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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

Derek Michael Chauvin,

J. Alexander Kueng,

Thomas Kiernan Lane,

Tou Thao,

Defendants.

STATE'S MOTION FOR RECONSIDERATION OF JANUARY 11 ORDER REGARDING TRIAL CONTINUNACE AND SEVERANCE

Court File No.: 27-CR-20-12646

Court File No.: 27-CR-20-12953

Court File No.: 27-CR-20-12951

Court File No.: 27-CR-20-12949

TO: The Honorable Peter Cahill, Judge of District Court, and counsel for Defendants; Eric J. Nelson, Halberg Criminal Defense, 7900 Xerxes Avenue South, Suite 1700, Bloomington, MN 55431; Robert Paule, 920 Second Avenue South, Suite 975, Minneapolis, MN 55402; Earl Gray, 1st Bank Building, 332 Minnesota Street, Suite W1610, St. Paul, MN 55101; Thomas Plunkett, U.S. Bank Center, 101 East Fifth Street, Suite 1500, St. Paul, MN 55101.

INTRODUCTION

The State respectfully requests that the Court reconsider portions of its January 11, 2021 Order. In that Order, the Court severed Defendant Derek Chauvin's trial from the trial of the other three Defendants, kept the trial for Defendant Chauvin scheduled for March 8, 2021, and continued the trial for the other three Defendants until August 23, 2021. The State moves for reconsideration of those portions of the Order severing Defendant Chauvin's trial from the trial of the other three Defendants, and allowing Chauvin's trial to proceed on March 8, 2021. The State is ready to begin trial of Chauvin and the other three Defendants on March 8. It believes, however, that there are grave risks to public health in holding this particular trial, with all of its unique facets, on that date.

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The aspects of the Court's Order that the State asks the Court to reconsider pose an extremely serious threat to public health. As epidemiologist Dr. Michael T. Osterholm, a world-renowned public health expert and member of President-elect Biden's Coronavirus Advisory Board, explains, the Court's Order "could have potentially catastrophic consequences for public health." Osterholm Aff. ¶ 42. Since the State filed its initial motion to continue the trial, a new, more infectious strain of the coronavirus has come to Minnesota. *See id.* ¶ 33. This strain "may be up to 70% more transmissible than the most common strain of the virus currently in the United States," meaning "that the new variant will spread from person to person much more easily." *Id.* ¶ 32. As a result, this new variant "may become the predominant form of the virus in the United States by March 2021." *Id.* ¶ 34. It will likely cause "a significant spike in coronavirus cases in Minnesota by March 2021" that could "substantially exceed the numbers of cases . . . reported during the most recent spike in November to December." *Id.* ¶¶ 34, 38.

In light of this new, more infectious strain of the coronavirus, Dr. Osterholm explains that it "could be extremely dangerous to hold a trial for Mr. Chauvin in March 2021," as most members of the general public will not have had an opportunity to be vaccinated by then. *Id.* ¶ 42. Indeed, Dr. Osterholm draws the sobering conclusion that it is "extremely likely that one or more of the dozens of participants in this trial . . . will contract the coronavirus during a trial held in March 2021." *Id.* ¶ 47. The public health risks of conducting a trial for Defendant Chauvin in March 2021 are also far greater than in the mine-run case, as the "large public gatherings" and demonstrations—involving thousands of people—that are likely to occur around the Court during this trial create a "high risk of COVID-19 transmission within the community" and "further increase[] the odds that the trial will become a superspreader event." *Id.* ¶¶ 44, 46.

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Dr. Osterholm also concludes that "[h]olding two separate trials in this case"—the Court's *sua sponte* solution to the internal risk of spreading COVID-19 in the courtroom, ordered without briefing or argument—would "endanger[] public health" because it substantially increases "the number of trial dates" and thus increases "the risk" and "potential exposure to COVID-19" for trial participants, courthouse staff and security, and the general public. *Id.* ¶¶ 51, 52. He therefore believes "it is far more dangerous to hold multiple trials—one in March 2021, and one in August 2021—than it would be to hold a single trial in the summer of 2021." *Id.* ¶ 51. Indeed, Dr. Osterholm's "conservative estimate[]" is that, by August 2021, well over 50% of the population is likely to have been vaccinated, making "the risk of COVID-19 transmission . . . substantially lower than in March 2021." *Id.* ¶¶ 30, 55. These public health concerns counsel strongly in favor of re-joining all four Defendants for trial and scheduling a single, joint trial for the summer of 2021.

In addition to these serious public health concerns, reconsideration is also warranted because the Court's decision to order severance violates Minnesota Rule of Criminal Procedure 17.03, which governs joinder and severance. As this Court held two months ago, all four factors under Rule 17.03 favor a joint trial. Nothing in this analysis has changed. Instead, the Order justifies severance based solely on the fact that some Defendants now wish to have additional support staff present in the courtroom. That is not relevant under Rule 17.03. And even if it were, that alone cannot outweigh the numerous other reasons this Court has already identified as favoring joinder. Moreover, the Court has other readily available alternatives to severance that could accommodate the Defendants' needs while still complying with the requirements of Rule 17.03.

Although the State continues to stand ready to try this case on March 8, the State believes that the timing of this trial is enormously consequential for public health. The difference between following the Court's current schedule—one trial in March, and one in August—and holding a

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single joint trial in the summer of 2021 may well be a matter of life and death for some Minnesotans. With the widespread availability of a COVID-19 vaccine just months away, and with the new, more contagious variant of the virus likely to become prevalent by March, the Court should not press forward with two separate trials on the schedule announced in the January Order.

The State therefore respectfully requests that the Court reconsider its January 11, 2021 Order, re-join the Defendants, and schedule the joint trial in the summer of 2021.

ARGUMENT

I. THE COURT'S JANUARY 11 ORDER ENDANGERS PUBLIC HEALTH.

The State sought a continuance because holding a trial in this case in March 2021 would pose a substantial risk to public health, both inside and outside the courtroom. These concerns were plainly "sufficient cause for the continuance." Minn. Stat. § 631.02.

Rather than granting that request, however, the Court took the extraordinary step of *sua sponte* severing Defendant Chauvin from the other three Defendants due to the risk of COVID-19 within the courtroom. The Court also decided to keep the March 2021 trial date for Defendant Chauvin, and continued the trial for the other three Defendants until August 2021. The Court justified its approach by noting that Defendants' late-breaking request to have additional counsel present at trial made it difficult to comply with "COVID-19 physical restrictions" in the assigned courtroom at the Hennepin County Government Center. *See* Order Regarding Discovery, Expert Witness Deadlines, and Trial Continuance, at 3 (Jan. 11, 2021) ("Jan. 11 Order").

Respectfully, the Court's solution is even worse for public health than the problem it was meant to solve, which the State would have pointed out had the Defendants suggested that proposal during briefing on the continuance motion, or had the Court floated it during the hearing. The risks to public health are even more pronounced now than they were when the State filed its original motion for a continuance because the new, highly infectious strain of the coronavirus has

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reached Minnesota and is expected to become prevalent by the time of Defendant Chauvin's March 2021 trial. In light of that development, Dr. Osterholm concludes that it could be "extremely dangerous" to hold two separate trials—one in March, and one in August—in this case. Osterholm Aff. ¶ 42. The State therefore respectfully requests that the Court reconsider its Order.

A. Holding Two Separate Trials Will Seriously Endanger Public Health.

As Dr. Osterholm explains, "[f]rom a public health perspective, it is far more dangerous to hold multiple trials—one in March 2021, and one in August 2021—that it would be to hold a single trial in the summer of 2021." *Id.* ¶ 51.

Two trials means "roughly twice the number of trial dates, and so twice the risk and twice the potential exposure to COVID-19." *Id.* ¶ 52. This is certainly true for the many in-court "trial participants, such as witnesses and court personnel," who "will need to be part of both trials." *Id.* Indeed, many of the eyewitnesses, police witnesses, and expert witnesses who would testify at the first trial would likely need to testify at a second trial, as well. As Dr. Osterholm notes, the "likelihood that these individuals will contract the coronavirus is substantially higher with two trials than one." *Id.* Indeed, that risk of exposure "is especially high in light of the new, more transmissible variant of the coronavirus." *Id.* Two trials will also likely "increase the raw number of individuals who may be exposed to COVID-19" during this case. *Id.* After all, two trials would likely mean a second round of jury selection—with dozens of new prospective jurors, and an entirely new jury—and the likely participation of new witnesses if any witnesses from the first trial are no longer available. *Id.*; *see* Order and Memorandum Opinion Granting State's Mot. for Trial Joinder, at 50 (Nov. 4, 2020) ("Joinder Order") (noting "the risk of witnesses becoming 'unavailable or unwilling to testify' at [a subsequent] trial—whether due to the trauma of

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testifying, the travel burdens imposed by testifying, or the ongoing COVID-19 pandemic" (quoting *State v. Jackson*, 773 N.W.2d 111, 119 (Minn. 2009)).

The serious public health risks also extend "outside the courtroom," including to "safety personnel, media, and demonstrators." Osterholm Aff. ¶ 52. Most notably, there are likely to be large public demonstrations during and after each trial in this case. Having "two separate trials" will "substantially increase the risk of COVID-19 transmission within the community and among members of the general public," as "[t]wo separate sets of public demonstrations" may "increase the number of opportunities for community spread of the virus." *Id.* ¶ 53.

Moreover, Dr. Osterholm has concluded that, "[f]rom a public health perspective," the fact that each of the two trials "might have slightly fewer participants than a single joint trial will not make holding separate trials substantially safer than holding a joint trial." *Id.* ¶ 54. Although there may be slightly fewer people in the courtroom as compared to a joint trial, "[e]ach of the two trials would still have a large number of participants and be conducted indoors." *Id.* And because "each of the two trials would likely attract large public demonstrations that may not be conducted with proper social distancing," *id.*, the "overall level" of risk to public health from two separate trials is substantially higher than the overall risk of holding a single joint trial, *id.* ¶ 56.

In light of Dr. Osterholm's conclusion that "it is far more dangerous to hold multiple trials" than it is to hold a single joint trial, *id.* ¶ 51, the State strongly disagrees with the Court's suggestion that COVID-related concerns justify severance in this case. The Court concluded that it would be "impossible to comply with COVID-19 physical restrictions in a joint trial involving all four defendants beginning March 8, 2021" based on the fact that Chief Judge Barnette "was made aware that each Defendant planned to have co-counsel or a legal support person at counsel table." Jan. 11 Order, at 3. Although a criminal defendant has a right to counsel, U.S. Const. amend. VI; Minn.

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Const. art. I, § 6, and a right to have his counsel present during trial, *see Gideon v. Wainwright*, 372 U.S. 335 (1963), there is no right to have a certain number of counsel or support staff assist in one's defense, let alone that such additional persons be present at counsel table.

In any event, the Court has other alternatives at its disposal to address the issue. The Court could move the entire trial to a larger facility. For example, the Court could move the trial to a different courthouse with larger courtrooms, such as the federal courthouse in Minneapolis. It could move the trial to a conference space, such as the Minneapolis Convention Center. Or it could move the trial to a large auditorium or event space at a university or law school, or to a gymnasium. *See infra* p. 22. The State stands ready and willing to discuss alternative venues or facilities with the Court and the parties. Alternatively, rather than ordering severance, the Court could make available a real-time communication system within the courtroom for counsel to communicate with co-counsel and support staff outside the courtroom. In light of the Court's audiovisual order, Defendants' additional counsel and staff could watch the trial and offer support from another room using that real-time communication system. *See infra* pp. 22-23. The Court could also permit additional counsel and staff for the Defendants and the State to be seated at the back of the courtroom (following appropriate social distancing protocols) rather than at counsel table. These alternatives would readily meet the Court's public health concerns without forcing severance or creating the serious public health issues associated with multiple trials.

B. The New, Highly Infectious Variant of the Coronavirus Further Increases the Public Health Risks of Conducting Any Trial in this Case in March 2021.

The Court's January 11 Order also endangers public health for a second reason: It maintains the March 2021 trial date for Defendant Chauvin. Dr. Osterholm did not mince words about this aspect of the Order: A March trial in this case would likely be "extremely dangerous," and would be "extremely unwise" from a public health perspective. Osterholm Aff. ¶¶ 42, 50.

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1. Two leading scientists on the President-elect's Coronavirus Advisory Board—Dr. Ezekiel Emanuel and Dr. Osterholm—both agree that holding a trial for any of the four Defendants in March 2021 would be dangerous and pose a serious risk to public health. *See* Emanuel Aff. ¶¶ 36-37 (filed with the State's Motion for a Continuance); Osterholm Aff. ¶ 16. Indeed, Dr. Osterholm agrees with Dr. Emanuel's "evaluation of the serious public health risks of holding a trial in this case in March 2021," and with his "estimates of the likely timeline for COVID-19 vaccinations." Osterholm Aff. ¶ 16. Defendants have presented zero evidence to the contrary.

As Dr. Osterholm's affidavit explains, the public health risks of holding a trial in this case in March 2021 have become even more severe since the State moved for a continuance and Dr. Emanuel filed his affidavit with the Court in late December. Since then, a new, more contagious strain of the coronavirus, first detected in the United Kingdom, has reached Minnesota. *Id.* ¶ 33 (citing *COVID-19 variant found in Minnesota*, Minn. Dep't of Health (Jan. 9, 2021), https://www.health.state.mn.us/news/pressrel/2021/covid010921.html)). Known as B-117, this new variant may be up to 70% more transmissible than the most common version of the virus today, meaning that it will spread from person to person far more easily. *Id.* ¶ 32.

Dr. Osterholm estimates that this new strain of the virus may become the "predominant form of the virus in the United States by March." *Id.* ¶ 34. Because this strain of the virus is more transmissible, the emergence of this new strain likely will be accompanied by a "significant spike in coronavirus cases in Minnesota by March 2021." *Id.* Cases, hospitalizations, and deaths at that time "may substantially exceed . . . the most recent spike in November to December, when Minnesota averaged 6,000 to 7,000 reported cases per day, 200 to 300 new hospitalizations per day, and 60 to 90 deaths per day." *Id.* ¶ 38. Dr. Osterholm estimates that, even with a strict stay-at-home order, by March 2021, there may be more than 5,000 to 8,000 new cases in Minnesota

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attributable to B-117 each day, "and substantially more than that by the end of March 2021." *Id.* ¶¶ 39-40. Remarkably, that estimate does "not include cases attributable to the original COVID-19 strain," which would also "likely continue to exist." *Id.* ¶ 40.

The dangers of this new, more infectious strain of the coronavirus in March 2021 are further compounded by the fact that the COVID-19 vaccine will not be available to the general public by that time. As both Drs. Osterholm and Emanuel have explained in their affidavits, "few members of the general public will have had the opportunity to be vaccinated by the beginning of March 2021." Osterholm Aff. ¶ 27; *see* Emanuel Aff. ¶ 36. "Based on current estimates, it is likely that the COVID-19 vaccine will begin to be available to some individuals in the general population" only beginning "in the late spring of 2021." Osterholm Aff. ¶ 28. Thus, while "vaccinat[ing] members of the general public" is a necessary measure to combat the spread of B-117, it is unlikely that a vaccine will be broadly available by the time B-117 becomes prevalent in March. *Id.* ¶ 36.

2. In light of these public health risks, this Court should not move forward with a March trial in this case. As Dr. Osterholm explains: "Holding a trial in this case in March 2021 will be particularly dangerous because the new, more contagious variant of the coronavirus will likely be prevalent at that time," and because "most members of the general public will not have had the opportunity to receive a COVID-19 vaccine." *Id.* ¶¶ 43, 45. Defendant Chauvin's trial will require an unusually large number of court security and staff, dozens of witnesses, and lawyers for the State and Defendant to remain inside in relatively close proximity for hours each day over the course of several weeks. As a result, holding a trial for Defendant Chauvin in March 2021 "would risk the safety of court staff, lawyers, witnesses," and "jurors . . . assembled at the courthouse." *Id.* ¶ 43. Such a trial "could even become a superspreader event." *Id.* That "is true no matter

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whether the trial involves one defendant or four, as even a trial for a single defendant would involve dozens of witnesses and jurors congregating in and around the courtroom." *Id.*

And that is not the only risk of holding this trial in March 2021: Large public gatherings and demonstrations, involving thousands of people from inside and outside Minnesota, are likely to occur during and after the trial. *See id.* ¶ 44; *see also id.* ¶ 42 (noting that the "number of people who would be inside the courtroom" is "relatively small" compared to the "large numbers of people likely to be convened outside the courthouse"). As Dr. Osterholm explains, "[t]here is a high risk of COVID-19 transmission within the community at any large public demonstrations—indoors or outdoors." *Id.* ¶ 44. And because "any public gatherings related to this case that occur in March 2021 would likely occur in cold weather," it is likely that people will "come inside" public buildings and the skyways "for heat," and "those indoor spaces can easily become sites for significant virus transmission." *Id.* Thus, "even with social distancing and mask protocols in place," these "large public gatherings" could easily "become 'superspreader' events." *Id.* ¶ 41.

All of these risks pose a particularly grave threat to public health in light of the expected "prevalence of the new strain of coronavirus by March 2021." *Id.* ¶ 46. As Dr. Osterholm explains, this more infectious variant of the coronavirus is expected to have become so prevalent by March that any trial participant or "member[ ] of the public who participate[s] in public demonstrations or large gatherings during the trial" is "substantially more likely" to contract the coronavirus than he or she would be right now. *Id.* ¶ 46. Anyone who contracts the coronavirus during the course of a March 2021 trial is also substantially more likely to "transmit the virus to others." *Id.* "This further increases the odds that the trial will become a superspreader event," at a time when Minnesota will need to do everything in its power to minimize what is likely to be a severe strain on its health system. *Id.* ¶ 47; *see id.* ¶ 50; *see also id.* ¶ 20 (explaining that a two-day, 175-person

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conference led to an estimated 200,000 to 300,000 COVID-19 cases worldwide). Holding Chauvin's trial in March 2021 therefore could exacerbate an already serious public health crisis.

Ultimately, Dr. Osterholm offers a grim assessment of the risks of conducting this trial in March 2021: "In light of the increased transmissibility of the new variant, the fact that the vaccine will not yet be available to most of the public in March 2021, the length of the trial, and the number of people expected to be present at the trial," it is "extremely likely" that "one or more of the dozens of participants in this trial—lawyers, witnesses, jurors, or court staff—will contract the coronavirus during a trial held in March 2021." *Id.* ¶ 47. "These trial participants may be exposed to the virus in the courtroom," "in the courthouse while the trial is not in session," or "outside of the courthouse, in their homes or in their daily routines." *Id.* And once they become infected with the virus, it is "substantially more likely that the virus could be transmitted to other trial participants" because of the prevalence of the new, more contagious strain. *Id.* ¶ 46. In short, a trial for Defendant Chauvin in March 2021 has the hallmarks of a possible superspreader event.

To be sure, even if the Court postpones Defendant Chauvin's trial, it may well schedule another trial in its place on March 8. *See* Jan. 11 Order, at 3 ("[I]f the trial in the above-captioned cases is continued, other trials of similar length and intensity are likely to take place in C-1856."). The Court may decide to revisit that plan in light of the fact that the Minnesota Judicial Council voted on January 14 to suspend criminal jury trials until at least March 15. *See* Randy Furst, *Minnesota will continue suspension of criminal jury trials but offer more exceptions*, Star Tribune (Jan. 14, 2021), https://www.startribune.com/minnesota-will-continue-suspension-of-criminal-jury-trials-but-offer-more-exceptions/600010712/. But even if it does not, the fact that *some* trial may proceed on March 8 does not mean that *this* trial should proceed on that date. As this Court has acknowledged on several occasions, "unique circumstances in these particular cases" often

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require unique solutions that may not be appropriate for other trials. *E.g.*, Order Denying Motion to Reconsider and Amend Order Allowing Audio and Video Coverage of Trial, at 4 (Dec. 18, 2020); Order Allowing Audio and Video Coverage of Trial, at 9 (Nov. 4, 2020) (referencing the "unique[ly] . . . intense public and media interest in these cases"); Order for Juror Anonymity and Sequestration, at 2-4 (Nov. 4, 2020) (explaining that the high degree of public and media interest in this case warrants having an anonymous jury).

Here, the expected length of the trial, the large number of individuals—including dozens of witnesses—who must be present in the courtroom during the trial, the fact that both sides have disclosed experts who must travel to Minnesota from other States, and the large number of security personnel who must be present in and around the courthouse during the trial makes this case different from the mine-run case. So, too, does the high likelihood of large public gatherings and demonstrations around the courthouse—involving thousands of people from Minnesota and around the country—during the trial. All of these factors increase the odds that this trial will result in increased COVID-19 transmission, and that this trial will turn into a possible superspreader event that seriously endangers public health. *See* Osterholm Aff. ¶¶ 42-47, 50. These factors therefore strongly counsel against holding a March 2021 trial for Defendant Chauvin or any other Defendant in this case, even if the Court ultimately schedules another trial to take its place.

3. The Court also should not hold a trial for any of the four Defendants in March 2021 for another reason: If the Court holds this trial at a time when few individuals in the general public are vaccinated, a coronavirus infection during the trial would prove to be highly disruptive, assuming the Court follows the appropriate public-health protocols. In light of Dr. Osterholm's assessment that it is "extremely likely" that "one or more of the dozens of participants in this trial . . . will contract the coronavirus during a trial held in March 2021," there is a high likelihood that

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the Court would need to respond to a coronavirus infection during trial if it proceeds on the schedule set forth in the January 11 Order. *Id.* ¶ 47. Recent coronavirus outbreaks during other Hennepin County trials, however, demonstrate the difficulty courts face in charting a path forward when a trial participant contracts the coronavirus during the trial.

Indeed, since the January 7 hearing, the State has learned of two recent cases in Hennepin County that were disrupted by COVID-19 infections. In *State v. Biley Wiley*, Case #27-CR-20-7764, a juror reported suffering from COVID-19 symptoms the day after jury deliberations began. The State requested that the court pause deliberations pending the result of the juror's COVID-19 test, but consented in the alternative to proceed with an eleven-member deliberating jury. The court stated that if the jurors elected to break and the defendant objected, it would grant a mistrial. The jurors chose to continue deliberating and acquitted the defendant within about one hour.

In *State v. Martell Miller*, Case #27-CR-19-22682, the court ordered a two-day recess when the defendant's attorney began experiencing coronavirus symptoms. During the recess, a juror tested positive for COVID-19. Even though the trial participants had been seated in the same courtroom as that juror for about eight days, the court decided—over the parties' objections—to excuse the juror, seat the alternate, and proceed with the trial without disclosing the positive test to the other members of the jury.[1] Rather than proceed with the trial under those potentially dangerous conditions, the State and Mr. Miller re-entered plea negotiations. The day after learning of the juror's positive test, Mr. Miller pleaded guilty to a lesser offense.

These cases underscore the disruptive consequences of a COVID-19 infection during the course of a trial. They also reflect that the Court lacks a clear, uniform set of protocols for handling

[1] In the alternative, the court offered to declare a mistrial to allow all parties to quarantine if all parties consented. The defendant, however, declined to agree to a mistrial. As a result, the court ruled that the trial would proceed as previously announced.

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a COVID-19 infection during the trial. The divergent approach these cases took leaves several important questions unanswered: What kind of regular testing will the Court require for trial participants? Will the Court require all other trial participants to be tested in the event one of the participants begins to experience symptoms? What kinds of contact tracing measures will the Court implement in the event that one of the trial participants tests positive for the virus? Under what circumstances will the Court notify trial participants if another participant ends up testing positive? Under what circumstances will the Court require other trial participants to quarantine if one of the lawyers tests positive? One of the witnesses? One of the jurors?

To make matters worse, the Court's options for addressing a COVID-19 infection among the trial participants in this case are likely to be even more limited in March 2021 than they are now. By that time, any person who tests positive for coronavirus is likely to have the more infectious variant of the virus. *See* Osterholm Aff. ¶ 34 ("[T]his new strain of the virus may become the predominant form of the virus in the United States by March 2021."). And because most members of the general public will not yet have been vaccinated by that time, the risk that the infected person will transmit the virus to others is extremely high. *See id.* ¶ 46. As a result, Dr. Osterholm cautions that, "[i]n the event that a trial participant contracts the coronavirus during the trial, it often will not be sufficient simply to quarantine that individual and proceed with the trial." *Id.* ¶ 48. Not only would the Court need to quarantine "any person who was in close contact with the infected individual" for "at least 10 days," but the Court would also potentially need to quarantine other trial participants. *Id.* ¶ 49. As Dr. Osterholm explains, "being indoors for an extended period of time with someone who is infected may pose a high risk of coronavirus transmission, even if the infected individual was wearing a mask and seated six feet or more from other trial participants during the trial." *Id*. And the new, more infectious variant of the

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coronavirus only "increase[s] the need to quarantine other trial participants when one trial participant has been infected." *Id.* The upshot, in other words, is that—depending on the circumstances—it may be necessary postpone the trial and require all participants to quarantine for at least ten days if a trial participant tests positive. *See id*.

The costs associated with a temporary delay, however, are unusually high in this case. It may be difficult for jurors to remember the testimony of the dozens of witnesses and experts if the trial is delayed. And because of the high-profile nature of this case, it could be difficult to insulate the jury from the large volume of anticipated media coverage regarding the trial. As a result, it is possible that what starts as a temporary delay in the trial could ultimately result in a mistrial.

Moreover, if other participants develop symptoms or test positive during the ten-day quarantine period, as was the case in *Miller*, additional continuances and quarantines may be necessary. And if multiple jurors, counsel, or key court personnel test positive, the Court may have no choice but to order a mistrial, as recently happened in one federal case. *See* Katie Buehler, *COVID-19 Outbreak Leads To Mistrial In EDTX*, Law360 (Nov. 17, 2020), https://www.law360.com/articles/1329617 (ordering mistrial in case where two jurors, several members of the parties' legal teams, and five court staffers contracted COVID-19).

All of this means that, in the "extremely likely" event that one or more trial participants test positive during Defendant Chauvin's March 2021 trial, attempting to proceed with the trial might result in a mistrial and require the Court to schedule a third trial date for this case (if the Court decides to proceed with one trial in March and one in August). Osterholm Aff. ¶ 47. And that, in turn, would further endanger public health. As Dr. Osterholm notes, more trials means more "trial dates," and so more "risk" and more "potential exposure to COVID-19." *Id.* ¶ 52.

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C. Holding a Single Joint Trial in the Summer of 2021 Would Be Substantially Safer Than The Schedule Mandated By the January 11 Order.

In light of the serious public health risks associated with holding multiple trials in this case, and in light of the serious public health risks associated with holding the first of those trials in March 2021, Dr. Osterholm concludes—and the State agrees—that "it would be substantially safer to hold one combined trial in the summer of 2021 than two separate trials in March 2021 and August 2021." Osterholm Aff. ¶ 55. The State initially proposed June 7, 2021 as the start date for a joint trial involving all four Defendants. *See* State's Mot. for Continuance (Dec. 31, 2020). The State, however, does not object to having a single joint trial for all four Defendants begin on August 23, 2021, and believes that a single joint trial on that date is far safer than either holding a single joint trial in March 2021, or holding two separate trials in March 2021 and August 2021.

As Dr. Emanuel has explained, it is likely that, by June 2021, millions of Americans will have received a COVID-19 vaccine. Emanuel Aff. ¶ 34. And that number is likely to increase substantially by August. Dr. Osterholm notes that, "[b]ased on current estimates, it is likely that over one hundred million Americans will receive a COVID-19 vaccination between March 2021 and August 2021." Osterholm Aff. ¶ 30. By that point, "current best estimates suggest that over 50% of the population will have been vaccinated." *Id.* Moreover, although the Court was skeptical of vaccination estimates in its January 11 order in light of "news reports detailing problems with the vaccine rollout," Jan. 11 Order, at 2, Dr. Osterholm has made clear that these "are conservative estimates, and it is likely that these estimates would hold true even if there are some delays in vaccine rollouts in parts of the country," Osterholm Aff. ¶ 30.

As Drs. Osterholm and Emanuel have explained, "as more people gain immunity through a vaccine, it becomes less likely that COVID-19 will be transmitted, both to people who have received the vaccine and to people who have not yet received the vaccine." Osterholm Aff. ¶ 21;

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see Emanuel Aff. ¶ 35. A summer trial date would therefore mean that those inside and outside the courtroom are less likely to contract the coronavirus, including the new B-117 strain. *See* Osterholm Aff. ¶¶ 36, 56 (explaining that vaccine provides "critical" protection against this new strain); News Release, *FDA Issues Alert Regarding SARS-CoV-2 Viral Mutation to Health Care Providers and Clinical Laboratory Staff: Impact on molecular tests remains low*, Food and Drug Admin. (Jan. 8, 2021), https://www.fda.gov/news-events/press-announcements/fda-issues-alert-regarding-sars-cov-2-viral-mutation-health-care-providers-and-clinical-laboratory (indicating that preliminary data suggests that existing vaccines may still be effective against B-117). For that reason, Dr. Osterholm believes that "the risk of COVID-19 transmission in the summer of 2021 will be substantially lower than in March 2021." Osterholm Aff. ¶ 55. This, in turn, means that a summer trial is substantially less likely to be disrupted by a COVID-19 infection among trial participants, and is substantially less likely to result in a mistrial or an extended pause in the trial. *See supra* pp. 14-15. It means that the public demonstrations surrounding the trial are far less likely to result in a COVID-19 outbreak in the community. *See supra* p. 10. And it means that the trial is far less likely to "significantly increase the burdens on the health care system at a time when cases, hospitalizations, and deaths are likely to be on the rise." Osterholm Aff. ¶ 50.

Holding a single trial in the summer of 2021, as opposed to two separate trials, would also "reduce the public's overall level of exposure to an outbreak, whether within the courtroom or at large public gatherings outside the courtroom." *Id.* ¶ 56. It would "decrease the number of days on which this case could create a risk of community spread of the virus," *id.*, including by reducing the overall number of days on which public demonstrations will take place and thereby decreasing "the number of opportunities for community spread of the virus," *id.* ¶ 53. It would ensure that trial participants are not exposed to added risk by virtue of having to be present at "multiple indoor,

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in-person trials." *Id*. ¶ 52. And it would also "ensure that a single trial occurs after many Minnesotans have had the opportunity to receive a COVID-19 vaccine." *Id.* ¶ 56.

In short, because the schedule set forth in the Court's Order would "extremely unwise" from a public health perspective and "could have potentially catastrophic consequences for public health," *id.* ¶¶ 42, 50, and because the public health risks will be "substantially lower" if this Court conducts a single, joint trial in the summer of 2021, *id.* ¶ 55, the Court should reconsider its order, re-join the four Defendants, and continue the joint trial until the summer of 2021.

II. THE COURT'S ORDER VIOLATES THE RULES FOR SEVERANCE.

The Court should also reconsider its January 11 Order because its decision to sever Defendant Chauvin's trial from the trials of the other three Defendants violates Minnesota's rules for joinder and severance. "Rule 17.03 contemplates one standard for joinder and pretrial severance." *Santiago v. State*, 644 N.W.2d 425, 441 (Minn. 2002). Thus, in evaluating whether to sever defendants, the Court must consider the same four factors that governed its initial joinder analysis: "(1) the nature of the offense charged; (2) the impact on the victim; (3) the potential prejudice to the defendant; and (4) the interests of justice." Minn. R. Crim. P. 17.03, subd. 2. Here, the four factors point in exactly the same direction as they did when the Court granted joinder in November: All four plainly favor joinder and disfavor severance. The State therefore respectfully requests that the Court reconsider its January 11 Order and re-join the four Defendants.

A. All Four Factors Still Favor Joinder and Disfavor Severance.

As this Court recognized in granting the State's motion for joinder just two months ago, all four factors strongly favor joinder and thus strongly disfavor severance.

First, the nature of the offenses charged "strongly supports joinder of all four Defendants in a single trial." Joinder Order, at 24. This factor favors joinder as long as (i) the defendants are charged with the same or similar offenses; (ii) the defendants worked in close concert with one

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another; or (iii) a great majority of the evidence will be admissible against all defendants. "Here, all three are present." *Id.* That conclusion was correct in November, and remains correct today.

Second, "joinder will protect witnesses from reliving the trauma of Floyd's death at multiple trials." *Id.* at 30 (capitalization altered). Indeed, because of the heightened risk that the coronavirus will disrupt a March 2021 trial, witnesses and family members may even be called to testify *more than* twice if the Court schedules separate trials, further exacerbating this trauma. *See supra* pp. 12-15. If anything, then, this factor favors joinder (and disfavors severance) more strongly than it did two months ago.

Third, Defendants will not be "prejudiced by joinder because their defenses are not antagonistic." Joinder Order, at 5. There remains no indication that "the State's case . . . falls into either of the narrow categories the Minnesota Supreme Court has recognized as involving antagonistic defenses." *Id.* at 39. This factor accordingly continues to "strongly favor[ ] joinder," and thus weighs strongly against severance. *Id.* at 34.

Finally, the interests of justice continue to "strongly favor joinder of all four Defendants in a single trial." *Id.* at 51. In its November Order, the Court identified five "considerations relevant to the interests of justice" that "favor joinder" of all four Defendants for trial, *id.* at 49:

- (i) Separate trials would potentially delay the resolution of this case. *Id.*

- (ii) Separate trials would place an undue burden on the State and the court system given the high degree of overlap with respect to witnesses, experts, and evidence. *Id.* at 49-50. Separate trials would also be extremely costly in terms of "security, the administrative burdens . . ., and the potential diminution in terms of the resources available to conduct trials for other criminal defendants at the Hennepin County Government Center while these cases are being tried." *Id.* at 50.

- (iii) Separate trials would unduly burden witnesses. Separate trials would require witnesses to travel to Hennepin County twice, "potentially suffering [greater] lost income," increasing their risk of exposure to COVID, and increasing the trauma of testifying. *Id.* Bifurcating the trials would also substantially increase the risk that

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witnesses may become "unavailable or unwilling to testify," particularly if they face public backlash or threats in response to their testimony. *Id.*

- (iv) Separate trials "run the risk of prejudicing potential jurors through the publicity related to each trial." *Id.* As the Court explained, if there were multiple trials, "impaneling a fair and impartial jury in those subsequent trials likely would become more difficult after the first trial concludes." *Id.* And it noted that "joinder is a critical safeguard to help protect the fairness of a jury trial." *Id.* at 51.

- (v) Joinder "is in the 'collective interest of the people' because it would allow the community and the nation to absorb the verdicts for the four Defendants at once." *Id.* (quoting *State v. Higgins*, 376 N.W.2d 747, 748 (Minn. Ct. App. 1985)). "Forcing the community and this State to endure" at least two separate trials six months apart "is likely to compound and prolong the trauma" they suffer. *Id.*

All of these considerations still cut in favor of joinder. If anything, they favor joinder even more strongly now. As Dr. Osterholm explains in his affidavit, "[f]rom a public health perspective, it is far more dangerous to hold multiple trials—one in March 2021, and one in August 2021—than it would be to hold a single trial in the summer of 2021." Osterholm Aff. ¶ 51. Holding multiple trials means greater "risk" and greater "potential exposure to COVID-19." *Id.* ¶ 52. Holding one trial for all four Defendants after the vaccine has become widely available to the general population, by contrast, will be "substantially safer." *See id.* ¶ 55; *supra* pp. 16-18. Moreover, in light of Dr. Osterholm's conclusion that there is a substantial likelihood that any trial in March 2021 would face a coronavirus-related interruption, it is possible that scheduling two separate trials might in practice mean that witnesses, jurors, and the general public may have to endure *more than two* trials—the original March trial for Defendant Chauvin, a potentially rescheduled trial for Defendant Chauvin in the event that one of the trial participants contracts COVID-19, and the August trial for the remaining three Defendants. *See supra* pp. 14-15.

The State is not aware of a single case in which a Court has ordered pre-trial severance despite the fact that all four of the relevant factors favored joinder. This case should not be the

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first. Because the Court's rationale from its November Order granting joinder applies with the same or greater force now, the State respectfully requests that the Court reconsider severance.

B. The Court's Rationale Does Not Support Severance.

The Court's January 11 Order does not suggest that the joinder analysis has changed. *See* Jan. 11 Order, at 2-3. That is not surprising. There have been no changes to the nature of the offenses charged, Defendants have not identified and cannot identify any potentially antagonistic defenses, and separate trials will still impose greater burdens on witnesses, the State, and the community as a whole. Instead, the *only* thing that has changed is that, in light of the fact that Defendants have now indicated that they wish to have more people present at counsel table, the Court believes it cannot provide enough space in its chosen courtroom for all trial participants due to "COVID-19 physical restrictions." Jan. 11 Order, at 3.

That development does not warrant severance for five reasons.

First, this fact has little or nothing to do with the four Rule 17.03 factors. The Defendants' wish to have more counsel or support staff in the courtroom does not impact the similarity of the charges, lessen the burden on eyewitnesses or family members, or give rise to any prejudice from potentially antagonistic defenses. *See supra* pp. 18-19. Nor does it give rise to any other form of legally cognizable prejudice: Although Defendants are of course entitled to have counsel present during the trial, they do not have a legal entitlement to a particular number of lawyers or support staff seated at counsel table. *See supra* pp. 6-7. As for the interests of justice, the State is not aware of *any* Minnesota case that has considered the number of counsel or support staff present during a trial when deciding whether to join or sever trials. Thus, even if this fact might be relevant to the interests of justice on the margins, it is nowhere close to the heartland of that factor.

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Second, even if Defendants' desire to seat additional people at counsel table were relevant to the interests-of-justice factor, that factor would still weigh strongly in favor of joinder and against severance. As the Court explained in November, "the interests of justice strongly favor joinder of all four Defendants in a single trial" for five separate reasons. Joinder Order, at 51; *see id.* at 49-51. Against the "strong[ ]" weight of those other considerations, Defendants' desire to have more counsel or staff in the courtroom is hardly enough to tip this factor towards severance.

Third, even if this Court were to somehow conclude that the interests of justice favored severance, that still could not justify severance. As the Minnesota Supreme Court has explained, the interests-of-justice factor is generally not "determinative" when standing alone. *Jackson*, 773 N.W.2d at 119. Here, the other three factors favor joinder—two of which do so "strongly." Joinder Order, at 4-5. Thus, even if the interests of justice factor did favor severance, that still could not shift the balance of the Rule 17.03 factors as a whole toward severance. *See, e.g.*, *State v. Johnson*, 811 N.W.2d 136, 142-144 (Minn. Ct. App. 2012) (affirming joinder where three of the Rule 17.03 factors favored joinder and one was neutral); *cf., e.g.*, *State v. Larson*, No. 21-CR-18-852, 2019 WL 10786230, at *2 (Minn. Dist. Ct. June 5, 2019) (denying joinder where two factors were neutral and two weighed heavily against joinder); *State v. Asefaw*, No. 27-CR-16-8321, 2017 WL 8781003, at *4 (Minn. Dist. Ct. May 2, 2017) (same, where interests of justice favored joinder, two factors disfavored joinder, and the last factor was neutral).

Fourth, there are other workable alternatives to severance that could satisfy Defendants' wish to have additional counsel or support staff present in the courtroom. The Court could move the trial to a larger facility, such as the federal courthouse in Minneapolis, a conference space, or a gymnasium. *See supra* p. 7.[2] Alternatively, in light of the Court's audiovisual order, the

[2] Although it is possible that the Court would need to pay to use an alternative facility, the Court has itself recognized the serious "costs to the State and the court system that are likely to attend"

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Defendants' additional counsel and staff could easily watch the trial and offer support from another courtroom so long as the Court approves the use of a real-time communication system for lawyers in the courtroom to communicate with their team. *See supra* p. 7. The Court could also allow additional counsel and staff to be seated at the back of the courtroom (following appropriate social distancing protocols) rather than at counsel table. Although the State recognizes that these alternatives may have potential drawbacks, each would accomplish what the Defendants seek without necessitating severance and departing so starkly from Rule 17.03.

Finally, ordering severance merely on the basis of Defendants' desire to have additional counsel and staff present in the courtroom sets a dangerous precedent. Taken to its logical conclusion, the Court's decision allowing these Defendants to unilaterally force severance at this late date would allow any defendant in a multi-defendant trial to torpedo joinder based on concerns about the number of support personnel in the courtroom. In fact, if similar distancing protocols remain in place come August, the remaining three Defendants may attempt to force severance then based on a similar request for additional support personnel at counsel table. There is no legal basis for granting severance solely on that rationale, in this case or any other.

In short, the Court's rationale for ordering severance in this case is inconsistent with Rule 17.03. Because the four factors under Rule 17.03 all plainly favor joinder and disfavor severance, the State respectfully requests that the Court reconsider its Order and re-join all four Defendants.

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multiple trials, "including added courthouse security, the administrative burdens in overseeing a trial that will attract global attention, . . . and the potential diminution in the resources available to conduct trials for other criminal defendants at the Hennepin County Government Center while these cases are being tried." Joinder Order, at 50. It is also possible that some alternative venues—including colleges or law schools during the summer months, or other federal, state, or local courthouses with sufficient capacity—might be willing to host this trial at a substantial discount.

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CONCLUSION

For the foregoing reasons, this Court should reconsider its Order, re-join the four Defendants for trial, and continue the joint trial until the summer of 2021.

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Respectfully submitted,

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