S. at 359. The district court deviated from the proper analysis by considering the prosecutor's reason for the strike when determining whether there was a prima facie showing of discriminatory intent, and by failing to state "fully its factual findings, including any credibility determinations."

The court further erred by refusing to consider "whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." *Snyder v. Louisiana, 552 U.S. 472, 477 (2008)*. The issue at step three is "the validity of the explanation—that is, [the court must] determine whether the proffered race-neutral reason was the actual basis for the peremptory strike or whether it was offered to mask a discriminatory purpose." *Batson v. Kentucky, 476 U.S. 79, 88 (1986)*; *see also, Flowers v Mississippi*, 139 S.Ct. 2228, 2019 WL 2552489 (U.S.2019). A relevant factor is whether the juror in question was treated the same as other jurors. *Id.* Disparate treatment can be a telltale sign of discriminatory intent. *Id.*; *see also Miller-El v. Cockrell*, 537 U.S. 322, 344 (2003) (recognizing that disparate questioning of jurors can be evidence of purposeful discrimination). Ms. Emerson was treated significantly differently than other jurors. Although the prosecutor claimed to have run record checks on all the jurors, when it came to Ms. Emerson he did much more than check to see if she had a criminal record. Nothing in the record indicates, and the prosecutor did not claim, he ran record checks on other juror's spouses, family members, significant others, or associates. Nor did the prosecutor openly question the credibility of any other juror, any other white juror. This disparate treatment of Ms. Emerson is indicative of racial animus.

When determining whether a prosecutor's race-neutral explanation for a peremptory strike is pre-textual a court also considers the "persuasiveness of the justification" offered for the strike. *Purkett v. Elm*, 514 U.S. 765, 767-68 (1995) at 768. And if the prosecutor's explanation relies on the juror's demeanor the "court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." *Snyder v. Louisiana, 552 U.S. 472, 477 (2008)*. The prosecutor's reason for striking Ms. Emerson was hardly persuasive. The baseless attack on Ms. Emerson's credibility "naturally gives rise to an inference of discriminatory intent." *Snyder*, 552 U.S. at 485.

The prosecutor argued the record refuted the suggestion that race played a role in his decision to strike Ms. Emerson because there was no pattern of him striking minority jurors. The defense need not establish a pattern of strikes to establish a *Batson* violation. "[U]nder *Batson*, the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors." *United States v. Battles*, 836 F.2d 1084, 1086 (8th Cir. 1987). This Court will find in the record of this case that the prosecutor's pattern of targeting black jurors is markedly similar to the pattern of striking found in the prosecutor in *Flowers v Mississippi*, 139 S.Ct. 2228, 2019. The prosecutor in my case struck nearly every black prospective juror (in a predominantly white jury panel with a white decedent), asked black jurors more questions than whites, and more rigorous questions to black jurors, just as Doug Evans did in Flower's case.

Moreover, Ms. Emerson was not the only person of color the prosecutor removed with a peremptory strike. The first black juror questioned, a black male, the prosecutor used a peremptory strike to remove him as well because of so-called, "language difficulties". Although this strike was not challenged by defense counsel, "use of language difficulty as a basis for peremptory strikes" can easily be invoked as "a pretext for racial or national origin discrimination." *United States v. Canoy*, 38 F.3d 893, 900 (7th Cir.1994); *see also Hernandez v. New York*, 500 U.S. at 371 ("It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis"). At the first trial, I exercised a *Batson* challenge when the state used a peremptory strike to remove the only black male questioned during jury selection after accusing him of being biased against the state just because the man answered the jury questionnaire honestly and stated that he had strong views on racism, fairness and equality in the justice system, because he recounted a time where he was unduly harassed by white Minneapolis Police officers, and because he believed there was still racial discrimination in America today. The prosecutor's treatment of other black jurors, then, does nothing to refute indications that Ms. Emerson's removal was racially motivated.

The Equal Protection Clause does "forbid discrimination on account of race in selection of the petit jury." *Batson v. Kentucky, 476 U.S. 79, 88 (1986)*. This Court and many other courts around the U.S. has recognized that jury selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our court system of justice, and also violates the equal protections clause of the Fourteenth Amendment to the U.S. Constitution. *Flowers v Mississippi*, 139 S.Ct. 2228, 2019 WL 2552489 (U.S.2019). This Court has also recognized that people of color have a general distrust of the criminal justice system and exclusion from jury duty only fosters that distrust. *Batson, 476 U.S. 79.* This Court should grant review of the prosecutor's use of a peremptory strike to remove Ms. Emerson because the lower courts misapplied the three-step *Batson* analysis when determining whether the prosecutor's strike was racially motivated. The district court's analysis was flawed because it, inter alia: (1) relied on the prosecutor's reason for the strike and the absence of a pattern of strikes when determining whether there was a prima facie case of discriminatory intent; (2) allowed the strike before defense counsel addressed whether the prosecutor's reason was a pretext; and (3) failed to give proper weight to its own assessment of Ms. Emerson's credibility when evaluating the prosecutor's asserted reason for the strike. The Minnesota Court of Appeals erred by: (1) focusing on step one when the trial court proceeded to steps two and three; (2) deferring to the district court's ruling on step three where the district court failed to follow the proper procedure when ruling on the strike; and (3) ignoring obvious indications the strike was racially motivated.

Careful application of the Batson standard is essential in cases like this if this Court is serious about reducing the distrust people of color have in the judicial system. Because the lower courts misapplied that standard, this Court should grant review and subject the prosecutor's strike of Ms. Emerson to the scrutiny it deserves and that the federal constitution requires.

IV. **Cumulative Prosecutorial Misconduct:** This Court should grant review to determine whether my trials were prejudiced due to cumulative prosecutorial misconduct and if these issues affected the guilty verdict. The evidence of guilt was not overwhelming in this case but the instances of prosecutorial misconduct found in the records of both jury trials are many. In both jury trials the prosecutor improperly: misstated the burden of proof; burden shifted; misstated the law; vouched for a government witness; misstated, misrepresented, and mischaracterized evidence–speculations, assumptions, and innuendoes on material element of intent and the sequence of events; made highly inappropriate and prejudicial comments and remarks about me; disparaged my character; disparaged defense counsel; belittled my defense by telling the jury that my self-defense assertion was made up and was the only available defense for me to use; insinuated I tailored my testimony–making comments about me being in trial and hearing testimonies; injecting his opinion and calling them "facts"; elicited inadmissible evidence and admitted inadmissible evidence to the jury; made comments to jury about matters not in evidence; mislead the jury– which included telling the jury I was asking state witness Genishia Cohen to come testify differently for me at trial; inflaming jury passions; misused Rule 609 evidence in prejudicial manner; racially discriminated against black prospective jurors, and improper reliance on irrelevant evidence to sway the court at sentencing. The Minnesota Court of Appeals made an unreasonable determination of the facts on this issue by saying this claim lacked merit.

The duty of a prosecutor is to see that justice is done on behalf of both the victim and the defendant. *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935). The gratuitous character attacks were unwarranted. "Freedom from malicious prosecution is a constitutional right." *Kinzer v. Jackson,* 316 F.3d. 139 (2nd Cir. 2003)."In some cases, although no single error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant." *United States v. Green*, 648 F.2d 587 (9th Cir. 1981). "In those cases where the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors." *United States v. Berry*, 627 F.2d 193 (9th Cir. 1980); *see also*, *United States v. Wallace,* 848 F.2d 1464, 1476 (9th Cir. 1988); *United States v. Young,* 470 U.S. 1, 11, 84 L. Ed. 2d 1, 105 S. Ct. 1038 (1985). The jury rejected the state's theory of the case so it is unclear what factual inferences they chose to use to convict me of second degree murder.

This Court should grant review to determine if prosecutorial misconduct weighed on the guilty jury verdict. *United States v. Olano,* 507 U.S. 725, 734, 113 S. Ct. 1770, 123 L. Ed.2d 508 (1993); *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997).

V. **Cumulative Judicial Errors and Judicial Misconduct:**

A. The District Court disregarded the Law of the Case Doctrine and Double Jeopardy Arguments When It Granted The State's Request To Add A Lesser- Included Offense At The Retrial

At the end of the second trial the state requested that the court submit a second degree intentional murder instruction to the jury as a lesser included offense. I objected to this and argued for the court not to add any new lessers at that point on Double Jeopardy principals, the Law of the Case Doctrine, and because the prosecutor expressly waived the court's invitation to add lesser included offenses in the first trial. The district court relied on Minnesota Supreme Court precedent in submitting the lesser to the jury. Not only was the state able to retry me, he was able to change his theory of the case substantially after hearing my testimony to fit second degree intentional murder which I believe also violated my double jeopardy protections.

The legislature has not made it clear in Minn.Stat.§ 609.04 (or in any other statute) whether lesser-included offenses can be added at the state's request at a retrial after a deadlocked jury nor does Minnesota courts have any clear case law on this question. This Court should grant certiorari to resolve this unsolved issue and also to guide the courts on dealing with this issue because it abridges defendant's constitutional protection against double jeopardy.

B. The District Court Committed Reversible Error By Giving Improper And Inadequate Jury Instructions

In the first trial the jury deliberated for four days and came back hung on the murder counts. During their deliberations the jury came back with several questions concerning the Instructions on the elements of aggravated robbery and attempt that went to the felony murder counts. The trial judge erred by (1) not fully answering the jury's question, thus leaving them confused about an essential element of the crime, (2) failed to define attempt for the jury, (3) altered the language of the self-defense JIG at the prosecutor's urging and over my objection, making a creative self-defense JIG that was goofy and confusing, (4) only answering the jury's question that favored a conviction. The jury asked for the definition of attempt which the judge did not give them. "In a felony murder case where the state is required to prove that the defendant committed an underlying

felony, the district court must instruct the jury on all elements and relevant definitions of the underlying felony, in addition to the crime charged. *State v. Charles,* 634 N.W. 2d 425 (Minn.Ct.App.2001). The jury then asked if all elements of aggravated robbery had to be found to convict, and the court referred them to the JIG, and the jury asked if the crime of aggravated robbery had to be completed in order to have an attempt. Judge Chu answered this question at the prosecutor's urging, instructing the jury that they did not have to find that a robbery was completed to convict me of felony murder. The Court of Appeals completely ignored this issue which is one of the most significant ones I raised on my direct appeal. This Court should grant review to determine if the improper jury instructions constitutes plain-error. *United States v. Olano,* 507 U.S. 725, 732, 113 S. Ct. 1770, 1777, 123 L. Ed. 2d 508 (1993); *Johnson v. United States,* 520 U.S. 461, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997)

C. Erred By Denying My Motion To Set The Jury Verdict Aside And Instead Enter A Judgement Of Acquittal

The district court judge, Regina M. Chu, abused her discretion by denying my motion for a judgement of acquittal at sentencing. My grounds for this motion was that the state's intent to kill evidence was entirely circumstantial thus making it legally insufficient as a matter of law and that the jury's verdict went against the weight of the evidence presented by the state in this trial. This Court should grant review of this issue to determine if I am constitutionally entitled to a judgement of acquittal 'as a matter of law' and 'on the facts'.

D. The Trial Court Judge's Bias

- Prejudicial rulings against defense pretrial motions in limine, other motions, trial objections, and allowed inadmissible evidence to be presented to the jury.
- Judge Chu's demeanor towards defense counsel and myself was clearly prejudice and distasteful. At the first trial, during pretrial motions discussions Judge Chu showed extreme lack of interest in the defense motions in limine. While reading our motions Chu said, "blah, blah, blah" and rolled her eyes in a dismissive way and then went on to ruling against our motion requests in favor of the state.
- Lied to a prospective juror, Ms. Emerson, and ignored clear instances of prosecutorial misconduct
- Exaggerated the criminality when sentencing, relied on irrelevant evidence, and focused mainly on my criminal history when sentencing me on the murder conviction.
- The district court violated my constitutional right to be present at all stages of the trial proceedings. I specifically requested, through counsel, to be allowed to be present with my attorneys when they, the state, and the court were to discuss jury instructions and lesser-included offenses back in the judge's chambers. When moving the court on my request the judge responded, "He's not coming in chambers."

This was a violation of my constitutional rights as well as Minn. R. Crim. P. 26.03, subdivision. 1 (1). The Court of Appeals said that I waived this claim by not citing any authority on it but in my direct appeal I clearly cited *State v. Charles*, 634 N.W. 2d 425 (Minn.Ct.App. 2001) which the Court of Appeals made rulings on this issue as well. The Court of Appeals failed to review this case carefully thus they have not met the ends of justice. This Court should grant review to ensure that the lower courts are not being bias or discriminatory and to ensure fairness and integrity in judicial proceedings.

VI. **Incomplete Jury Verdict:** The district court failed to complete the guilty verdict rendered after my first trial finding me guilty of ineligible possession of a firearm. Here, the district court discharged the jury without even indicating it would accept the jury's partial verdict. *See* Minn. R. Crim. P. 26.03, subdivision 20(7). The court did not ask the jury in open court and as a group whether the verdict finding me guilty of ineligible possession of a firearm was indeed its verdict, nor did the court provide me or counsel with a reasonable opportunity to individually poll the jury. The court instead asked for the verdict form, read it, and discharged the jury without providing me an opportunity to request the jurors to be individually polled. It is generally recognized that a district court commits reversible error by discharging a jury without providing the defendant a reasonable opportunity to request individual polling. *See United States v. Randle,* 966 F.2d 1209, 1214 (7th Cir. 1992); *People v. Wheat*, 889 N.E.2d 1195, 1201 (Ill. App. 2008); *see also* 49 A.L.R.2d 619, §§ 8, 9 (Originally published in 1956). In *Randle*, the district court began reading the defendant's probation report in the jury's presence less than two seconds after reading the jury's verdict, and without asking the defense if it wished to poll the jurors. 966 F.2d at 1214. The Seventh Circuit held that providing the defendant less than two seconds to request individual polling was "clearly * * * inadequate," and granted the defendant a new trial. *Id.* In *Wheat*, the Illinois Court of Appeals reversed a conviction because the trial court did not provide the defendant the opportunity to request the jurors be polled until after the verdict was read and the jury discharged. 889 N.E.2d at 1201. In doing so, the court rejected the state's assertion that the defendant had an obligation to interrupt the district court and request polling before the jury was discharged. *Id.* Here, too, the district court provided the defense no opportunity to request that jurors be individually polled before discharging the jury. The court without pause or hesitation discharged the jury immediately after reading the verdict form finding me guilty of ineligible possession of a firearm. As in *Randle* and *Wheat*, this was itself reversible error even if the court had completed the verdict in the first instance by asking the jury as a group to affirm the verdict.

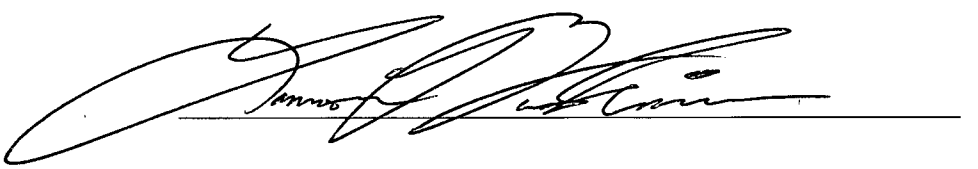
It is axiomatic that a valid, unanimous jury verdict is required before a court can adjudicate and sentence a defendant. *See, e.g., Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). The record here contains no final jury verdict on the ineligible possession of a firearm. Because the court discharged the jury before accepting and completing the verdict there is no jury "verdict" finding me guilty of ineligible possession of a firearm. *See Ogundipe v. State, 33 A.3d 984, 992 (Md. 2011)* (holding "the verdict sheet itself is not the verdict"). The district court accordingly had no authority to convict and sentence me for the ineligible possession of a firearm offense and to then assign an extra point and a half to my criminal history score for this non-existent conviction when calculating my sentence for second degree murder. This Court should grant review to ensure that the lower courts understand the importance of completing a verdict and providing the parties an opportunity for jurors to be individually polled before discharging the jury.

This Court should grant plenary review, for the reasons argued above, to restore the essential balance to our system of jurisprudence. This case provides a vehicle to address uncertain and unanswered questions of law, inconsistencies in inferior court rulings, and proper applications of procedures and doctrines this Court has recognized. This case presents an ideal opportunity to reaffirm the Equal Protection Clause's principals set out in *Batson*, which has been largely ignored and even expressly rejected by the lower courts. While the Minnesota Court of Appeals have abandoned any judicial effort to clarify some of these essential questions of substantial law in this case, and the courts have contradicted it's rulings in older cases which rulings support my contentions on this appeal, review of this petition is warranted for this Court to enforce the Constitution's structural guarantees of fairness and equality and to ensure fairness and integrity in judicial proceedings. This Court should grant certiorari because this case provides the Court with the best opportunity to consider the constitutionality of the convictions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



SIGNED / SWORN BEFORE ME ON

Date: 01/30/2020

THIS 30 DAY OF 01 20 20.