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White Paper

On the Decision by the Circuit Attorney for the City of St. Louis Whether to File Criminal Charges against Mark and Patricia McCloskey

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Introduction

On May 25, 2020, George Floyd died after an interaction with officers from the Minneapolis, Minnesota police department. Much, if not all, of the arrest was filmed either by individual citizens' cell phones or by police officers' body-worn cameras. This arrest garnered national attention owing to the final moments of Floyd's life. Video footage captured officer Derek Chauvin kneeling on Floyd's neck for about the last 8 minutes of his life, amid repeated entreaties from Floyd of "I can't breathe." This episode ultimately resulted in the arrest of Chauvin and the other three officers on the scene.[1] Each was charged with homicide, of varying degrees, under Minnesota law.[2]

[1] Am. Compl. at 4, State of Minnesota v. Chauvin, No. 27-CR-20-12646 (Minn. June 3, 2020); Compl. at 6, State of Minnesota v. Kueng, No. 27-CR-20-12953 (Minn. June 3, 2020); Compl. at 6, State of Minnesota v. Lane, No. 27-CR-20-12951 (Minn. June 3, 2020); Compl. at 6, State of Minnesota v. Thao, No. 27-CR-20-12949 (Minn. June 3, 2020).

[2] Chauvin was charged with second degree murder, third degree murder, and second degree manslaughter. Am. Compl. at 1-2, State of Minnesota v. Chauvin, No. 27-CR-20-12646 (Minn. June 3, 2020). Kueng, Lane and Thao were each charged with aiding and abetting second degree murder and aiding and abetting second degree manslaughter.

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In the wake of Floyd's killing, protests erupted across the country to denounce the excessive use of force by law enforcement officers. While the majority of the protests were peaceful, some individuals used the opportunity to commit bad acts of fomenting violence and vandalizing public property.

St. Louis, Missouri was not immune from the wave of protests across the country. St. Louis citizens, too, exercised their right to peacefully assemble and to redress their government for grievances. One of these protests gives rise to the subject of this White Paper.

On June 28, 2020, a group of citizens decided to march to the home of the mayor of St. Louis, Mayor Lyda Krewson, to protest her releasing the names and addresses of protesters who demanded racial justice in the wake of the killing of George Floyd. Media reports indicate that the Mayor lives on Portland Place, a private road in a gated community just off the busy two-lane highway called Kingshighway in St. Louis, MO. Publicly available video footage shows protestors walking through an open gate in the neighborhood in which the Mayor's home is located and marching on the sidewalk or in the street. Publicly available video footage also shows an interaction with the protestors in the front of Mark and Patricia McCloskey's home, which is located on Portland Place, in the vicinity of the Mayor's home. These videos show Mark McCloskey brandishing an assault rifle and his wife Patricia McCloskey brandishing a handgun. At various times, the McCloskeys pointed their guns or otherwise used their weapons to threaten the group of protestors. It is important to note here that no publicly available video shows any protester breaching the curtilage of the home. The protestors appear from the videos to have been on the sidewalk or street, not on the McCloskeys' grass, walkway, or any area abutting their home. In addition, the publicly available videos do not show any protester brandishing a weapon or otherwise threatening the McCloskeys.

This White Paper will first explore whether probable cause exists to charge the McCloskeys with a substantive crime under Missouri state law. Next, the White Paper will analyze Missouri's "castle doctrine," which gives people a basic right to protect their homes in self-defense, and offer an opinion regarding its applicability to the publicly available facts. Finally, we will explore some issues surrounding applicable legal standards in state criminal law and other federalism questions in light of comments made by public officials related to the Circuit Attorney's management of the case thus far.

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Substantive Crime: Unlawful Use of a Weapon

Section 571.030.1 of the Missouri criminal code sets forth ten paragraphs, each of which provides a separate ground of liability for the crime of *Unlawful Use of a Weapon*. Under Section 571.030.1 (4), a person is guilty of Unlawful Use of a Weapon when, in pertinent part, he or she knowingly "[e]xhibits, in the presence of one or more persons, any weapon readily capable of lethal use in any angry or threatening manner." In Missouri, this section of the law is commonly known as "flourishing" or "brandishing" a weapon. This offense obtains when a person points a weapon, exhibits a weapon, or merely holds a weapon in an angry or threatening manner in the presence of one or more persons. A review of relevant Missouri authority, in light of all publicly available evidence, indicates that a charge of Unlawful Use of a Weapon under RSMo § 571.030 is well founded.

A brief exegesis of the statute is in order. Under the brandishing a weapon clause, liability for Unlawful Use of a Weapon occurs when a person "exhibits, in the presence of one or more persons, any weapon readily capable of lethal use in any angry or threatening manner." There is no dispute that the McCloskey's "exhibit[ed]" a weapon in the "presence of one or more persons." But two additional conditions must obtain in order for criminal liability to attach. We consider the relevance of each in turn.

First, the statute provides that the weapon must be "readily capable of lethal use." The case law in Missouri shows that the State need not show that the weapon was capable of firing. Publicly available reports indicate that, by the time a search warrant was issued, a spring was no longer present in the gun, making it inoperable. Operability, however, is not the *sine qua non* for liability under the flourishing statute. Rather, Missouri courts have held that "a firearm is a 'weapon readily capable of lethal use' without requiring it also to be proven at trial that it was functional or loaded."[3] Accordingly, whether the gun was operable is of no moment.

Second, the weapon must have been exhibited "in an angry and threatening manner." The Missouri law against brandishing weapons in a threatening way measures the threat according to whether a reasonable person under the circumstances would perceive a threat. Courts have held that the manner of holding a gun will be a criminal offense if a reasonable person under the circumstances would feel threatened. Under Missouri law, the statute can be violated even if victims were to testify in court that they did not in fact feel threatened. The State need not show that there was a verbal threat accompanying the flourishing of the

[3] Wiliams v. State, 386 S.W.3d 750, 754 (Mo. 2012). See also State v. Lutjen, 661 S.W.2d 845, 847 (Mo. Ct. App. 1983) ("The statute does not contemplate that the gun be already lethal [loaded], but only that the weapon can readily become lethal [by loading]").

weapon in an angry or threatening way. In short, the test for reasonableness is objective rather than subjective.[4]

Upon review, the publicly available information on the incidents of June 28, 2020 involving the McCloskeys provide a strong basis to support a probable cause determination for charging the McCloskeys. It is for a court to decide whether the law has been violated using the standards set forth in the code.

Affirmative Defense: The Castle Doctrine

Even when, as here, there is a strong basis to support a charge of brandishing a weapon in a threatening way, Missouri residents are entitled to raise affirmative defenses that may excuse them from criminal liability. One such excuse is a claim of self defense. Simply put, the law of self defense holds that a person who is not the aggressor is justified in using force against an adversary when he or she reasonably believes themselves to be in imminent danger of death or serious bodily injury. This self-defense doctrine excuses violations of the law in defense of one's self as well as one's home—the so-called "castle doctrine."

In 2007, the Missouri legislature adopted a strong castle doctrine. The law is premised on the notion that your home is your "castle," a place of safety, and that you are entitled to defend it and those residing in it if presented with a dangerous threat. Section 563.041 of the criminal code permits individuals to "use physical force upon another person when and to the extent that he or she reasonably believes it necessary to prevent what he or she reasonably believes to be the commission or attempted commission by such person of stealing, property damage or tampering in any degree." Section 563.03 specifies, in relevant part, that there is no duty to retreat from a dwelling, residence, or privately held property if the owners find it necessary to defend themselves or their property from intruders who pose imminent threats.

The Missouri castle doctrine imposes a reasonableness standard. Section 563.031.1(2) specifies that a person is only permitted to violate the law—including the Unlawful Use of a Weapon statute—if, "under the circumstances as the actor reasonably believes them to be," doing so is necessary to protect his or her home or to prevent further crimes.

On a review of the case law, a self-defense claim alone will not remove criminal liability if it is not well founded. In a 2016 case addressing the unlawful use of a weapon, a Missouri judge considered whether a man who brandished a weapon could claim to have done so

[4] See Wiliams v. State, 386 S.W.3d 750, 754 (Mo. 2012); State v. Williams, 779 S.W. 2d 600, 603 (Mo. Ct. App.1989) (citing State v. Murry, 580 S.W. 2d 555, 557 (Mo. Ct. App.1979)).

legitimately in self defense.[5] It was the first time since the legislature passed Missouri's castle doctrine into law that the judge had to consider whether the new law vitiated the old laws. Like judges elsewhere, this judge determined that the state legislature did not intend for the laws of self-defense, including the castle doctrine, to cancel out the other criminal laws. Reading the laws together, he concluded that a resident is entitled to use force to defend against unlawful entry, but only to defend against what he *reasonably* perceives to be an *imminent* use of force. He further treated the flourishing of a weapon as a use of force that could only be excused by a legitimate self-defense claim.[6]

If prosecuted for the crime of flourishing a weapon, a court would have to determine whether the McCloskeys' actions meet the Castle Doctrine's standards of reasonableness.

Legal Standards: Reasonableness and Evidentiary Proof

Both the laws against the crime of brandishing a weapon and the potential affirmative defense of the castle doctrine impose a reasonableness requirement. That is, the law will not countenance every subjective fear of death or serious bodily injury. Importantly, U.S. law normally makes the self-defense justification unavailable to the so-called first-aggressor. Put simply, one cannot start a fight, and then, when the victim responds in kind, rely on a theory of self-defense to avoid criminal liability. The law only allows innocents or those with "clean hands" to be protected by the self-defense justification.

These laws also require that there be evidence rather than mere assertions as proof. Were the State Circuit Attorney to charge the McCloskeys for the crime of brandishing a weapon, to prevail in court, the prosecution would have to provide evidence beyond a reasonable doubt of commission of the crime. Likewise, to prevail on a self-defense claim of protecting themselves or defending their property under the castle doctrine, the McCloskeys would have to provide substantial evidence of the same kind of immediate danger of serious bodily harm.[7] A judge and jury would have to then decide whether it was objectively reasonable, under the circumstances, for the McCloskeys to conclude that there was evidence that they

[5] State v. Whipple, No. ED102962 (2016).

[6] In *Whipple*, the judge specified that the perception of the harm that gives rise to the claim must reasonably appear to be imminent. There, a self defense claim was found to be reasonable where there was substantial evidence of immediate harm. In that case, the defendant charged with flourishing a weapon had pulled out his gun, without pointing it at anyone, with hopes of intimidating his interlocutors to leave. The court determined that his brandishing of the weapon supported the charge of unlawful use of a weapon, but that he could assert a successful self-defense claim on that charge because there was substantial evidence that he was in immediate danger of serious bodily harm. State v. Whipple, No. ED102962 (2016).

[7] Id.

were at risk of immediate danger to justify an assertion of a self-defense or Castle Doctrine defense. It is notable that over three dozen neighbors from an adjoining street in the same development wrote an open letter to condemn "the behavior of anyone who uses threats of violence, especially through the brandishing of firearms, to disrupt peaceful protest."[8]

These legal standards make sense. What would be the state of affairs without a reasonableness requirement or a rule against a first aggressor? It would be a return to lawlessness and disorder. The reasonableness standards help ensure the law and order we need more than ever in our diverse democracy, in trying times.

These are the standards that the law lays out, and the context against which a court of law can make a determination about them. These standards impose reasonableness and evidentiary requirements for the State or the McCloskeys alike to successfully prevail on any charges or claims related to these proceedings. Adhering to these standards is essential to upholding the rule of law.

Federal intervention

Various media outlets have reported requests for federal intervention into the investigation of Patricia and Mark McCloskey.[9] This is an odd invocation of federal jurisdiction in a matter controlled by Missouri state criminal law. The putative allegation is that the McCloskeys violated a particular subsection of RMo 571.030.1 by brandishing their weapons at a group of citizens. There appears to be no basis in law for federal intervention. Basic principles of federalism confirm this view. States prosecute state crimes and the federal government prosecutes federal crimes. An attempt to confer federal jurisdiction on the basis of this public record is not well-founded.

[8] On the publicly available video and audio footage, we do not see such evidence of threats or of immediate danger. Nor does practice and pattern of protests suggest that it would be reasonable to assume that peaceful protesters intend to invade homes around them. To be sure, the private lane of Portland Place, where the McCloskeys live, is by definition different from the public boulevard, Kingshighway, from which the protestors marched. One could imagine that the McCloskeys consider the private lane to itself be their home, as Mark McCloskey claimed, giving them a right to protect it. It is up to Missouri courts to determine whether the shared private lane is the same as the McCloskeys' individual home. Similarly, if prosecuted for the substantive crime of flourishing a weapon, whether the McCloskeys can prevail on a self-defense claim on those facts is a matter for a jury to decide.

[9] Meagan Flynn et al., *'A modern-day night ride': St. Louis prosecutor receives death threats as Trump defends couple who pointed guns at protesters*, The Washington Post, July 15, 2020 (stating that Missouri's governor spoke to President Trump and believes the Justice Department will be "getting involved"); Tom Jackman, *Sen. Josh Hawley calls for civil rights probe of St. Louis prosecutor Kim Gardner over McCloskey case*, The Washington Post, July 16, 2020 (stating that Senator Josh Hawley wrote a letter to the Justice Department asking it to investigate whether the local prosecutor is violating the couple's civil rights by investigating).

The decision whether to charge a citizen of a crime rests with the Circuit Attorney for the City of St. Louis. She, alone, has authority to decide whether to prosecute. The decision to prosecute is generally left to the sole discretion of the prosecutor.[10] Courts rarely intervene in the charging decision, so long as the prosecutor has the legal authority to charge, and the decision whether to prosecute is generally unreviewable.[11]

Calls in the media to divest the Circuit Attorney of jurisdiction or otherwise review her decision to prosecute appear results-driven, and not based on a legitimate substantive argument relating to an abuse of discretion.[12] In most jurisdictions, including St. Louis, prosecutors limit their broad discretion to charge by ethical considerations and internal policy norms.[13] The American Bar Association counsels prosecutors to charge only when they can establish probable cause that a criminal violation has occurred.[14] Many offices, as a function of internal office rules or norms, will decline to prosecute unless they have a good faith belief as to the existence of sufficient admissible evidence to prove a case beyond a reasonable doubt.[15]

Based on publicly available evidence, there are no credible arguments that probable cause to charge is lacking. Similarly, to the extent that no non-public exculpatory evidence exists, it is clear that a reasonable jury could find, beyond a reasonable doubt, that the conduct under review violated Missouri's Unlawful Use of a Firearm statute. As stated above, the McCloskeys have a credible affirmative defense, which, given the specific arguments advanced in this matter, is a jury question—not an *ex ante* basis to decline a prosecution.

Conclusion

This White Paper evaluates whether, based on publicly available information, probable cause exists to charge Mark and/or Patricia McCloskey on Unlawful Use of a Weapon charges related to an incident that occurred between the McCloskeys and a group of protesters on June 28, 2020.

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[10] Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

[11] Id.

[12] We note here that there appears to be a pattern regarding attempts to divest black women prosecutors, who describe themselves as "progressive" prosecutors, of jurisdiction. To our knowledge, similar attempts have been reported with respect to cases involving, inter alia, Rachel Rollins in Boston, Kim Fox in Chicago, Aramis Ayla in Florida, and Marilyn Mosby in Baltimore.

[13] Am. Bar Ass'n Standards: The Prosecution Function § 3-3.9 (3d ed. 1993).

[14] Model Rules of Pro. Conduct r. 3.8(a) (Am. Bar Ass'n, Discussion Draft 1983).

[15] Am. Bar Ass'n Standards: The Prosecution Function § 3-3.9(a) (3d ed. 1993).

The video evidence, without more, establishes probable cause to prosecute, and no good arguments exist to undermine this conclusion. Further, if the video information is a reasonable facsimile of the evidence to be produced in a criminal prosecution, it is clear that a reasonable jury could find, beyond a reasonable doubt, that both Mark and Patricia McCloskey violated Section 571.030.1 (4) of the the Revised Statutes of Missouri. To be sure, Missouri has a robust castle doctrine that affords any defendant an affirmative defense to the crime charged. While there appears to be a good faith basis to assert a castle doctrine defense in the instant matter, based on the publicly available information, it appears unreasonable for the McCloskeys to have believed that they were in imminent fear of bodily injury or injury to their property.

The scope of this White Paper does not include the normative questions regarding whether or how the Circuit Attorney should exercise her discretion. The range of options run from declining to prosecute outright, to diverting the matter from criminal prosecution upon the satisfaction of certain conditions, to prosecuting the couple to include every conceivable charge for which there is probable cause. Such considerations are beyond the reach of this Paper.

As with any criminal prosecution, it is essential to embrace a fundamental constitutional principle: An accused is presumed innocent unless and until a duly constituted fact-finder determines guilt beyond a reasonable doubt. The presumption of innocence is not merely a theoretical construct; rather, it is a value that must insinuate itself into each and every aspect of the criminal process.

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