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STATE OF MINNESOTA | **DISTRICT COURT**

COUNTY OF HENNEPIN | **FOURTH JUDICIAL DISTRICT**

State of Minnesota, Plaintiff, vs. **MOHAMED MOHAMED NOOR,** Defendant.	**STATE'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO PROHIBIT EVIDENCE OF DEFENDANT'S PRE-ARREST SILENCE** MNCIS No: 27-CR-18-6859

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To: THE HONORABLE KATHRYN QUAINTANCE, HENNEPIN COUNTY DISTRICT COURT JUDGE; COUNSEL FOR DEFENDANT; AND DEFENDANT.

INTRODUCTION

The defendant is charged with second degree intentional murder, third degree murder, and second degree manslaughter. His trial is set for April 1, 2019. In the defendant's "First Motions in Limine," filed February 15, 2019, the defendant moved the court to prevent the State from introducing evidence "that Defendant invoked his *Miranda* rights and remained silent[.]"[1] The defendant was not arrested until after he was charged on March 20, 2018, and was never in custody at any time prior to that. There has been no custodial interrogation in this case. The defendant was never read *Miranda* rights and never invoked any Fifth Amendment privilege. Accordingly, his pre-trial silence may be used to impeach him if he testifies, and the State may likewise offer it in its case in chief.

STATEMENT OF FACTS

After the defendant shot and killed Ms. Ruszczyk on July 15, 2017, a Minneapolis Police Officer brought him to Room 100 at Minneapolis City Hall, which is the headquarters of the

[1] Defendant's First Motions in Limine, 02/15/19, at 4.

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Minneapolis Police Department (MPD). Other MPD officers at the scene had contacted Minneapolis Police Federation personnel, which is standard in an officer-involved shooting case. The Federation arranges for an attorney to represent any officer who may need representation. In this case, attorney Thomas Plunkett responded to Room 100 and met with both the defendant and Officer Matthew Harrity. Agents from the Minnesota Bureau of Criminal Apprehension (BCA) arrived at Room 100 after midnight on July 16, 2017. The BCA photographed the defendant and Officer Harrity, collected their uniforms, and took their blood samples for toxicology testing. Mr. Plunkett was present for these events.

The BCA did not attempt to interview the defendant or Officer Harrity at that time. It has been the common practice in cases where an officer shoots a citizen in the line of duty to permit the officer some time, usually three days, before the investigating agency requests a voluntary interview. Special Agent Doug Henning (SA Henning) of the BCA discussed this with Mr. Plunkett, asked that Mr. Plunkett contact him when he could arrange for an interview with the defendant, and gave his business cards to both the defendant and Officer Harrity. On July 18, 2017, Mr. Plunkett and SA Henning spoke by phone and Mr. Plunkett said the defendant would "not be providing a statement at this time." Mr. Plunkett told SA Henning that if that decision changed, he would contact SA Henning.

Eight days later, on July 26, 2017, SA Henning met with Mr. Plunkett and the defendant to collect a DNA sample from the defendant with the defendant's consent. At that time, SA Henning asked Mr. Plunkett if the defendant had reconsidered his decision not to give a voluntary statement. Mr. Plunkett said nothing had changed, but again said that he would contact SA Henning if it did. The defendant was not in custody or charged with a crime at this time.

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Six months later, on January 23, 2018, the Hennepin County Attorney's Office sent Mr. Plunkett a letter stating, "If Mr. Noor wishes to appear before the Grand Jury and answer questions put to him by prosecutors and grand jurors, he may do so." A month after that, on February 28, 2018, Mr. Plunkett replied in a letter "As you know from our past discussions and communication, Officer Noor asserted his Constitutional right to remain silent from the beginning. To be clear, he is again invoking his Constitutional right to remain silent."

The defendant was never subpoenaed to appear before the grand jury. He was charged by complaint warrant on March 20, 2018, turned himself in on March 21, 2018, and immediately posted bail. That was the only time he has been in custody.

ARGUMENT

THE STATE MAY ELICIT EVIDENCE IN ITS CASE IN CHIEF THAT THE DEFENDANT DECLINED TO GIVE A VOLUNTARY OUT-OF-CUSTODY STATEMENT.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V. Generally, this prevents the State from commenting on the silence of a defendant who asserts his right not to testify at trial. *Griffin v. California*, 380 U.S. 609, 613-15 (1965). It has long been established that the State may impeach a defendant who chooses to testify with their pre-arrest silence. *Jenkins v. Anderson*, 447 U.S. 231, 238-39 (1980) (holding a testifying defendant "cast[s] aside his cloak of silence" and may be impeached with evidence that he remained silent before arrest). Minnesota law is clear that the State may use a defendant's pre-arrest silence in its case in chief if the defendant was under no government-imposed compulsion to speak or remain silent. *State v. Borg*, 806 N.W.2d 535, 543 (Minn. 2011); *State v. Johnson*, 811 N.W.2d 136, 148 (Minn. Ct. App. 2012), *review denied* (Minn. March 28, 2012). "When the government does nothing to compel a person who is not in custody to speak or remain silent . . .then the voluntary decision to do one or the other raises no Fifth

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Amendment issue." *Borg*, 806 N.W.2d at 543 (citing *Jenkins*, 447 U.S. at 241) (Stevens, J. concurring).

To prevail on a claim that Fifth Amendment rights have been violated, there must have been an express invocation of the privilege against self-incrimination in response to an officer's question. *Salinas v. Texas*, 570 U.S. 178, 181 (2013). While no "ritualistic formula is necessary to invoke the privilege . . . a witness does not do so simply by standing mute." *Id.* (citations omitted). One must assert the privilege in order to benefit from it. *Id.* While due process prohibits prosecutors from introducing a defendant's silence *after* the defendant has heard *Miranda* warnings, that rule does not apply where "a suspect has not received the warnings' implicit promise that any silence will not be used against him." *Id. at* 188 n. 3 (internal citations omitted).

In *State v. Borg*, the defendant was sent a pre-arrest, pre-*Miranda* letter from police requesting an interview. 806 N.W.2d 535, 539 (2011). The letter was addressed to the defendant, but asked him to have his "attorney contact [the police sergeant] as soon as possible to arrange an interview appointment." *Id.* At trial, the State elicited evidence in its case in chief from the police sergeant that the defendant never responded to the letter. *Id.* at 540.[2] The Minnesota Supreme Court upheld the admission of this testimony, stating "[w]hen the government does nothing to compel a person who is not in custody to speak or to remain silent … the voluntary decision to do one or the other raises no Fifth Amendment issue." *Id.* at 543. The court reasoned that the letter itself was not questioning, and the letter compelled nothing. *Id.* The court held there was "nothing illegitimate about [the investigator's] attempt to interview [the defendant] by arranging an appointment through [the defendant's lawyer]," and that the defendant's voluntary decision not to respond raised no Fifth Amendment issue. *Id.*

[2] Interestingly, it was in dispute whether Borg had even *received* the letter, but the court nonetheless permitted the testimony. *Borg*, 806 N.W.2d at 543.

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Here, just as in *Borg*, SA Henning requested that the defendant grant an interview through his attorney. The defendant was never in custody, and he would not be charged with a crime for eight more months. Other than giving the defendant his business card, SA Henning had no contact with the defendant, was never alone with him, and never attempted anything close to an interrogation. Because the defendant was not in custody and there was no interrogation, there would have been no reason for SA Henning to ever read the *Miranda* warning to the defendant. The defendant and Mr. Plunkett were given unlimited time to consider their course of action. The defendant was not faced with a compulsion to speak or not speak.

The defendant's motion relies on *State v. Dunkel*, 466 N.W.2d 425, 428 (Minn. Ct. App. 1991) and *State v. Billups*, 264 N.W.2d 137, 139 (Minn. 1978). This reliance is misplaced because both *Dunkel* and *Billups* were expressly rejected by the Minnesota Supreme Court in *Borg*. The Minnesota Court of Appeals' decision in *Dunkel* indeed involved a police detective's attempt to interview a defendant out of custody. 466 N.W.2d at 427. The detective testified during the state's case in chief that he spoke to the defendant's attorney on the phone about setting up an interview, and the attorney declined. *Id.* The court of appeals held this was error, albeit harmless. *Id.* at 428-29. Ten years later, the Minnesota Supreme Court decided *Borg*, finding that *Dunkel* was "not binding," nor was it "settled law." 806 N.W.2d at 546 n.4. Obviously, this rejection of *Dunkel* by the higher court is significant.

As for *Billups*, it involved the police attempting to interview an in-custody, hospitalized defendant who had been shot by police. 264 N.W.2d at 137-38. The police interviewed the defendant in the hospital twice, reading him the *Miranda* warnings both times. *Id.* Each time, the defendant denied doing anything wrong. *Id.* After the interviews, the defendant met with a lawyer who advised him not to talk to police unless he was present, and the defendant was not questioned

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again. *Id.* At trial, the defendant testified to an alibi. *Id.* The prosecutor cross-examined the defendant by pointing out he had never expressed an alibi to police. *Id.* The supreme court held this was error. *Id.*

Importantly, the *Billups* holding has no bearing on this case because "*Billups* applies only in the context of *Miranda*; *Miranda* applies only when a suspect is in custody, and therefore *Billups* does not apply [where] … nothing in the record establishes that [the defendant] was in custody." *Borg* 806 N.W.2d at 545. So, just as *Billups* did not apply in *Borg* because the defendant was never in custody, *Billups* does not apply here.

The fact that the defendant had counsel at the point SA Henning requested an interview is immaterial. *See, e.g., Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 199 (2008) ("The Sixth Amendment right of the accused to assistance of counsel … does not attach until prosecution is commenced.") (internal citations and quotations omitted). Simply having a lawyer does not insulate a criminal defendant from the consequences of their choice on whether to voluntarily speak with the police. *See Borg*, 806 N.W.2d at 545 (holding that the defendant's silence on the advice of counsel did not amount to an invocation of his Sixth Amendment right to counsel because the silence occurred before he was charged).

Here, the defendant's attorney spoke with SA Henning three separate times and never stated that the defendant was invoking a right to remain silent, even if there had been such a right at the time. In the early morning hours after the defendant killed Ms. Ruszczyk, the attorney and investigator exchanged contact information and made an agreement to discuss the possibility of a voluntary statement in a couple of days. That discussion occurred two days later on July 18, 2017, when the defendant's attorney told SA Henning over the phone that the defendant would not be providing a statement. There was no meeting, no reading of *Miranda*, and no statement that the

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defendant was invoking a right to silence. On July 26, 2017, the defense attorney told SA Henning only that "nothing had changed" regarding the defendant's declining to give a voluntary statement. Politely declining, or even explicitly refusing, to give an out of custody interview to the police is not an invocation of the right to remain silent; a right, again, which only applies when the subject is in custody and subject to interrogation. *See*, *e.g.*, *State v. Conger*, 652 N.W.2d 704, 709 (Minn. 2002) ("But *Miranda* rights do not attach until a suspect is in custody.").

In sum, the defendant had a choice on whether to tell his side of the story during a voluntary interview in a non-coercive setting. His decision not to do so is relevant. It should therefore be admitted into evidence.

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CONCLUSION

It has been long-established under United States Supreme Court precedent that the State may impeach a testifying defendant with his pre-arrest silence. In Minnesota, the State is also allowed to present evidence of pre-arrest silence in its case in chief as long as the defendant was under no governmental compulsion to speak at the time he stayed silent. Here, there is no evidence that the defendant was ever in custody when asked to interview, nor is there any evidence he faced any sort of governmental compulsion to speak or not speak. Therefore, the defendant's motion to prohibit the State from introducing evidence of his pre-arrest silence should be denied.

Respectfully submitted,

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Dated: February 25, 2019