EARL GRAY
DEFENSE

May 5, 2023

Judge Leonardo Castro
Ramsey County Courthouse
15 W Kellogg Blvd.
St. Paul, MN 55102

Re: **State of Minnesota v. Brian Harry Kjellberg**
Court File No.: 62-CR-21-6868

Dear Judge Castro:

The defense has attached a Minnesota Law Review Article, Investigating Juror Misconduct in Minnesota, to support our request to question all 12 jurors that were part of deliberation in this case at the *Schwartz* hearing. The Defense further requests the jurors be brought in and sequestered from one another so they cannot discuss this process.

Under Minn. R. Evid. 606(b), courts may not inquire into a juror's thought process or procedures, except where such testimony may illuminate whether (a) extraneous prejudicial information was improperly brought to the jurors' attention, (b) outside influence was improperly brought to bear upon any juror, or (c) threats of violence or violent acts were brought to bear upon jurors from any source in order to reach a verdict.

Based on the Exhibits provided by the defense after the verdict, it is imperative to inquire into all 12 jurors whether there was any extraneous prejudicial information improperly brought to their attention (for example, other criminal trials in Minnesota where Mr. Gray was the attorney), or any outside influence that was improperly brought to bear upon any juror (racial biases and pressure).[1] These jurors may have received other forms of information beyond what was provided in the record that influenced their decision in this case.

It is important to question all jurors because of how these questions must be carefully calibrated to avoid overstepping the rules. Proof of misconduct is subject to third party

[1] See *State v. Bowles*, 530 N.W.2d 521 (Minn. 1995), finding that "Race-based pressure constitutes "extraneous prejudicial information" about which a juror may testify".

EARL GRAY, LAWYER | WWW.EARLGRAYDEFENSE.COM
332 MINNESOTA ST. SUITE W1610 (1ST BANK BUILDING) - SAINT PAUL, MINNESOTA 55101
(PH) 651.223.5175 (FAX) 651.223.5179 (CELLULAR) 612.801.9379 (EMAIL) INFO@EARLGRAYDEFENSE.COM

ALSO ADMITTED TO PRACTICE IN WISCONSIN - OFFICE MANAGER: PAT K. TRAPP

Filed in District Court
State of Minnesota
5/19/2023 9:09 AM

confirmation (as stated in the attached article), other jurors can be questioned and confirm or deny any acts that occurred, this would be the only way to verify the nature of the allegations at hand. *Schwartz* hearings should be conducted to the fullest extent possible to identify the truth.

Respectfully Submitted,

Earl P. Gray &

Amanda J .Montgomery

Enclosure

Cc: Hassan Tahir
Makenzie Lee

Filed in District Court
State of Minnesota
5/19/2023 9:09 AM

Proposed Questions for Juror Foreman:

(1) Do you have a public Facebook profile where you post or re-post about current criminal cases and trials at times?

(2) Did you ever post related to this case, on any social media account?

(3) Did you watch the Kim Potter trial on TV?

(4) Did you follow the news highlights from that trial?

(5) Did you know Earl Gray represented Kim Potter?

(6) If yes, did you know that before being selected as a juror in this case?

(7) If yes, why did you not disclose that during jury selection?

(8) Did you follow the George Floyd case?

(9) Did you watch the George Floyd trial on TV?

(10) Did you watch the news highlights related to that trial?

(11) Did you know that Earl Gray was involved in the George Floyd case as a lawyer for one of the police officers charged, Thomas Lane?

(12) If yes, did you know that before being selected as a juror in this case?

(13) If yes, why did you not disclose that during jury selection?

(14) Did you know before the evidence was presented that Mr. Stewart was black?

(15) Did you tell the other jurors about any of your conflicts or opinions with white people?

(16) Did you tell the other jurors about any of your conflicts or opinions with police officers?

(17) If your personal emails or text message were looked at from the beginning of you being called to jury duty until after your deliberations were complete, would any of your communications disclose statements by you regarding the Kjellberg case?

(18) Do you believe that Mr. Stewart was killed because he was black?

(19) If yes, did you share that opinion during deliberations?

(20) Do you have a strong personal bias relating to white people killing black people?

(21) Did you share that opinion with other jurors?

Filed in District Court
State of Minnesota
5/19/2023 9:09 AM

(22) Do you have an opinion that white people do not understand what it is like to be black in America?

(23) If so, did you discuss or mention these opinions with the other jurors during deliberations or at any time?

Proposed questions for other 11 jurors:

(1) Did the juror foreperson request to be appointed as the foreperson?

(2) Did any of the jurors discuss at any time the fact that Stewart was black and perhaps that is why he was killed?

(3) Did the foreperson or any other juror make comments relating to race and how that may have played a role in this case?

(4) Did anyone discuss that Kjellberg was white?

(5) Were any stories told by any jurors about white people killing black people?

(6) Did you feel any race-based pressure during the deliberations?

(7) Was there any prejudicial information brought to the attention of jurors?

(8) Was the Georgia murder case of a black person being killed by three white people ever mentioned by any juror?

(9) Did you read the Facebook of the jury foreperson before or after the deliberations in this case?

(10) Were any of you told that Earl Gray represented Kim Potter? Or Thomas Lane – in relation to the George Floyd case?

(11) Was the Potter case or the George Floyd case discussed in the jury room by anyone?

(12) Did you discuss this trial with anyone prior to deliberations?

(13) Did you feel that deliberations were solely related to the evidence presented at trial and nothing else?

(14) Did you feel there was any outside influence brought to the attention of jurors?

(https://minnesotalawreview.org/)

Minnesota Law Review (https://minnesotalawreview.org/)

Investigating Juror Misconduct in Minnesota

November 8, 2017

INVESTIGATING JUROR MISCONDUCT IN MINNESOTA

By: Melanie Johnson, Volume 102 Staff Member

In the American criminal justice system, jurors are expected to be unbiased. [1] It's an issue most often litigated pre-trial during the jury selection process as counsel for the defendant and state grapple over diversity of the jury venire or defects in voir dire, and this is no accident—once trial gets underway, the jury deliberation process is considered sacrosanct.

But of course, from threats to outside information, things can and do go wrong in jury rooms. A prosecutor might be spotted exchanging words with a juror outside the courtroom.[2] An agitated juror might suggest he and another juror "step outside" to settle a dispute.[3] Jurors are human beings separated from their families, instructed to make an important decision about the lives of others, and informed that they can only return home once they've reached a consensus. It is a situation bound to heighten the curiosity of some, or test the last nerve of others.

Courts have historically upheld the right of jurors to reach a decision free from external scrutiny and without having their verdict undermined either by outside influence or "juror's remorse."[4] But the inevitability of conflict within jury rooms creates tricky problem for the court: How can a judge determine whether a juror's verdict was affected during deliberation without overstepping the bounds of the Minnesota Rules of Evidence?

I. DETERMINING WHETHER MISCONDUCT OCCURRED IN THE JURY ROOM

Defendants have the constitutional due process right to a fair trial and an impartial jury.[5] Where alleged misconduct has occurred on a criminal jury, the State of Minnesota applies Minnesota Rule of Criminal Procedure 26.03, subd. 10 to allegations of juror misconduct discovered prior to deliberations (e.g., access to prejudicial materials) and Minn. R. Crim. P. 26.03, subd. 20(6) to allegations of misconduct discovered after the jury has entered deliberations or after the verdict has been rendered.[6] A *Schwartz* hearing is the procedure "by which both rules are carried out."[7]

Governed by a procedure originally set forth in *Schwartz v. Minneapolis Suburban Bus Co.*, 104 N.W.2d 301(1960), and later codified into the Minnesota Rules of Criminal Procedure, *Schwartz* hearings should be liberally granted upon a *prima facie* showing by the moving party.[8] Jurors are questioned under oath by the judge, and counsel is entitled to be present and have the hearing recorded in order to create a record for appeal. [9]

The Minnesota Rules of Evidence attempt to strike a balance between the court's interest in protecting juror deliberations from external scrutiny and its interest in maintaining the integrity of the court system.[10] Both judges and attorneys must toe a narrow line to avoid harassing jurors or encouraging them to second-guess their decisions.[11] Under Minn. R. Evid. 606(b), courts may not inquire into a juror's thought processes or procedures, except where such testimony may illuminate whether (a) extraneous prejudicial information was improperly brought to the jurors' attention, (b) outside influence was improperly brought to bear upon any juror, or (c) threats of violence or violent acts were brought to bear upon jurors from any source in order to reach a verdict.[12]

These three exceptions must be made apparent to the court through externally-manifested behaviors. Jurors may testify about obtaining newspapers or other forms of information beyond that provided in the record, about conversations with witnesses, attorneys or other parties to the case, about bribes, and about coercion, including

threats and race- and faith-based pressures.[13] Any accounts of extraneous information may not be "wholly speculative."[14]

Because intruding into the thought processes of jurors is forbidden, a judge's determination of whether conduct was prejudicial to the defendant's trial must be based on an objective consideration of the facts, not on juror's statements about their subjective reactions to a situation.[15] This has proven understandably problematic in the investigation of reported threats. Although jurors are permitted by Minn. R. Evid. 606(b) to testify to intimidation brought to bear upon them from any source, such testimony is limited to "express acts or threats of violence," distinguishing between psychological and overt coercion.[16]

II. COURTS HAVE STRUGGLED TO DETERMINE WHAT IS WITHIN THEIR "SOUND DISCRETION" WHEN CONDUCTING A *SCHWARTZ* HEARING

The manner in which a *Schwartz* hearing is conducted is within the sound discretion of the court.[17] This leaves the scope of a *Schwartz* hearing murky at best, with the Minnesota Supreme Court once clarifying that "trial courts should use their discretion and good judgment . . . and should be liberal in granting a hearing."[18] But what does "good judgment" look like when the finality of a verdict is on the line?

First, inquiries into juror conduct must be carefully calibrated to avoid overstepping Minn. R. Evid. 606(b). Proof of misconduct is subject to third-party confirmation. Because courts cannot inquire into the mindset of the juror, a juror alleging abusive conduct cannot be asked, for example, if he or she *felt* threatened; rather, such a juror must testify in the *Schwartz* hearing to the specific physical or verbal acts that constituted the perceived threat, and another juror must be able to confirm that those acts occurred.

Second, Minn. R. Crim. P. 26.03, subd. 10 establishes a ceiling for the questioning of jurors but not a floor.[19] The Rule says only that judges "may" call each juror, and courts have struggled to determine where the judge's "good judgment" ends in terms of the number of jurors represented in the *Schwartz* hearing. Judges are often reticent to recall an entire twelve-juror pool from their daily lives, and the Minnesota Supreme Court has generally found that less-than-full *Schwartz* hearings are permissible if they sufficiently verify the nature of the allegations.[20]

III. A COURT ACTING ON "SOUND DISCRETION" SHOULD SEEK TO CONDUCT A *SCHWARTZ* HEARING TO THE FULLEST EXTENT NECESSARY IN THE INTEREST OF JUSTICE

The Court of Appeals has struggled to identify the threshold standards of the District Court's sound discretion in juror misconduct investigations. Based on examination of the record, I would suggest that precedent reflects that courts should conduct *Schwartz* hearings in such a way as to construct a complete view of the potential misconduct from multiple perspectives. Juror misconduct is a serious issue that casts doubt onto a constitutionally sacred process. Both parties are entitled to due process, and in the interests of judicial finality, *Schwartz* hearings should be conducted to the fullest extent possible to identify the truth.

Because courts may not inquire into a juror's mindset during deliberations, any overt acts of coercion must be "matters of sight and hearing . . . accessible to the testimony of others and . . . subject to contradiction."[21] Under this standard, a juror's claim must be investigated by interviewing other jurors in the panel about the incident in question.[22] Because juror testimony is the only evidence of due process violation available, it should be collected to the fullest extent necessary to ensure justice.[23]

Traditionally, court's reasons for approving smaller *Schwartz* hearings have been limited. For example, although the Minnesota Supreme Court in *Olkon* found that "the manner in which a *Schwartz* hearing is conducted rests within the sound discretion of the trial court," it determined in the very same paragraph that a hearing in which only six of the 12 jurors were represented was permissible *only* because four of those six jurors had been directly "referred to in the allegations of misconduct" and thus would have the greatest knowledge of the incident.[24] Other courts have permitted limited *Schwartz* hearings if any one of the interviewed jurors was "theoretically capable of describing the contacts" witnessed by all.[25] A juror who cannot recall key details about the incident in question should have his testimony supplemented by others.[26]

The potential for misconduct during the deliberation process is at times inevitable. Under the "matters of sight and hearing" standard set by *Olkon* and the Minnesota Rules of Evidence, not only should a *Schwartz* hearing include examination of any jurors named in the misconduct allegation, but most, if not all jurors who may have witnessed any overt conduct that could lead courts to an objective conclusion of misconduct.

1. U.S. Const. amends. VI, XIV. ↑
2. State v. Powers, 654 N.W.2d 667, 678 (Minn. 2003) ↑
3. State v. Kelley, 517 N.W.2d 905, 908 (Minn. 1994) (explaining that "during the deliberations there had been a confrontation in which one juror asked another to step out into the hall to settle their dispute" and "this juror threatened to injure the second juror."). ↑
4. In cases where jurors were polled after the verdict, these results may be used as evidence that a juror is simply having second thoughts; "the fact that a juror has had second thoughts about a verdict does not necessitate a new trial." State v. Fitzgerald, 382 N.W.2d 892, 896 (Minn. Ct. App. 1986); *see also* State v. Xiong, No. A03-70, 2004 WL 727101, at *1 (Minn. Ct. App. Apr. 6, 2004) (finding a two-juror *Schwartz* hearing sufficient partly because the post-verdict jury poll showed agreement on the verdict). According to the Minnesota Supreme Court, "The rationale for the exclusion of juror testimony about a verdict or the deliberation process is to protect juror deliberations and thought processes from governmental and public scrutiny and to ensure the finality and certainty of verdicts." State v. Pederson, 614 N.W.2d 724, 731 (Minn. 2000). ↑
5. U.S. Const. amend. VI. ↑
6. Minn. R. Crim. P. 26.03, subd. 10; Minn. R. Crim. P 26.03, subd. 20(6). *See generally* Kelly Lyn Mitchell, *Judging the Court's Own Conduct: Tracing the Use of the Schwartz Hearing Through Time*, 29 Wm. Mitchell L. Rev. 521, 523 (2002) (citing *State v. Greer*, 662 N.W.2d 121 (Minn. 2003). ↑
7. Kelly Lyn Mitchell, *Judging the Court's Own Conduct: Tracing the Use of the Schwartz Hearing Through Time*, 29 Wm. Mitchell L. Rev. 521, 523 (2002). ↑
8. A *prima facie* showing of juror misconduct requires evidence which "standing alone and unchallenged would warrant the conclusion of jury misconduct." State v. Anderson, 379 N.W.2d 70 (Minn. 1985); State v. Starkey, 516 N.W.2d 918 (Minn. 1994). Moving party must demonstrate more than a reasonable possibility that an event affected a juror's verdict, including facts beyond a juror simply have second thoughts about their verdict. State v. Woods, No. A10-1076, 2011 WL 2302105, at *4 (Minn. Ct. App. June 13, 2011) (rejecting appellant's abuse of discretion claim against the district court when it denied a *Schwartz* hearing based on the fact that the verdict was returned immediately after reports that a juror had become ill, and that juror was later taken to the hospital based on her medical condition). Second thoughts do not necessitate a *Schwartz* hearing or new trial. State v. Fitzgerald, 382 N.W.2d 892, 896 (Minn. Ct. App. 1986) ↑

9. The defendant must be present at *Schwartz* hearing or during any communications with the jury. State v. Bowles, 530 N.W.2d 521 (Minn. 1995). Any juror alleging misconduct by other jurors should be interviewed out of presence of other jurors. *Kelley*, 517 N.W.2d at 905. ↑
10. Minn. R. Evid. 606(b). ↑
11. Attorneys are barred from grilling jurors on their own, and any attorney who privately investigates a potential violation of Minn. R. Evid. 606(b) risks being denied a *Schwartz* hearing, or losing the right to raise the issue for the first time in a motion for a new trial. Olberg v. Minneapolis Gas Co., 191 N.W.2d 418 (Minn. 1971); Baker v. Gile, 257 N.W.2d 376, 377–78 (Minn. 1977). ↑
12. Minn. R. Evid. 606(b). ↑
13. See *Bowles*, 530 N.W.2d at 536 ("Race-based pressure constitutes 'extraneous prejudicial information' about which a juror may testify."); State v. Olkon, 299 N.W.2d 89, 109 (Minn. 1980) (finding allegations that anti-Semitic behavior influenced the jury verdict a valid reason to conduct a *Schwartz* hearing). ↑
14. *See* State v. Mings, 289 N.W.2d 497, 498 (Minn. 1980). The party moving for a *Schwartz* hearing must be able to provide "specific" evidence that the jurors improperly received information. State v. Martin, 614 N.W.2d 214, 226 (Minn. 2000). ↑
15. Minn. R. Evid. 606(b). *See also Martin*, 614 N.W.2d at 226 (barring inquiry into the sympathies of jurors during deliberation on the basis that Minn. R. Evid. 606(b) "forbid[s] testimony about [jurors'] thought processes in determining guilt"); Pajunen v. Monson Trucking, Inc., 612 N.W.2d 173, 176 (Minn. Ct. App. 2000) (arguing that courts should not inquire about jurors' conversations or their mental processes during deliberations, "absent any serious dispute between parties about what was said"). ↑
16. Any testimony as to "psychological intimidation, coercion, and persuasion" is inadmissible. Minn R. Evid. 606(b), Minnesota Supreme Court Advisory Committee Comment; s*ee also* State v. Jackson, 615 N.W.2d 391, 396 (Minn. Ct. App. 2000) ("Evidence of psychological intimidation, coercion and persuasion is not admissible."). However, the Minnesota Supreme Court explicitly permits jurors to testify about *overt* acts of coercion if the acts in question are "matters of sight and hearing, and therefore accessible to the testimony of others and subject to contradiction." State v. Kelley, 517 N.W.2d 905, 910 (Minn. 1994) (quoting State v. Hoskins, 193 N.W.2d 802, 812 (Minn. 1972)). ↑
17. *Olkon*, 299 N.W.2d at 109; *see, e.g.*, State v. Powers, 654 N.W.2d 667 (Minn. 2003) (permitting a single-juror *Schwartz* hearing under the specific circumstances). ↑
18. Olberg v. Minneapolis Gas Co., 191 N.W.2d 418, 424–25 (Minn. 1971). ↑
19. Minn. R. Crim. P. 26.03, subd. 10 ("[T]he court may on its initiative, and must on motion of either party, question *each juror*, out of the presence of the others, about the juror's exposure to that material.") (emphasis added). ↑
20. In general, court encourages all reasonable efforts to question all of the jurors. However, where this is not reasonable, the court has permitted a smaller number of jurors represented at the hearing. *See, e.g.*, State v. Greer, 662 N.W.2d 121 (Minn. 2003) (holding that the district court did not abuse its discretion by questioning only six of the twelve jurors). ↑
21. *Hoskins*, 193 N.W.2d at 812. ↑
22. Courts may also consider the results of any juror polling after the verdict. *See* State v. Fitzgerald, 382 N.W.2d 892, 896 (Minn. Ct. App. 1986); *see also* State v. Xiong, No. A03-70, 2004 WL 727101, at *1 (Minn. Ct. App. Apr. 6, 2004) (finding a two-juror *Schwartz* hearing sufficient in part because the post-verdict jury poll showed agreement on the verdict). ↑

23. Consider the case of *State v. Gibson*. Here, the appellant challenged a *Schwartz* hearing conducted by the district court following allegations that a juror heard potentially prejudicial information about the appellant and later repeated that information to the rest of the jurors in the deliberation room. State v. Gibson, No. A12-1708, 2013 WL 4779021, at *2–3 (Minn. Ct. App. Sept. 9, 2013). The district court, in conducting the *Schwartz* hearing, had called only the jury foreperson, who was not the juror who heard the radio report. Satisfied with the foreperson's contemporaneous explanation at trial that the juror's radio access to information about the trial was "inadvertent," the court declined to examine any other jurors about the impact of the outside information, holding that the issue was sufficiently handled by a curative instruction to the jury. *Id.* In order to reconstruct the sequence of events and get a full picture of the incident, the district court in *Gibson* should have summoned multiple jurors. *See Greer*, 662 N.W.2d at 125 (holding that courts should "make all reasonable efforts to hear from all the jurors who took part in the verdict"). Instead, *Gibson* bifurcates *Schwartz*, negating the moving party's *prima facie* showing by accepting the testimony of a single juror about the origin of the information rather than its potential impact. Furthermore, the *Gibson* court seems to misinterpret the foreperson's note, which suggests that the *hearing* of the information was inadvertent, not, as the court suggests, the repetition of this extraneous information to the rest of the jurors. *Gibson*, 2013 WL 4779021, at *3 ("The extent of the extrajudicial information was that appellant had priors, which only one juror heard and inadvertently repeated to the jury."). ↑
24. State v. Olkon. 299 N.W.2d 90, 109 (Minn. 1980) (approving a *Schwartz* hearing where three jurors were specifically named in the allegation affidavit, the fourth was implicitly identified by his physical features, the fifth was the foreperson, and the sixth was chosen at random from the remaining seven jurors to create 50% representation). The *Olkon* court found no abuse of discretion in this limited representation of jurors, especially "in light of the fact that no juror misconduct was revealed by the testimony of the six jurors." *Id.* ↑
25. *See, e.g.,* State v. Kelley, 517 N.W.2d 905 (Minn. 1994) (where each juror called was able to verify the alleged threat); *Greer*, 662 N.W.2d at 125 (where alleged ex parte contacts were reported to have taken place in the presence of all the jurors); State v. Powers, 654 N.W.2d 667, 678 (Minn. 2003) (where alleged misconduct took place outside of the deliberation room and out of sight of the other jurors, and all parties denied any improper contact). ↑
26. The failures of a single-juror *Schwartz* hearing can be seen most clearly in *Gibson*, 2013 WL 4779021, at *3. In that case, asked if the outside information presented to the juror pool indicated the nature of defendant's "priors," the only juror called for the hearing "stated that he did not remember." *Id.* ↑

Posted in De Novo (https://minnesotalawreview.org/category/denovo/)

Minnesota Law Review
229 19th Ave. South
Minneapolis, MN 55455

Tel: (612) 625-9330
Fax: (612) 624-5400
mnlawrev@umn.edu (mailto:mnlawrev@umn.edu)