

If I Had Made the Closing Argument in Defense of Derek Chauvin . . .

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At this writing, in mid-May, 2021, former Minneapolis police officer Derek Chauvin has been convicted by a jury of second-degree murder, third-degree murder, and second-degree manslaughter in the death of George Floyd during Floyd's arrest. Chauvin hasn't been sentenced yet. The first charge carries a maximum of forty years in prison.

Chauvin was one of four officers involved in the arrest of Floyd on May 25th 2020 for passing a counterfeit \$20 bill. They handcuffed him but were unable to get him to go into the back seat of a police car. While Floyd was lying face down in the street, Chauvin had his knee on Floyd's neck and shin on his back for over nine minutes and he died. Mobile phone video taken by a bystander recorded the episode. The autopsy revealed that Floyd had COVID, heart disease, and high amounts of fentanyl and methamphetamine in his system at the time of his death. The medical examiner's opinion was that Floyd died of cardiac arrest and that his health condition contributed to his death, which he ruled a homicide. The case received extensive attention because of its racial angle: Chauvin is white, Floyd was black. It fit the current widely-believed narrative of an epidemic of racism-motivated killings of blameless blacks by white cops.

I didn't follow the Chauvin case all that closely. I sampled front-page news accounts in the paper and read daily summaries of the trial on the internet. I watched the defense closing argument on television, which brought up questions for me and prompted this writing. Later, I read a transcript of it.¹

In his closing argument, Chauvin's defense attorney, Eric Nelson, didn't exactly hit the ground running. It's fifteen minutes

into his presentation and he's still defining reasonable doubt and the presumption of innocence and I'm going, I got it, I got it, move it! When Nelson finally got into the substance of what he had to offer, it seemed as if the word "reasonable" was in every other sentence: what was reasonable for a police officer to do in this circumstance; reasonable, reasonable, reasonable. This from the transcript characterizes the thrust of Nelson's closing argument:

And then you look at the direct knowledge that a reasonable police officer would have at the precise moment force was used. That includes information that they gather from dispatch, their direct observations of the scene, the subjects, and the current surroundings. They have to take into consideration whether the suspect was under the influence of a controlled substance. They can take that into consideration, because again, this is a dynamic and ever-changing. Just like life, things change. It's a dynamic situation. It's fluid. They take into account their experience with the subject at the beginning, the middle, the end. A reasonable police officer tries to, or is at least cognizant and concerned, about future behavior, and that factors into the reasonable police officer's analysis too, because sometimes officers take someone into custody with no problem and suddenly they become a problem. It can change in an instant.²

This went on for about forty-five minutes and I'm thinking, what's he doing this for, reasonableness is the last thing you want to try to tack on to Chauvin. What Chauvin did was, it seems to me, obviously unreasonable. The reasonable thing to have done when all four officers couldn't get Floyd into the police car—he was a really big muscular guy—was to call for a police van, or better, an ambulance and emergency medical personnel (Floyd was saying he couldn't breathe), and let Floyd sit or lie somewhere handcuffed until they got there. At least Chauvin could have taken his knee off Floyd's neck as soon as Floyd stopped thrashing around.

And anyway, I thought to myself, Chauvin isn't accused of being unreasonable. You don't go to jail for being unreasonable. You go to jail for breaking a law. It struck me that, really, I didn't know what law or laws Chauvin was accused of violating. As did everyone, I had seen the video and assumed that it was to be taken as Chauvin out-and-out murdering Floyd, but I wasn't up on the particulars—first degree, second degree, and so on--and Nelson going on about reasonableness wasn't helping me out in this regard.

I quickly checked online while Nelson was making his presentation and learned that Chauvin was accused of second degree murder and two lesser charges, manslaughter being one of them. I didn't get into any details of the laws, wanting to get back to Nelson—or sort of; in truth, he was boring the hell out of me. I kept waiting for him to deal directly with the charges against Chauvin and how the prosecution hadn't proved them, but it never happened. He jumped around, this, that, and the other thing—all the trouble they had getting Floyd to cooperate, what force is authorized, how long Chauvin's knee was on his neck (or was the knee on his upper back?), Floyd's cause of death, and the hostile bystanders, and what was reasonable in all of that.

It was clear Nelson was conscientious and had put in a lot of preparation time, but I'm reacting, "How exactly does all of this relate to what Chauvin's accused of doing?" The trial must be more than just whether Chauvin is a racist white cop like all the rest of them and oppresses Blacks for no reason at all and looked very bad on a video, and that if you agree that what was going on was evil personified, and who wouldn't, put the creep in prison and throw away the key. The law is more precise, nuanced, than that, or so I assumed anyway. (Later: Yes, the law is more precise than that, but I've concluded from writing this up that Chauvin was indeed convicted of looking on the video like your typical racist white cop who tortures and executes poor, helpless blacks, case closed, cart him off.)

I'm not an attorney, but I've taught school and written for publication, and I know that to convince people of something—

which was the challenge for the defense here—you need to organize your presentation so that things tie together in an easy-to-understand, accessible, convincing way. People ought to feel good about themselves for getting on board with you. From watching his presentation and later reading a transcript of it, my call is that defense attorney Nelson didn't bring that off.

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Take this for what it's worth, I'm no expert on the details of the case and have zero legal expertise, but I'm going to be so presumptuous as to sketch out how I would have come at the closing defense argument in the Chauvin trial for your consideration.

I'd have grounded my presentation in the specifics of the laws Chauvin was accused of violating and argued that the prosecution hadn't established beyond a reasonable doubt that he had violated them. I'm not contending this would make any difference in the verdict, just that it would have been better than what Eric Nelson did. This was a rigged proceeding from the get-go, right out of Stalin's time or East Germany before the fall of the Berlin Wall. It was a show trial. Here's an enemy of people, nail him good (and, in this instance, if you don't, it's an apocalypse, and we know where you live). Clarence Darrow couldn't have won this case. But even if a cause is futile, we still are obligated to do the right thing the best we can. We can push the rock up the mountain even if it is sure to roll back down on us. Here's how I would have pushed the rock.

In the closing argument, I would have put the Minnesota legal statutes Chauvin was accused of violating on big pieces of cardboard and set them on easels. I looked it up, there were three of them, three counts. With a pointer that had a rubber tip on it, I would have directed my presentation at what was on the three pieces of cardboard. If it wasn't on the cardboard, I wouldn't deal with it (with one exception, which I'll get to right at the end of this writing).

As it was, in no time at all, the jury found Chauvin guilty on all three counts. One juror after the trial said that eleven of the

twelve were ready to convict twenty minutes into the deliberation, but one juror held them up a bit on some technicalities. Count I was second degree murder. Count II was third degree murder. Count III was second degree manslaughter. Wielding my pointer, I'd have said to the jury, "These are the three laws that Derek Chauvin is accused of violating. Let's go through them one at a time. The question for you is whether the prosecution has proven beyond a reasonable doubt that Chauvin did these things. Men and women of the jury, much less a reasonable doubt, there is *no* doubt that Derek Chauvin didn't violate any of these laws."

I'll go through the three counts here and briefly say how I'd come at them. You can add your own thinking to mine. The counts are taken from the formal charges against Chauvin.³

COUNT I

Charge: Second Degree Murder – Unintentional – While Committing a Felony

Minnesota Statute 609.19 (1)

Maximum Sentence: Imprisonment for not more than 40 years.

Offense Level: Felony

Charge Description: That on or about May 25, 2020, in Hennepin County, Minnesota, Derek Michael Chauvin caused the death of a human being, George Floyd, without the intent to effect the death of any person, while committing a felony offense other than criminal sexual conduct in the first or second degree with force or violence or a drive-by shooting, namely assault in the third degree.

This is the big one, forty years. What jumps out here is that in order to be guilty of violating this law, it isn't enough that Chauvin caused the death of Floyd, he had to do it while committing

a particular felony, third degree assault (which usually isn't a felony, but sometimes is if the offense is bad enough). Subdivision 1 of the Minnesota statute for third degree assault applies in this case:

609.223 ASSAULT IN THE THIRD DEGREE

Subdivision 1. Substantial bodily harm.

Whoever assaults another and inflicts substantial bodily harm may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both.

The issue with this count is whether the prosecution has shown beyond a reasonable doubt that Chauvin was assaulting Floyd rather than restraining him.

To the jury:

“Are you certain enough that Chauvin was assaulting Floyd to put him in prison for forty years? The video has this exchange:

Chauvin: Relax.

Floyd: I can't breathe!

Chauvin: You're fine. You're talking fine.

And this:

Officer: I just worry about the excited or delirium or whatever.

Chauvin: That's why we have EMS coming.

“Does that sound to you like assault with the intent to inflict substantial bodily harm, no reasonable doubt about it? Could it be that Chauvin thought he was restraining Floyd until the medical people got there? He may have been unreasonable, or unwise, in doing what he was doing, but that is not the issue in this count. It is whether he was committing the felony offense of assault against Floyd. Ask yourself, ‘How has the prosecution demonstrated to me

beyond a reasonable doubt that Chauvin was assaulting rather than restraining Floyd?’ They haven’t, and there is *no* doubt about that.”

The second count, third degree murder.

COUNT II

Charge: Third Degree Murder – Perpetrating an Eminently Dangerous Act and Evincing a Depraved Mind

Minnesota Statute 609.195 (a)

Maximum Sentence: Imprisonment for not more than 25 years

Offense Level: Felony

Charge Description: That on or about May 25, 2020, in Hennepin County, Derek Michael Chauvin caused the death of another, George Floyd, by perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human life.

The key elements here are perpetuating an eminently dangerous act and evincing (revealing) a depraved mind, without regard for human life.

“Has the prosecution demonstrated to you beyond a reasonable doubt that the neck restraint Chauvin applied is eminently—exceedingly, extremely—dangerous? No, it hasn’t. This restraint is authorized by the Minneapolis police department, is widely used by law enforcement throughout the world, and is not known for causing death; it certainly hadn’t in Minneapolis before the Floyd incident. Are you sure beyond a reasonable doubt that Chauvin thinks to himself, ‘Here’s my chance to perpetrate an eminently dangerous act right here in front of all these people and with this young woman taking a video on her cellphone.’ Conjecture isn’t evidence. Presumption isn’t evidence. What hard evidence has the prosecution given you that supports you being so certain that this

human being—Chauvin is a human being, just like George Floyd, just like you—was perpetrating an eminently dangerous act rather than trying to do his job that you are willing to put him in prison for 25 years? Twenty-five years from now is 2146. And how have you been shown that Derek Chauvin is no less than depraved? Not just performing an ill-advised act, but depraved. And that he is without regard for human life? The prosecution has established *this*? When? How? This count takes the cake. It’s absurd.”

And the third charge, second degree manslaughter.

COUNT III

**Charge: Second Degree Manslaughter – Culpable Negligence
Creating an Unreasonable Risk**

Minnesota Statute: 609.205 (1)

**Maximum Sentence: Imprisonment for not more than 10
years, or payment of a fine of not more than \$20,000, or both.**

Offense Level: Felony

Charge Description: That on or about May 25, 2020, in Hennepin County, Minnesota, Derek Michael Chauvin caused the death of another, George Floyd, by his culpable negligence, creating an unreasonable risk and consciously took the chance of causing death or great bodily harm to another, George Floyd.

The angle here is the part about consciously took the chance of causing death or great bodily harm.

“It’s fair to say that what Derek Chauvin did contributed to George Floyd’s death, though even that isn’t a dead certainty given Floyd’s dire health condition. But did Chauvin *consciously take the chance of killing Floyd*? Was that on his mind? The prosecution has established that? Absolutely, it hasn’t. Chauvin had no way of knowing about Floyd’s COVID and heart disease. We’re talking

about a police officer here, not a medical expert. It's commonly believed that if you can speak you can breathe. Should Chauvin have just let Floyd lie there until medical help got there, where Floyd said he wanted to be ('I want to lay on the ground, I want to lay on the ground. I'm going down, I'm going down. I'm going down'). Arguably, yes. Given that Mr. Floyd died, we can assume that with 20/20 hindsight Derek Chauvin would do things differently. But that doesn't justify putting him in prison for ten years. He didn't consciously—*consciously*, with intent—take the chance of causing Floyd's death. There is *no* evidence that supports that speculation."

More to be said, but you get the idea of how I would have come at the closing argument. If nothing else, it provides an alternative to the approach taken by Chauvin's defense attorney, Eric Nelson. A *New York Times* article squared with what I saw Nelson doing, that is to say, pushing the reasonable-police-officer theme.

For nearly three hours, Mr. Nelson focused on Mr. Chauvin's decision-making and on what factors may have caused Mr. Floyd's death. He emphasized that the jury instructions say that no crime has been committed if a police officer was justified in using reasonable force and that jurors should determine what is justified by considering what "a reasonable police officer in the same situation would believe to be necessary."⁴

As far as I can see, in going this route, Nelson didn't speak to what the charges against Chauvin actually were, and it was deadly bad for Chauvin. I certainly wouldn't have wanted to be making the case that what Chauvin did was reasonable.

I keep thinking I have to be missing the point in all of this somehow. I've recently begun reading the *Powerline* site online and finding it very informative. It's a group of attorneys commenting on the news. One of them, Scott Johnson, wrote this with reference to federal charges against the four police officers involved in the Floyd case:

State convictions and stiff sentences against the former police officers in this case would easily satisfy federal concerns. The theory of the state prosecutions is that, even though George Floyd was lawfully arrested and detained, police exploited their detention authority, abusing his rights to (a) be subjected to only reasonable (not excessive) force, and (b) have police protect his right to life. Chauvin was found guilty of those abuses, and it is highly likely that the other three former officers will be, too.⁵

Exploited detention authority? Used unreasonable force? Didn't protect Floyd's right to life? Chauvin was found guilty of those abuses? I thought the charges were violating Minnesota statutes prohibiting assault, committing an eminently dangerous act, behaving from a depraved mind and having no regard for human life, and knowingly taking a chance on causing death or great bodily injury. Scott Johnson is a Minneapolis attorney who for 25 years has written for major publications, including *National Review* and *The New York Times*, and he is a fellow at the prestigious Claremont Institute. He's got really strong legal credentials, and I'm following the NFL draft (Wilson has a history of shoulder surgery). I don't know. I'll leave it to you to sort this out.

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I'll close with three things I would have done if I had been defending Chauvin.

First, I would have done my best to get that mask off him. Personalize him, make him an individual. With the mask on, Chauvin comes off as a type, a symbol for racist cops everywhere. If you throw the book at him, you are making a statement about police and their practices in general, not punishing a mortal, fallible-like-we-all-are, individual person, with parents and a sister and former stepchildren whom he may still be in contact with and a job

that happens to be that of a police officer. I'd try to humanize Chauvin, make the jury aware that whatever they do, for whatever reason, they are doing to *him*.

I would have had him testify. Attorneys are really skittish about having defendants testify, something about them getting worked over by prosecution grilling. I don't get it. I don't care what instructions judges give juries—don't read anything into the defendant's choice not to testify, etc. If I'm on a jury, I'm thinking he has something to hide or he'd be bursting at the seams eager to tell his side of the story. Plus, I want to hear from him. We've heard from everybody else. Tell us, what were you doing and why? Give us your side.

I don't see how Chauvin would be vulnerable on the stand. All he has to do is hang in there with a simple story. "We've got a guy who we can't wrestle into the car and he's ranting and thrashing around and kicking his legs. I thought I was staying calm and restraining him until the ambulance got there, which turned out to be longer than I expected. People were yelling at me and threatening me and I thought I might have to use mace to protect myself when in my mind I was doing the proper thing. It was a dangerous situation, so bad that the emergency medical people wouldn't attend to Floyd until they got him out of there. Absolutely, I wasn't assaulting Floyd. I thought the knee restraint was safe and that since he was talking he could breathe. I feel terrible that he died. I'll live with it for the rest of my life. I wish I could have done better by George Floyd, but I know in my heart that I did the best I could to safely make the arrest within the intense pressure of that moment."

And last, I would have ended my closing argument by referring to the elephant in the room: people were threatening to tear apart the city of Minneapolis, and other cities as well, if the jury didn't convict Chauvin, and there were threats against the jurors themselves if they didn't do the mob's bidding. The jurors weren't sequestered, they knew this. I don't know how directly I could have addressed the threat that was looming over the trial. Perhaps

something like this: “There are times in our lives, not more than a few, when we are called upon to do the truly honorable thing and there is a very strong temptation not to. Doing the honorable thing in that circumstance tests our character: our honesty, our integrity, our autonomy, our toughness, our courage. This is a highly charged case, you knew that before you took your oath as a juror. You’ll very likely never be tested like this again in your life. You have the responsibility to assess thoroughly and impartially whether or not the prosecution has established beyond a reasonable doubt that Derek Chauvin violated three Minnesota laws. You pledged to do that, and only that. Now is your time to stand up and be counted, as a citizen and as a human being. Thank you.”

Endnotes

1. Both the transcript and a video of the defense closing argument are online.
<https://www.rev.com/blog/transcripts/defense-closing-argument-transcript-derek-chauvin-trial-for-murder-of-george-floyd>
<https://minnesota.cbslocal.com/video/5503824-full-video-defense-presents-closing-arguments-in-derek-chauvin-trial-part-1/>
2. From the transcript of the defense closing argument. Op. cit.
3. The formal charges against Chauvin.
<https://assets.documentcloud.org/documents/6935897/Derek-Chauvin-Second-degree-murder-charge.pdf>
4. “In His Closing Argument, Derek Chauvin’s Lawyer Urges Jurors to ‘Not Let Yourselves Be Misled.’” Nicholas Bogel-Burroughs, *The New York Times*, April 19, 2021. <https://www.nytimes.com/2021/04/19/us/derek-chauvin-defense-closing-argument.html>
5. “A Redundant Prosecution, Star Tribune Edition,” posted on *Powerline* by Scott Johnson on May 8th, 2021.
<https://www.powerlineblog.com/archives/2021/05/a-redundant-prosecution-star-tribune-edition.php>

