No. A21-0453

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APPELLATE COURTS

State of Minnesota

In Supreme Court

State of Minnesota

Respondent,

v.

Omar Nur Hassan,

Appellant.

APPELLANT'S PRINCIPAL BRIEF

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RESTATEMENT OF THE ISSUE PRESENTED

(1) Whether the State presented sufficient evidence at trial to establish Appellant's identity as the second shooter despite the break in the State's evidentiary chain.

Holding Below:

The jury convicted Appellant as the second shooter.

Apposite Authority:

State v. Scharmer, 501 N.W.2d 620, 622 (Minn. 1993)

State v. Silvernail, 831 N.W.2d 594 (Minn. 2013)

State v. Harris, 895 N.W.2d 592 (Minn. 2017)

(2) Whether the Minnesota Constitution's prohibition on cruel or unusual punishment precludes the automatic imposition of a LWOP sentence under Minn. Stat. § 609.106 given Appellant's youth, and whether Appellant should have been afforded an individualized sentencing process under the Minnesota Constitution prior to the District Court's imposition of a LWOP sentence.

Holding Below:

The District Court imposed a sentence of LWOP without affording Appellant an individualized sentencing process.

Apposite Authority:

Minn. Const. art. I, sec. 5

Nelson v. State, 947 N.W.2d 31, 36 (Minn. 2020), *cert. denied,* 20-1155, 2021 WL 1520828 (U.S. Apr. 19, 2021)

State v. Trog, 323 N.W.2d 28 (Minn. 1982)

PROCEDURAL HISTORY

March 1, 2019: Abdilahi Ibrahim and another individual fired 26 rounds into a car parked behind the Red Sea Bar & Restaurant, killing A[redacted] F[redacted] and injuring two others.

April 10, 2019: The State charged Appellant with aiding and abetting murder, later indicting Appellant for aiding and abetting first-degree murder. The State also charged—and later indicted—co-defendant Abdilahi Ibrahim (27-CR-19-8238).

June 28, 2019: Appellant was arrested in Kenya and ultimately extradited to Minnesota where he remained in custody pending trial, unable to post bail.

September 30, 2019: Appellant entered not guilty pleas to all 12 counts against him.

January 14, 2021: The State dismissed all counts of second-degree murder against Appellant and Ibrahim. Ibrahim and Appellant were tried jointly.

January 19, 2021: The District Court, Honorable Peter A. Cahill, presiding, heard and ruled on motions *in limine*, and the joint trial against Ibrahim and Appellant commenced. The State called five witnesses. During a break in the testimony of the State's fifth witness, Ibrahim accepted an offer from the State to plead guilty to one count of Murder – Second-degree – With Intent – Not Premeditated (Crime Committed for Benefit of Gang) in violation of Minn. Stat. § 609.19.1(1). He was sentenced to serve 330 months in prison. Appellant maintained his innocence, rejected an offer to resolve, and continued with his trial.

January 25, 2021: The jury returned its verdict, acquitting Appellant of all counts of aiding and abetting first-degree murder for the benefit of a gang, but convicting Appellant of aiding and abetting first-degree murder in violation of Minn. Stat. § 609.185(a)(1).

February 9, 2021: Appellant's counsel argued at Appellant's sentencing hearing that the Minnesota Constitution's prohibition on cruel or unusual punishments afforded Judge Cahill the discretion to depart from imposing a mandatory life sentence. Judge Cahill sentenced Appellant to LWOP.

April 27, 2021: Appellant timely filed his notice of appeal to the Minnesota Supreme Court.

June 16, 2021: Final certificate of transcript filed and delivered to the parties.

August 15, 2021: Deadline for submission of Appellant's principal brief.

STATEMENT OF THE CASE

Appellant was convicted of aiding and abetting first-degree murder and, pursuant to Minn. R. Crim. P. 29.02, subd. 1(a), appealed to the Minnesota Supreme Court. On appeal, Appellant asserts that the State presented insufficient evidence at trial on the issue of his identity as the second shooter. Appellant asserts that the State's evidence of Appellant's identity as the second shooter was circumstantial and that the circumstances proved at trial were consistent with a rational hypothesis except that of guilt: Specifically, that the unknown individual identified by law enforcement only as "Individual No. 5"—who wore clothes that were very similar to Appellant's, who arrived at HCMC in the suspect vehicle, and who law enforcement believed may be seen on security footage re-entering the vehicle just prior to the shooting—*was* the second shooter. Despite any arguable reasonableness of the State's inference of Appellant's guilt, the evidence did not form a complete chain leading so directly to Appellant's guilt as to exclude beyond a reasonable doubt any rational hypothesis except that of guilt.

There is a distinct breaking point in law enforcement's evidentiary chain related to Appellant's identity. After Appellant left HCMC on March 1, 2019, at approximately 10:29PM (in a vehicle that was *not* the suspect vehicle) no witness testified that they could ever again positively identify Appellant as the second shooter. This included the lead investigator on the case, the State's clothing comparison expert, and the FBI CAST Agent tasked with tracking the movements of Appellant's cell phone during the time period when the murder occurred. The evidence of guilt is consistent with the rational hypothesis that

Individual No. 5 was the second shooter. Because the State did not sufficiently prove Appellant's identity as the second shooter, this Court must reverse.

Should Appellant's sufficiency challenge fail, Appellant alternatively asserts that the Minnesota Constitution's prohibition on cruel punishment afforded the district court the discretion to decline to impose an LWOP sentence following Appellant's conviction for aiding and abetting first-degree murder given Appellant's youth. As applied to Appellant, Minn. Stat. § 609.106 is unconstitutional. Appellant should have been afforded an individualized sentencing process through which he could present evidence to the district court that an LWOP sentence was not appropriate. The district court erred in denying Appellant's motion regarding sentencing.

STATEMENT OF THE FACTS

The Karmel Mall and Red Sea Shootings

On March 1, 2019, at approximately 9:17PM, A[redacted] Y[redacted] ("Y[redacted]") was shot at the Karmel Mall on the south side of Minneapolis ("the Karmel Mall shooting"). TT. at 658; 677. Y[redacted], who is Appellant's cousin, was transported to HCMC where he underwent emergency surgery. TT. at 678; 689.

At approximately 11:53PM that same evening, Abdilahi Ibrahim ("Ibrahim") and another individual shot 26 rounds into a car parked behind the Red Sea Bar & Restaurant on Cedar Avenue in Minneapolis ("the Red Sea shooting"). TT. 608; 655; 660. A[redacted] F[redacted] was killed instantly, M[redacted] S[redacted] was shot in the spine and paralyzed, and J[redacted] P[redacted] was hit superficially and self-transported to HCMC. TT. At 655-56; 658. Ibrahim pled guilty to being one of the two shooters. TT. 686-87.

Just after midnight on March 2, 2019, law enforcement responded to the Red Sea shooting. TT. at 655; 656; 660. Lt. Molly Fischer obtained footage of the Red Sea shooting from the Red Sea and the West Bank Diner, which is next door to the Red Sea. TT. at 668. She also obtained Milestone camera system footage from throughout the Minneapolis area, through which she was able to identify the suspect vehicle as a silver Chevrolet Malibu ("the suspect vehicle"). TT. at 665-66. The suspect vehicle was recognizable: "Earlier in the evening on March 1st, there had been a decent snowfall [and there was a] distinctive snow covering on the hood of this vehicle in almost a triangle type shape specific to the passenger side of the vehicle." TT. at 665.

The Red Sea and West Bank Diner videos capture the suspect vehicle arriving at the Red Sea prior to the shooting. TT. at 777. Lt Fischer could not confirm how many individuals were in the suspect vehicle when it arrived; however, there were "at least four[.]" TT. at 776. Lt. Fischer did not identify any of those individuals. TT. at 777. Per the footage, the vehicle pulls up to the Red Sea and "two people . . . get out of the vehicle, one out of the front seat, one out of the passenger rear seat." TT. at 777.

> The vehicle then pulls onto Fourth Street, does a U-turn in the street and then faces back towards Cedar. At that point there is another individual that exits the rear of that vehicle on the passenger -- or on the driver's side rear of the vehicle, walks around the back trunk of the vehicle, and then enters back inside that same vehicle.

TT. at 777.

Ibrahim and the other individual walked westbound on the sidewalk of Fourth Street, and proceeded down the alley toward the back of the Red Sea. TT. at 671. Ibrahim and the other individual approached the victim vehicle from behind and are seen firing into the vehicle before running back toward the suspect vehicle. TT. at 674. Law enforcement recovered 26 discharged cartridge casings (DCCs) from the crime scene. TT at 608.

All 26 DCCs were swabbed for DNA. TT. at 612. Law enforcement "didn't find any fingerprints [or] any DNA connections with any bit of evidence and Omar Hassan." TT. at 781; 814-15. In April 2020, Amber Fossum, a forensic scientist with the Minnesota BCA, obtained DNA evidence from one of the bullets fired into the victim vehicle and was able to develop a single-source male DNA profile from that bullet. TT. at 859-60. In August 2020, Ms. Fossum was provided with DNA samples from Appellant and Ibrahim. TT. at 860. Ms. Fossum compared the fired bullet to Appellant's and Ibrahim's DNA samples and

the DNA did not match either individual. TT. at 860. Ms. Fossum obtained "insufficient DNA" on the other DCCs to form a profile. TT. at 857.

On March 3, 2019, Lt. Fischer attempted to speak with Y[redacted], who was still at the hospital. We do not know the substance of that conversation because Y[redacted] did not testify; however, after that conversation, Lt. Fischer formed the opinion that the shootings were gang-related and that the Red Sea shooting was retaliatory. TT. at 678-80. None of the other surviving victims of the Red Sea shooting provided law enforcement with information regarding the identity of second shooter. TT. at 656; 658; 660-61; 734; 758.

The HCMC and Milestone Video Footage

On March 8, 2018, Lt. Fischer obtained HCMC security footage from March 1, 2019, following the Karmel Mall shooting and before the Red Sea shooting. TT. at 680.

Starting at approximately 9:50PM that night, Lt. Fischer observed that "a bunch of younger 20-year-old roughly Somali males showed up to that emergency room area and were talking and speaking with each other." TT. at 683. The individuals arrived in five different vehicles, each carrying three to five people. TT. at 739. Because Lt. Fischer could not ever identify more than a handful of those individuals, she assigned vehicles and individuals who appeared to be a part of the larger group with numbers. TT. at 693.

Car No. 1 was a dark-colored Sedan carrying Individuals 1, 2, and 3. TT. at 740. Individual 1 was "a black male, early 20s, short fade, wearing dark athletic shoes with lower trim, dark pants, dark longer parka jacket, dark hoodie worn up, and a dark durag on his head[.]" TT. at 740-41. Lt. Fischer did not identify Individual 1. Individual 2 was Omar

Hassan, the Appellant, who Lt. Fischer described as a "black male, early 20s, short afro with fade, wearing dark pants, dark athletic shoes, dark sweatshirt, dark lighter weight waist length jacket." TT. at 741. Lt. Fischer identified Appellant because Appellant introduced himself as Omar Hassan to hospital staff when inquiring as to his cousin's status. TT. at 686. Individual 3 was a "male in early 20s, black beard, thick afro with fade, wearing dark pants, dark hoodie, dark athletic shoes with a light, white trim, and a tan three-quarter length dress coat." TT. at 741. Individual 3 drove the dark-colored Sedan Appellant arrived in, and was identified as Hussein Abdulrezaq Ali. TT. at 741.

At approximately 9:58PM, Car No. 2, which was the suspect vehicle, arrived at HCMC carrying Individuals 4, 5, and 6. TT. at 743; 693. Law enforcement was never able to identify Individuals No. 4, 5, or 6. TT. at 745. Lt. Fischer specifically testified, however, that Individual No. 5 was a person of interest in the investigation because "his clothing attire is very similar to Omar Hassan's[.]" TT. at 745; 751. Individual number 5 was "a black male . . . early 20s, short hair, wearing dark pants, dark shoes, and a dark hoodie[.]" TT. at 744. Despite that Individual 5's face was exposed on the video footage and his hood was never up, Lt. Fischer did not identify him. TT. at 760. ("I didn't get the identity of individual No. 5."). To date, law enforcement has not spoken with Individual No. 5 and does not know his identity. TT. at 690 ("Q. Was this individual ever identified? A. No, I was never able to identify him.").

Car No. 3 arrived carrying Individuals 7, 8, and 9, none of whom Lt. Fischer identified. TT. at 746. Car No. 4 arrived at approximately 10:08PM carrying Individuals

10, 11, 12, and 13. TT. at 697; 746-47. Lt. Fischer "was not able to identify any of those four individuals." TT. at 746; 748.

Car No. 5—another dark-colored sedan—arrived shortly after 10:08PM, carrying five males: Ibrahim, a man Lt. Fischer identified as "Bullethead," Zaid Mohamed, and two individuals who were never identified. TT. at 699.

Lt. Fischer also identified Y[redacted]'s sister, "Muna (ph)," on the HCMC footage. TT. at 696. Lt. Fischer "didn't try to ask" Muna to help identify any of the unidentified individuals at HCMC because "she wasn't part of our investigation." TT. at 747; 762. Law enforcement "didn't try to talk with any of those other[]" sixteen individuals observed at HCMC. TT. at 760. Lt. Fischer did not "think it would have been helpful to know what those people were talking about there." TT. at 760. Law enforcement "did not reach out to any of" the victim's parents to aid in the identification process. TT. at 780.

Sometime between 10:08PM and 10:29PM, Appellant left the HCMC emergency room and re-entered the rear seat of the vehicle he had arrived in "for about 15 seconds." TT. at 806. The vehicle had circled the block while Appellant was in HCMC. TT. at 806. At trial, Lt. Fischer testified that she developed a "suspicion" that Appellant obtained a handgun from the vehicle, but confirmed that it was "not an actual fact" when asked why she had never included that suspicion in any police report she had authored in the 22 months that the case was pending. TT. at 708; 808-09 ("I didn't put anything in my report"); 810 ("[I]t was only suspicion, not an actual fact"). Lt. Fischer believed that "the way [Appellant] had his hands in his pocket" after returning to HCMC lent itself to her suspicion, although she conceded that Appellant had his hands in his pockets on numerous

occasions before leaving HCMC and re-entering the vehicle he arrived in. TT. at 809. Lt. Fischer stated it was further suspicious because when Appellant re-entered HCMC, he walked into a single-stall bathroom with another individual. TT. at 709. After leaving the bathroom with the other individual, Appellant "went back to talk to the charge nurse[.]" TT. at 806.

At 10:29PM, Appellant and Ibrahim left HCMC together in Car No. 5. TT. at 711; 823. Appellant did not leave HCMC in the suspect vehicle. TT. at 712; 775. Lt. Fischer testified that Individual No. 5 was also observed leaving HCMC in a "black vehicle" with four people in it, but did not specific which vehicle or with whom he left. TT. at 795. After leaving HCMC at 10:29PM, no witness positively identified Appellant in any footage, testified that Appellant was at the crime scene, or saw Appellant with a firearm.

At 10:48PM, an unknown dark-colored vehicle is seen pulling up behind the suspect vehicle, which was still parked outside of HCMC. TT. at 713-14. Two unidentified individuals exited the dark-colored sedan, and opened the truck, before entering the suspect vehicle. TT. at 713. Lt. Fischer could not conclude that it was the same vehicle Appellant had entered after leaving HCMC, the same vehicle Individual No. 5 had entered after leaving HCMC, or an entirely different vehicle. TT. at 713-14. Lt. Fischer, however, did testify that one of the individuals "definitely could be" Individual No. 5. TT. at 756.

At approximately 10:50PM, the two individuals who had entered the suspect vehicle drove North on Park Avenue, to Washington Avenue, and toward Cedar Avenue. TT. at 758; 821. Milestone cameras lost sight of the vehicle, but, at some point and at some location unknown to law enforcement, the suspect vehicle must have picked up two or

more additional unknown individuals. TT. at 822. Although law enforcement was unable to track the vehicle after it drove toward Cedar at approximately 10:50PM, the vehicle was next seen in front of the Red Sea Bar & Restaurant just prior to the shooting at approximately 11:53PM. TT. at 777.

The Location of Appellant's Cell Phone

Law enforcement obtained a search warrant for Appellant's phone to attempt to retrace the movements of that phone on March 1 and 2, 2019, using cell phone tower pings.

Special Agent Richard Fennern, a CAST Agent with the FBI, testified that, "from 10:39 to 10:52[PM] . . . the phone . . . moved from the area of HCMC down to a further area northwest in downtown Minneapolis." TT. at 877. At 10:58—8 minutes after the two unidentified individuals entered the suspect vehicle and are seen driving out of downtown Minneapolis toward Cedar—Appellant's phone pinged "in downtown Minneapolis." TT. at 877. At 11:09 and 11:14, the phone appeared "in the near north area of Minneapolis." TT. at 877-78. The phone hits "kind of near the . . . north area of Minneapolis" from "11:23PM to 11:52PM[.]" TT. at 879.[1] The "next activity after that [was] actually across the river" "to the east." TT. at 879. "During this time from 11:34 to 11:44, the phone hits on . . . all three sides of that tower at different times." TT. at 880. "The next activity then shows that the phone [moved] south." TT. at 880. "At 11:47PM," the phone was "right

[1] SA Fennern's testimony per the trial transcript is that the phone pinged "kind of near the . . . north area of Minneapolis" from "11:23PM to 11:52PM[.]" This is likely a typographical error, and should state "11:23PM to 11:**25**PM" given his other testimony.

near the Morrissey Homes area followed by the next tower to the south . . . facing north at 11:49:26PM, and the tower facing southeast – or southwest at 11:29:43PM." TT. at 881.[2]

SA Fennern testified that, at 11:52PM, Appellant's cell phone pinged to a cell tower that was "near Riverside Avenue or Fourth Street and 19th Avenue providing coverage back facing to the north to the area that would include the Red Sea Bar & Restaurant." TT. at 881. At the same time, SA Fennern testified on direct examination that Appellant's phone also pinged to another tower near the West Bank softball fields:

> You can see the next towers to the north of that, the main one being at the top of the page where it says West Bank softball fields, that's going to be the next larger tower that's going to be providing coverage back in that same area. So with the slide, you can't say exactly where the phone is located to a specific street or an address, it just -- you can say it's either consistent with the address or inconsistent, meaning that out of all the towers that it could have selected it selected the tower here at Riverside that provides coverage to the area of [redacted].

TT. at 882.

Appellant's cell phone next pinged "at 11:58:59 p.m. utilizing a tower and sector right near 280 and 94." TT. at 882. That ping was "[f]ollowed by the next activity at 12:09 a.m. on the 2nd, which is the far right of the screen near Concordia University in St. Paul." TT. at 882. SA Fennern testified that, "from 12:09 to 12:30 a.m. . . . there's five different contacts on three cell towers all in that same area near Concordia University near Hamline Avenue and University Avenue." TT. at 882.

> Following that, . . . from 12:30 a.m. to 12:39 a.m. . . . the phone mov[ed] from east to west back to the area near HCMC. So starting at 12:30 near

[2] As with Footnote 1, the reference to "11:29:43" is likely a typographical error in the trial transcript and should state "11:**49**:43."

> Concordia, then to activity that takes place at 12:33 a.m. at the tower just near Prior Avenue and 94, and then 12:39 back in Minneapolis near HCMC.

TT. at 882. SA Fennern did not triangulate Appellant's cell phone's location, which would have more accurately detailed the phone's actual location during the times in question. TT. at 888-890. SA Fennern conceded he could only conclude that a "phone call hit off of . . . the tower" "in the general area" of the Red Sea at 11:52:56PM. TT. at 892-93.

Lt. Fischer chose not to request a cell phone tower dump of all phones that were near HCMC (between 9 and 10:30PM) and also near the Red Sea (during the time of the shooting) because "to go through that information . . . did not seem to be a good resource of how we could figure out what was going on in this investigation[.]" TT. at 786. Likewise, Lt. Fischer chose not to request a list of owners of vehicles that matched the description of the suspect vehicle because it would have been too time-consuming. TT. at 787-88; 89 ("It's a lot of work to go through, again, to try to find this random Chevy Malibu that we don't even know is registered in the state of Minnesota to possibly ask someone a question."). Lt. Fischer, in other cases, has taken a picture of a suspect vehicle to a local dealer to ask what make/model a vehicle is, but did not do that here. TT. at 791.

Comparison of the HCMC footage with the footage of the Red Sea shooting

After law enforcement compared the Red Sea and West Bank Diner footage with the HCMC footage, "There were two specific individuals" whose "physical characteristics, as well as their clothing physical characteristics were closely related to the physical characteristics and clothing characteristics that [law enforcement] had observed on the

West Bank Diner video of [the] two shooting suspects." TT. at 683. One was Appellant; the other was Individual No. 5. Again, law enforcement knew Appellant's identity because Appellant had introduced himself to hospital staff. Individual 5's identity was, and is apparently still, unknown.

The State asked Alison Murray to compare footage of the suspect at the crime scene with the individuals at HCMC. She concluded the shooting suspect had "a dark head covering, a dark waist length jacket, dark pants, light socks, and dark shoes." TT. at 901. There appeared to be "a dark area" near the suspect's jawline. TT. at 902. The suspect was "[p]ossibly wearing gloves or dark coverings on the hands." TT. at 902. The suspect's "jacket appeared to reflect differently than the pants" and "the head covering appeared lighter or to reflect differently than the jacket," which Ms. Murray took to mean that the jacket, pants, and head covering were made of "different materials." TT. at 902-903. The suspect's

> pants appeared tapered, cropped, or in a tucked-in position. And . . . the lace area of the shoes were dark. I noted a high prominent shoe tongue area, and a higher area near the heel of the shoe. I also noted a small dark area protruding from the heel of the shoe. The shoes appear dark on the bottoms.

TT. at 902-903.

Ms. Murray compared her observations of the suspect at the crime scene, to a still image of Appellant at HCMC earlier in the evening: "I noted a dark hood, a dark waist length jacket, dark pants, light socks, and dark shoes." TT. at 903. She also observed:

> [A] hood that appeared to belong to the undergarment, not the jacket, a hood shape that stopped short of the forehead exposing a dark area, a hood appears to come up and cover the bottom portion of the neck, jacket material that appears shiny or reflective with a tufted pattern, matte black pants with a light design

> appeared consistent with Nike swoosh, the tapered or synched pants exposing white socks, a dark lace area on the shoe, possibly small light design area near the toes, a high shoe tongue, a possible design on the shoe tongue, a dark sole on the bottom of the shoes. *** A high shoe back with a possible tag or loop design.

TT. at 904.

Ms. Murray testified that there were also material differences between the appearance of Appellant and the shooting suspect, including: "The tufted pattern of the jacket, the Nike swoosh, and the possible design feature on the shoes" none of which were "observed on the scene images." TT. at 907. Ms. Murray noted that the bottom of the Defendant's shoes also appeared to be white, which she speculated was snow that later melted. TT. at 905.

Ultimately, Ms. Murray concluded: "[T]here is not enough information to confirm or eliminate the apparel pieces recorded in the Hennepin County Healthcare video as being the apparel recorded in the scene surveillance video[.]" TT. 914 ("Q. That was your conclusion? A. Correct.").

Appellant's Arrest

On March 3, 2019, Appellant's sister purchased Appellant a round-trip ticket to Kenya for a flight with his family leaving March 6, 2019, with an anticipated return date to Minneapolis on April 1, 2019. TT. at 720. Appellant's extended family lived in Kenya. TT. at 728-29.

On March 6, 2019, Appellant traveled to Kenya. TT. at 720-21. Law enforcement noted Appellant's cell phone was deactivated approximately four days after the shooting occurred, which was consistent with the date of his international travel. TT. at 418.

On March 28, 2019, an unidentified instagram user titled "d.money" messaged Appellant (whose username was mali_pirate) and asked: "How long u planning on staying there." TT. at 721. "The response back from mali_pirate [was] 'sc' —literally two letters — 'me and prolly another month.'" TT. at 721. Law enforcement noted a comment posted by mali_pirate stating, "Niggas be thinkin police ain't watchin, they just waitin fucknigga."

Federal authorities became involved in the homicide investigation and arrested Appellant in Kenya on June 28, 2019. TT. at 724. After his arrest, he was extradited to New York, was interrogated by law enforcement, and spoke with law enforcement for an hour. TT. at 759. Of the individuals observed at HCMC prior to the shooting, Appellant was the only individual who spoke with law enforcement. TT. at 760.

Appellant was extradited to Minnesota and was indicted; he was unable to post bail and remained in custody from June 28, 2019, until his trial commenced in January 2021. On January 14, 2021, the State dismissed all counts of second-degree murder against Appellant and Ibrahim. On January 19, 2021, the Appellant and Ibrahim stood trial on four counts of aiding and abetting first-degree murder. On the first day of trial, Ibrahim accepted an offer from the State and pled guilty to one count of Murder – Second-degree – With Intent – Not Premeditated (Crime Committed for Benefit of Gang) in violation of Minn. Stat. § 609.19.1(1). He was sentenced to serve 330 months in prison. Appellant maintained his innocence, rejected an offer to resolve, and continued with his trial.

On January 25, 2021, the jury acquitted Appellant of all counts of aiding and abetting first-degree murder for the benefit of a gang; however, the jury convicted Appellant of aiding and abetting first-degree murder in violation of Minn. Stat. §

609.185(a)(1).[3] Sentencing was set for February 9, 2021. Prior to sentencing, Appellant's trial counsel filed a motion requesting the court sentence Appellant without regard to the mandatory, automatic LWOP sentence. Judge Cahill denied the motion:

> With regard to the motion, the motion to find the statute unconstitutional is denied. I am bound by Supreme Court precedent in that regard. I understand why the defense wishes to make the motion to argue to the Supreme Court to modify its earlier ruling, and so I respect the reason why the motion was filed, but it is denied.

2.9.21 Sentencing Transcript at 5.

Appellant received a sentence of LWOP. This appeal follows.

[3] Prior to a verdict, the Court relayed an additional instruction to the jurors in an attempt to avoid a hung jury. TT at 1023-24. Although trial counsel did not object to the Court's language, Appellant asserts that the *Allen* instruction was erroneous. *See State v. Martin*, 211 N.W.2d 765, 768 (Minn. 1973); *see also Allen v. United States*, 164 U.S. 492 (1896).

ARGUMENT

I. THE EVIDENCE OF APPELLANT'S IDENTITY AS THE SECOND SHOOTER WAS CIRCUMSTANTIAL AND INSUFFICIENT TO PROVE GUILT BEYOND A REASONABLE DOUBT BECAUSE THE CIRCUMSTANCES PROVED WERE CONSISTENT WITH A RATIONAL HYPOTHESIS EXCEPT THAT OF GUILT.

a. STANDARD OF REVIEW

This Court must conduct a painstaking review of the record to determine "whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the [fact-finder] to reach its verdict." *Staunton v. State*, 784 N.W.2d 289, 297 (Minn. 2010) (quotation omitted). A guilty verdict will only remain undisturbed if the fact-finder, "could reasonably conclude that [the] defendant was proven guilty of the offense charged" while giving "due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt." *Id.* "A finding of insufficient evidence to convict amounts to an acquittal on the merits because such a finding involves a factual determination about the defendant's guilt or innocence." *State v. Sahr*, 812 N.W.2d 83, 90 (Minn. 2012).

Any element of an offense proven entirely by circumstantial evidence is subject to heightened scrutiny upon review. *See State v. Al-Naseer*, 788 N.W.2d 469 (Minn. 2010). Under the circumstantial-evidence standard, this Court applies a two-step analysis. *See State v. Silvernail*, 831 N.W.2d 594, 598–99 (Minn. 2013).

The first step is to identify the circumstances proved. *See State v. Andersen,* 784 N.W.2d 320, 329 (Minn. 2010). In identifying the circumstances proved, the Court defers "to the jury's acceptance of the proof of these circumstances and rejection of evidence in

the record that conflicted with the circumstances proved by the State." *Id.* (quoting *State v. Stein,* 776 N.W.2d 709, 718 (Minn. 2010) (plurality opinion)). As with direct evidence, the Court "construe[s] conflicting evidence in the light most favorable to the verdict and assume[s] that the jury believed the State's witnesses and disbelieved the defense witnesses." *State v. Tscheu,* 758 N.W.2d 849, 858 (Minn. 2008). Stated differently, in determining the circumstances proved, the Court considers those circumstances that are consistent with the verdict. *See State v. Hawes,* 801 N.W.2d 659, 668–69 (Minn. 2011). This is because the jury is in the best position to evaluate the credibility of the evidence even in cases based on circumstantial evidence. *Id.* at 670.

The second step is to "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *State v. Palmer,* 803 N.W.2d 727, 733 (Minn. 2011) (internal quotations omitted). This Court reviews the circumstantial evidence not as isolated facts, but as a whole. *See State v. Hurd,* 819 N.W.2d 591 (Minn. 2012). It "examine[s] independently the reasonableness of all inferences that might be drawn from the circumstances proved; [including the] inferences consistent with a hypothesis other than guilt." *Andersen,* 784 N.W.2d at 329 (internal quotations omitted). Under this second step, the Court must "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt, not simply whether the inferences that point to guilt are reasonable." *Palmer,* 803 N.W.2d at 733 (internal quotations omitted). We give "no deference to the fact finder's choice between reasonable inferences." *Andersen,* 784 N.W.2d at 329–30 (citation omitted) (internal quotation marks omitted); *see State v.*

Harris, 895 N.W.2d 592, 601 (Minn. 2017) ("[T]he State has not established a compelling reason for us to overrule an approximately century-old rule governing the review of convictions based on circumstantial evidence. We therefore decline the State's invitation to abandon the circumstantial-evidence standard.").

b. THE STATE'S EVIDENCE OF APPELLANT'S IDENTITY AS THE SECOND SHOOTER WAS CIRCUMSTANTIAL.

CRIMJIG 3.05 defines direct and circumstantial evidence, and confirms that the State's evidence on the issue of identity was circumstantial because it was not direct:

> A fact is proven by direct evidence when, for example, it is proven by witnesses who testify to what they saw, heard, or experienced, or by physical evidence of the fact itself. A fact is proven by circumstantial evidence when its existence can be reasonably inferred from other facts proven in the case.

10 Minn. Prac., Jury Instr. Guides--Criminal CRIMJIG 3.05 (6th ed.) ("Direct and Circumstantial Evidence").

The State inferred Appellant's identity as the second shooter through the presentation of other facts proven in the case: Appellant's clothing at HCMC and the shooter's clothing at the Red Sea; the location of Appellant's cell phone somewhere near the Red Sea around the time of the shooting; Appellant's family travel to Kenya two days after the shooting and his failure to make his return flight (inferred to be consciousness of guilt, or flight); the deactivation of his cell phone; the Instagram communications; and his relationship to Y[redacted].

The State could only prove identity through circumstance because it had no direct evidence of Appellant's identity as the second shooter. Neither Appellant's fingerprints nor

DNA were at the crime scene. Of the 26 DCCs from the crime scene, law enforcement developed a single-source male DNA profile from one, which *excluded* Appellant (and Ibrahim). *See Tscheu,* 758 N.W.2d at 855 (holding proof of defendant's identity as the murderer was circumstantial even despite the State presenting proof that the defendant's DNA was found inside the deceased victim, as well as under her fingernails). Appellant demanded a trial and did not testify. *See id.* at 872 (Meyer, J., concurring) ("A verdict of guilty cannot properly be based solely on the jury's disbelief of a defendant's denial of the charges."). Likewise, no eyewitness testified that they observed Appellant at the crime scene and no witness testified that they observed Appellant with a firearm. Law enforcement did not recover any firearm.

Proof of the Defendant's identity as the shooter was circumstantial. Therefore, even if the inferences on which the State relied to establish identity were reasonable, Appellant's conviction must be reversed unless the circumstances "proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Palmer,* 803 N.W.2d at 733.

c. THE CIRCUMSTANCES PROVED AT TRIAL.

"[C]onsider[ing] only those circumstances that are consistent with the verdict"—*Hawes,* 801 N.W.2d at 668–69—the State proved the following at Appellant's trial:

> On March 1, 2019, at approximately 9:17PM, Appellant's cousin was shot and transported to HCMC. Following the shooting, Appellant arrived at HCMC in a dark-colored Sedan sometime before 9:58PM. Appellant was a black male, early 20s, short afro with fade, wearing dark pants, dark athletic shoes, dark sweatshirt, dark lighter weight waist length jacket. Ibrahim and numerous others also arrived at HCMC.

At some point before 10:29PM, Appellant exited HCMC and briefly re-entered the same vehicle he had arrived in. Appellant obtained a firearm from that vehicle.[4] Appellant then returned to HCMC and entered a single-stall restroom with another individual. Appellant left HCMC at 10:29PM in another dark-colored sedan, with Ibrahim.

Although losing sight of Appellant after leaving HCMC, law enforcement did track the approximate location of Appellant's phone (making the assumption that Appellant was with his phone at the time).

At 10:48PM, a dark-colored sedan pulled up behind the suspect vehicle, which was still parked outside of HCMC. Two unidentified individuals exited the vehicle and entered the suspect vehicle. At approximately 10:50PM, the suspect vehicle drove North on Park Avenue, to Washington Avenue toward Cedar Avenue.

At 10:58PM, Appellant's phone was in downtown Minneapolis. At 11:14, the phone was in the near north area of Minneapolis. From 11:23 to 11:25PM, the phone was in the north area of Minneapolis. At 11:49:26PM, the phone was right near the Morrissey Homes area. At 11:52PM, the phone pinged to a cell tower that was "near Riverside Avenue or Fourth Street and 19th Avenue providing coverage back facing to the north to the area that would include the Red Sea Bar & Restaurant." TT. at 881.

At some point, somewhere, the suspect vehicle picked up at least two additional unknown individuals. The suspect vehicle arrived at the Red Sea at approximately 11:53PM. Ibrahim and the second shooter exited the vehicle.

The second shooter was dressed similarly to how Appellant was dressed apprximately one hour earlier. Appellant was also dressed very similarly to Individual No. 5. The second shooter had a dark head covering, a dark waist length jacket, dark pants, light socks, and dark shoes. There appeared to be a dark area near the suspect's jawline. The suspect was possibly wearing gloves or dark coverings on the hands. The suspect's jacket appeared to reflect differently than the pants and the head covering appeared lighter or to reflect differently than the jacket, which indicated that the two were made of different materials. The suspect's pants appeared tapered, cropped, or in a tucked-in position, and the lace area of the suspect's shoes

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[4] Appellant does not concede this is a reasonable inference. *See* 10 Minn. Prac., Jury Instr. Guides--Criminal CRIMJIG 3.05 (6th ed.) ("A fact is proven by circumstantial evidence when its existence can be *reasonably* inferred from other facts proven in the case."). For purposes of the sufficiency of the evidence analysis, however, whether Appellant obtained a firearm from the vehicle in which he arrived is unimportant due to the disconnect in the State's chain of events. *See State v. Webb*, 440 N.W.2d 426, 430–31 fn. 2 (Minn. 1989) ("Although we must accept the evidence in a light most favorable to the conviction, we note again our grave doubts about the reliability of the evidence on these points.").

were dark. The shoes had a high prominent shoe tongue area, and a higher area near the heel of the shoe. The shoes appeared dark on the bottoms.

Ibrahim and the second shooter fired 26 times into the vehicle, killing A[redacted] F[redacted]. They then fled back to the suspect vehicle.

On March 6, 2019, Appellant travelled to Kenya and he failed to make his return flight. He informed another unknown individual that he guessed that he would not return to the US for at least another month, and posted a comment about law enforcement 'watching' and 'waiting.' Federal agents arrested Appellant was arrested just over two months later.

d. THE CIRCUMSTANCES PROVED REASONABLY INFER GUILT, BUT THEY ARE CONSISTENT WITH A RATIONAL HYPOTHESIS EXCEPT THAT OF GUILT. THE EVIDENCE DID NOT FORM A COMPLETE CHAIN LEADING SO DIRECTLY TO APPELLANT'S GUILT AS TO EXCLUDE BEYOND A REASONABLE DOUBT ANY RATIONAL HYPOTHESIS EXCEPT THAT OF GUILT. BECAUSE THE STATE DID NOT SUFFICIENTLY PROVE IDENTITY, THIS COURT MUST REVERSE.

Under the second step of the sufficiency analysis, this Court must "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt, not simply whether the inferences that point to guilt are reasonable." *Palmer,* 803 N.W.2d at 733. The reason courts apply such a heightened standard of review in cases where convictions are obtained based on circumstantial evidence is due to the danger of circumstantial evidence: "[W]here circumstantial evidence consists in reasoning from a minor fact or series of minor facts to establish a principal fact, the process is fatally vicious if the circumstances, from which an attempt is made to deduce a conclusion of guilt, depends upon speculation and conjecture[.]" *State v. Waltz,* 54 N.W.2d 791, 796 (Minn. 1952).

There was a fatal disconnect in what needed to otherwise be "a complete chain" of circumstantial evidence. *State v. Scharmer*, 501 N.W.2d 620, 622 (Minn. 1993) (reversing burglary conviction where "[t]he evidence did not form a complete chain leading so

directly to appellant's guilt as to exclude beyond a reasonable doubt any rational hypothesis except that of his guilt."); *In re Welfare of M.E.M.*, 674 N.W.2d 208, 215 (Minn. Ct. App. 2004) ("When the evidence is circumstantial, it must form a complete chain that, viewed as a whole, leads so directly to the guilt of the defendant as to exclude any reasonable inference of doubt of guilt.") (quoting *State v. Jones,* 516 N.W. 2d 545, 549 (Minn. 1994)).

The disconnect occurred during the 57 minutes after Appellant left HCMC and before the shooting occurred, during which we know the approximate location of Appellant's phone, but not the *actual* locations of Appellant, Ibrahim, the vehicle Appellant and Ibrahim entered after leaving HCMC, the suspect vehicle, any of the other individuals who left HCMC in the suspect vehicle, or Individual No. 5. We also do not know whether Appellant entered the suspect vehicle outside of HCMC and/or whether Appellant and Ibrahim remained together during that 57 minutes.

The State *inferred* that Appellant and Ibrahim remained together, *inferred* that Appellant was with his phone the entire time the phone's location was being approximated, and *inferred* that Appellant either entered the suspect vehicle outside of HCMC or the suspect vehicle picked up Appellant and Ibrahim before driving to the Red Sea. But those inferences—and the overall greater inference of Appellant's identity as the second shooter—were not reasonable because, in order for the jury to draw those inferences, the jurors were *required* to either (1) draw arbitrary lines in the credibility of the State's witnesses despite that the State's witnesses' testimony was unconflicted; or (2) impermissibly speculate, or both.

First, consider Lt. Fischer's testimony that that the individual seen entering the suspect vehicle in the dark-colored sedan "definitely" could have been Individual No. 5. Even if it was *not* Individual No. 5, however, Lt. Fischer could not and did not conclude that it was Appellant. The State's unreasonably inferred one of two things: Either Appellant entered the suspect vehicle outside of HCMC, or the suspect vehicle picked up Appellant at some later time. The first inference is unreasonable because the State would effectively be urging the jury to find Lt. Fischer credible where her testimony aligned with Appellant's guilt, while urging the jury to disregard Lt. Fischer's testimony where it fails to align with Appellant's guilt. The inference that Appellant entered the suspect vehicle outside of HCMC also is contradicted by SA Fennern's phone ping, placing Appellant's phone *in* downtown Minneapolis approximately 10 minutes *after* the suspect vehicle left downtown Minneapolis.

The second inference—that the suspect vehicle picked up Appellant at some unknown location and time after it drove away from HCMC toward Cedar—is likewise not reasonable because it speculative. Ibrahim certainly entered the suspect vehicle at some point because he was at the crime scene. It also is true that Appellant and Ibrahim left HCMC together. But the State *speculates* that Appellant and Ibrahim remained together based on the second shooter's clothing, while acknowledging a belief that Individual No. 5 *was* in the suspect vehicle and the fact that Individual No. 5 was dressed very similarly to Appellant. The State has footage of an individual who Lt. Fischer believes "definitely could be" Individual No. 5 entering the suspect vehicle outside of HCMC; but it *speculates*

that Appellant later also entered the vehicle. It left the jury to speculate when and where this occurred, *if* it occurred.

The State asked the jury to make a similarly unreasonable inference with regard to the clothing comparison. Ms. Murray concluded that there were similarities and material differences between Appellant's attire and the shooter's attire. Her professional conclusion, however, was that: "[T]here is not enough information to confirm or eliminate the apparel pieces recorded in the Hennepin County Healthcare video as being the apparel recorded in the scene surveillance video[.]" TT. 914. Despite this, the State urged the jury to conclude the opposite: Believe Ms. Murray when it is aligns with our theory of guilt, but disregard our own witness's testimony when it conflicts with Appellant's guilt. Ms. Murray concluded unequivocally that "there is not enough information" to confirm that Appellant was the shooter, but the State urged the jury to make the exact opposite conclusion: There *is* enough information to confirm that Appellant was the shooter. Either this inference is based upon speculation, or Ms. Murray is credible only up to the point where her testimony fails to align with the State's version of events. That is not reasonable.

The same occurred with the cell phone pings. Appellant's cell phone was in downtown Minneapolis 8 minutes *after* the suspect vehicle left downtown Minneapolis. After leaving HCMC, there is a patent disruption in the chain of evidence. At no point did anyone testify that Appellant was with his phone, which is important. Putting that speculation aside for a moment, however, SA Fennern could not conclude that Appellant *was* at the Red Sea or at any particular address. At best, he could conclude that the location of Appellant's phone was "consistent" with being in the "area" near the Red Sea at a time

close to when the shooting occurred. *See* TT. at 882 ("[Y]ou can't say exactly where the phone is located to a specific street or an address, it just -- you can say it's either consistent with the address or inconsistent, meaning that out of all the towers that it could have selected it selected the tower here at Riverside that provides coverage to the area of [redacted]."). Despite this testimony, the State urged the jury to infer the opposite: Even though SA Fennern could not conclude that Appellant was at the Red Sea, you—the jury—*can.* While jurors are permitted to connect the dots, the jury cannot simply *disregard* testimony where it fails to align with guilt.

In the context of circumstantial evidence, it is true that the Court "construe[s] conflicting evidence in the light most favorable to the verdict and assume[s] that the jury believed the State's witnesses and disbelieved the defense witnesses." *Tscheu,* 758 N.W.2d at 858. This is because the jury is in the best position to make a credibility determination. *Id.* at 670. But Lt. Fischer's, Ms. Murray's, and SA Fennern's testimony does not *conflict* with other evidence or testimony. It *conflicts* with the State's theory of guilt. There is a material difference between those two things. The circumstantial evidence analysis does not require this Court to disregard testimony put forth by State witnesses that conflicts with the State's assertion that there exists proof of guilt beyond a reasonable doubt. This Court must "assume that the jury believed the State's witnesses," *Tscheu,* 758 N.W.2d at 858, including their testimony aligning with Appellant's guilt *and* their testimony that does not.

If the defense had called its own clothing examiner to contradict Ms. Murray, for example, then this Court would be free to ignore the defense expert's testimony on appeal, reasonably assuming that the jury disbelieved the defense witness and credited the State

witness. Here, however, only the State witnesses testified. Ms. Murray, for example, testified honestly as to her expert conclusion that there was not enough information to conclude that the apparel in the HCMC footage was the apparel in the video of the shooting. The inference was that the State's witnesses were credible, where their testimony aligned with the State's theory of the case. Where the testimony contradicted that State's theory of the case, however, the State encouraged the jury to disregard it. An inference that Appellant was the second shooter on those facts is not reasonable.

Identifying Appellant as the second shooter on the basis that he had a motive to retaliate due to the Karmel Mall shooting is also unhelpful and speculative.[5] Motive is distinct from proof of identity even though it may be helpful in proving identity, but the inference of identity based on motive is unreasonable due in large part to the State failing to adequately investigate the case.[6] More importantly, the State offered no evidence that any victim in the Red Sea shooting was connected to any shooter in the Karmel Mall shooting.

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[5] Appellant disputes the strength of any evidence of motive to retaliate against the victims in the Red Sea shooting. The State presented no evidence as to who shot Y[redacted]. The jury was only informed that Lt. Fischer formed the opinion that the shootings were gang-related and retaliatory, but were not informed *why* she formed that opinion because that testimony would have been hearsay. Appellant was acquitted of murder for the benefit of a gang.

[6] Law enforcement did not even *try* to speak with Muna to help identify the individuals at HCMC—including Individual No. 5. The burden of proof is not loosened because an investigation involves potentially uncooperative witnesses. Where law enforcement opts not to even *try* to speak with known witnesses who would likely be able to provide information if they *did* agree to speak with law enforcement, that decision cuts toward a finding of reasonable doubt. Here, law enforcement failed to take reasonable investigatory steps, assuming they would be unsuccessful. Imagine the slippery slope created by the judiciary condoning that conduct. *See Waltz,* 54 N.W.2d at 796.

In *Silvernail*, the state presented both direct and circumstantial evidence of guilt, but "the circumstantial evidence [was] sufficient to support the jury's verdict." *Silvernail*, 831 N.W.2d at 599. Of most relevance to Appellant's case, this Court cited the *absence* of evidence of that appellant's innocence. *Id.* "[T]here [were] no reasonable inferences to be drawn from the circumstances proved that [the victim] was killed by another individual." *Id.* at 600 (citing *Andersen*, 784 N.W.2d at 329 (explaining that the court must "examine independently the *reasonableness* of all inferences that might be drawn from the circumstances proved")). Under *Silvernail*, then, the reasonableness of the inference of Appellant's guilt is directly impacted by the reasonableness of "inference to be drawn from the circumstances proved that [the victim] was killed by another individual." *Id.* Here, the hypothesis that Individual No. 5 was the second shooter, is based upon the testimony of State witnesses.

In *State v. Scharmer*, this Court reversed a burglary conviction due to insufficient evidence on the issue of the defendant's identity:

> In the case before us, none of the physical evidence introduced by the state was ever linked to appellant, who fit the description given by the eyewitnesses primarily because of the color of his skin. Proof of the facts was left more to conjecture and speculation than to reasonable inferences. The evidence did not form a complete chain leading so directly to appellant's guilt as to exclude beyond a reasonable doubt any rational hypothesis except that of his guilt.

State v. Scharmer, 501 N.W.2d 620, 621-22 (Minn. 1993). Without a complete evidentiary chain, Appellant's conviction is akin to the improper conviction in *Scharmer*.

The break in the evidence chain was also an issue in *Webb*, where this Court reversed a murder conviction for insufficient evidence, despite the appellant apparently

making a joking reference to a close friend that he "did it." *State v. Webb,* 440 N.W.2d 426 (Minn. 1989). There, the circumstances that were consistent with guilt were that:

> the body of the victim was found in the vicinity of the appellant's apartment; he was seen speaking to her earlier in the day; and his bedspread was found near the victim. Additionally, an unidentified man was seen dragging a heavy object along the sidewalk near the appellant's apartment. After the murder, appellant shaved his beard and gave away some of his clothing, and later made an apparently joking reference to a friend that he "did it."

Id. at 430-31.

While those circumstances cast a *suspicion* of guilt, they "in no way" excluded other rational inferences which could also be drawn from the circumstances proved which "undercut the state's hypothesis of the appellant's guilt." *Id.* As in this case, "No physical evidence was discovered linking the victim with the appellant *** No hair, fibers, blood or body fluids were found on the victim, or on the bedspread or sheet to indicate that they had ever been in appellant's apartment." *Id.* As importantly, the man seen dragging the heavy object along the sidewalk was unidentified. *Id.* While the inference was that it was the appellant, that inference was based on speculation rather than on facts in the record.

The circumstances proved in this case "undercut the state's hypothesis of the appellant's guilt." *Webb*, 440 N.W.2d at 430-31. Despite the arguable reasonableness of the State's inference of guilt, the evidence did not form a complete chain leading so directly to Appellant's guilt as to exclude beyond a reasonable doubt any rational hypothesis except that of guilt. Because the State did not sufficiently prove Appellant's identity as the second shooter, this Court must reverse.

II. THE MINNESOTA CONSTITUTION'S PROHIBITION ON CRUEL PUNISHMENT MANDATES THAT APPELLANT SHOULD HAVE BEEN ENTITLED TO AN INDIVIDUALIZED SENTENCING PROCESS PRIOR TO THE DISTRICT COURT'S IMPOSITION OF AN LWOP SENTENCE.

a. STANDARD OF REVIEW

Constitutional interpretation is a legal question that this Court reviews de novo. *Nelson v. State*, 947 N.W.2d 31, 36 (Minn. 2020), *cert. denied,* 20-1155, 2021 WL 1520828 (U.S. Apr. 19, 2021).

b. THE MINNESOTA CONSTITUTION PROHIBITS CRUEL OR UNUSUAL PUNISHMENTS.

The Federal Eighth Amendment, applied to the states through the Fourteenth Amendment, prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII; *Roper v. Simmons*, 543 U.S. 551, 560 (2005). Article I, Section 5 of the Minnesota Constitution materially differs from the federal Eighth Amendment because it precludes the imposition of any "cruel ***or*** unusual" punishment. *Compare* Minn. Const. art. I, sec. 5 *with* U.S. Const. amend VIII. "This difference is not trivial." *State v. Mitchell*, 577 N.W.2d 481, 488 (Minn. 1998). "The United States Supreme Court has upheld punishments that, although they may be cruel, are not unusual." *Id.* (citing *Harmelin v. Michigan,* 501 U.S. 957, 994-95 (1991) ("Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense[.]")).

While it is true that "the legislature has determined that a person convicted of first-degree murder is to receive a mandatory life sentence *** a legislatively-mandated punishment cannot stand if it is cruel or unusual in violation of the Minnesota Constitution." *Mitchell*, 577 N.W.2d at 488-89.

> Generally, when determining whether a punishment is cruel or unusual, this court focuses on the proportionality of the crime to the punishment. The Supreme Court, in deciding whether punishment is cruel and unusual, asks if the punishment comports with the evolving standards of decency that mark the progress of a maturing society.

Id. at 489 (citations and quotations omitted). The analysis of "proportionality" under Minnesota law is similar to the Federal framework. *See, e.g., Graham v. Florida*, 560 U.S. 48, 59 (2010); *Thompson v. Oklahoma*, 487 U.S. 815, 821 (1988) (plurality opinion) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

The automatic imposition of LWOP sentences for youthful offenders like Appellant, without first providing those offenders with an individualized sentencing process, does not—and for decades *has not*—comported with the evolving standards of decency in Minnesota that mark our progress as a maturing society. It is cruel, although not unusual.

The United States Supreme Court "has not, yet, extended the *Roper-Miller-Montgomery* line of cases to an offender who is 18 years or older." *Nelson*, 947 N.W.2d at 42 (Chutich, J. dissenting). But it is well-established that the Minnesota Constitution may provide greater protection than the United States Constitution: "It is axiomatic that a state supreme court may interpret its own state constitution to offer greater protection of individual rights than does the federal constitution." *State v. Fuller*, 374 N.W.2d 722, 726 (Minn. 1985) (citations and quotations omitted). "State courts are, and should be, the first line of defense for individual liberties within the federalist system." *Id.*

Although the United States Supreme Court has not *yet* expanded its Eighth Amendment jurisprudence, it has nevertheless repeatedly acknowledged that the relative immaturity of youthful offenders *is* a relevant factor in sentencing even where those

offenders are *over* age 18. *See Gall v. United States*, 552 U.S. 38, 58 (2007) (stating that "it was not unreasonable" to consider a defendant's immaturity at age 21, when the offense was committed"); *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (noting that youth, for a 19-year-old offender, "is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury").

The rapid expansion of Federal Eighth Amendment sentencing prohibitions in recent decades signals an impending blurring of the current "bright line" of 18 years. *See Thompson,* 487 U.S. at 823 (1988) (plurality opinion) (holding that a 15-year-old boy could not be sentenced to the death penalty); *Roper*, 543 U.S. at 567 (2005) (extending the death-penalty ban to offenders under age 18); *Graham*, 560 U.S. at 75 (2010) (prohibiting life sentence for nonhomicide crimes committed by juveniles without giving the offender a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."); *Miller v. Alabama*, 567 U.S. 460, 469 (2012) (extending the *Graham* rule to juvenile homicide crimes).

Minnesota's prohibition of "cruel *or* unusual" punishment is a literally broader and more flexible categorical prohibition on types of punishment than those prohibited by the Federal Eighth Amendment. The Minnesota constitution equally prohibits punishment that is cruel but not unusual, punishment that is unusual but not cruel, and punishment that is cruel and unusual. The more flexible language runs against validating inflexible sentencing structures for youthful offenders—including the automatic imposition of LWOP sentences. The more flexible language supports a more flexible sentencing process for youthful offenders who are "constitutionally different from adults in their level of culpability."

Montgomery v. Louisiana, 577 U.S. 190 (2016), *as revised* (Jan. 27, 2016); *see Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("[Y]outh is more than a chronological fact.").

Minn. Stat. § 609.106 mandates imposition of the "harshest possible penalty" authorized under Minnesota law. *Miller*, 567 U.S. at 489. Appellant will die in prison under Minn. Stat. § 609.106, regardless that Minnesota abolished the death penalty and despite that his sentence is more severe than a life sentence imposed upon any less youthful individual. The automatic imposition of Appellant's life sentence is cruel because of Appellant's youth and the fact that Minnesota courts have historically imposed life sentences is not dispositive under the Minnesota Constitution. *See Harmelin,* 501 U.S. at 994-95.

c. THE DISTRICT COURT ERRED IN FINDING MINN. STAT. § 609.106 CONSTITUTIONAL AND IN FAILING TO AFFORD APPELLANT AN INDIVIDUALIZED SENTENCING PROCESS THROUGH WHICH THE COURT COULD, AT ITS DISCRETION, DETERMINE WHETHER IMPOSITION OF A LWOP SENTENCE WAS APPROPRIATE.

Appellant was 21 years, 2 months, and 25 days old when this offense occurred. Although "human brain development may not become complete until the age of twenty-five," *Gall*, 552 U.S. at 58, and although "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole," *Miller*, 567 U.S. at 473, Appellant was afforded no individualized sentencing process before the district court imposed a life sentence. Instead, "at the outset," *Graham*, 560 U.S. at 72-73, the district court made an implicit finding of Appellant's "permanent incorrigibility." *Montgomery*, 577 U.S. at 209.

Societal norms and constitutional principles require that Judiciary provides Appellant with an individualized sentencing determination; that is, at the very least, a hearing at which mitigating circumstances—his developmental status, his education or lack thereof, his upbringing, and his unique personal characteristics—may be considered before imposing the "harshest possible penalty." *Miller*, 567 U.S. at 489. The refusal to afford him this process ignores Minnesota's evolved understanding of the blurry line between "youth" and "adulthood." It is inconsistent with Minnesota's already decades-old recognition of youthful immaturity as a relevant sentencing consideration for offenders *over age 18*.

This Court has, for at least 40 years, acknowledged that an *adult* offender's youthfulness and immaturity are necessary sentencing considerations in the context of the appropriateness of imposing otherwise *mandatory* minimum sentences. *See State v. Trog*, 323 N.W.2d 28 (Minn. 1982). In *Trog*, the district court stayed execution of a presumptively executed prison sentence "in view of defendant's youth" among other relevant sentencing factors. *Id.* In affirming, this Court held:

> [A] defendant's particular amenability to individualized treatment in a probationary setting will justify departure in the form of a stay of execution of a presumptively executed sentence. *** Numerous factors, ***including the defendant's age***, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family, are relevant to a determination whether a defendant is particularly suitable to individualized treatment in a probationary setting.

Id. at 31 (emphasis added) (citing *State v. Wright*, 310 N.W.2d 461 (Minn. 1981) ("The justification given by the trial court focused more on defendant as an individual and whether the presumptive sentence would be best for him and for society.")).

There is no federal equivalent to *Trog*. A federal criminal court may sentence an individual without regard to a recommended guideline sentence, but it cannot sentence in disregard of a legislatively enacted mandatory minimum sentence. *See, e.g., Melendez v. United States*, 518 U.S. 120 (1996) (holding that motion by government for departure from applicable guidelines range based on substantial assistance does not also authorize departure from a statutory minimum sentence).

Minnesota's appellate courts have repeatedly affirmed that courts may sentence without regard to otherwise mandatory minimum sentences where there are substantial and compelling reasons to do so, in part due to consideration of the adult offender's age. *See, e.g., State v. Heywood*, 338 N.W.2d 243, 243 (Minn. 1983) (affirming departure from a mandatory minimum sentence because of the "the defendant's youth" at age 21); *State v. Patton*, 414 N.W.2d 572, 575 (Minn. Ct. App. 1987) (affirming departure from a mandatory minimum prison sentence citing the defendant's "immaturity, at nineteen years of age" and "a concern that incarceration was not appropriate for him."); *State v. Krouch*, C8-90-2225, 1991 WL 15398, at *1 (Minn. Ct. App. Feb. 12, 1991) (affirming departure from a mandatory minimum sentence where the defendant "was immature for the age of 19."). The authority to depart from mandatory minimums finds roots in the sentencing guidelines, in Minn. Stat. § 609.11, and in *State v. Olson*, 325 N.W.2d 13, 17–19 (Minn. 1982) (granting district courts authority to depart from mandatory minimum sentences but recognizing that legislature may further restrict judicial discretion). And while Minn. Stat. § 609.106 does restrict judicial discretion, "a legislatively-mandated punishment cannot

stand if it is cruel or unusual in violation of the Minnesota Constitution." *Mitchell*, 577 N.W.2d at 488-89.

This history of considering adult defendants holistically during the sentencing process directly aligns with the first strand of precedent that formed the basis for the *Miller/Montgomery* rules. *See Nelson*, 947 N.W.2d at 36. That strand of precedent concerned remedying a mismatch between the sentence imposed and the defendant's culpability. *Id.* Citing *Roper*, there are "[t]hree general differences between juveniles under 18 and adults [that] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders, including ***lack of maturity, vulnerability to negative influence, and transitory personality traits.***" *Id.* at 36 (emphasis added) (citing *Roper,* 543 U.S. at 569–70); *accord Trog*, 323 N.W.2d at 31 (*"*Numerous factors, including the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family, are relevant[.]").

In limiting its holding to those individuals under 18, the Supreme Court noted the potential for that bright line rule to be both under- and over-inclusive:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. ***The qualities that distinguish juveniles from adults do not disappear when an individual turns 18***. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn.

Id. (citing *Roper,* 543 U.S. at 574) (emphasis added).

There is no consensus in Minnesota law as to when an individual is an adult or a juvenile, but there is consistency that the determination is more than the product of a

person's chronological age. In appropriate circumstances, individuals *under* age 18 can be prosecuted and sentenced as though they were "adults." *See* Minn. Stat. § 609.055, subd. 2(a) ("[C]hildren of the age of 14 years or over but under 18 years may be prosecuted for a felony offense" in certain circumstances). In fact, under Minn. Stat. § 609.055, subd. 2(b), "A child who is alleged to have committed murder in the first degree after becoming 16 years of age is capable of committing a crime and may be prosecuted for the felony."

In recent years, the Minnesota Legislature has postponed age thresholds at which it had historically afforded privileges to "children" who became "adults" at age 18. As of 2020, "adults" can no longer purchase tobacco until they are 21. *See* Minn. Stat. § 609.685 (2020) ("Sale of Tobacco to Persons Under Age 21"). As of 2020, "children" under 18 can no longer marry even with parental consent in response to developments in brain-development science. *See* Minn. Stat. § 517.02 (2020) (eliminating parental consent exception); *see Nelson*, 947 N.W.2d at 39 ("In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from . . . marrying without parental consent.") (citing *Roper*, 543 U.S. at 569); *id.* at fn. 8. Any health plan in Minnesota that provides dependent coverage of "children shall make that coverage available to children until the child attains 26 years of age." Minn. Stat. § 62A.302, subd. 3.[7]

[7] "Minnesota law makes some distinctions between adults and youth at points other than 18 years. [A] few rights are withheld and a few protections are extended until age 19 or 21 in the belief that 18-year-olds are not ready to be entirely on their own in particular areas." *See* Minnesota House Research, Youth and the Law: A guide for Legislators (December 2020) (available at https://www.house.leg.state.mn.us/hrd/pubs/youthlaw.pdf)

Under evolving and existing Minnesota law, the reason we differentiate between juveniles and adults for purposes of sentencing—recognition of the comparative immaturity and irresponsibility of juveniles—is not compatible with drawing a bright line at age 18. Minn. Stat. § 645.451 defines "minor" and "adult," however, "context clearly requires different meaning[s]" be applied to those terms when drawing a bright line for the automatic imposition of LWOP for young people. *See id.*, subd. 1.

"[T]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." *Roper*, 543 U.S. at 561. In Minnesota, some juveniles *are* trusted with significant privileges and responsibilities. For example, a 15-year-old may be trusted with the privilege and responsibility to drive a motor vehicle for up to 40 miles by themselves at age 15. *See* Minn. Stat. § 171.041. This is despite that, "crashes . . . are the leading cause of death among persons aged 1 to 24, the second leading cause of unintentional injury-related death for all ages combined and the fifth leading cause of death among all persons" in Minnesota.[8] When that juvenile turns 16, they can, in some situations, possess a firearm without being accompanied by a parent or guardian. *See* Minn. Stat. § 97B.021. The same juvenile is not trusted with the privilege or responsibility to consume alcohol for 5 additional years, despite that they can apparently be sentenced to serve the remainder of their life in prison starting 3 years earlier. *See* Minn. Stat. § 340A.503.

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[8] *See* MN DPS 2019 Crash Facts (citing (Injury Facts, 2016 Edition, p. 14-15,18)) (available at https://dps.mn.gov/divisions/ots/reports-statistics/Documents/2019-crash-facts.pdf)

Portions of the Minnesota Constitution itself supports that those who are 18 in Minnesota are still not be trusted with all of the privileges and responsibilities enjoyed by "adults." *See* Minn. Const. art. V, sec. 2 (the governor and lieutenant governor "[e]ach shall have attained the age of 25 years"); *Id.* at art. VII, sec. 6 (individuals " 21 years of age" may hold office). While the Constitution permits an 18-year-old to vote, they cannot hold office until they are 21. *See* Minn. Stat. § 204B.06, subd. 1(3).

If Minnesota's prohibition against cruel or unusual punishment is truly intended to capture "evolving" societal standards, it is also incompatible with maintaining that bright line of 18 years. This Court did not draw a line in *Trog*. It outlined relevant sentencing considerations, including the defendant's age. Courts throughout Minnesota to this day continue to routinely exercise appropriate discretion in weighing those factors as reasonable sentencing considerations. Minnesota's district courts already handle individualized sentencing processes in serious felony cases, including homicides.

This Court should not hold that "youth (and all that accompanies it) [is] irrelevant to imposition of [the] harshest prison sentence" because to do so "poses too great a risk of disproportionate punishment." *Miller*, 567 U.S. at 479; *see Graham*, 560 U.S. at 72-73 (noting that a life sentence without the possibility of release reflects a judgment that the offender is "incorrigible" even though "characteristics of juveniles make that judgment questionable," particularly when the decision is "made at the outset."). A 21-year-old cannot rationally be found to be *permanently* incorrigible if their brain was not fully developed when the crime was committed. As importantly, such a finding cannot be supported without process: a hearing, an investigation, the presentation of evidence.

The district court was presented with virtually no information about Appellant as an individual. While not unusual in Minnesota's history, the failure to afford Appellant an individualized sentencing process following his conviction is cruel given his youth. Minn. Stat. § 609.106 is unconstitutional as applied to Appellant. If this Court finds sufficient evidence existed to convict, it must nevertheless remand and afford Appellant an individualized sentencing process.

CONCLUSION

For the reasons put forth above, Appellant requests that this Court reverse and vacate his conviction. Alternatively, Appellant urges this Court to find the automatic imposition of his sentence to be cruel, and reverse and remand for an individualized sentencing process at which the district court may impose a sentence that is reasonable.

Respectfully submitted,

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CERTIFICATE OF DOCUMENT LENGTH

I hereby certify that this brief conforms to the document length requirements as set forth by Minnesota Rule of Criminal Procedure 29.04, subdivision 3. Specifically, this brief does not exceed 14,000 words in length, exclusive of the caption, signature block, and addendum. This brief was written using Microsoft Word version 16.50 (2019) and the program reports that the length of this brief is 11,775 words.

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