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STATE OF MINNESOTA  
IN SUPREME COURT

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STATE OF MINNESOTA,

Respondent,

vs.

EDISON JOSEPH MAHKUK,

Appellant.

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**RESPONDENT'S BRIEF AND APPENDIX**

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## LEGAL ISSUE(S)

- I. Did the trial court prejudicially err in admission of limited gang expert testimony?
- II. Does the record support the trial court's temporary partial closure of the courtroom where one witness appeared to be intimidated by gang spectators and reported threats from the gang and another witness recounted threats by the previous gang?
- III. Did the trial court abuse its discretion in giving instructions consistent with Minnesota law?
- IV. Where the defendant and an alleged "newly discovered" witness were companions together at the scene of the crime at the time of the offense and the witness's "newly discovered" testimony related to what the witness observed when he and Appellant were together, did the postconviction court abuse its discretion by denying a new trial based upon a claim of newly discovered evidence?

## STATEMENT OF FACTS

This is an appeal from convictions for two counts of Murder in the First Degree (Premeditated Murder) and two counts of Murder in the First Degree (Intentional Murder for the Benefit of a Criminal Gang) relating to the November 27, 2004 shooting deaths of D ■ B ■ and J ■ B ■ in the courtyard at the Little Earth housing complex.

At the Little Earth housing complex just before 4:00 *a.m.* on November 27, 2004, J ■ W ■ called down from her balcony to J ■ B ■ and D ■ B ■. B ■ was W ■'s brother-in-law, and W ■ had known B ■ since she was nine years old. The two men were hanging out with some other friends in the courtyard below W ■'s apartment. Because of the hour and because she thought B ■ and B ■ were drunk, W ■ suggested the two men come inside and go to bed. (T. 33) She invited only B ■ and B ■, not the others in the courtyard. B ■ and B ■ agreed to come in, and W ■ started toward the door to let them in.

Before she reached her apartment door, the sound of gunshots stopped W ■ and brought her back to the balcony. "I went to open the door and got half-way down the hall and I heard the first two shots. ...I ran back out onto the balcony and seen the Indian boys shooting them [witness crying]." (T. 33) W ■ saw three men with guns – Michael McFarlane, Vinnie Williams and the Appellant, Edison Mahkuk. (T. 35) "...[A]ll three of them were shooting at my brother-in-law and D ■." (T. 40) Then the gunmen turned and ran.

A departing gunman addressed W [REDACTED] on her balcony. "...[O]ne of them looked up at me and said, 'Native Mob bitch' and shot in the air." (T. 39) B [REDACTED] was already dead, and W [REDACTED] saw her brother-in-law fall. (T. 67) She ran downstairs to help him as best she could. J [REDACTED] B [REDACTED] died later that morning from a bullet that entered at his flank and traveled up through his torso and exited near his armpit. (T. 730-731) This was consistent with a shot fired as B [REDACTED] was bent forward and fleeing the assailants.

The two victims had been hanging out with friends – A [REDACTED] B [REDACTED], D [REDACTED] E [REDACTED], A [REDACTED] J [REDACTED] and B [REDACTED] G [REDACTED]. For an hour or more, the group had been stopping at various apartments and chatting with people at their doorways or in the courtyard. At the time of the shooting, the friends had separated slightly as different individuals chatted with other Little Earth residents. Some of the friends belonged to a Native American gang. A [REDACTED] B [REDACTED] and D [REDACTED] E [REDACTED] were Project Boyz or Project Boyz associates. A [REDACTED] J [REDACTED] had no gang affiliation. B [REDACTED] G [REDACTED], once a member of the Native Mob, didn't admit that he had flipped to become a Project Boy. At trial, however, G [REDACTED] testified and acknowledged that "someone might think that". After getting out of prison G [REDACTED] had a dispute with other Native Mob members including Mike McFarlane. After the dispute G [REDACTED] hung out with Project Boyz. (T. 425-26, 361)

The Project Boyz are a Native American gang that split off from the Native Mob, a much larger Native American gang. (T. 351) Because both gangs include members who grew up together in the Little Earth complex and still live in or

around Little Earth, there is frequent interaction at Little Earth between gang members. Sometimes it is peaceful, and sometimes it is not.

A ■■■ B ■■■, D ■■■ E ■■■, A ■■■ J ■■■ and B ■■■ G ■■■ all testified about the night's events and the killings. Like J ■■■ W ■■■, they identified the assailants as Mike McFarlane, Vinnie Williams and the Appellant, who is sometimes known as "Eddie Cheeks". (T. 294) Up until the shootings, they had no contact or interaction that night with their assailants. A ■■■ B ■■■, E ■■■, J ■■■ and G ■■■ all described three men coming directly from one side of the courtyard. All of them saw at least one gun. All of them ran. All heard shooting behind them. B ■■■, E ■■■, and G ■■■ identified the assailants – Mike McFarlane, Vinnie Williams and Appellant – as members of the Native Mob. (T. 159, 280-82, 350)

The only words exchanged came from the assailants. A ■■■ J ■■■ had stepped into a doorway of one building and was talking to a girl inside an apartment when the assailants passed round a fence just before rushing their victims.

...I was talking with this girl by the door and I looked this way and I could see three people coming, but I didn't think nothing of it and I started talking to her, and that's when I seen Vincent [Williams] come around the corner and he said, "Fuck you, niggers, Native Mob cuz."

(T. 293) J ■■■ could see a gun in Williams' hand as Williams spoke. (T. 295)

The girl in the doorway pulled J ■■■ and others inside. They shut the door. (T.

295, 244) A ■ B ■ heard someone shouting, "Shoot them niggers, shoot them niggers" and took off running. As he ran, he saw his brother J ■ "tustling" with Mike McFarlane. (T. 245) McFarlane shrugged off J ■ B ■ and B ■ ran north. A ■ B ■ could see McFarlane firing in the direction J ■ B ■ ran. (T. 248)

After the assailants fled, people came back outside. They found D ■ B ■ behind a bench. He had been shot six times. One shot entered the back of his head. J ■ B ■ was trying to stand up, but he couldn't. He died later that morning at Hennepin County Medical Center from a gunshot wound that entered one flank, traversed up his body and exited near the opposite armpit. (T. 730, 731)

Both direct witnesses and an expert on Indian gangs testified that the Native Mob had gang-based motive for the shooting. B ■ G ■ testified that he had separated himself from Native Mob (T. 365), that he feared their retribution for leaving and that someone looking at his conduct might think he had flipped to Project Boyz. (T. 426-427) D ■ E ■ corroborated G ■, saying that G ■ had been Native Mob but that "something happened". (T. 159-160) G ■ further testified that Mike McFarlane believed that G ■ had stolen some Native Mob guns. (T. 352-53) Roberta Rock, Mike McFarlane's girlfriend, testified that G ■ was no longer a member of Native Mob because he had stolen guns from Vincent Williams. Officer John LaLuzerne testified that on August 29, 2004 on a few months before the killings, he arrested the Appellant in south Minneapolis. In the squad LaLuzerne asked Appellant routine identification

questions. Appearing to be somewhat under the influence, the Appellant responded excitedly that that he was Native Mob and that they were “taking over”. (T. 601)

Officer Stephen Setzer testified as an expert on Indian gangs. Setzer testified that Project Boyz is an Indian gang that split off from Native Mob in 2001 or 2002. He testified that splitting off from a gang or flipping from a gang is viewed as disrespectful and requires physical punishment from the gang. Otherwise the gang is perceived as weak. (T. 687-690) Setzer testified that gang claims that death was the only way out of a gang were common but that in his opinion, the claims were often just a scare tactic. (T. 698) Setzer knew Appellant personally and had interviewed Appellant four years before the shooting when Appellant was fourteen. At that time, Appellant claimed to be an “associate” of Native Mob. (T. 691) In addition to Appellant, Setzer knew Appellant’s brother, his sister, his mother, his aunts and his cousins. (T. 692) Setzer’s opinion was that by the time of the shooting in this case, Appellant had become a full member of the gang. (T. 691) On cross-examination, Setzer admitted that both Native Mob and Project Boyz hang out in the same areas at Little Earth and that sometimes nothing happens as a result of this. Setzer agreed on cross-examination that assaults or fights between gang members are at times the product of being drunk or high, rather than the product of any gang purpose. (T. 695) On re-direct, Setzer explained that assaults between gang members where there was no drinking or getting high together preceding the fight tended to be for either personal

revenge or for gang purposes. "But usually when there's violence and it's not involved or isn't stemming from a party, it's because there was a hit ordered by a gang leader or it's a revenge factor due to someone in their family or someone close to them being victimized by the person they are going after." (T. 699)

There was no objection to this testimony.

The jury found Appellant guilty of four counts of Murder in the First Degree, *i.e.*, two counts of aiding and assisting in premeditated murder and two counts of aiding and assisting in murder for the benefit of a gang. This appeal followed.

## ARGUMENT

### I. THE LIMITED EXPERT TESTIMONY OF STEPHEN SETZER, WHO WAS A DIRECT WITNESS AS WELL AS AN EXPERT ON SUBJECTS HE ADDRESSED, WAS ADMISSIBLE. IF ADMISSION OF EXPERT TESTIMONY WAS ERROR, THE ERROR WAS CERTAINLY HARMLESS.

#### A. Testimony of Stephen Setzer.

The district court in this matter heard a great deal more gang expert testimony than the jury heard. In compliance with procedures described in *State v. DeShay*, 669 N.W.2d 878 (Minn. 2003), and *State v. Lopez-Rios*, 669 N.W.2d 603 (Minn. 2003), the State's gang expert, Minneapolis Police Officer Stephen Setzer testified at a pre-trial hearing about his expert qualifications, experience, training and knowledge regarding these gangs.

Setzer's testimony clearly qualified him as an expert on Native American gangs. Setzer is a Minnesota Gang Strike Force member and one of two Strike Force members who specialize in Native American gangs. (PT. 76, 78)<sup>1</sup> Setzer's sources of expert information included his own confidential and non-confidential interviews of gang members (PT. 87-88, 96), reviewing police reports and information (PT. 101), reading relevant published literature (PT. 98), long experience as a police officer in the Minneapolis Phillips neighborhood (PT. 77),

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<sup>1</sup> "PT" refers to the pre-trial hearing on gang testimony and other matters.

and monitoring the mail and telephone calls of Native American gang members in Minnesota's prison. (PT. 102)<sup>2</sup>

Setzer was an ordinary witness about gang issues in this case as well as an expert. He was intimately familiar with the location of the crime in this case and with the community living there. In addition to policing in the Phillips neighborhood for many years, Setzer worked as a private security officer at Little Earth from 1998 until 2001 or 2002. (PT. 115) Setzer knew the Appellant and his family and could testify based upon the same personal experiences relied upon by civilian witnesses who testify about gang affiliation:

Well, I've dealt with Eddie on several occasions on the street and seen him out and about hanging with other Native Mob members and, in fact, even with members of other gangs. I've seen him on the street for years. I know him, I know his brothers, I know who his sister is, his mom, his aunts, his cousins. I know their whole family pretty much.

(T. 693) Setzer knew Appellant was a Native Mob member "[b]ecause I have talked to him on several occasions and he has freely admitted it." (PT. 84) In relation to one 1999 killing, Appellant gave Setzer information leading to a murder conviction. (PT. 123)

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<sup>2</sup> Setzer's Gang Strike Force partner, the other specialist in Native American gangs, is a corrections agent with authority to read or listen to prisoners' communications who constantly monitors communications between gang members and individuals outside the prison. (T. 102) The information from this monitoring is compared to police information about crimes and events on the street as a check on its reliability. The comparisons show that when inter-gang confrontations occur, news about them spreads very quickly. (T. 689)

Setzer's measured testimony clarified and added precision to issues outside the knowledge of the typical juror. Some of Setzer's testimony tended to deflate stereotypes jurors might have. Setzer testified, for example, that a commonly heard gang credo, *i.e.*, that death is the only way out of a gang, was hyperbole: "...I think it's more of a scare tactic to keep guys from leaving." (T. 698) Setzer testified that members of opposing Native American gangs sometimes socialize together, that opposing gang members do not inevitably assault each other and that when assaults occur they are sometimes the result of proximity and alcohol or drugs, as opposed to gang-related motives. (T. 695, PT. 93) Setzer testified about situations in gang culture that create a motive for retaliation, but in keeping with the holdings of *DeShay* and *Lopez-Rios* his testimony was substantially limited. It was neither a subterfuge for "seemingly unlimited" testimony about gangs nor an attempt to convict Appellant by association.

#### **B. Legal Standard For Expert Testimony About Gangs.**

A district court has broad discretion in evidentiary matters and its rulings will not be disturbed absent an abuse of discretion. *State v. Marchbanks*, 632 N.W.2d 725, 730 (Minn. Ct. App. 2001). On appellant review a defendant claiming error bears the burden of proving both error and prejudice. *Id.*; *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1988). Only errors substantially influencing the jury verdict warrant reversal. *Marchbanks, supra*.

Testimony about criminal gangs is relevant and permissible in prosecutions where acting for the benefit of a criminal gang is an element of the charged offense. “Criminal gang” is a statutorily defined term:

As used in this section, "criminal gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, that:

(1) has, as one of its primary activities, the commission of one or more of the offenses listed in section 609.11, subdivision 9;

(2) has a common name or common identifying sign or symbol; and

(3) includes members who individually or collectively engage in or have engaged in a pattern of criminal activity.

Minn. Stat. § 609.229. As with other elements of offenses, the jury must find that the statutorily required facts have been proven.

Admission of expert testimony rests within the broad discretion of the trial court. *Lopez-Rios*, 669 N.W.2d at 612; *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999). The primary consideration for admission of expert evidence is “whether it will assist the jury in resolving factual questions presented.” *Lopez-Rios*, 669 N.W.2d at 612; *State v. Grecinger*, 569 N.W.2d 189, 195 (Minn. 1997). Gang expert testimony has troubled Minnesota’s appellate courts in cases where it has been largely cumulative of other witness testimony and where the “seemingly unlimited development of the roles and activities of gangs in general” and

reference to the criminal “gamut from ‘murder for hire’ to property crimes” injects needless prejudicial material into cases as simple as drug sales. *DeShay*, 669 N.W.2d at 885-87. On the other hand, gang culture is outside the knowledge of the typical juror. Consequently expert testimony is appropriate and helpful when properly limited. *State v. Jackson*, 714 N.W.2d 681, 692 (Minn. 2006.) For example, in *Lopez-Rios* the Minnesota Supreme Court observed that some background or history of gang rivalries would have been helpful to the issues in that case but found error in testimony so extensive as to divert the jury from the issues<sup>3</sup>. Conversely, in *State v. Jackson, supra*, the court upheld introduction of gang expert testimony that was helpful and neither belabored nor excessive.

Because the jurors are unlikely to be familiar with gang culture, [the expert’s] testimony provided useful context for the state’s theory as to why Jackson would attack a person seeking to avoid a fight. In addition, [the expert’s] testimony was neither labored nor excessive.

*Jackson, supra* at 692. Minnesota cases now require that a gang expert’s qualifications and testimony be determined at a pretrial hearing and carefully monitored to prevent the defendant from being tried for the criminal actions and bad acts of others. *DeShay*, 669 N.W.2d at 888.

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<sup>3</sup> “While a brief history of the Sureno 18<sup>th</sup> Street rivalry and an explanation of the importance of retaliation in the gang culture may have been helpful, there was no need for [the expert] to mention that Southern California has “an inordinate number” of Hispanic gangs, that the Los Angeles 18<sup>th</sup> Street gang has over 9,000 members or that the author of the Latin Kings “lit” was currently in prison in Connecticut.” *Lopez-Rios*, 669 N.W.2d at 612.

Appellant implicitly argues that expert testimony should *never* be admitted in a trial where the defendant is charged with committing a crime “for the benefit of a gang.” Minnesota courts have wisely declined to categorically forbid expert testimony on this subject outside the knowledge of the typical juror. *Jackson at* 691. To do so would encourage verdicts based upon stereotypes and the lurid dramas of popular media.

**C. The District Court’s Ruling Complied With Applicable Standards.**

The *DeShay* procedure was followed in the Appellant’s case, and the trial court limited expert testimony on gangs, expressly tailored its ruling to conform to *DeShay* and *Lopez-Rios* and to minimize prejudice to the Appellant. (T. 149, 159-60) Appellant’s brief would lead one to believe that the district court thoughtlessly threw open the doors to any and all gang-related evidence that was available (and later imposed minor, insignificant restraints on the evidence that it previously ruled could be admitted). Contrary to Appellant’s claims, the district court, in its initial decision and subsequent evidentiary rulings, exercised care and caution and took all necessary steps to prevent the introduction of unfairly prejudicial and inflammatory evidence.

*Expert Testimony about Criminal Activity of the Native Mob.* The charged offense required a finding that, and therefore permitted proof that, the Native Mob “has, as one of its primary activities, the commission of one or more of the offenses listed in section 609.11, subdivision 9.” This inevitably permits proof of relevant crimes by the Native Mob. The district court reasonably permitted expert

testimony “in a kind of summary, vague way” because the court believed this to be the least prejudicial way to present evidence on this topic.

[THE COURT]: ...The difficulty in *DeShay* is balancing their concern about using prior records with the statutory elements, which require proof of not only criminal activity but specific crimes. There’s a listing under Chapter 611 [*sic*] of the crimes that are supposed to be illicit.

Some kind of evidence about that has to come in. The State could do it in a number of ways – introducing juvenile records or adjudications, arrest reports, probable cause holds. I believe that offering it through an expert in a kind of summary, vague way is the least prejudicial way to do it.

(PT. 159) The trial court further limited expert testimony on this issue by permitting testimony about offenses but forbidding testimony that there was a pattern. “...I only want him to offer it as criminal activity by members. Whether or not there’s a pattern would be a jury question.” (PT. 162)

Sound reasoning supports the district court’s decision. It is unclear how any other effective method of proof would be less prejudicial than the method the court chose. Although there may be a preference for lay witness testimony with regard to gangs in general, a gang’s criminal activities is one area where lay witness testimony is likely to be more prejudicial and to have less precision and less depth than expert testimony. Anecdotal lay evidence, *e.g.* “the Native Mob beat me up and shot my cousin”, would clearly be more prejudicial than the evidence in this case. Common street knowledge, otherwise known as “Rumor”, is less reliable. Calling Native Mob members to testify about their practices and

purposes runs afoul of both the Fifth Amendment and creates enormous practical difficulty.<sup>4</sup> Although there was apparently a lay witness who could testify that the Native Mob “rob[s] and steal[s] and make[s] money,” (PT. 151), this was likely an opinion based upon narrower, less scholarly and, quite frankly, less accurate information than the expert’s<sup>5</sup>. No lay witness could testify that the Native Mob (or its members) had committed the crimes enumerated in § 609.11, subd. 9.<sup>6</sup> For example, a lay witness probably could not testify that the “robbing” and “stealing” (allegedly) committed by members of the Native Mob constituted aggravated or

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<sup>4</sup> Appellant presumably would have the State call a member of the Native Mob to testify how the crime would benefit his/her gang; only a member of the Native Mob could testify about how the crime would benefit the Native Mob without having to rely on “hearsay and second- and third-hand information.” (Appellant’s Brief at p. 25) Obviously, such a witness would be difficult to procure. Gangs have a code of silence and “[i]mplicit in that conspiracy of silence [i]s the threat of violence against any member who [breaks] the agreement.” *State v. Byers*, 570 N.W.2d 487, 494 (Minn. 1997). In the absence of such a witness, however, Appellant’s position leaves the State with no way to prove its case - and renders Minn. Stat. § 609.229 virtually un-prosecutable. Such a result is unpalatable and must be rejected by this Court.

<sup>5</sup> The accuracy of this lay testimony is debatable, and foundation for the allegation is lacking. This underscores the need for expert testimony on this point. During the pre-trial hearing, Officer Setzer stated that the primary crimes the gangs engaged in were gun trafficking and drug sales, not “robbing” and “stealing.” (PT. 81, 88, 104)

<sup>6</sup> The crimes listed in this statute are: murder in the first, second, or third degree; assault in the first, second, or third degree; burglary; kidnapping; false imprisonment; manslaughter in the first or second degree; aggravated robbery; simple robbery; first-degree or aggravated first-degree witness tampering; certain criminal sexual conduct offenses; escape from custody; arson in the first, second, or third degree; drive-by shooting under § 609.66, subd. 1(e); harassment and stalking under § 609.749, subd. 3, clause (3); possession or other unlawful use of a firearm in violation of § 609.165, subd. 1(b), or § 624.713, subd. 1, clause (b); a felony violation of chapter 152; or any attempt to commit any of the above-listed offenses.

simple robbery, as opposed to theft (under § 609.52) - unless he was to enumerate the specific details of each offense and the jury was to match those details with the elements of the relevant criminal statute. The district court opted for a less graphic, less precarious, and less prejudicial course: having Officer Setzer list the specific crimes committed by members of the Native Mob “in a kind of summary, vague way.” (PT. 159) Setzer testified that the gang was engaged in drug trafficking and illegal gun sales, a less prejudicial and more accurate allegation than “robbing, stealing and making money”. Because the gang’s criminal history was an element of the State’s case, the district court committed no error in selecting the least-prejudicial manner for introducing reliable evidence on the issue.

*Ten-Point Gang Identification Criteria.* The district court prohibited Officer Setzer from referring to the ten-point gang-identification criteria, as doing so “gives it some kind of scientific basis that doesn’t exist.” (PT. 163-64)

*Historical Background on the Origins of the Native Mob.* The district court found testimony about the origins of the Native Mob (*i.e.*, its evolution as an offshoot of the Vice Lords gang) was unnecessary and irrelevant. (PT. 160)

*Expert Testimony on Ultimate Questions.* The district court ruled that the issues of “whether or not this is a criminal gang and whether or not some act was done to further or promote or assist in criminal by gang members” constituted “ultimate opinions” that could not be offered by Officer Setzer. (PT. 169)

*Expert Testimony on Gang Motives and Practices.*

The court's limits in this case – the court permitted testimony about gang motives and practices and excluded testimony as to ultimate issues – comply with applicable Minnesota cases.

Unlike most offenses, the State must establish motive in a crime charged under Minn. Stat. § 609.229. The conduct involved in this case - and the purpose underlying that conduct - was likely inscrutable to the average lay person. The same is true of the concept of “flipping.” As the district court stated during the pre-trial hearing:

On the issue of flipping from gang to gang, I think that's the kind of information that jurors certainly wouldn't – actually, all of this that I'm admitting, I believe that jurors wouldn't have knowledge of, that is, gang lifestyle, and therefore the concept of flipping, which I believe is one of the motives here, could and should be explained by the expert as it relates specifically to these gangs.

(PT. 165-66)

As these concepts were outside the understanding of the jurors, Officer Setzer's testimony on this point was helpful to the jury. This Court acknowledged as much in *Lopez-Rios*. *Lopez-Rios*, 669 N.W.2d at 612 (“a brief history” of the rivalry between the two gangs “and an explanation of the importance of retaliation in the gang culture” can be helpful to a jury). *See also Utz v. Commonwealth*, 505 S.E.2d 380, 386-387 (Va. Ct. App. 1998) (recognizing that motivation for gang shootings is often “beyond the common knowledge and experience of ordinary

jurors” and permitting introduction of gang expert testimony “in order to show motive”), cited in *DeShay*, 669 N.W.2d at 887.

*Setzer’s Testimony that Appellant was a Member in the Native Mob.*

Officer Setzer is best described as a hybrid witness on this issue. He was both an expert on the Native Mob and an ordinary witness who had seen Appellant hanging with other Native Mob members and heard Appellant admit to membership in the Native Mob.

The district court permitted Officer Setzer to express an opinion about whether Appellant was a member of the Native Mob provided that it was not couched in the ten-point criteria.

However, I think, all and all, his foundation is that there were admission, there are associations with gang members, arrests with gang members. I think the fact that he may have given information about gang members he didn’t list, but I see that as a factor in his membership. Apparently he also referred to a tattoo, that may or may not be a factor, and being identified by a reliable source, somebody from the Home School. I think those provide a sufficient foundation for him expressing an opinion about membership in the gang.

...

So I will allow the officer to – or the expert to state an opinion about membership. When he does so, though, I want him to state his opinion and the reasons supporting it to stand by themselves. I don’t want him to refer to the ten-point criteria as a basis for his opinion, rather than the underlying factors.

(PT. 163) Citing to *Lopez-Rios*, Appellant erroneously argues that this testimony was inadmissible. (Appellant’s Brief at pp. 24-25). Appellant’s reliance on

*Lopez-Rios* on this point is misplaced. While the *Lopez-Rios* court found it “troublesome” that the State’s expert had been permitted to offer an opinion about the defendant’s membership in the gang, the “opinion” offered here by Officer Setzer was not like the “opinion” offered in *Lopez-Rios*. In *Lopez-Rios*, the expert’s opinion on the defendant’s gang membership was based on, and the expert testified about, the ten-point gang-identification criteria and hearsay statements. 669 N.W.2d at 611-13. This caused the Court great discomfort, especially since “expert testimony on the issue of a defendant’s gang membership that rests on hearsay has Sixth Amendment Confrontation Clause implications.” *Id.* at 613.

The district court in Appellant’s case excluded any reference to the ten-point gang-identification criteria. Unlike the expert in *Lopez-Rios*, the “opinion” Officer Setzer offered was based on Officer Setzer’s observation of the gang and on conversations Officer Setzer had with Appellant, not on hearsay. (See T. 685-691). Thus, Officer Setzer’s “opinion,” based as it was on first-hand observation and conversations with the Appellant in addition to professional expertise, is quite unlike the opinion testimony that gave the Court pause in *Lopez-Rios*. There was no error in its admission.

Because Setzer was a direct witness who heard Appellant “freely admit” to membership in the Native Mob and other witnesses identified Appellant as a Native Mob member as well (See T. 159, 280-82, 350, 601), any possible error in an expert opinion on this issue was certainly harmless.

#### **D. Appellant's Arguments.**

Appellant's argument repeatedly suggests that the expert testimony in this case was extensive and duplicative. This is hyperbole. The gang expert testimony in this case was quite limited. Excluding matters outside the presence of the jury, Setzer's entire testimony totals a mere 17 pages in a 976 page trial transcript. Setzer's direct examination consumes a mere 9 pages.

Setzer's testimony was not needlessly duplicative or cumulative. The lay witnesses did not opine about possible gang motives, one subject of Setzer's expert testimony. Appellant's brief points out that Appellant's co-defendants, Mike McFarlane and Vincent Williams, were acquitted. These acquittals suggest the testimony of the State's civilian witnesses was not so strong as to make Setzer's testimony on identical topics cumulative. When lay witnesses are members of opposing gangs, as in this case, their testimony is impeachable for bias and is inherently weak. Consequently some, limited corroborating testimony from a more neutral source is proper. Setzer's testimony was quite limited.

Appellant's brief erroneously complains that the district court erred in permitting expert testimony about gang response to "flipping" and about possible motivation for retribution - that is, how the killings might have benefited the Native Mob. Appellant argues that this type of testimony is barred under *State v. Blanche*, 696 N.W.2d 351 (Minn. 2005), as it "describ[es] how gang members are obligated to retaliate against members of other gangs by shooting at them." (Appellant's Brief at 25-26). But *Blanche* is inapposite to the instant matter. In

*Blanche*, this Court held that the expert's "testimony that gang members retaliate against other gangs by shooting at each other was prejudicial because there was a risk that the jury would improperly use this evidence to conclude that *Blanche* was the shooter simply because he is a member of a gang." 696 N.W.2d at 374. In other words, the *Blanche* Court was concerned that jurors would use this *motive* testimony as *identification* evidence. In the present case, however, there was no real likelihood that the jurors would improperly use Setzer's testimony as identification evidence instead of properly using it in considering motive. Eye witnesses identified Appellant as one of the three gunmen, another witness reported his admission that he was involved, and the Native Mob was identified as a large gang with hundreds of members. Although relevant evidence can be excluded when it is more prejudicial than probative, the likelihood that gang motivation evidence in this case would be improperly used as identity evidence was quite remote. Thus, the district court did not err in admitting this portion of Officer Setzer's testimony.

Appellant's brief erroneously argues that the district court erred by permitting Officer Setzer to give "summary, vague" testimony directed at element of one of the charges, *i.e.*, that one of the primary activities of the Native Mob was commission of listed criminal offenses. As previously discussed, the district court's ruling permitted introduction of relevant evidence in the least prejudicial manner and thus was not an abuse of the court's discretion.

Appellant's brief argues that Setzer's testimony improperly recycled hearsay by referring to another reliable source, a county home school agent dealing with Appellant's family who had identified Appellant as a member of the Native Mob. There was no objection to this testimony. (T. 692) The testimony identified an additional, reliable and informed source Setzer relied on in forming his opinion given moments earlier. Setzer's opinion, however, was clearly more than recycled hearsay, and the unobjected reference to another reliable expert constituted, at most, testimony by an expert that his own opinion was not outside the mainstream of opinion on a subject. There was no plain error in the testimony which was, given the remaining evidence on the subject, clearly harmless.

Appellant's brief erroneously claims that the district court erred in refusing to compel the Respondent to accept Appellant's offer to stipulate that he was a member of the Native Mob. Appellant concedes that an offer to stipulate does not take away the Respondent's right to prove its case. The State's evidence included Appellant's admissions to Officer Setzer and photographs of Appellant with other gang members. The alleged prejudice of the State's proof in this case was that it "implied that Appellant knew of and had been complicit in other unrelated criminal activity committed by the gang." Essentially, Appellant argues that he should be able to stipulate that he was a gang member and then argue that he was nothing more than an "honorary member," someone with no real knowledge or active association in the gang's ventures. Since the Respondent was required to prove that Appellant was actively pursuing the benefit of the gang, Appellant's

proffer was not an adequate substitute the evidence Appellant wished to exclude. *See State v. Durfee*, 322 N.W.2d 778, 785-86 (Minn. 1982) (permitting introduction of photographs depicting victim's serious injuries, despite defendant's offer to stipulate that victim had suffered great bodily harm; the photographs "provided demonstrable, visual evidence to the jury of the extent and severity of [the victim's] injuries indicating their cause and source"). *See also State v. Matelski*, 622 N.W.2d 826, (Minn. Ct. App. 2001) (trial court properly refused defendant's offer to stipulate to gang membership in prosecution for crime committed for the benefit of a gang; because charge was aiding and abetting another gang member, evidence was needed to show that defendant and accomplice "were often in each other's presence, were companions and participated in gang activities together"), *rev. denied* (Minn. May 15, 2001).

Appellant's brief mischaracterizes the record and erroneously argues that the Setzer testified to an expert opinion about the motive for the shooting in this case, as opposed to giving general testimony about gang motives and practices. In fact, Setzer was neither asked for nor did he state his opinion about the motive for the shooting in this case. Setzer did testify about likely motives for assaults in general between gang members, but this testimony started with defense counsel's cross examination asking for Setzer's opinions on this subject. On cross-examination, defense counsel opened the door by asking Setzer whether, in his opinion, assaults between these members of these rival gangs were often just the result of alcohol or drugs operating on young men together. Setzer agreed that this

was true. (T. 695) Setzer testified on re-direct that the many assaults between rival gang members in this area were simply the result of alcohol or drugs acting upon individuals in close contact but that when there was no personal contact preceding an assault and no family revenge factor to trigger the assault, it was usually for gang purposes. (T. 699) There was no objection to the testimony because defense counsel opened the door for it on cross-examination. Nor was there any surprise because Setzer had given similar testimony at the pretrial hearing. (PT. 93) The prosecutor's re-direct merely asked for the limitation Setzer put on his own opinion that defense counsel had previously introduced. There was no error in completing Setzer's opinion testimony first sought by defense counsel, and certainly no "plain error."

Appellant's brief erroneously argues that the trial court abused its discretion by ruling that the prosecution could introduce evidence of Appellant's crimes as part of proving the criminal nature of the Native Mob. In fact the evidence of Appellant's prior offenses was not introduced at trial. The ruling is irrelevant on appeal because the State accepted a defense stipulation that the Native Mob was a criminal gang. The district court ruled that the Respondent could prove an element of the offense, *i.e.*, that the Native Mob was a criminal gang, in part by showing a prior offense of the Appellant, unauthorized possession of a gun. The court would have permitted introduction of this evidence "because the statute [requires proof] that either collectively or individually they are committing certain crimes, and possession of a firearm is one of them." (T. 164)

There are actually two gun possession incidents involving Appellant recounted in the record, and the record is not completely clear as to which of these incidents the ruling related to. Neither incident was ultimately recounted to the jury. In the first incident, Appellant committed and/or admitted gun possession for the benefit of the gang. Police officers including Setzer executed a search warrant at the house of Harold Lightfeather, another Native Mob member. Crack cocaine and handguns were found by police (T. 668) (outside presence of jury). Appellant's older brother Zachary "Otie" Mohr who is gang leader was also present. Mohr ordered Appellant to take responsibility for the gun and drugs in the house. "Otie told him he was to take the blame for it... He told Eddie and I heard him... because at the time he [Appellant] was fourteen." (PT. 105) In the second incident Officer LaLuzerne responded to a pistol-whipping call and encountered the Appellant who ran and threw a pistol. The Appellant and the pistol were taken into custody and Appellant, who appeared to be somewhat drunk, responded to identification questions by saying he was Native Mob and should have "mowed down" the officers (T. 118-123) (outside the presence of the jury). Because of the stipulation, the jury heard about the Appellant's admissions to membership in Native Mob in these incidents but none of the other incriminating details.

Minnesota cases on proving this element of the offense, *i.e.*, that a gang is "criminal gang", observe that the potential prejudice is that a defendant may be unfairly convicted on guilt by association and put in the position of "defending allegedly criminal activity of others". *See DeShay at 887; State v. Burrell, 697*

N.W.2d 579; 601 (Minn. 2005). The district court's ultimately irrelevant ruling in this case avoided the prejudice of convicting Appellant based on other gang members' crimes. Appellant's subsequent stipulation prevented presentation of evidence that the gang committed prerequisite crimes based upon Appellant's conduct, not the conduct of others. Because committing crimes like gun possession is an element of the offense in this case, similar to proof of extensive physical injuries raising the level of assault, admitting evidence of predicate crimes committed by Appellant was *res gestae*, simply part of the offense and not prejudicial error. It is to be expected that conduct constituting a crime or part of a crime has prejudicial aspects. Respondent is unaware of any cases holding that crimes may not be prosecuted because proving their elements might be prejudicial to the defendant. The logic of Appellant's argument is that the State must prove the Native Mob committed identified crimes but can show neither offenses by the Appellant nor offenses by anyone else. The court should not adopt this absurdity.

Finally, Appellant incorrectly claims that Officer Setzer testified in violation of the district court's order when he briefly stated that, during a previous encounter with Appellant, Appellant had "talked about a variety of gun activity, but he talked about possession of firearms." (T. 691) Before Officer Setzer testified, the district court ruled that it was "unnecessary" for Officer Setzer to recount Appellant's statements "about other crimes committed by other members of gang or his own." (T. 682) Defense counsel queried whether the court's ruling

meant there was to be “no mention of guns.” (T. 682) The court responded: “Yes, that’s what I meant.” (T. 682)

After the verdict was returned, Appellant made a motion for a mistrial based, *inter alia*, on Officer Setzer’s testimony. The district court denied that motion:

As to the motion for a new trial, I am denying that. I did have the chance to consider the basis for the motion during the trial itself when the reference that you were referring to was made. I remember at the time that I thought it did violate the Court’s order, but I did take into account that it was a fleeting reference and unspecific as to this defendant. I took it to mean that it was a general reference to the Native Mob, not a specific reference to this defendant, which was an issue that I particularly wanted not to be given to the jury.

I should also note that the State had not accepted the offer by the defense to stipulate that the defendant was a member of this particular gang, and therefore certain information had already been presented to the jury about his gang involvement; and there had been references about gang involvement and activities earlier in the trial. In the context of those references, I felt that this fleeting reference by the witness was not prejudicial and would [not] affect the outcome of the case.

(ST. 15)

The court’s comments make clear that it was especially concerned with Officer Setzer referring specifically to Appellant’s prior arrest for possession of a firearm; as Appellant had stipulated to the fact that the Native Mob was a criminal gang, evidence of Appellant’s arrest for possession of a firearm was no longer

necessary. Officer Setzer's fleeting, vague reference to "a variety of gang activity" including "possession of firearms" was not a reference to Appellant's arrest. More importantly, this brief comment could not have impacted the jury's verdict. Cf. *State v. Haglund*, 267 N.W.2d 503, 506 (Minn. 1978) (where prosecutor unintentionally elicited reference to defendant's prior criminal record, reversal was not required because "reference was of a passing nature" and evidence of guilt was overwhelming); *State v. Dunkel*, 466 N.W.2d 425, 429 (Minn. Ct. App. 1991) ("brief, quiet and undramatic" reference to defendant's exercise of right to remain silent did not warrant reversal). The district court did not abuse its discretion by declining to order a mistrial.

The trial court's admission of brief and measured gang expert testimony in this case was not an abuse of discretion. The gang expert testimony in this case was solidly based on personal experience and familiarity with the Appellant, substantial familiarity with the scene of the offense and the community living there, and extensive professional study, including interviews, research and even monitoring of gang members' communications. The testimony defused stereotypes about criminal gangs while adding depth and precision to the jury's understanding of the issues. Several of the errors raised on appeal relating to the gang expert's testimony drew no objection below. There was clearly no plain error, and Appellant's argument that he was denied a fair trial is simply wrong. The gang expert testimony in this case was fair and proper.

**II. IN THIS CASE OF MURDERS COMMITTED FOR THE BENEFIT OF A GANG WHERE WITNESSES REPORTED FEAR OF REPRISALS, ONE WITNESS REPORTED THREATS OF RETRIBUTION BY THAT GANG, AND WITNESS APPEARED TO BE RESPONDING TO INTIMIDATION FROM THE GALLERY, THE TRIAL COURT PROPERLY IMPOSED A LIMITED REMEDY: EXCLUDING MEMBERS OF THE KILLERS' GANG, INCLUDING TWO BROTHERS OF THE DEFENDANT WHO WERE LEADERS IN THAT GANG, DURING THE TESTIMONY OF A FEW CIVILIAN WITNESSES LIVING IN THE AREA FREQUENTED BY THE GANG AND LIKELY TO BE INTIMIDATED.**

**A. The Trial Court's Ruling.**

The prosecutor in this case did not seek to close the courtroom before trial. Then spectator-induced fear in one civilian witness led the prosecutor to change her position and ask that gang members be excluded from the courtroom.

...The State is obviously concerned because there have allegations by the witnesses of intimidation by the Native Mob gang members as we've gotten closer to trial.

It was very clear to me by Ms. W■■■■'s behavior on the stand, her sort of refusal to testify about some things she had testified about in the Grand Jury, although she ultimately did testify about those, some of her behaviors, and certainly talking to her afterwards, that she felt intimidated by them being in the courtroom.

(T. 139) W■■■■ also informed the prosecutor that she had been told that a "hit" was put out on her just before trial. (T. 144) W■■■■ further reported that someone had walked past the place where she was staying and flashed Native Mob gang

signs at the residence. (T. 143) Because of her concern about intimidation, the prosecutor offered to drop one of her witnesses from the case, an officer familiar with members of the Native Mob. The officer would sit in civilian clothes in the back of the courtroom to identify Native Mob members, who would be excluded from the courtroom. (T. 140) The defense objected to partial closure but did not request a hearing on the matter. (T. 141-43)

The court agreed that intimidation appeared to be a factor in the testimony and fashioned a limited viewing restriction different from the prosecutor's request. The closure was limited to members of either gang (*i.e.*, Native Mob and Project Boyz) and to the testimony of civilian witnesses living in the affected community and likely to be intimidated by gang members.

I will permit some limited restriction on the people in the courtroom, and for that purpose will allow officers not in uniform to attend for the purpose of identifying gang members in the gangs relevant to this case. There are two gangs.

The reason I am making this ruling is because the whole subject of this case is the alleged conflict between these two gangs. And based on the testimony I heard yesterday as well as [the prosecutor's] representations about intimidation that's been going on outside of the charged matters, *I think intimidation is a factor* and therefore will permit officers to observe the proceedings for the purpose of identifying for the Court and the participants people that are known gang members.

And during the testimony of, let's say, citizen witnesses who reside in the community that was affected who are likely to know the gang members and be intimidated by them, I'll exclude identified gang members during that testimony only, not for the whole trial.

(T. 145-146) (*emphasis supplied*). The preceding day's testimony that the district court referenced was preliminary testimony of the State's gang expert, Stephen Setzer, who discussed crimes committed by the gangs and tensions between them. Setzer identified Appellant's two older brothers as not merely members but representatives, *i.e.*, area leaders, in the Native Mob. (P.T. 109)

### **B. Legal Standard.**

The right to a public trial is guaranteed by the United States and Minnesota constitutions, but that right is not absolute. The right to a public trial may "give way in certain cases to other rights or interests." *Waller v. Georgia*, 467 U.S. 39, 45 (1984). In *Waller* an entire proceeding, a seven day suppression hearing, was closed in order to protect about two hours of arguably confidential testimony. *Waller* announced the standard for closing public trials or hearings. To justify a complete closure, a party must:

advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing proceedings, and it must make findings adequate to support the closure.

*Id.* at 48. Ensuring the safety of witnesses and stopping or reducing the impact of witness intimidation are overriding interests that can justify a complete closure of a courtroom. *Woods v. Kuhlman*, 977 F.2d 74, 76 (2d Cir. 1992).

*Waller* concerned closing an entire proceeding. More limited "partial closures", for example, closing the *Waller* proceeding for the 2 1/2 hours of

delicate testimony instead of the whole seven days or closing a proceeding to certain individuals, are subject a less stringent test.

A partial closure need only be supported by a “substantial interest”, as opposed to an “overriding” one. *United States v. Farmer*, 32 F.3d 369, 371 (8th Cir. 1994); *United States v. Galloway*, 937 F. 2d 542, 546 (10th Cir. 1991). Partial closures do not present the same danger of unfairness and oppression inherent in wholly secret proceedings. *Farmer*, 32 F.3d at 371.

Maintaining the safety and orderliness of the courtroom is an overriding interest that can permit and has traditionally been accepted as a reason for closing courtrooms. This is inherently a matter for the trial court.

...Because an appellate court cannot glean from the transcript the atmosphere or particular threats to order and decorum in the courtroom, trial courts are vested with broad discretion in deciding matters of courtroom procedure. *Minneapolis Star & Tribune v. Kammeyer*, 341 N.W.2d 550, 559 (Minn. 1983) (emphasizing, in determining whether a trial court abused its discretion, “when it excluded the public from [a] pretrial hearing or when it restricted access to portions of the record” from that hearing, that a “trial court must have control of its courtroom”).

*State v. Lindsey*, 632 N.W.2d 652, 658-59 (Minn. 2001). It is the trial court that must, in cases like Appellant’s, look across its bench every day to measure the atmosphere of the courtroom, including the intent and discontent and even menace of opposing groups of spectators.

When a court completely closes a proceeding, the court must determine whether an “overriding interest” is likely to be prejudiced, the closure must be no

broader than necessary to protect any overriding interests, and the court must make findings adequate to support the closure. *Waller*, 467 U.S. at 48; *State v. McCrae*, 494 N.W.2d 252, 259 (Minn. 1992). If the court has failed to conduct such a hearing but the record supports the court's action, the reviewing court may affirm the decision based upon the record. *Galloway*, 937 F.2d at 546. A party objecting to closure is entitled to a separate hearing on the matter, but where no separate hearing is requested, the failure to hold such a hearing is not reversible error. *State v. Garcia*, 561 N.W.2d 599, 605 (N.D. 1997); *United States v. Sherlock*, 952 F. 2d 1349, 1359 (9th Cir. 1989) *cert. den. sub nom. Charley v. United States*, 506 U.S. 958 (1992).

When the trial court has not conducted a hearing and made specific findings in support of closure and the record is not sufficient in itself to support closure, the remedy on review is remand to the trial court for a hearing and specific findings that may be reviewed. *See State v. Biebinger*, 585 N.W.2d 384, 385 (Minn. 1998) (summarily reversing Court of Appeals grant of a new trial where the trial court, although stating its reasons for granting closure, had failed to take evidence and make specific findings in support of closure). This remedy is required in part because harmless error does not apply to closure decisions. *State v. Fageroos*, 531 N.W.2d 199, 202-03 (Minn. 1999).

**C. The District Court's Ruling Was Not Error, and the Proper Remedy for Appellant's Alleged Error is Remand for Further Findings.**

The record in this case supports the trial court's partial closure of the courtroom. A party must advance a substantial interest in support of partial closure.

The interest advanced in this case, ensuring the safety of witnesses and stopping or reducing the impact of witness intimidation, is an "overriding interest" that permits complete closure, *Kuhlman*, 977 F.2 at 76, and certainly justifies partial closures like the one in this case. The manifest intimidation of the first civilian witness on the stand, the threats – both direct and implied – that the prosecutor reported and the willingness to use violence for the benefit of the gang demonstrated by the case itself are sufficient to support the trial court's finding. The court found, "... I think intimidation is a factor and therefore will permit officers to observe the proceedings for the purpose of identifying for the Court and the participants people that are known gang members." (T. 145)

The court in this case made closure no broader than necessary to protect the interest involved. Closure was limited to the testimony of civilian witnesses knowing gang members and likely to be influenced by their presence. The closure was even-handed, excluding members of both gangs.<sup>7</sup>

The court not only considered but adopted an alternative to the closure requested. That is, the court imposed a temporary partial, as opposed to complete,

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<sup>7</sup> Although none was reported, this protected Appellant from potential courtroom intimidation from the gang of the victims.

closure. Only gang members were excluded from the courtroom during closure, and the closure was limited to a few witnesses.

The court stated its reasons on the record. Appellant claims this fails to meet the requirement of making specific findings in support of closure. If the court's statement of its reasons is insufficient, the remedy is remand for more complete findings. *Fageroos*, 531 N.W.2d at 202-04; *Biebinger*, 585 N.W.2d at 385. The remedy is not, as Appellant claims, reversal and a new trial. The record, however, is sufficient to support the court's order of partial closure and therefore does not require remand. *Farmer*, 32 F.3d at 371.

Appellant's brief inflates the court's ruling and erroneously compares it to cases where a defendant's family was excluded from the courtroom. The court in this case did not exclude the Appellant's mother, aunt or any other relatives who were not identified gang members. Where individual family members intimidate witnesses but others do not, exclusion of the offending family members but not the rest of the family is not error.

Appellant's brief argues that because J ■■■ W ■■■ reported the threats and because she had already testified before the partial closure, the remaining witnesses had nothing to fear and there was therefore no reason for any closure. Appellant offers no basis for the court to conclude that the Native Mob would seek to intimidate J ■■■ W ■■■ but refrain from intimidating the other civilian witnesses. Contrary to Appellant's argument, other witnesses reported that they were afraid. B ■■■ G ■■■ avoided police for the first day because he was afraid of being a

witness. He testified on the stand that he was afraid and that the Native Mob had threatened his family. (T. 409, 410, 422, 436) A [REDACTED] J [REDACTED] had also reported his fears. (T. 144) The nature of the offense itself demonstrates that all the civilian witnesses had reason to be afraid, and the evidence showed that other civilian witnesses were afraid. The report of threats and intimidation against one civilian witness and her apparent response to intimidation from the audience, supports the temporary, partial closure during the testimony of other similar witnesses.

The Appellant's brief confuses the issues and the legal standard applicable in this case by relying on cases of complete closure of the courtroom to the public (e.g., *State v. Ware*, 498 N.W.2d 454 (Minn. 1993) (complete closure of courtroom during verdict). Contrary to Appellant's claims, the trial court limited its order to exclusion of individuals when witnesses were "likely... to be intimidated by them" (T. 146) and was not overbroad.

Citing *Williams v. State*, 690 N.E. 2d 162, 170 (Ind. 1997) Appellant's brief speculates that merely identifying gang members in the gallery may intimidate potential spectators and violate the public's right to public access. *Williams*, however, found no error in identifying spectators in the gallery. Instead *Williams* noted that the practice was common in some federal prosecutions, observed that the practice had "both a slight burden and a slight benefit" and simply held that when trial courts take such unusual steps they must provide the reason for authorizing unusual procedures. *Id.* *Williams* clearly supports the trial court's authority to identify spectators who are likely to disrupt the proceedings.

The record supports the district court's temporary, partial exclusion of Native Mob members and Project Boyz members from Appellant's trial. Because Appellant argues that the trial court's findings were insufficient and that the trial court erred by failing to hold a separate hearing, Appellant's remedy, if there is error, is remand for a hearing and explicit findings by the district court. *Biebinger, supra*.

### **III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN INSTRUCTING THE JURY.**

#### **A. Standard of Review.**

Trial courts are granted "considerable latitude" in the selection of language for jury instructions. *State v. Persitz*, 518 N.W.2d 843, 848 (Minn. 1994); *State v. Oates*, 611 N.W.2d 580, 584 (Minn. Ct. App. 2000); *State v. Gray*, 456 N.W. 2d 251, 258 (Minn. 1990). Upon the review of a trial courts refusal to give requested instructions, an appellate court will not reverse "absent a demonstrated abuse" of the trial court's discretion. *Sanderson v. State*, 601 N.W.2d 219, 224 (Minn. Ct. App. 1999) (Jury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case. *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988); *State v. Martinez*, 694 N.W.2d 86, 89 (Minn. Ct. App. 2005)). Claims of error must show that the instructions, considered as a whole, materially misstated the law. *State v. Traxler*, 583 N.W.2d 556, 560 (Minn. 1998); *State v. Turnipseed*, 297 N.W.2d 308, 312 (Minn. 1980); *State v.*

*Larson*, 281 N.W.2d 481, 485 (Minn. 1979); *State v. Knaak*, 396 N.W. 2d 684, 688 (Minn. Ct. App. 1986).

A defendant's failure to propose specific instructions or to object to instructions before they are given constitutes a waiver of the right to appeal unless the instructions contain plain error affecting substantial rights or an error of fundamental law and the error seriously affects the fairness integrity or reputation of judicial proceedings. *State v. Crowbreast*, 629 N.W. 2d 433, 437 (Minn. 2001) citing *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). Even when instructions are erroneous, appellate courts will not reverse for errors in instructions unless the errors are prejudicial. *State v. Larson*, 281 N.W.2d at 485; *State v. Jensen*, 308 Minn. 377, 242 N.W.2d 109 (1976), *State v. Knaak*, 396 N.W.2d at 688.

#### **B. Accomplice Liability Instruction.**

The Appellant's brief acknowledges that the district court properly defined accomplice liability for the jury<sup>8</sup>, observes that in addition to stating the relevant standard the district court listed factors that the jury could consider, and admits that the factors listed are derived from Minnesota cases on accomplice liability. Appellant argues, however, that by listing factors acknowledged in Minnesota cases on accomplice liability, the district court prejudicially erred in its accomplice liability instruction.

The district court defined accomplice liability for the jury:

In all four counts of the indictment, the defendant is charged with what we call “aiding and abetting” in the commission of the crime. In Minnesota a defendant can be held liable for a crime even though another person or persons actually commits the criminal act, provided the defendant intentionally aids, advises, hires, conspires, counsels with, or otherwise procures someone else to commit the crime. This is called “aiding and abetting.”

In order to aid and abet another in the commission of a crime, it is necessary that the defendant voluntarily associate with the criminal venture in some way, and voluntarily participate in it as something that he wishes to bring about. In other words, he must voluntarily seek, by some act or omission of his, to make the criminal venture succeed.

(T. 879)

Then the court stated “factors” the jury could consider in determining accomplice liability:

In determining whether the defendant intentionally aided and abetted in the commission of the crimes charged, you may consider the following factors:

The defendant’s companionship and association with the other participants in the crime before, during and after its commission;

The defendant’s conduct before during and after the crime;

Whether the defendant knew that a crime was going to be committed by the other participants;

Whether the defendant took reasonable steps to prevent the crime from being committed;

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<sup>8</sup> “The trial court’s jury instructions on accomplice liability for the most part followed the provisions of Minnesota’s accomplice liability statute and standard CRIMJIG on accomplice liability.” (Appellant’s brief at p. 35)

Whether the defendant intended his presence or acts to encourage or further completion of the crime by other participants;

And any other common sense factor that leads you to conclude that the defendant was a knowing participant in the commission of the crime.

(T. 879-880)

Then the court stated a limitation on the factors given and explained an accomplice's responsibility for foreseeable results of the criminal plan:

Mere presence at the scene of a crime, without more, is not enough for you to impose liability under the aiding and abetting law. Such a person is merely a witness. However, a person's presence does constitute aiding and abetting if it is done intentionally and if it also aids or encourages the commission of the crime to any degree.

The law further provides that a defendant who intentionally aids and abets another person in the commission of a crime is not only guilty of the intended crime or crimes, but also guilty of any other crimes that are reasonably foreseeable, probable consequences of trying to commit the intended crime.

(T. 880-81)

Appellant's brief erroneously argues that simply listing factors that a jury may consider is an abuse of a trial court's discretion. Various approved jury instructions list "factors" a jury may consider. *See, e.g.,* CRIMJIG 3.19 relating to eye witness identification. Appellant's legal analysis confuses the law on instructions stating "factors" with the law on instructions stating or suggesting "inferences" or presumptions for the jury to apply. The Minnesota case upon which Appellant relies, *State v. Olson*, 482 N.W.2d 212 (Minn. 1992), condemns

instructing the jury about the inference to be made from one factor but approves the use of balanced factors instructions. *Olson*, 482 N.W.2d at 216. The *Olson* opinion includes an example of an acceptable factors instruction that begins, “In determining whether or not the state has proved beyond a reasonable doubt that the defendant was in know possession of [name of drug] you may consider such factors as...” *Id.* 216 n.3 (*emphasis supplied*). The approved sample instruction reads much like the instruction given by the trial court in this case. The other authority cited by Appellant on this issue, *Ture v. State*, 681 N.W.2d 18 (Minn. 2004), relates to whether a federal-style extensive instruction about evidentiary factors was compulsory, as opposed to permissible. *Ture* does not support Appellant’s argument that such giving such instructions is error.

The Respondent notes that some of the trial court’s added language regarding aiding and abetting was included at the request of the defense. (T. 170) There is no merit in Appellant’s claim that the factors instruction was one-sided.

Appellant’s brief argues that the factors listed misstated Minnesota law, but this argument simply takes individual factors out of context and fails to consider the instructions as a whole. Instead of considering the instructions as a whole, Appellant analyzes individual factors as if the district court had never defined accomplice liability for the jury and instead had simply listed factors.

Appellant claims, for instance, that the court misled the jury on how to evaluate passive acquiescence. This simply argument ignores the court’s definition of accomplice liability. In defining accomplice liability, the court

instructed the jury that accomplice liability requires that the actor “must voluntarily seek, by some act or omission of his, to make the criminal venture succeed.” (T. 879 )

Appellant cavils that the court listed factors relating to withdrawal (*i.e.*, taking reasonable steps to prevent the crime after withdrawal) without giving the full CRIMJIG on withdrawal. Because there was no evidence of withdrawal in this case, Appellant was not entitled to CRIMJIG 4.02; *State v. Evans*, 347 N.W. 2d 813, 816 (Minn. Ct. App. 1984). Raising this potentially mitigating factor could only help the Appellant.

Appellant likewise complains that the court’s factors included whether the Appellant knew a crime was going to be committed. Appellant argues that this should have been an element because the knowledge relates to whether the Appellant acted “intentionally”. This is another example of Appellant taking part of the instructions out of context. The district court’s definition of accomplice liability required the State to prove that Appellant:

voluntarily associate[d] with the criminal venture in some way, and voluntarily participate[d] in it as something that he wishes to bring about. In other words,... voluntarily [sought], by some act or omission of his, to make the criminal venture succeed”

(T. 879) There was no request by either the State or the defense for an instruction defining “intentionally”. Presumably defense counsel believed the court’s instructions were sufficient on this issue. The instructions considered as a whole

clearly did not mislead the jury on whether Appellant had to know the criminal plan.

**C. Elements Instruction.**

The Appellant erroneously claims that the trial court abused its discretion by inserting accomplice liability language into the elements instruction for the crimes charged. The Minnesota Supreme Court explicitly approved an identical instruction and expressly denied Appellant's argument in *State v. Souvannarath*, 545 N.W.2d 30, 33 (Minn. 1996). The Minnesota Supreme Court reaffirmed the holding of *Souvannarath* in *State v. White*, 684 N.W.2d 500, 508-509 (Minn. 2004). There is no merit in Appellant's claim.

The trial court's instruction fairly and correctly stated Minnesota law, and there was neither error nor prejudice in the instructions given.

**V. THE POSTCONVICTION COURT DID NOT ABUSE ITS DISCRETION BY DENYING AN NEW TRIAL BASED ON A CLAIM THAT TESTIMONY OF AN ACCOMPLICE WHO ACCOMPANIED THE EVIDENCE THROUGHOUT THE EVENTS WAS "NEWLY DISCOVERED".**

"A petitioner seeking postconviction relief has the burden of establishing, by a fair preponderance of the evidence, facts which warrant a reopening of the case." *State v. Rainer*, 502 N.W.2d 784, 787 (Minn. 1993) (citing Minn. Stat. § 590.04). On appeal, the decision of the postconviction court is reviewed "only to determine whether there is sufficient evidence to support the postconviction court's

findings,” and the postconviction court’s decision is not disturbed “absent an abuse of discretion.” *Sutherlin v. State*, 574 N.W.2d 428, 432 (Minn. 1998).

Pursuant to Minn. Stat. § 590.04, subd. 1, no evidentiary hearing is required where “the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief.” An evidentiary hearing “is not required unless facts are alleged which, if proved, would entitle a petitioner to the requested relief.” *Fratzke v. State*, 450 N.W.2d 101, 102 (Minn. 1990) (citing *State ex rel. Roy v. Tahash*, 277 Minn. 238, 245, 152 N.W.2d 301, 306 (1967)).

Claims for postconviction relief based upon newly discovered evidence must meet four elements:

Newly discovered evidence will only be used to grant postconviction relief if four elements are met: (1) the evidence was not known to the petitioner or counsel at the time of trial; (2) the evidence could not have been discovered through due diligence before trial; (3) the evidence is not cumulative, impeaching, or doubtful; and (4) the evidence probably would produce an acquittal or a more favorable result.

*Sutherlin*, 574 N.W.2d at 434; *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997).

“Newly discovered evidence” does not include testimony of an eye witness known to a defendant or defense counsel that the defense simply fails to interview or subpoena. *State v. Klotter*, 274 Minn. 58, 65, 142 N.W.2d 568, 572 (1966); *State v. Buchman*, 389 N.W.2d 879, 884 (Minn. Ct. App. 1986).

Although the newly available testimony of a co-defendant who refused to testify at trial is evaluated for whether it meets the newly discovered evidence standard, *State v. Warren*, 592 N.W.2d 440, 450 (Minn. 1999), the testimony's previous unavailability does not make it newly discovered.

“The unanimous view of circuits that have considered the question is that [the requirement that the evidence has been discovered since the trial] is not met simply by offering the post-trial testimony of a co-conspirator who refused to testify at trial.”

*Warren, supra*, (quoting *United States v. Dale*, 991 F.2d 819, 838-39 (D.C. Cir. 1993)). Minnesota cases have consistently declined to find that newly available co-defendant testimony met the standard for newly discovered evidence. *Warren, supra*; *Pierson v. State*, 637 N.W.2d 571, 577 (Minn. 2002); *Johnson v. State*, 486 N.W.2d 825, 828 (Minn. Ct. App. 1992); *State v. Norregaard*, 380 N.W.2d 549 (Minn. Ct. App. 1986).

In a postconviction proceeding after trial, the Appellant claimed that newly available co-defendant testimony was “newly discovered evidence”. The co-defendant, Michael McFarlane, identified Marcel Rainey, not the assailants identified by the State’s witnesses, as the person who killed J [REDACTED] B [REDACTED] and D [REDACTED] B [REDACTED]. McFarlane’s story placed Appellant and McFarlane together at the scene of the crime when Rainey allegedly killed B [REDACTED] and B [REDACTED]. The postconviction court found that McFarlane’s testimony was failed to meet the newly discovered evidence standard.

In this case it is clear that Petitioner was aware that McFarlane was a witness to the murders and that his testimony could be helpful. Viewed in the light most favorable to the Petitioner, McFarlane's testimony establishes that McFarlane and Petitioner were present at the time of the murders.

Thus, like the defendant in *Pierson*, who must have been aware of the *substance* of his co-defendant's testimony because he was with the co-defendant when the crime was committed, Petitioner must have been aware of the substance of McFarlane's testimony because he was present with McFarlane when the murders were committed.

There is no indication that McFarlane's testimony brought to light any facts that were both unknown and undiscoverable by Petitioner prior to his trial.

(Postconviction Order<sup>9</sup>, p. 5) (emphasis in original)

The postconviction court's decision properly applied relevant Minnesota law. As the postconviction court noted, the Minnesota Supreme Court upheld denial of postconviction relief in *Pierson v. State, supra* under remarkably similar circumstances.

*Pierson* has failed to establish that the substance of Smith's testimony was unknown to him at the time of his trial. The evidence clearly shows that *Pierson* and Smith were together throughout the events of October 5, 1993. Thus *Pierson* undoubtedly knew that Smith had information regarding *Pierson's* involvement in those events. The fact that Smith may have been unavailable to testify at *Pierson's* trial does not change this result.

*Pierson, supra* at 577. The *Pierson* court, in turn, noted that the facts of that case were quite similar to the facts of *Warren, Id.* *Warren* likewise found that the newly

available co-conspirator evidence failed the newly discovered evidence standard.

*Pierson, supra.*

The Appellant's brief erroneously claims that *Warren* and *Pierson* are distinguishable and that the postconviction court erred, arguing that Appellant was prevented from knowing the substance of McFarlane's testimony by McFarlane's compliance with an order from his lawyer not to talk about the event and by his own counsel's decision not to seek to interview McFarlane. This is nonsense. First, as a practical matter, it is highly improbable that Appellant and McFarlane could experience this striking event together without remarking upon it at the time. Subsequent orders from McFarlane's counsel are largely irrelevant to this. More importantly, even assuming for the sake of argument that McFarlane's story was true and that the State's witnesses had misidentified the shooter, this information was clearly known to Appellant at the time of trial because Appellant was with McFarlane. The substance of McFarlane's testimony, as it applies to Appellant's defense, is that Appellant did not participate in the killing. Assuming for the sake of argument that McFarlane's story was true, Appellant knew that he had not killed B [REDACTED] and B [REDACTED] and knew that his companion McFarlane was witness to this fact. By being present with McFarlane at the time of the event, Appellant had better and more complete information about McFarlane's knowledge than he and defense counsel would have had if they simply received a report from the police or copies of an interview.

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<sup>9</sup> A copy of the Postconviction Order in this case is reprinted in the Appendix.

The Appellant had the burden of proving that McFarlane's evidence was not known to the *petitioner* or counsel at the time of trial and not discoverable by them. *Sutherlin, supra* at 434. Appellant knew the substance of McFarlane's testimony because the two men were together at the relevant times. The postconviction court did not abuse its discretion by finding Appellant had failed to show newly discovered evidence merited a retrial.

## CONCLUSION

For the above-stated reasons, Respondent respectfully requests this court to affirm Appellant's convictions or, in the alternative if the courts holds that the record is insufficient to support partial closure of the trial, for this court to remand for findings by the district court.

DATED: February 14, 2007

Respectfully submitted,

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A05-1520  
A06-2087  
STATE OF MINNESOTA  
IN SUPREME COURT

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State of Minnesota,

Respondent,

vs.

Edison Joseph Mahkuk,

Appellant.

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**CERTIFICATION OF BRIEF  
LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 12,396 words. This brief was prepared using Microsoft Word 2003, Times New Roman font face size 13.

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