

# Deadly Force: How George Floyd’s Killing Exposes Racial Inequities in Minnesota’s Felony-Murder Doctrine Among the Disenfranchised, the Powerful, and the Police

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## I. Equity in Peril: How Felony-Murder Charging Discretion and Widely Varying Punishments are Deployed Against White Defendants, Defendants of Color, and Peace Officers

Minnesota’s second-degree felony-murder statute represents a unique and creative charging mechanism that affords wide discretion to prosecutors. This makes it ripe for inequitable application. It is the most serious charge brought against George Floyd’s killer, Derek Chauvin.<sup>1</sup> Innovative prosecutors can find ways to charge felony-murder for almost any unintended death, and they often also use it in cases where they allege homicidal intent. At the same time, it is a charge prosecutors can find plausible justification to not bring in most cases. This wide discretion provides leverage to prosecutors in plea negotiations. Plea negotiations can work to the benefit of defendants who are initially charged with second-degree intentional murder by affording them the opportunity to plead down to felony-murder, which carries less than half the guideline sentence.<sup>2</sup> This wide charging discretion also has the potential to unfairly elevate crimes that should have been charged as manslaughter, third-degree murder, or other lesser

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1. Complaint at 1, State v. Chauvin, No. 27-CR-20-12646 (Hennepin County District Court 2020).

2. Sentencing guidelines provide for 306 months for intentional second-degree murder and 150 months for second-degree felony-murder for an offender with no criminal history. MINNESOTA SENTENCING GUIDELINES GRID § 4.A (MINNESOTA SENTENCING GUIDELINES COMMISSION 2020). There are recent Minnesota cases where even defendants indicted for first-degree premeditated murder were allowed to plead all the way down to second-degree felony-murder. See *infra* Section II.B.

offenses. The discretion can entail a twenty-fold inflation in sentencing over the charges on which it is commonly predicated.<sup>3</sup> For these reasons, the charging and disposition of felony-murder cases reveal much about racial disparities in the larger criminal justice system.

The felony-murder doctrine is frequently weaponized against people of color, while prosecutors and judges allow White defendants to exploit the doctrine to their benefit. Killings by peace officers magnify the disparity; officers who should be charged with felony-murder instead face reduced charges, or more frequently, no charges at all.<sup>4</sup> The victim's and the killer's race matter, both in police killings and in the broader application of the felony-murder doctrine. Understanding this context allows for an informed prediction about the felony-murder prosecution of George Floyd's killer, calls for reform or abolition of the felony-murder doctrine, and reveals much about the affected community.

Section II of this Article analyzes sentencings, plea negotiations, convictions, and charging under Minnesota's felony-murder doctrine across race, buttressing statistics with egregious examples and exposing racial inequities in the way felony-murder is deployed. Section III provides a legal analysis of the case against Philando Castile's killer, Jeronimo Yanez. While the world applauded the second-degree manslaughter charge against Yanez, the case was actually ripe for felony-murder charging. This section juxtaposes the Yanez case with a more obscure shooting by a defendant of color who was not a peace officer, illustrating that a killing by a peace officer can be more egregious, yet not result in charges of the level faced by a lay person of color. Section IV exposes how Minnesota peace officers who kill are rarely charged at any level. It provides a brief overview of the only other two prosecuted Minnesota police killings in recent memory, reconciling these cases with larger trends and accounting for race. The section closes with a prediction of the outcome of the Chauvin prosecution and an

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3. Compare MINN. STAT. § 609.66, subd. 1a (2020) (providing for a two-year statutory maximum penalty for reckless or unlawful intentional discharge of a firearm), with MINN. STAT. § 609.19, subd. 2 (2020) (providing for a forty-year statutory maximum for second-degree felony-murder). Relative to statutory maximum comparisons, the disparities are generally less pronounced when it comes to guideline sentences for common predicate felonies. But they are still marked. An offender with a criminal history score of zero faces a guideline sentence of twenty-one months for second-degree assault and 150 months for second-degree felony-murder. MINNESOTA SENTENCING GUIDELINES GRID § 4.A (MINNESOTA SENTENCING GUIDELINES COMMISSION 2020). A guideline sentence for an offender with no criminal history who is convicted of unlawful discharge of a firearm is probation. *Id.*

4. See *infra* Section IV.

acknowledgement of the hurt, the hope, and the heart of the Twin Cities community.<sup>5</sup>

## II. The Color of Injustice: Racial Disparities in Charging and Disposition of Second-Degree Felony-Murder Cases

Defendants of color have different outcomes under the felony-murder doctrine than White defendants. When defendants of color are charged with more serious murder counts, they are less likely to be afforded the opportunity to plead down to second-degree felony-murder.<sup>6</sup> Defendants of color are more often convicted of the most serious charge when the top count is second-degree felony-murder.<sup>7</sup> They are statistically more likely to be convicted in general and are often sentenced more harshly upon conviction.<sup>8</sup> Egregious facts of individual cases across demographics fortify these statistical trends, making it clear that the felony-murder doctrine has long been weaponized against people of color, while representing a relatively lenient alternative for White defendants.

The statistics relied upon in this Article were drawn from a set of all second-degree felony-murder convictions sentenced from 2012 through 2018 in Ramsey and Hennepin counties, where St. Paul and Minneapolis are respectively located.<sup>9</sup> The data set includes offenders who initially faced lesser or greater charges, so long as the conviction was ultimately for second-degree felony-murder. The statistical set includes cases that were resolved through guilty pleas as well as trial convictions. The data include the length of sentences, alongside the guideline sentences. Offender age, gender, and race are also included. This data set reveals much about the deployment, effect, and backdrop of Minnesota's felony-murder rule in perpetuating racial inequities.

### A. Racially Disparate Sentencings

Sentencing statistics across race expose disparities in the application of the felony-murder doctrine. White defendants sentenced to second-degree felony-murder in Ramsey and Hennepin

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5. The Twin Cities is a colloquialism referring to the greater Minneapolis and Saint Paul metropolitan region, generally. For the purposes of this Article, Twin Cities refers primarily to Hennepin and Ramsay counties where the data was gathered from.

6. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2<sup>ND</sup> DEGREE MURDER, § 609.19, SUBD. 2(1): SENTENCED 2012-2018 (2020) (on file with author).

7. *Id.*

8. *Id.*

9. *Id.*

counties from 2012 to 2018 were two-and-a-half times more likely to receive a shorter-than-guideline sentence relative to a longer-than-guideline sentence.<sup>10</sup> Meanwhile, defendants of color received mitigated and aggravated sentencing departures at roughly the same rate.<sup>11</sup> Judges gave reduced sentences to White defendants 25% of the time, compared to 16% for defendants of color.<sup>12</sup> One White defendant was sentenced to a mere five years for his involvement in a drug deal where the victim was shot to death.<sup>13</sup> While the defendant did not fire the fatal shots, he was also armed.<sup>14</sup>

This disparity is also manifested by White defendants committing egregious crimes but receiving guideline sentences, instead of the aggravated sentences that similarly-situated defendants of color frequently receive. Even after hearing all the gruesome evidence during a jury trial of a White defendant who tortured his girlfriend to death, a sentencing judge ordered a guideline range sentence.<sup>15</sup> The defendant had beaten the victim over her entire body.<sup>16</sup> There were scrapes and scratches on her arms and knees, likely from her attempt to crawl away.<sup>17</sup> The defendant fractured her neck before ultimately choking her to death.<sup>18</sup> He admitted to choking her the night before as well.<sup>19</sup> If ever a case warranted an aggravated sentencing departure, this one did. However, the White defendant was given a guideline-range sentence.<sup>20</sup>

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10. *Id.*

11. *Id.*

12. *Id.*

13. Felony Criminal Complaint at 2–4, *State v. Sjostrand*, No. 62-CR-18-219 (Ramsey County District Court 2012).

14. *Id.* at 2–3.

15. Felony Criminal Complaint at 2, *State v. Manney*, No. 27-CR-11-16860 (Ramsey County District Court 2012).

16. *Id.*

17. *Id.*

18. *Id.*

19. Like the trial judge, who exercised relative leniency at sentencing, prosecutors were lenient to this White defendant by declining to seek an indictment under the domestic abuse provision of the first-degree murder statute. MINN. STAT. § 609.185(a)(6) (2010) (providing for culpability when an actor “causes the death of a human being while committing domestic abuse, when the perpetrator has engaged in a past pattern of domestic abuse . . . and the death occurs under circumstances manifesting an extreme indifference to human life”).

20. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2<sup>ND</sup> DEGREE MURDER, § 609.19, subd. 2(1): SENTENCED 2012-2018 (2020).

Even when an aggravated sentence is arguably warranted for a defendant of color,<sup>21</sup> it can still be disproportionately harsh and glaringly out of sync with what similarly-situated White defendants receive. An Asian defendant received a sentence double the presumptive sentence for killing a child in his care.<sup>22</sup> Sentencing guideline ranges suggest that he had a criminal history score of zero.<sup>23</sup> Meanwhile, a White woman who suffocated her infant to death before almost killing a second child the same way received a sentence of barely half of what the sentencing guidelines prescribed.<sup>24</sup> There should be parity in sentencing across race under the felony-murder statute, but there is not.

### *B. Plea Negotiations and Convictions Across Race*

On their face, the racial demographics of second-degree felony-murder convictions in the Twin Cities support the claim of widespread racial disparity. Minnesota's population is approximately 83.8% White.<sup>25</sup> A higher concentration of people of color reside in the St. Paul/Minneapolis metro area,<sup>26</sup> which is 77.1% White.<sup>27</sup> Second-degree felony-murder conviction statistics do not mirror this demographic data. Between 2012 and 2018, defendants of color accounted for 80.2% of felony-murder convictions, while White defendants accounted for just 19.8%.<sup>28</sup> Normalized for demographics, people of color in the Twin Cities are statistically twelve times more likely to be convicted of second-degree felony-murder.<sup>29</sup>

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21. See e.g., Felony Criminal Complaint at 2–3, State v. Meak, No. 62-CR-15-1070 (Ramsey County District Court 2012). The defendant was alleged to have “rough housed” a child; semen was found on the child. *Id.*

22. *Id.*; MINNESOTA SENTENCING GUIDELINES GRID § 4 (MINNESOTA SENTENCING GUIDELINES COMMISSION 2011).

23. See MINNESOTA SENTENCING GUIDELINES GRID § 4 (MINNESOTA SENTENCING GUIDELINES COMMISSION 2011).

24. Complaint at 2, State v. Casey, No. 27-CR-13-22282 (Ramsey County District Court 2013); MINNESOTA SENTENCING GUIDELINES COMMISSION, 2<sup>ND</sup> DEGREE MURDER, 609.19, SUBD. 2(1): SENTENCED 2012-2018 (2020).

25. *Quick Facts Minnesota*, U.S. CENSUS BUREAU (July 1, 2019), <https://www.census.gov/quickfacts/MN>.

26. MINNESOTA STATE DEMOGRAPHIC CENTER, DEPARTMENT OF ADMINISTRATION, AGE, RACE, & ETHNICITY (2018), <https://mn.gov/admin/demography/data-by-topic/age-race-ethnicity/>.

27. *Race and Ethnicity in the Minneapolis Area (Metro Area)*, CEDAR LAKE VENTURES, INC. (Sept. 14, 2018) (citing U.S. Census data), <https://statisticalatlas.com/metro-area/Minnesota/Minneapolis/Race-and-Ethnicity>.

28. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2<sup>ND</sup> DEGREE MURDER, 609.19, SUBD. 2(1): SENTENCED 2012-2018 (2020).

29. *Id.*

More troubling than the racial distribution of second-degree felony-murder convictions is the disparity in what the convictions reflect in the shadow of the original charges. The overwhelming majority of convictions are the result of plea negotiations.<sup>30</sup> Indeed, negotiated plea deals have become the vessel by which most criminal cases are resolved around the country.<sup>31</sup> 66.7% of the White defendants convicted of second-degree felony-murder in Minnesota were initially charged or indicted with more serious levels of homicide.<sup>32</sup> For White defendants, a guilty plea to second-degree felony-murder most often represents generous resolution relative to the exposure under the original complaint or indictment. White defendants in the Twin Cities routinely benefit by pleading down to second-degree felony-murder.

Conviction statistics under the second-degree felony-murder doctrine represent the opposite trend for defendants of color. Defendants of color sentenced to second-degree felony-murder had their charges reduced in only 38.5% of cases.<sup>33</sup> For the rest of the defendants of color, their second-degree felony-murder conviction represented the most serious count.<sup>34</sup> The plea bargaining statistics reveal a striking racial disparity: White defendants plead to reduced felony-murder charges at nearly double the rate of defendants of color.

Inequities run deeper than statistically tilted plea negotiations. The facts of individual cases, as alleged in the criminal complaints, best illustrate two parallel yet unenviable trends. White defendants are frequently punished leniently, while defendants of color receive harsher treatment even when the facts support opposite outcomes.

A robbery involving six codefendants that left a young man dead illustrates this disturbing trend. Two of the codefendants were Black, and four were White.<sup>35</sup> While all six were initially indicted

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30. *See id.*

31. INNOCENCE PROJECT, REPORT: GUILTY PLEAS ON THE RISE, CRIMINAL TRIALS ON THE DECLINE (Aug. 7, 2018), <https://innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/>; NAT'L ASS'N OF CRIM. DEF. LAWYERS, THE TRIAL PENALTY REPORT 14 (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf>.

32. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2<sup>ND</sup> DEGREE MURDER, 609.19, SUBD. 2(1): SENTENCED 2012-2018 (2020).

33. *Id.*

34. *Id.*

35. *Id.*

for first-degree murder,<sup>36</sup> the four White codefendants were permitted to plead guilty to a reduced charge under the inherently pliable second-degree felony-murder rule.<sup>37</sup> The Black defendant who fired the gun pled to second-degree intentional murder.<sup>38</sup> While the Black codefendant who did not fire the gun pled guilty to second-degree felony-murder, he received a harsher-than-guideline sentence.<sup>39</sup> The White codefendants all received sentences within guideline sentence range for second-degree felony-murder.<sup>40</sup> None of the four White codefendants received consecutive sentences; both of the Black codefendants did.<sup>41</sup>

According to the complaint and newspaper coverage of the incident, five of the codefendants hatched a detailed plan to break into their drug dealer's apartment to steal drugs and take back a gaming system.<sup>42</sup> Newspaper coverage reported that at least part of the group was intent on "beating the [expletive] out of [the drug dealer] then taking everything."<sup>43</sup> The same source recounted an agreement to split what they burglarized, "since it's a group deal."<sup>44</sup> The sixth codefendant was reportedly recruited to bring a gun; he "made sure it was loaded."<sup>45</sup> As a car waited outside, four of the codefendants burst into the apartment, according to the criminal complaint.<sup>46</sup> Some reportedly ransacked it searching for drugs, yelling and swearing at the victim, while others attacked the

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36. Brandon Stahl, *Suburban Women Plead Guilty to Murder For Their Role in Drug Robbery-Turned Slaying*, STAR TRIB. (Jan. 22, 2018), <https://www.startribune.com/suburban-women-plead-guilty-to-murder-for-their-role-in-drug-robbery-turned-slaying/470561553/?refresh=true>.

37. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2<sup>ND</sup> DEGREE MURDER, 609.19, SUBD. 2(1): SENTENCED 2012-2018 (2020).

38. *Id.*

39. *Id.* While he pled down to second-degree unintentional felony-murder like the White codefendants, his sentence was 24% higher than prescribed in the Minnesota Sentencing Guidelines. *Id.*; MINNESOTA SENTENCING GUIDELINES GRID § 4.A (MINNESOTA SENTENCING GUIDELINES COMMISSION 2017).

40. *Id.*; MINNESOTA SENTENCING GUIDELINES COMMISSION, 2<sup>ND</sup> DEGREE MURDER, 609.19, SUBD. 2(1): SENTENCED 2012-2018 (2020).

41. [hereinafter 2x] MINNESOTA SENTENCING GUIDELINES COMMISSION, 2<sup>ND</sup> DEGREE MURDER, 609.19, SUBD. 2(1): SENTENCED 2012-2018 (2020).

42. Complaint at 3, State v. Peterson, No. 27-CR-17-10674 (Hennepin County District Court 2018).

43. Stahl, *supra* note 36.

44. *Id.*

45. *Id.*; Complaint at 3, State v. Peterson, No. 27-CR-17-10674 (Hennepin County District Court 2018).

46. Complaint at 3, State v. Peterson, No. 27-CR-17-10674 (Hennepin County District Court 2018).

decedent and “pistol whipped” him.<sup>47</sup> The complaint further recounts that they forced the decedent’s girlfriend onto a bed, pointed the gun at her head, and told her they would kill her if she left the bedroom.<sup>48</sup> She described holding the decedent as “he took his last breath.”<sup>49</sup> The decedent was shot in the neck; the bullet grazed his jugular vein, shattered his spine, and fractured his skull.<sup>50</sup> Prosecutors also noted blunt force trauma to his head and face.<sup>51</sup> The codefendants reportedly left him there and fled with the drugs.<sup>52</sup>

Although it may be argued that lesser charges are warranted because the White codefendants did not actually pull the trigger,<sup>53</sup> it is a well-established tenet of Minnesota criminal law that accomplices are liable for the conduct of the principal at the same level.<sup>54</sup> Even so, the disparity in sentencing under the same statutory subsection remains: the Black codefendant who did not pull the trigger received a significantly harsher sentence than the

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47. Complaint at 3, *State v. Peterson*, No. 27-CR-17-10674 (Hennepin County District Court 2018).

48. Stahl, *supra* note 36.

49. Complaint at 3, *State v. Peterson*, No. 27-CR-17-10674 (Hennepin County District Court 2018); David Chanen, *Mother of Slain Teen Laments A Wasted Life Over Drugs, Mistakes*, STAR TRIB. (Apr. 7, 2018), <https://www.startribune.com/mother-of-slain-teen-laments-a-wasted-life-over-drugs-mistakes/479024163/>.

50. Complaint at 3, *State v. Peterson*, No. 27-CR-17-10674 (Hennepin County District Court 2018).

51. *Id.*

52. *Id.*

53. Admittedly, some legal scholars have taken issue with this tenet, arguing that an accomplice should not bear full liability for the actions of the principal actor. See Michael Heyman, *Losing All Sense of Just Proportion: The Peculiar Law of Accomplice Liability*, 87 ST. JOHN’S L. REV. 129 (2013); Sherif Girgis, *The Mens Rea of Accomplice Liability: Supporting Intentions*, 123 YALE L.J. 266 (2013); Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91 (1985).

54. *State v. Ezeka*, 946 N.W.2d 393, 407 (Minn. 2020) (citing MINN. STAT. § 609.05, subd. 1 (2018)); *State v. Whitman*, 114 N.W. 363, 364 (Minn. 1908). It is notable that in at least one U.S. jurisdiction, “[f]or all intents and purposes the ‘second-degree felony-murder’ rule for accomplices has been abolished.” CAL. STATE SENATE, FACT SHEET FOR SENATE BILL 1437 (2018); see also *People v. Cruz*, 260 Cal. Rptr. 3d 166, 169 (Cal. Ct. App. 2020) (citing CAL. STAT. ch. 1015, §1 (2018) (explaining that “to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life”). If Minnesota had a similar limitation, the five codefendants who did not fire the fatal shot may not have been convicted of second-degree felony-murder. Other states align with Minnesota in holding accomplices fully liable under the felony-murder doctrine. See, e.g., *State v. Chambers*, 515 N.W.2d 531, 533 (Wis. Ct. App. 1994); *State v. Blair*, 228 P.3d 564, 568 (Ore. 2010); *State v. Rios*, 172 P.3d 844, 846 (Ariz. 2007).



similarly-situated White codefendants. The felony-murder rule should not be contorted to reach inequitable outcomes.

While advocates for the White codefendants may argue that they were actually treated too harshly, in reality, they reaped the benefit of the second-degree felony murder rule, considering that the facts could have yielded a conviction under a far more serious variant of the doctrine. Under Minnesota law, both the first and second-degree murder statutes have a provision for felony-murder.<sup>55</sup> Burglary is among the predicate felonies specifically enumerated in the first-degree felony-murder statute.<sup>56</sup> Ample facts alleged in the complaints would support this predicate offense.<sup>57</sup> Yet prosecutors were content with a conviction under the lesser second-degree felony-murder provision. Their decision transformed potential first-degree felony-murder life sentences into second-degree felony-murder sentences as short as twelve and a half years.<sup>58</sup>

While the author does not contend that life sentences would be just in this case, an analytical juxtaposition of the second-degree and first-degree felony-murder rules illustrates the wide-ranging homicidal liability that exists on strikingly similar facts. Such discretion perpetuates further inequity in plea negotiations, trials, and sentencings, leaving a system ripe for abuse and incapable of delivering racial equity. This heartbreaking example exposes the reasons that both first-degree and second-degree felony-murder should be excised from Minnesota's statutory and common law schemes. Doing so will leave a thoughtfully-tiered system, accounting for all levels of homicidal and less-than-homicidal liability,<sup>59</sup> and it will create a construct under which these six

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55. See MINN. STAT. § 609.185(a)(3) (2016); MINN. STAT. § 609.19, subd. 2(1) (2016).

56. See MINN. STAT. § 609.185(a)(3) (2016). The Supreme Court of Minnesota recognizes first-degree felony-murder prosecutions predicated on burglary. See, e.g., *State v. Mosley*, 853 N.W.2d 789, 794 (Minn. 2014).

57. See Complaint at 3, *State v. Peterson*, No. 27-CR-17-10674 (Hennepin County District Court 2018) (alleging on its face burglary while possessing a firearm as the predicate felony).

58. MINN. STAT. § 609.19, subd. 1(1) (2016); MINNESOTA SENTENCING GUIDELINES COMMISSION, 2<sup>ND</sup> DEGREE MURDER, 609.19, SUBD. 2(1): SENTENCED 2012-2018 (2020).

59. Absent the felony-murder doctrine, the Minnesota Legislature has erected a thoughtful, effective, and wide-ranging statutory scheme that aptly addresses all unjustified killings, ranging from second-degree manslaughter, MINN. STAT. § 609.205(1) (2020) to third degree murder, MINN. STAT. § 609.195(a) (2020), to second-degree intentional murder, MINN. STAT. § 609.19, subd. 1(1) (2020), to first-degree murder, MINN. STAT. § 609.185(a)(1) (2020).

codefendants, Black and White, could have been equitably charged or indicted, negotiated with, tried, and sentenced.

While it is easy to heap criticism on prosecutors who apply the felony-murder doctrine in racially inequitable ways, one should not overlook that it is the theoretical underpinnings of Minnesota's felony-murder doctrines that enable them to do so. Minnesota's statutory schemes provide the architecture for convictions under statutory provisions with guideline sentences ranging from just over ten years to life in prison for essentially the same conduct. Both the theory and application of Minnesota's felony-murder doctrines must be repaired or repealed if the disparities cannot be reconciled. As the law stands now, felony-murder makes for faux plea negotiations, and as exemplified below, unjust charging. These are the byproducts of the unconscionably wide prosecutorial discretion inherent in the doctrine.

### *C. Charging Discretion Ripe for Abuse*

White defendants frequently benefit from the felony-murder rule, while defendants of color have a markedly different experience. Just as this disparity is painfully apparent in plea negotiations and conviction trends, it also manifests in charging decisions. Even when prosecutors ultimately amend their charges, initial charging decisions reveal further racial inequity. These decisions inarguably impact the course of individual prosecutions, even when cases gravitate away from the initial charges. It is the stunningly wide discretion inherent in Minnesota's felony-murder doctrine, in the abstract, that sustains racially inequitable charging practices.

Defendants of color may face aggressive felony-murder charges for facts that should not warrant murder prosecutions at all. According to a criminal complaint and newspaper reports, a Black Minneapolis man had a dispute with his brother.<sup>60</sup> Isolated in the basement, the victim shot the defendant.<sup>61</sup> Witnesses say they heard three shots, and the defendant shouted out, "my brother just shot me."<sup>62</sup> It was only then that the defendant returned fire.<sup>63</sup> His defensive gunshots killed his brother only after the defendant himself received multiple gunshot wounds.<sup>64</sup>

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60. Complaint at 3, *State v. Clark*, No. 27-CR-18-4772 (Hennepin County District Court 2018).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

In their criminal complaint, prosecutors strained to justify their second-degree felony-murder charge by noting that the victim's firearm was only "a small gun,"<sup>65</sup> as if to imply that the bullets fired from it did not have lethal potential. It is also noteworthy that prosecutors acknowledged that it was the victim who pursued the defendant into the basement, where, cornered, they exchanged gunfire.<sup>66</sup> Self-defense would have negated the second-degree assault on which the felony-murder was predicated.<sup>67</sup> Legal scholars have advanced compelling arguments as to why most assaults should not be viable predicate felonies; most states have adapted their laws accordingly.<sup>68</sup> Charging prosecutors were almost certainly aware of this fracture in the legal and academic communities. But that did not prevent them from bringing murder charges against this Black defendant.

The felony-murder charge was not, however, enough for prosecutors: they went a step further by also bringing the grossly inflated charge of second-degree intentional murder.<sup>69</sup> The result was a leveraging of plea negotiations to extract a plea to what appears a lesser count of second-degree felony-murder. This prosecutorial tool creates an artificial middle count used to extort guilty pleas from people of color who are actually liable of lesser crimes, or no crime at all.

Stretching the second-degree felony-murder doctrine to charge and convict this Black defendant is not an isolated occurrence. Another Black man left to care for his girlfriend's infant children was convicted of second-degree felony-murder, primarily for failing to seek medical care for an infant's burned wrist and instead giving him too much over-the-counter medicine, which doctors opined may have had an unintended sedative effect.<sup>70</sup> In attending to the child,

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65. *Id.*

66. *Id.*

67. MINN. STAT. § 609.065 (2006) (characterizing "justifiable taking of life" as occurring "when necessary in resisting or preventing an offense which the actor reasonably believes exposes the actor or another to great bodily harm or death").

68. Greg Egan, *Collateral and Independent Felonious Design: A Call to Adopt a Tempered Merger Limitation for Predicate Felonies of Assault Under a Minnesota Felony-Murder Doctrine Currently 'Too Productive of Injustice'*, 44 MITCHELL HAMLINE L. REV. 98 (2018) (advocating adoption of a merger limitation to Minnesota's felony-murder doctrine, which would make most assaults inviable as predicate felonies).

69. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2<sup>ND</sup> DEGREE MURDER, 609.19, SUBD. 2(1): SENTENCED 2012-2018 (2020).

70. Complaint at 2-3, *State v. Todd*, No. 27-CR-12-17771 (Hennepin County District Court 2012).

the defendant had wrapped the child's wrist,<sup>71</sup> which likely would have made it difficult to assess the severity of the burn. This should have been significant to charging attorneys, because the specific cause of death was a blood infection from the burn.<sup>72</sup>

There were injuries consistent with child abuse, which prosecutors implicitly speculated the defendant had caused.<sup>73</sup> But they also acknowledged that more than a dozen other people resided in a home containing rotting food, dead animals, and overall filthy conditions.<sup>74</sup> The complaint further acknowledged a potential accidental fall down the stairs,<sup>75</sup> but prosecutors refused to concede that this could have accounted for some of the injuries noted in the autopsy. Regardless of the source or intentionality of the injuries, the cause of death was listed as "complications from neglect."<sup>76</sup>

In assessing the fairness of attributing fatal neglect to the defendant, prosecutors should have considered several factors. The defendant, who was twenty years old, was the only one in the house who took any responsibility for caring for the children under intensely challenging circumstances.<sup>77</sup> He described having to feed the children nonperishable food and being relegated to a small room in the basement.<sup>78</sup> The defendant's mother was upset at him for having the children in the house, but that did not stop her from leaving additional young children in his care when she too left the home for an unspecified amount of time.<sup>79</sup> The defendant had made scores of phone calls to the children's mother; she ignored them all, so he did not know if or when she would return.<sup>80</sup> Furthermore, when she finally returned, she was with the children during the hours immediately before it became known that the infant was dead; the infant did not die while in the defendant's care.<sup>81</sup>

Rather than focusing on those facts, the charging prosecutor focused on the allegation that the defendant left the children sleeping in a crib for an hour before their mother finally returned so he could go to the store—likely to buy food for the children.<sup>82</sup>

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71. *Id.* at 2.

72. *Id.* at 3.

73. *Id.* at 3–4.

74. *Id.* at 2.

75. *Id.*

76. *Id.* at 3.

77. *Id.* 1–2.

78. *Id.* at 2.

79. *Id.*

80. *Id.*

81. *Id.* at 3.

82. *Id.*

Prosecutors make no mention of which, or how many, adults were in the house for the hour during which he did not, allegedly, “arrange for supervision.”<sup>83</sup> A second-degree felony-murder conviction for this young Black defendant represents a miscarriage of justice, and it stands in stark contrast to the manner in which the doctrine is generally employed in cases charged against White defendants.

Even when later amended, initial charging decisions often reflect deference to White defendants ultimately convicted of second-degree felony-murder. Two men were shot to death at a St. Paul motel because one of them allegedly owed a codefendant \$1,000.<sup>84</sup> The White defendant drove the killer to the hotel, knocked on the door, then helped force entry.<sup>85</sup> He watched as several shots were fired, then the victims bled to death in the parking lot and on a nearby roadway.<sup>86</sup> After the defendant fled in his car, he later picked up the shooter and other codefendant and drove them further away from the scene while they plotted their stories to avoid incriminating one another.<sup>87</sup> Police found the two lifeless bodies and quickly apprehended the defendant.<sup>88</sup> Yet prosecutors effectively ignored both deaths when making their initial charging decision: they charged the White defendant only with aiding and abetting attempted first-degree aggravated robbery and aiding and abetting attempted simple robbery.<sup>89</sup> These offenses carry statutory maximum sentences of just ten and five years, respectively.<sup>90</sup> Prosecutors failed to charge second-degree felony-murder initially.<sup>91</sup> The Black codefendant who was not the gunman in this

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83. *Id.* at 1–4.

84. Felony Criminal Complaint at 3, *State v. Benner*, No. 62-CR-16-2156 (Ramsey County District Court 2016).

85. *Id.*

86. *Id.*

87. *Id.* at 4.

88. *Id.*

89. *Id.* at 1–2.

90. MINN. STAT. § 609.245, subd. 1 (2014); MINN. STAT. § 609.24 (2014).

91. Felony Criminal Complaint at 3, *State v. Benner*, No. 62-CR-16-2156 (Ramsey County District Court 2016).

Defendants of color are routinely charged with felony-murder from the onset of prosecution for similar or even less egregious robberies resulting in unintended deaths. *See, e.g.*, Complaint at 3, *State v. Smith*, No. 27-CR-14-1327 (Hennepin County District Court 2014); Criminal Felony Complaint at 2–3, *State v. Calloway*, No. 62-CR-16-6907 (Ramsey County District Court 2016); Criminal Felony Complaint at 3 *State v. Smith*, No. 62-CR-16-6906 (Ramsey County District Court 2016); Complaint at 2–3, *State v. Foresta*, No. 27-CR-13-25524 (Hennepin County District Court 2014); Complaint at 3, *State v. Turner*, No. 27-CR-13-25523 (Hennepin County District Court 2013).

case was sentenced to the statutory maximum: forty years in prison.<sup>92</sup> The White codefendant was sentenced to just over twelve years.<sup>93</sup> The initial decisions impact trial preparation, investigations, plea negotiations, and sentencings—further propelling racial inequities.

The Twin Cities has an unadmirable history in the disposition of second-degree felony-murder cases. The record is ripe with disheartening examples of White defendants benefiting from the felony-murder doctrine, while defendants of color receive draconian treatment. The racial inequities manifest in charging, plea negotiations, conviction levels, and sentencings. Nearly a decade of statistics support these findings. In the abstract, the felony-murder doctrine is strained, artificial, and unfair. The archaic doctrine's application magnifies its flaws. The felony-murder doctrine exacerbates racial inequities and should be overhauled or altogether abolished.

### III. Culpable Negligence or Reckless Intent: A Case Study in the Charging of a Peace Officer and an Indigent Man of Color

A police shooting and a shooting by an indigent person of color occurred in recent years in Ramsey County; though similar in factual consequence, they quickly took on very different legal complexions. In 2016, after months of deliberation, Ramsey County prosecutors made a charging decision in a high-profile police shooting.<sup>94</sup> The victim was a beloved Black school cafeteria worker,

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92. MINN. STAT. § 609.19, subd. 1 (2014). Sarah Horner, *He Didn't Pull the Trigger, But He Gets 40 Years*, ST. PAUL PIONEER PRESS (Feb. 8, 2017), <https://www.twincities.com/2017/02/08/st-paul-man-gets-40-years-for-midway-area-double-murder/>.

93. MINNESOTA SENTENCING GUIDELINES COMMISSION, 2<sup>ND</sup> DEGREE MURDER, § 609.19, subd. 2(1): SENTENCED 2012-2018 (2020).

94. See generally John Choi, Ramsey County Attorney, *Remarks Regarding the Hiring of a Special Prosecutor to Assist in the Philando Castile Matter* (July 29, 2016), <https://www.ramseycounty.us/sites/default/files/County%20Attorney/County%20Attorney%20transcribed%20remarks%207%2029%2016.pdf> (stressing the importance of being “thoughtful and deliberate” in order to “provide the legitimacy this case requires and deserves”). The charging decision was announced more than four months after the incident. See Press Release, Office of the Ramsey County Attorney, *Ramsey County Attorney Announces Criminal Charges Against Police Officer in Death of Philando Castile*, RAMSEY COUNTY ATTORNEY'S OFFICE (Nov. 16, 2016), [https://www.ramseycounty.us/sites/default/files/County%20Attorney/11.16.16%20County%20Attorney%20Remarks%20as%20Prepared%20for%20Delivery%20in%20Yanez%20Case\\_0.pdf](https://www.ramseycounty.us/sites/default/files/County%20Attorney/11.16.16%20County%20Attorney%20Remarks%20as%20Prepared%20for%20Delivery%20in%20Yanez%20Case_0.pdf); Felony Criminal Complaint at 7, *State v. Yanez*, No. 0620373879 (Ramsey County District Court 2017).

Philando Castile.<sup>95</sup> The defendant was a veteran of the St. Anthony Police Department, Jeronimo Yanez.<sup>96</sup> Castile had been driving with his girlfriend and her young daughter when Yanez pulled the car over for a broken brake light.<sup>97</sup> Castile “calmly” told the officer that he had a firearm; he also had a valid permit to carry.<sup>98</sup> Yanez suddenly fired seven times into the car, killing Castile and nearly striking his girlfriend and the child.<sup>99</sup> Prosecutors charged Yanez with second-degree manslaughter and intentional discharge of a firearm that endangers safety.<sup>100</sup>

The same office charged a more obscure case nearly a decade earlier against a nineteen-year-old Mexican immigrant, Alfredo “Freddy” Gutierrez-Gonzales, who was mishandling a rifle on the front porch of a house.<sup>101</sup> When Gutierrez-Gonzales heard someone approaching, he put the rifle down.<sup>102</sup> His friend called out, “Don’t trip, it’s just me.”<sup>103</sup> As Gutierrez-Gonzales picked the rifle back up, it suddenly went off.<sup>104</sup> The bullet struck his friend, who was White, in the head; he died at the scene.<sup>105</sup> Prosecutors did not dispute that the rifle going off was anything other than a tragic accident.<sup>106</sup> Within days, prosecutors charged Gutierrez-Gonzales with second-degree felony-murder.<sup>107</sup> The peace officer and the young man of color faced markedly different consequences.

The felony-murder charge in the Gutierrez-Gonzales case rested on a legally unstable foundation. The criminal complaint clearly enumerated the predicate felony: reckless discharge of a

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95. Mitch Smith, *Officer Cleared in 2016 Killing of Black Driver*, N.Y. TIMES at A1 (June 16, 2017).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Felony Criminal Complaint at 7, *State v. Yanez*, No. 0620373879 (Ramsey County District Court 2017).

101. Felony Criminal Complaint at 1–3, *State v. Gutierrez-Gonzales*, No. 62-CR-08-16753 (Ramsey County District Court 2008).

102. *Id.* at 3.

103. State’s Memorandum of Law, *State v. Gutierrez-Gonzales*, No. 62-CR-08-16753 (Ramsey County District Court 2008).

104. Felony Criminal Complaint at 3, *State v. Gutierrez-Gonzales*, No. 62-CR-08-16753 (Ramsey County District Court 2008).

105. *Id.*; Mara Gottfried, *Girlfriend of Suspected Shooter: ‘Turn Yourself In . . .’*, ST. PAUL PIONEER PRESS (Nov. 16, 2008), <https://www.twincities.com/2008/11/16/girlfriend-of-suspected-shooter-turn-yourself-in/>.

106. Felony Criminal Complaint at 3, *State v. Gutierrez-Gonzales*, No. 62-CR-08-16753 (Ramsey County District Court 2008).

107. *Id.* at 5.

firearm within a municipality.<sup>108</sup> Unlike most other viable predicate felonies, which require intentional or knowing levels of *mens rea* to trigger felony-murder prosecutions,<sup>109</sup> the predicate felony in the case against Gutierrez-Gonzales required only reckless *mens rea*.<sup>110</sup> Although under Minnesota common law, offenses with reckless *mens rea*—or even strict liability—are technically viable predicate felonies,<sup>111</sup> this charging vehicle stretches the theoretical framework of the felony-murder doctrine, which is premised on imputed intent, and has come under harsh criticism.<sup>112</sup>

In *State v. Engle*, decided just months before Gutierrez-Gonzales was charged, the Supreme Court of Minnesota assessed the *mens rea* requirement for reckless discharge of a firearm within a municipality as a standalone offense.<sup>113</sup> The *Engle* Court noted ambiguity in whether the reckless *mens rea* required the voluntary act of pulling the trigger, or merely any voluntary act that “increases the likelihood that the gun will discharge accidentally.”<sup>114</sup> The *Engle* Court concluded that any “conscious or

108. *Id.* at 1.

109. *See, e.g.*, *Butala v. State*, 887 N.W.2d 826, 831 (Minn. 2016) (establishing that arson is a viable predicate felony); MINN. STAT. § 609.561, subd. 1 (2020) (specifying a *mens rea* requirement of “intentionally” for the predicate felony of arson); *State v. Dorn*, 887 N.W.2d 826, 831 (Minn. 2016) (requiring that the actor knowingly or intentionally commit the predicate assault to trigger the felony-murder doctrine) (cited in Greg Egan, *Collateral and Independent Felonious Design: A Call to Adopt a Tempered Merger Limitation for Predicate Felonies of Assault Under a Minnesota Felony-Murder Doctrine Currently ‘Too Productive of Injustice’*, 44 MITCHELL HAMLINE L. REV. 98 (2018) (analyzing the general intent crime of first-degree assault as a Minnesota predicate felony, contrasting it to the elevated *mens rea* threshold of specific intent assault required to trigger felony-murder under Ohio law)).

110. MINN. STAT. § 609.66, subd. 1(a)(3) (2006); *see generally* *State v. Engle*, 743 N.W.2d 595 (Minn. 2008) (developing *mens rea* required for reckless discharge of a firearm in a municipality).

111. *See* *State v. Smoot*, 737 N.W.2d 849, 853–855 (Minn. Ct. App. 2007) (holding that felony Driving While Impaired, a strict liability offense, may serve as a viable predicate felony in felony-murder prosecutions).

112. Interview with Professor George M. Platt, University of Oregon School of Law (Nov. 14, 1969) (cited in *State v. Blair*, 214 P.3d 47, 57 (Oregon Ct. App. 2009) (stressing “we have approached the outer limits of the *mens rea* requirement with respect to murder in the felony-murder doctrine. In effect what we have is strict liability when one who sets out to commit a lesser felony with no *mens rea*—with no mental element of intending to kill anyone—winds up as a murderer . . . [T]here will be a door through which the very unusual defendant will be able to exit from the charge of murder”).

113. *State v. Engle*, 743 N.W.2d 592 (Minn. 2008).

114. *Id.* at 595–96 (Minn. 2008) (cited in *State v. Coleman*, 944 N.W.2d 469, 478 (Minn. Ct. App. 2020) (defining reckless *mens rea* but applying it to third-degree murder)).



intentional act in connection with the discharge of a firearm” satisfies the *mens rea* element.<sup>115</sup>

Arguably, the law just months before Gutierrez-Gonzales was charged required a deliberate, volitional trigger pull.<sup>116</sup> The complaint did not allege one.<sup>117</sup> Still, prosecutors rushed to charge Gutierrez-Gonzales with felony-murder. More unnerving, prosecutors made no attempt to satisfy even the lower post-*Engle mens rea* threshold. They failed to plead any voluntary acts by Gutierrez-Gonzales that would have “increase[d] the likelihood that the gun will discharge accidentally.”<sup>118</sup> The only facts alleged in the complaint relating to Gutierrez-Gonzales’ handling the rifle are “trying to put a clip in” and “pick[ing] the gun back up” after “put[ting] the gun down.”<sup>119</sup> This is routine conduct that peace officers across the nation engage in every day without criticism; yet it is the sole alleged misconduct on which Gutierrez-Gonzales’ felony-murder charge hinged.

The same office declined to utilize a similar predicate felony against Yanez. Prosecutors had to have realized that such a charging option was available; the potential predicate felony was evident as counts two and three on the very face of the complaint: intentional discharge of a firearm that endangers safety.<sup>120</sup> The *mens rea* for the would-be predicate felony was intentional.<sup>121</sup> If reckless discharge of a firearm could predicate felony-murder charges in the case against Gutierrez-Gonzales, certainly intentional discharge of a firearm could serve as a predicate felony in the case against Yanez. Intentional discharge of a firearm is a

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115. *State v. Engle*, 743 N.W.2d at 596. It should not be lost on the reader that the defendant in *Engle*, a private security guard, was acting in a quasi-law enforcement capacity. *Id.* at 593. While the race of the victim is unclear from the published appellate court opinion, it is clear that Mr. Engle shooting and paralyzing the victim was not justified. *Id.* Notwithstanding the horrific consequences of the shooting, Mr. Engle was not charged with attempted murder or even assault, and the Ramsey County sentencing judge imposed a mere two years of probation after which the conviction was to be reduced to a misdemeanor. *Id.* Rare are the cases where a lay person of color receives the benefit of such generous charging or sentencing.

116. *See generally id.*

117. Felony Criminal Complaint at 3, *State v. Gutierrez-Gonzales*, No. 62-CR-08-16753 (Ramsey County District Court 2008) (alleging the “gun suddenly went off . . . the shooting was an accident”).

118. *See Engle*, 743 N.W.2d at 596.

119. Felony Criminal Complaint at 3, *State v. Gutierrez-Gonzales*, No. 62-CR-08-16753 (Ramsey County District Court 2008).

120. Felony Criminal Complaint at 1-2, *State v. Yanez*, No. 0620373879 (Ramsey County District Court 2017).

121. MINN. STAT. § 609.66, subd. 1a(2) (2006).

more legally sound predicate felony because of its heightened *mens rea* requirement. Charging second-degree felony-murder would have recalibrated plea negotiations, trial strategy, and the way jurors viewed the evidence. It may have even led to a guilty plea or a different verdict at trial.

The facts only bolster the case for a felony-murder charge against Yanez. He deliberately aimed his firearm in the direction of Castile and the other two innocent occupants of the vehicle, and with full volitional control, pulled the trigger no less than seven times.<sup>122</sup> Obviously, prosecutors thought they had a strong case for the unlawful intentional discharge of a firearm, otherwise they would not have charged Yanez with those two counts. But they failed to take the next step and bring the felony-murder charge, even though the only additional proof they would have needed was not in dispute: Philando Castile's lifeless body.

The Yanez prosecutors may argue that it was a legitimate exercise of discretion not to charge a felony-murder count. That discretion is precisely the problem: it so rarely gets used to the detriment of peace officers and is so often weaponized against people of color.<sup>123</sup> Regardless of whether it was Yanez's status as a peace officer or the race of the victims that differentiated the charging in the two cases, this disparity exemplifies unconscionable systemic bias in the prosecution of police killings and killings by civilian people of color. If prosecutors cannot harmonize their charging decisions across these demographics, the felony-murder doctrine should be abolished.

#### **IV. George Floyd's Call to Action: Reevaluating the Use and Consequence of Minnesota's Felony-Murder Doctrine to Begin Healing Gaping Wounds**

The distorted approach to police killings, coupled with larger systemic racial bias, has plagued the Twin Cities' handling of felony-murder cases, other homicides, and crime more generally. In the four years between the Castile and Floyd killings, Minnesota prosecutors brought charges against peace officers on just two other occasions.<sup>124</sup> In that time there were forty-seven on-duty police

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122. Smith, *supra* note 95.

123. See *supra* Section II; see also Greg Egan, Op-Ed, *Minnesota Needs to Change its 'Felony-Murder' Doctrine: Racial Inequities are One Reason*, ST. PAUL PIONEER PRESS at 19A (June 28, 2020).

124. Pat Borzi, *Why Are Cops in Minnesota So Rarely Charged in Officer-Involved Deaths?*, MINNPOST (June 1, 2020), <https://www.minnpost.com/metro/2020/06/why-are-cops-in-minnesota-so-rarely-charged-in-officer-involved-deaths/>.

killings in the state.<sup>125</sup> The problem goes back much further: from 2000–2016, the Office of the Hennepin County Attorney did not bring charges in a single police shooting.<sup>126</sup> The racial inequity of that approach and the tacit acceptance of the devastation, dehumanization, and terror it encompasses have deeply scarred the community. The Chauvin prosecution affords an opportunity to begin healing.

The exceedingly rare cases charged against peace officers, while driven in part by their unique factual circumstances, still mirror the racial inequities evident in second-degree felony-murder prosecutions more generally. They also reflect a basic deference to peace officers. A Washington County Sheriff's deputy, Brian Krook, was recently indicted for second-degree manslaughter for shooting a young man in the midst of a mental health crisis.<sup>127</sup> The victim was a White, off-duty Emergency Medical Technician.<sup>128</sup> The victim's race and occupation likely motivated prosecutors to seek the indictment. In addition, there tends to be greater sympathy for victims suffering from a mental health crisis.<sup>129</sup> Under these circumstances, even though Krook was also White, prosecutors went to the grand jury. They did not, however, go so far as to recommend a felony-murder charge. One can speculate as to whether prosecutors would have pursued felony-murder had the shooting involved an officer of color. Conversely, had the victim been a person of color, an indictment may not have been sought at all. What appear to be surface inroads towards justice in the Krook prosecution are nuanced and may actually be yet another manifestation of racial inequity.

The Krook case stands in stark contrast to the final prosecuted police shooting in Minnesota in recent years. Mohamed Noor was a Black, Somali-American Minneapolis police officer who, in the dark

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125. Jeff Hargarten, Jennifer Bjorhus, MaryJo Webster, & Kelly Smith, *Every Police-Involved Death in Minnesota Since 2000*, STAR TRIB. (Oct. 2, 2020), <https://www.startribune.com/fatal-police-encounters-since-2000/502088871/>.

126. Tom Jackman & Devlin Barrett, *Charging Officers with Crimes is Still Difficult for Prosecutors*, WASH. POST (May 29, 2020), <https://www.washingtonpost.com/crime-law/2020/05/29/charging-cops-with-crimes-is-still-difficult-prosecutors/>.

127. Summons at 1, *State v. Krook*, No. 82-CR-19-2887 (Washington County District Court 2019); Matt Sepic, *Washington Co. Deputy Says he Felt 'Horrible' After Shooting, Killing a Man Threatening Suicide*, MINN. PUB. RADIO NEWS (Mar. 18, 2020), <https://www.mprnews.org/story/2020/03/17/washington-co-deputy-says-he-felt-horrible-after-shooting-a-suicidal-man-to-death>.

128. *Id.*

129. Hargarten et al., *supra* note 125.

of night, shot and killed a White woman.<sup>130</sup> While initially Noor was charged with third-degree murder and second-degree manslaughter,<sup>131</sup> prosecutors later elevated charges, bypassing second-degree felony-murder to charge Noor with second-degree intentional murder.<sup>132</sup> Although bringing criminal charges—perhaps even a felony-murder charge—was appropriate, intentional murder was a stretch.<sup>133</sup> There was no body camera footage and no incriminating statement by Noor.<sup>134</sup> His charges far exceeded those that Yanez and Krook faced. Noor’s was the only one of the three cases where an officer of color killed a White victim.

The prosecution of Derek Chauvin, the former Minneapolis police officer charged with second-degree felony-murder for kneading the life out of George Floyd for nearly eight minutes,<sup>135</sup> now proceeds against this backdrop. A long history of racial inequity in the prosecution and sentencing under this statutory subdivision plagues the Twin Cities community. The felony-murder rule is weaponized against defendants of color and seldom deployed to the same effect against White defendants. The difference is even more pronounced when it comes to peace officers who kill, especially when those officers are White. Most frequently, officers are never even charged.<sup>136</sup> On the only other occasion a White officer was charged or indicted, it was only to second-degree culpable manslaughter, not felony-murder.<sup>137</sup> Police kill; the initial public

130. Libor Jany, *Ex-Minneapolis Police Officer Noor to Plead Not Guilty in Damond Shooting Death*, STAR TRIB. (April 26, 2008), <https://www.startribune.com/minneapolis-police-officer-mohamed-noor-will-plead-not-guilty-in-shooting-death-of-justine-damond/480845391/>.

131. Complaint at 1, State v. Noor, No. 27-CR-18-6859 (Hennepin County District Court 2018).

132. *Second-Degree Murder Charge Officially Added to Noor Complaint*, 5 EYEWITNESS NEWS KSTP (Mar. 26, 2019), <https://kstp.com/news/second-degree-murder-charge-officially-added-mohamed-noor-complaint/5175413/>.

133. In its statutory amendments in the wake of George Floyd’s killing, the Minnesota Legislature recognized a more nuanced mental state required for prosecution of an officer in Noor’s position, which in some ways validated his defense. Compare MINN. STAT. § 609.066, subd. 1(1) (2016) (classifying a killing as “justified” only when actually “necessary to protect the peace officer or another from apparent death or great bodily harm”), with MINN. STAT. § 609.066, subd. 1(1) (2020) (inserting “if an objectively reasonable officer would believe, based on the totality of the circumstances known to the officer at the time and without the benefit of hindsight, that such force is necessary”).

134. Jany, *supra* note 130.

135. Ted Warren, *Prosecutors Say Officer Had Knee on George Floyd’s Neck for 7:46 Rather Than 8:46*, L.A. TIMES (June 18, 2020), <https://www.latimes.com/world-nation/story/2020-06-18/derek-chauvin-had-knee-george-floyd-neck-746-rather-than-846>.

136. Jackman & Barrett, *supra* note 126.

137. Indictment, State v. Krook, No. 82-CR-19-2887 (Washington County District

outrage dissipates; only in rare cases are charges brought; then it happens all over again. Community leaders like former Minneapolis NAACP president Leslie Redmond have expressed their exasperation: “The 13th [amendment to the U.S. Constitution] abolished slavery except if one was duly convicted of a crime. The legacy of slave patrols have continued through our current policing system and it is time for a change. The murder of George Floyd made people realize that silence equal[s] consent.”<sup>138</sup>

Notwithstanding this tragic recent history, the author predicts that the Chauvin prosecution will be different: he will be convicted of second-degree felony-murder. Slow as the waking of conscience may be, the tide is finally shifting. Although only one of the recent Minnesota police killings has resulted in a conviction, all three cases were brought in the past five years.<sup>139</sup> On an unprecedented scale in the wake of George Floyd’s killing, the streets have flooded with sustained protest—both in Minnesota and around the world.<sup>140</sup> Their calls are for racial equity and police reform.<sup>141</sup> And it has not been without effect: the public has successfully demanded laws aimed at fostering more effective relationships between the police and the community, preventing police killings, and imposing greater accountability when killings do occur.<sup>142</sup> Moreover, leaders like Minneapolis Police Chief Medaria Arradondo are now at the helm. He immediately discharged all four officers involved in Floyd’s death and promised, “The Floyd family will lead me

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Court 2019).

138. Interview with Leslie E. Redmond, Esq., Former NAACP President, in St. Paul, Minnesota (Jan. 3, 2021).

139. Jon Collins & Riham Feshir, *Two Minnesota Police Shooting Trials, Two Very Different Verdicts*, MPR NEWS (May 1, 2019), <https://www.mprnews.org/story/2019/05/01/two-minnesota-police-shooting-trials-two-very-different-verdicts>.

140. Olivia Le Poidevin, *George Floyd: Black Lives Matter Protests Go Global*, BBC NEWS (June 8, 2020), <https://www.bbc.com/news/av/world-52967551>.

141. *Id.*

142. *See, e.g.*, MINN. STAT. § 299C.80 (2020) (calling for the formation of an independent Use of Force Investigations Unit within the Bureau of Criminal Apprehension to conduct officer-involved death investigations); MINN. STAT. § 609.06, subd. 3 (2020) (limiting choke holds and other restraints by peace officers); MINN. STAT. § 609.066, subd. 2 (2020) (tightening restrictions on peace officers’ use of deadly force); MINN. STAT. § 626.5534 (2020) (imposing a use of force reporting requirement upon chief law enforcement officers); MINN. STAT. § 626.8434, subd. 3 (2020) (prohibiting “warrior-style” training); MINN. STAT. § 626.8435 (2020) (establishing the Ensuring Police Excellence and Improving Community Relations Advisory Council, which legislators intended to protect civil and human rights, provide for citizen involvement, and advance reforms that “promote positive interactions between peace officers and the community”); MINN. STAT. § 626.8469 (2020) (providing for training in crisis response, conflict management, mental illness crises, and cultural diversity); MINN. STAT. § 626.8475 (2020) (imposing a duty for peace officers to intervene and report “regardless of tenure or rank”).

forward.”<sup>143</sup> This too reflects an environment in which Chauvin’s conviction is more likely. Finally, the aggressive charging of Chauvin,<sup>144</sup> like the general approach of Attorney General Keith Ellison and his team to this prosecution, are in and of themselves promising.<sup>145</sup> Things are starting to change.

The theoretical underpinnings, statutory scheme, and caselaw formulating Minnesota’s felony-murder doctrine, legally and morally flawed as they are,<sup>146</sup> provide the ideal framework to prosecute Chauvin. The other cases were officer shootings. Prosecutors would have had to prove that hectic, split-second decisions substantiated more nuanced predicate felonies, such as reckless or intentional discharge of a firearm in a municipality or in a way that endangers safety. By contrast, Chauvin’s predicate felony is an intimate physical assault several minutes in duration.<sup>147</sup> There was time to think. There was time to stop. And it was caught on film. George Floyd posed no immediate threat to Chauvin or others, and even if he did, the presence of multiple other officers would have mitigated that threat.

Charging prosecutors have analyzed the Chauvin case through a different lens than past police killings. Finally deploying a second-degree felony-murder charge against a peace officer demonstrates this shift. They have strong evidence to support the charge. A conviction will not repair the long-standing racial inequities of the felony-murder doctrine—or of criminal

143. Sara Sidner, *Minneapolis Police Chief Vows to Reform Police Department*, CNN VIDEO (June 13, 2020), <https://www.cnn.com/videos/us/2020/06/13/minneapolis-police-chief-reform-george-floyd-sidner-pkg-nr-vpx.cnn>.

144. Chauvin faces charges under the second-degree felony-murder doctrine that are aggressive for peace officers, but squarely akin to what defendants of color have historically and routinely faced. *See supra* Section II.

145. Libor Jany, *Seeking to Show Pattern of Excessive Force by Chauvin, Prosecutors Cite Incident with 14-Year-Old Boy Who Couldn’t Breathe*, STAR TRIB. (Nov. 18, 2020), <https://www.startribune.com/chauvin-prosecutors-cite-incident-with-14-year-old-boy-who-couldn-t-breathe/573105501/> (detailing prosecution’s intent to introduce evidence of Chauvin’s prior use of unreasonable force against a fourteen-year-old boy while “ignoring his pleas that he could not breath.”); *see also* Stephan Montemayor & Chao Xiong, *Four Fired Minneapolis Police Officers Charged, Booked in Killing of George Floyd*, STAR TRIB. (June 4, 2020), <https://www.startribune.com/four-fired-minneapolis-officers-booked-charged-in-killing-of-george-floyd/570984872/> (announcing Ellison’s decision to upgrade the charges to include second-degree felony-murder within days of being assigned the case).

146. Greg Egan, *Collateral and Independent Felonious Design: A Call to Adopt a Tempered Merger Limitation for Predicate Felonies of Assault Under a Minnesota Felony-Murder Doctrine Currently ‘Too Productive of Injustice’*, 44 MITCHELL HAMLINE L. REV. 98 (2018).

147. Complaint at 1–4, *State v. Chauvin*, No. 27-CR-20-12646 (Hennepin County District Court 2020).

prosecutions more generally—nor will it completely halt the onslaught of police killings in the Twin Cities and in the rest of the nation. But a conviction is likely, and it just may have some effect in making peace officers reevaluate use of force, and in making prosecutors and judges more cognizant of racial disparities that leave gaping wounds in our community.