DISTRICT COURT, LARIMER COUNTY, COLORADO 201 Laporte Ave. Fort Collins, CO 80521 Telephone: (970) 494-3500 DATE FILED: October 21, 2020 3:47 PM FILING ID: C25782BE1FDB4 CASE NUMBER: 2020CR1295	
The People of the State of Colorado v. GUDMUNDSEN, SCOTT AUSTIN	
Qusair Mohamedbhai, #35390 Matthew J. Cron, #45685 Siddhartha Rathod, #38883 Rathod ǀ Mohamedbhai LLC 2701 Lawrence Street, Suite 100 Denver, CO 80205 (303) 578-4400 (t) / (303) 578-4401 (f) qm@rmlawyers.com / mc@rmlawyers.com / sr@rmlawyers.com	Case Number: 2020CR1295 Division: 4A
VERIFIED MOTION TO COMPEL PROSECUTION PURSUANT TO C.R.S. § 16-5-209	

Petitioner Barry Wesley, through his counsel Qusair Mohamedbhai, Matthew J. Cron, and Siddhartha H. Rathod of the law firm RATHOD | MOHAMEDBHAI LLC, hereby submits this Verified Motion to Compel Prosecution pursuant to C.R.S. § 16-5-209.

INTRODUCTION

On June 11, 2020, Defendant Scott Gudmundsen approached Petitioner Barry Wesley and his co-worker Kyle Farrell, who were canvassing a quiet neighborhood in Loveland on behalf of a roofing company. Gudmundsen, armed with multiple firearms and other weapons, ordered both men to the ground, face-down. Both men complied. Gudmundsen then stepped over Mr. Farrell and approached Mr. Wesley, a 21-year old student-athlete at Colorado State University. Gudmundsen knelt on the back of Mr. Wesley's neck and jammed a loaded Glock 17

semiautomatic pistol into Mr. Wesley's back. As Mr. Wesley begged for his life, Gudmundsen responded that he would not kill Mr. Wesley, but that the police would do so when they arrived.

Why was Mr. Wesley subjected to this abuse? Why did Gudmundsen walk past Mr. Farrell, kneel on Mr. Wesley's neck, jam his gun into Mr. Wesley's back, and threaten that the police would kill Mr. Wesley? The answer is rendered obvious by two simple facts: Mr. Farrell is white and Mr. Wesley is Black.

When law enforcement arrived, they did not kill Mr. Wesley but detained Gudmundsen instead.[1] The District Attorney's Office has rightfully brought several charges against Gudmundsen,[2] yet they have refused to bring charges under Colorado's bias-motivated crime statute despite multiple requests by undersigned counsel on behalf of Petitioner. *See* C.R.S. § 18-9-121. In response to these requests, the District Attorney's Office has offered implausible explanations for Gudmundsen's conduct, theorizing, for example, that Gudmundsen may have targeted Mr. Wesley because he is bigger than Mr. Farrell. But such an explanation does not account for Gudmundsen's statement to Mr. Wesley's employer earlier that morning that he did not want Blacks in his neighborhood; for Gudmundsen's kneeling on Mr. Wesley's neck in the same manner by which a Minneapolis police officer had killed George Floyd two weeks prior; for Gudmundsen's telling Mr. Wesley that the police would kill him at a time when the eyes of the nation were focused on the killing of Black Americans by law enforcement; or for Gudmundsen's participation in an organization that espouses racial hatred and employs white supremacist language and symbols. And such an explanation does not account for the fact that

[1] **Ex. A**, *Officer Geoff Reeves Affidavit in Support of Warrantless Arrest*, 2020CR1295, Jun. 12, 2020.
[2] The charges that Gudmundsen currently faces are felony menacing, felony impersonating a police officer, misdemeanor prohibited use of a firearm, and misdemeanor false imprisonment. **Ex. B**, *Scott Gudmundsen Arrest Record*, 2020CR1295, Aug. 3, 2020.

Black Americans are routinely the victims of systemic racism at the hands of both law enforcement and private citizens.[3]

The District Attorney's refusal to acknowledge and prosecute Gudmundsen's racial animus is unconscionable. Section 18-9-121 declares that "it is the right of every person, regardless of race, . . . to be secure and protected from fear, intimidation, harassment, and physical harm." If this statute does not protect Mr. Wesley, then whom does it protect? As Martin Luther King Jr. once said, "[t]here comes a time when silence is betrayal." Although Petitioner fully respects the discretion that our justice system bestows upon district attorneys, Mr. Wesley cannot abide the District Attorney's silence in the face of the clear racial animus Gudmundsen exhibited in perpetrating this attack. Mr. Wesley respectfully requests that this Court exercise its authority under C.R.S. § 16-5-209 to hold a limited evidentiary hearing and compel the District Attorney to bring charges under C.R.S. § 18-9-121.

FACTUAL BACKGROUND

On June 10, 2020, Mr. Wesley began his first day of work for Premier Roofing Company under the supervision of Kyle Farrell. Their job entailed canvassing neighborhoods to secure roofing contracts for houses that needed repairs. *See* **Ex. C**, *Kyle Farrell Declaration*, Oct. 19, 2020, at ¶¶ 3-4. When Mr. Wesley and Mr. Farrell knocked on the door of Scott Gudmundsen's house, he greeted them with extreme belligerence, shouting at them to get off his property.

[3] The phenomenon of white Americans taking advantage of the criminal justice system's systemic bias toward Blacks has occurred throughout our nation's history, but it has attracted renewed attention in recent years. In numerous high-profile incidents, the police have been called for "offenses" perpetrated by Black Americans as benign as sitting in Starbucks, playing golf, walking a dog, and mowing the lawn. *See, e.g.*, Chan Tov McNamarah, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 335, 340-41 (2019) (footnotes omitted) (listing incidents); *see also* Bruce Vielmetti, *A Black man who was arrested in his new house after neighbor called police is suing Monona, officers*, MILWAUKEE J. SENTINEL (Sept. 17, 2020) (detailing arrest involving Black man "who was handcuffed in his own home at gunpoint after Monona police responded to a neighbor's call about a Black man on the porch"); Jan Ransom, *Amy Cooper Faces Charges After Calling Police on Black Bird-Watcher*, N.Y. Times (July 6, 2020) (describing incident involving white woman calling police on Black Harvard-educated amateur ornithologist in New York's Central Park).

Farrell Decl. ¶ 5. Messrs. Wesley and Farrell walked off Gudmundsen's property, but he followed them. *See Officer Reeves Aff.*; *Farrell Decl.* ¶ 6. Gudmundsen stated that members of "antifa" had been terrorizing the neighborhood, and he gestured at a firearm on his hip. *Farrell Decl.* ¶ 7. Eventually, after demanding to see Mr. Farrell's identification, Gudmundsen returned to his house, and Mr. Farrell and Mr. Wesley continued to canvass the neighborhood. *See Officer Reeves Aff.*; *Farrell Decl.* ¶ 7.

The next morning, on June 11, 2020, Mr. Wesley was told by Mr. Farrell that Gudmundsen had called Premier Roofing's office that morning and had spoken with the branch sales manager, Skylar Memsic. According to Mr. Farrell's declaration, Mr. Memsic informed him that Gudmundsen had "said that he 'did not want antifa or Mexicans **or Blacks** in my neighborhood.'" *Farrell Decl.* ¶ 8 (emphasis added). Mr. Memsic also informed him that Gudmundsen had "yelled violently" during that conversation. *Id.* Mr. Farrell did not communicate these details to Mr. Wesley; he informed Mr. Wesley only that they had been instructed to avoid Gudmundsen's street but to return to the same neighborhood. *Id.* ¶ 9.

At one point as Messrs. Wesley and Farrell were canvassing, Gudmundsen quickly approached them, dressed in full body armor and camouflage clothing and carrying a firearm. *Id.* ¶ 11. The next thing they knew, Gudmundsen was rushing at them, screaming that he was police and to "get the f--- on the ground or I'll kill you!" *Id.* ¶ 12.

Both men followed Gudmundsen's instructions and laid face down on the ground; Gudmundsen then stepped over Mr. Farrell and proceeded to place his knee on the back of Mr. Wesley's neck—just as Officer Derek Chauvin of the Minneapolis Police Department had knelt on the neck of George Floyd two weeks earlier. *Officer Reeves Aff.*; *Farrell Decl.* ¶ 14; *see also* **Ex. D**, *What We Know About the Death of George Floyd*, N.Y. TIMES, Sept. 12, 2020. Mr.

Wesley begged for his life, to which Gudmundsen responded, "I'm not going to kill you. **The police are going to do that for me**." *Officer Reeves Aff.*; *Farrell Decl.* ¶ 15 (emphasis added).

Gudmundsen kept his knee on Mr. Wesley's neck and his loaded Glock 17 semiautomatic pistol jammed into his back until a police officer arrived. *Officer Reeves Aff.*; *Farrell Decl.* ¶¶ 16-17. The officer held all three men on the ground until additional officers arrived. *Farrell Decl.* ¶ 17. Mr. Wesley and Mr. Farrell were then permitted to stand up, and were ultimately released after questioning. *Id.* ¶¶ 17-18.

Prior to his arrest, Gudmundsen was an active member of an organization called "Soldiers of Valhalla Shooting Club."[4] **Ex. E**, *Soldiers of Valhalla Facebook Screenshot*. A recent post by one member to the group's Facebook page featured an advertisement for a t-shirt, with a suggestion that members purchase the t-shirt and "shout to the world that you're a proud American and **Viking blood is running through your veins**." *Id.* (emphasis added).

According to research published by Public Radio International, white supremacist groups in the last fifteen years have increasingly "turned to an ancient heathen religion known most commonly as Odinism" to bolster their racist ideology. **Ex. F**, *White supremacists are killing in the name of an ancient Nordic religion*, PRI.COM, May 25, 2017. The article cites, for example, the case of Frazier Glenn Miller, who wrote a book titled "A White Man Speaks Out," which includes the following passage: "**Valhalla does not accept Negros**. There's a sign over the pearly gates there which reads, 'Whites only.' Oh, Glory day!" *Id.* at 5 (emphasis added). On April 13, 2014, Mr. Miller shot and killed three people, including a 14-year-old boy, at two suburban Kansas Jewish centers. *Id.*

[4] *See* Alex Prewitt, *"This Guy's Been Watching the Wrong Type of News Channel or Something,"* SPORTS ILLUSTRATED MAGAZINE (Aug. 20, 2020), https://www.si.com/college/2020/08/20/barry-wesley-colorado-state-antifa-daily-cover. This article provides a useful overview of the incident, as well as background material on Mr. Wesley's leadership and recognition at Colorado State University.

In one post he made to the Soldiers of Valhalla Facebook group shortly before his arrest, Gudmundsen is seen wearing a t-shirt with the word "Valhalla" above an image of a skull-and-crossbones with a Valknot symbol across the forehead. **Ex. G**, *Scott Gudmundsen Video Screenshot*. According to the Anti-Defamation League, the Valknot is a Norse symbol that is commonly used by white supremacist groups. **Ex. H,** *Valknot, General Hate Symbols*, ANTI-DEFAMATION LEAGUE.

LEGAL ARGUMENT

I. Legal Standard for Motion to Compel Prosecution Under C.R.S. § 16-5-209

Section 16-5-209 of the Colorado Revised Statutes authorizes a court, upon "affidavit filed with the judge alleging the commission of a crime and the unjustified refusal of the prosecuting attorney to prosecute any person for the crime," to require the prosecuting attorney "to appear before the judge and explain the refusal." The court, in its discretion, may hold a hearing without finding that the petitioner has met any particular burden. *See J.S. v. Chambers*, 226 P.3d 1193, 1197 (Colo. App. 2009) (noting statutory authority to hold "limited evidentiary hearing"), *cert. denied sub nom. Stene v. Chambers*, 2010 WL 894042 (Colo. Mar. 15, 2010).

Section 16-5-209 further permits the court, "based on the competent evidence in the affidavit, the explanation of the prosecuting attorney, and any argument of the parties," on finding the prosecuting attorneys' decision was "arbitrary and capricious and without reasonable excuse," to "order the prosecuting attorney to file an information and prosecute the case." A petitioner must prove the prosecutor's exercise of discretion was arbitrary and capricious "by clear and convincing evidence" to meet its burden under C.R.S. § 16-5-209. *Sandoval v. Farish*, 675 P.2d 300, 303 (Colo. 1984) (en banc).

The court in *Sandoval* provided a list of non-exhaustive factors for courts to consider in determining whether the petitioner met this burden. *Id.* Those factors include: (1) the prosecutor's reasonable doubt that the accused is in fact guilty; (2) the extent of the harm caused by the offense; (3) the disproportion of the authorized punishment in relation to the particular offense or the offender; (4) possible improper motives of a complainant; (5) reluctance of the victim to testify; (6) cooperation of the accused in the apprehension or conviction of others; and (7) availability and likelihood of prosecution by another jurisdiction. *Id.*; *see also J.S. v. Chambers*, 226 P.3d at 1206-09 (applying factors).

II. Petitioner Has Proffered Clear and Convincing Evidence of Prosecutorial Abuse of Discretion Under *Sandoval*

a. The First Sandoval *Factor Strongly Favors Prosecution.*

The first *Sandoval* factor is whether the prosecutor has "reasonable doubt that the accused is in fact guilty." *Sandoval v. Farish*, 675 P.2d 300, 303 (Colo. 1984). Here, there can be no reasonable doubt that Gudmundsen is guilty of a bias-motivated crime.

A person commits a bias-motivated crime "if, with the intent to intimidate or harass another person because of that person's actual or perceived race," he or she "[b]y words or conduct, knowingly places another person in fear of imminent lawless action directed at that person" and "such words or conduct are likely to produce bodily injury to that person." C.R.S. § 18-9-121.

As with most intent showings, a prosecutor will typically need to prove racial motivation through circumstantial evidence. In other words, the trier of fact will have to infer the defendant's motive from statements or behaviors that suggest hateful intent. The use of biased and exclusionary language, such as statements that members of a specific race "do not belong" in the defendant's neighborhood prior to an act of violence or intimidation, as occurred in this case,

have been held to be sufficient evidence to uphold a hate crime conviction. *See People v. Johnston*, 641 N.E.2d 898, 900 (Ill. App. 1994) (upholding hate crime conviction where white teenagers shouted "N------ don't belong in our neighborhood" before assaulting two Black youths); *see also, e.g.*, *People v. Lashley*, 1 Cal. App. 4th 938, 942 (Cal. App. 1991) (finding defendants' use of racial epithets "in the minutes preceding the attack" were on their own sufficient to conclude the acts were "motivated by racial hatred").

Of course, racist language is not the only accepted evidence of racist motive. For example, a prosecutor can prove racist motive by showing the defendant singled out a Black victim and ignored his white companion, as also occurred in this case. *See, e.g.*, *People v. Davis*, 674 N.E.2d 895, 895-96 (Ill. App. 1996) (concluding that defendant's motivation in attacking victim was racist based on fact that "defendant directed his words and assault at [victim], an African-American, rather than his white companion"); *Commonwealth v. Rink*, 574 A.2d 1078, 1081 (Pa. Super. 1990) (finding "overwhelming" the fact that the Black homeowner, and not his white companion, "suffered the consequences of the [defendants'] actions," and especially noting the companion's testimony that "the [defendants'] did not seem to want him, but were after [the victim]").

Racist symbols and statements, such as on tattoos and clothing, are also probative. *See, e.g.*, *United States v. Allen*, 341 F.3d 870, 886-87 (9th Cir. 2003) (finding racist symbols, such as swastika tattoo, were admissible evidence of racist motive); *State v. Novak*, 949 S.W.2d 168, 171 (Mo. App. 1997) (defendant's "white pride" tattoo competent evidence of racist motive); *City of Wichita v. Edwards*, 939 P.2d 942, 950 (Kans. App. 1997) (finding "substantial evidence exists indicating [defendant's] actions were racially motivated" where defendant "was wearing a 'white power' T-shirt"). A prosecutor can also show racist motive by pointing to a defendant's

participation in a racially hostile group, such as the groups with which Gundmundsen associates. *See, e.g., O'Neal v. Delo*, 44 F.3d 655, 661 (8th Cir. 1995) (finding defendant's association with the Aryan Brotherhood to be probative evidence of motive of racial animus in his murder of Black victim). Finally, certain acts, like Gudmundsen's sinking his knee into the back of Mr. Wesley's neck and promising that the police were going to kill him, "necessarily signal[]" a "message of intimidation and racial hatred." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 402 (1992).

Although a prosecutor must show the defendant committed an act of intimidation or harassment "because of" racial animus, the racist motive need not be the **only** motive. It does not appear that any Colorado court has had an opportunity to address the scope of the bias-motivated crime causation element, but other jurisdictions have. In *In re M.S.*, 896 P.2d 1365, 1377 (Cal. 1995), the California Supreme Court addressed this issue as follows:

> On one hand, the Legislature has not sought to punish offenses committed by a person who entertains in some degree racial, religious or other bias, but whose bias is not what motivated the offense; in that situation, it cannot be said the offense was committed because of the bias. On the other hand, **nothing in the text of the statute suggests the Legislature intended to limit punishment to offenses committed exclusively or even mainly because of the prohibited bias**. A number of causes may operate concurrently to produce a given result, none necessarily predominating over the others.[5] (emphasis added).

Most jurisdictions to consider the issue have taken the same approach as California. *See, e.g.*, *Matter of Welfare of S.M.J.*, 556 N.W.2d 4, 7 (Minn. App. 1996) (noting that statutory requirement that prohibited activity be committed "because of" victim's race or other protected status indicates legislative purpose to "exclude offenses committed by a person who entertains

[5] The California bias-motivated crime statute is substantially similar to C.R.S. § 18-9-121. At the time *In re M.S.* was decided, California's statute provided that "no person . . . shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of California or the United States **because of** the other person's race, ..." *See* Cal. Penal. Code § 422.6 (1995). The California Supreme Court's decision in *In re M.S.* was codified into the bias-motivated crime statute in 2004 amendments. *See* 2004 Cal. Legis. Serv. Ch. 700 (S.B. 1234) (West).

racial or other bias but whose bias is not *in substantial part* what motivated the offense"); *People v. Nitz*, 674 N.E.2d 802, 806 (Ill. App. 1996) (interpreting statute that defines a hate crime as the commission of one of enumerated acts "by reason of" the victim's actual or perceived protected status).

The evidence in this case indisputably demonstrates that Gudmundsen acted out of racial animus. On June 11, 2020, Gudmundsen expressly told Mr. Mismic that he did not want Blacks in his neighborhood. He then prepared for battle: dressing in tactical gear and camouflage clothing, he armed himself with multiple firearms and patrolled the neighborhood for Mr. Wesley. When he spotted Mr. Wesley in the neighborhood, he acted with laser focus on Mr. Wesley, largely ignoring Mr. Farrell. Even after he had restrained Mr. Wesley, with his knee on Mr. Wesley's neck and his gun jammed into Mr. Wesley's back, he paid little attention to Mr. Farrell. He then told Mr. Wesley that the police would kill him, a promise that could only reference the nationwide attention on extrajudicial killing of Black men by law enforcement. Gudmundsen's involvement with a white supremacist organization only reinforces the racial nature of this attack.

Finally, even if Gudmundsen were to argue that he was motivated by a delusional belief that Mr. Wesley and Mr. Farrell were terrorists intent on carrying out violence in his neighborhood, this would not preclude a conviction under the bias-motivated crime statute, as the statute does not require that a racist motive be the exclusive motive. *See* C.R.S. § 18-9-121.

b. **The Remaining *Sandoval* factors Are Either Irrelevant or Favor Prosecution.**

The other six *Sandoval* factors are either irrelevant or militate in favor of prosecution. *See* 675 P.2d 300, 303 (Colo. 1984) ((2) the extent of the harm caused by the offense; (3) the disproportion of the authorized punishment in relation to the particular offense or the offender;

(4) possible improper motives of a complainant; (5) reluctance of victim to testify; (6) cooperation of the accused in the apprehension or conviction of others; and (7) availability and likelihood of prosecution by another jurisdiction).

The victim and Mr. Farrell, the two key witnesses, are prepared to testify if needed, and there is no reason that Gudmundsen should not be charged under the bias-motivated crime statute due to any "disproportion of the authorized punishment" in relation to the offense. If Gudmundsen is found guilty under the bias-motivated crime statute, the punishment authorized under that statute will be entirely appropriate. Thus, the third and fifth factors are irrelevant or weigh in favor of prosecution.

There is no evidence in this case that the District Attorney's Office has made a deal with Gudmundsen in exchange for cooperation in the apprehension or conviction of others, and similarly no reason to believe that any other jurisdiction will prosecute this case, rendering the sixth and seventh factors irrelevant.

The harm caused by this offense, on the other hand, cannot be overstated. At a time when public trust and confidence in police departments across the nation is at an historic low, a just and equal application of the criminal law is of paramount importance. Indeed, Mr. Wesley seeks this unusual remedy only to ensure that the laws of Colorado are applied equally to protect young Black men like himself from those who carry out violent acts of racial hatred. The failure to adequately prosecute this case not only harms Mr. Wesley, it also reinforces the message that there are separate systems of justice for white and Black Americans. This factor weighs heavily in favor of prosecution.

In sum, the evidence of racial motivation in this case is overwhelming, and the other relevant factors weigh in favor of compelling prosecution. Reasonable persons fairly and

honestly considering the evidence presented here must conclude that prosecution of a charge under C.R.S. § 18-9-121 is proper. *See J.S. v. Chambers*, 226 P.3d 1193, 1201 (Colo. App. 2009).

CONCLUSION

Based on the foregoing, Petitioner respectfully requests this Court exercise its discretionary authority pursuant to C.R.S. § 16-5-209 to order a limited evidentiary hearing. If, after a hearing, the evidence is as presented in this Motion and the attached Exhibits, Petitioner respectfully requests that this Court order the District Attorney to file an information and prosecute the case.

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