Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

Plaintiff,

vs.

DEREK MICHAEL CHAUVIN,
TOU THAO,
THOMAS KIERNAN LANE,
J. ALEXANDER KUENG,

Defendants.

ORDER AND MEMORANDUM OPINION GRANTING STATE'S MOTION FOR TRIAL JOINDER

Court File No. 27-CR-20-12646
Court File No. 27-CR-20-12949
Court File No. 27-CR-20-12951
Court File No. 27-CR-20-12953

These matters are before the Court on the State's motion to join all four Defendants -- Derek Michael Chauvin (Chauvin), Tou Thao (Thao), Thomas Kiernan Lane (Lane), and J. Alexander Kueng (Kueng) -- for trial in a single trial proceeding.

A hearing was held on various motions filed by all parties in all four of these cases on September 11, 2020 (Hearing), including the State's trial joinder motion. Matthew Frank and Neal Katyal appeared on behalf of the State of Minnesota. Eric Nelson appeared on behalf of Chauvin. Robert Paule and Natalie Paule appeared on behalf of Thao. Earl Gray appeared on behalf of Lane. Thomas Plunkett appeared on behalf of Kueng. All four Defendants were also present at the Hearing.

Based upon all the files, records, and proceedings herein, and the parties' written submissions as well as the oral arguments at the Hearing, the Court enters the following Order.

ORDER

1. The State's motion for trial joinder is **GRANTED**.

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

2. A joint trial of all four Defendants shall be held beginning March 8, 2021 at 9:00 a.m. in Courtroom 1856 at the Hennepin County Government Center.

3. The attached Memorandum Opinion is incorporated herein.

BY THE COURT:

Digitally signed by Cahill, Peter
Date: 2020.11.04 19:28:38
-06'00'

Peter A. Cahill
Judge of District Court

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

MEMORANDUM OPINION

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY 4

BRIEFS AND EXHIBITS 6

FACTUAL BACKGROUND 8

A. Lane and Kueng Arrive at Cup Foods and Detain Floyd 8

B. Lane and Kueng's Initial Efforts to Place Floyd in Their Squad 10

C. Chauvin and Thao Arrive As Lane and Kueng Continue Trying to Force Floyd into the Squad 12

D. Chauvin Joins Lane and Kueng in the Effort to Force Floyd into the Squad 13

E. The Critical Nine Plus Minutes (8:19:18 - 8:28:42 P.M.): Floyd Is Subdued and Restrained Prone on Chicago Avenue; Chauvin Kneels on the Back of Floyd's Neck, Pinning Floyd's Face to the Street; Kueng and Lane Assist Chauvin in Restraining Floyd by Pinning Floyd's Back and Legs to the Street; and Thao Maintains Watch, Observing the Other Three Officers Kneeling on Floyd as Well as the Gathering Bystander Crowd 14

F. Floyd's Death 21

DISCUSSION 21

I. THE FOUR-FACTOR TEST APPLIED IN DETERMINING IF TRIAL JOINDER IS APPROPRIATE. 21

II. THE NATURE OF THE OFFENSES CHARGED FAVORS JOINDER. 23

III. JOINDER WILL PROTECT WITNESSES FROM RELIVING THE TRAUMA OF FLOYD'S DEATH AT MULTIPLE TRIALS. 30

IV. BECAUSE NONE OF THE DEFENDANTS HAS GIVEN NOTICE OF ANY DEFENSES THAT ARE ANTAGONISTIC TO ANY OF THE OTHER DEFENDANTS, NONE OF THE DEFENDANTS WILL BE PREJUDICED BY JOINDER. 34

V. THE INTERESTS OF JUSTICE ARE SERVED BY JOINDER. 48

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

INTRODUCTION AND SUMMARY

The Minnesota Rules of Criminal Procedure prescribe four factors for trial courts to consider in deciding whether to order multiple defendants charged with similar crimes in connection with an underlying incident tried jointly or separately. Having considered all four factors in light of the evidence presently in the record before this Court and the Defendants' indicated intended defenses, this Court concludes Chauvin, Thao, Lane, and Kueng should be joined for a single trial, rather than conducting four separate trials.

The first factor weighs strongly in favor of joinder because of the similarity of the charges and evidence against all four Defendants. Chauvin is charged with unintentional second-degree murder and second-degree manslaughter in connection with George Floyd's death in Minneapolis on May 25, 2020. Thao, Lane, and Kueng each is charged with aiding and abetting Chauvin on the unintentional second-degree murder and second-degree manslaughter charges. The critical evidence at trial will likely include the following:

- videos from the body-worn cameras of Lane, Kueng, and Thao recording events at the scene from 8:08:00 – 8:42:16 p.m., as well as from a cell-phone video taken by one of the bystanders, Darnella Frazier, standing on the sidewalk a few feet away and capturing more than ten minutes of footage, including Chauvin kneeling on Floyd's neck and Thao managing the bystander crowd, engaging in dialogue with some of those bystanders, while also watching Chauvin, Kueng, and Lane restraining Floyd face down in the street
- Minneapolis Police Department Policies and Procedures and Training Manuals
- Autopsy reports and medical and forensic testimony regarding the circumstances and manner of Floyd's death, and the cause, as well as any contributing causes, of his death
- Eyewitness testimony

All this critical evidence will be the same for all four Defendants and all of it would appear to be admissible to prove the charges against all four Defendants.

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

The second factor slightly favors joinder in view of the impact conducting four separate trials (or, in any event, more than one trial) would have on eyewitnesses if the witnesses were forced to relive the events of May 25, 2020 by testifying to the same events at multiple trials. It appears at least one of the likely eyewitnesses is a minor, deemed by the law to be "particularly vulnerable" for these purposes.

The third factor also strongly favors joinder because there is no indication at this stage of the proceedings that any of the Defendants is likely to be prejudiced by joinder because their defenses are not antagonistic but instead are mutually supportive -- all Defendants contend they were authorized in using force because Floyd was resisting their demands to take a seat in the squad car for transport to the Jail for booking and that the force they used was reasonable. In addition, all Defendants contend that Floyd's death resulted from his underlying medical conditions, heart disease, and hypertension acting in combination with several drugs found in his system post-mortem and was not caused by their actions in subduing and restraining him.

Finally, the fourth factor also strongly favors joinder because conducting four separate trials arising from the same underlying incident and involving the same evidence and the same witnesses would result in unwarranted delay and impose unnecessary burdens on the State, the Court, and the witnesses. Moreover, in wake of the unprecedented (at least in this State) scope of the publicity these cases have received locally, statewide, nationally, and even internationally, and the intensity of public interest and scrutiny of Floyd's death, if trials were to proceed separately for each Defendant, trial-related publicity surrounding the first trial (and succeeding trials) could potentially compound the difficulty of selecting a fair and impartial jury in all subsequent trials. Thus, the interests of justice also warrant joinder.

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

BRIEFS AND EXHIBITS

On August 12, 2020, the State filed its notice of motion and motion for trial joinder, together with its supporting Memorandum of Law and Affidavit of Matthew Frank, with exhibits, in all four cases.

On September 8, 2020, Chauvin, Thao, Lane, and Kueng each filed a separate Memorandum of Law (or "Written Objection") in opposition to the State's motion for trial joinder.

On September 10, 2020, the State filed a Reply Brief in support of its motion for trial joinder.

On September 25, 2020: (i) Chauvin filed a Memorandum of Law Regarding the Effect of the State's Spreigl Notice on Its Joinder Motion; (ii) Thao filed a Memorandum of Law Regarding the Effect of Spreigl Evidence on Joinder; and (iii) Kueng filed a Memorandum - Effect of the State's Spreigl Notice on Joinder. Upon the filing of these Defense memoranda, the State's trial joinder motion was taken under advisement.

The State filed the following exhibits in connection with its trial joinder motion (*see* Frank Affidavit (Aug. 12, 2020)):

Exh. 1: Kueng's body-worn camera video recording events during Floyd's May 25, 2020 detention, arrest, subdual and restraint

Exh. 2: Lane's body-worn camera video recording events during Floyd's May 25, 2020 detention, arrest, subdual and restraint

Exh. 3: Thao's body-worn camera video recording events during Floyd's May 25, 2020 detention, arrest, subdual and restraint

Exh. 4: Lane's May 31, 2020 video interview by Minnesota Bureau of Criminal Apprehension (BCA) Special Agents Brent Peterson and Michelle Presconi (also

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

present was FBI Special Agent Kevin Keane, Defense Counsel Earl Gray, and Law clerk Kevin Gray)

Exh. 5: Thao's June 2, 2020 video interview by BCA Special Agent Brent Peterson and FBI Special Agent Blake Hofstetter

Exh. 6: Sections 1-101 to 1-112 (five pages) from the City of Minneapolis Police Department Policy and Procedures Manual (MPDPPM) addressing the "Written Directives System" and Sections 5-301 to 5-318 of the MPDPPM addressing "Use of Force" (21 pages)

Exh. 7: Hennepin County Medical Examiner's Office Autopsy Report on George Floyd (June 1, 2020) (3 pages)

Exh. 8: Hennepin County Medical Examiner Press Release Report announcing results of the Floyd autopsy

Exh. 9: Case Consult report by the Defense Health Agency, Armed Forces Medical Examiner System (June 10, 2020) issued after an independent evaluation of the HCMC Medical Examiner's Autopsy Report by the United States Department of Justice (2 pages)

None of the Defendants filed exhibits in connection with the State's trial joinder motion.

This Court's Order and Memorandum Opinion on Defense Motions to Dismiss for Lack of Probable Cause, filed into all four cases on October 21, 2020, lists 57 exhibits the parties collectively filed into these cases in connection with the Defendants' motions to dismiss all charges for lack of probable cause (*id*. at pp. 10-15), some of which are the source for some of the factual background summarized in the next section.

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

FACTUAL BACKGROUND[1]

A. Lane and Kueng Arrive at Cup Foods and Detain Floyd

On the evening of May 25, 2020, Cup Foods, located at Chicago Avenue and 38th Street in South Minneapolis, reported the use of a counterfeit $20 bill to purchase merchandise. Kueng and Lane responded to the dispatch report, arriving at Cup Foods about 8:08 p.m. The manager explained two men had been involved: one had used a counterfeit $20 bill to purchase cigarettes (the manager showed Lane and Kueng that bill); the other had tried to use a counterfeit $20 bill which the cashier had rejected.[2] The manager informed Kueng and Lane that the men involved were sitting in a blue vehicle across the street. (Kueng & Lane BWC Videos at 8:08:40-8:09:06 p.m.)[3]

---

[1] The facts summarized here are derived from the Statements of Probable Cause in the Complaints as well as the voluminous evidentiary submissions filed by the parties in connection with the defense motions to dismiss for lack of probable cause in all four cases together with the State's evidentiary submissions in connection with this trial joinder motion. These facts are not intended as, and do not constitute, formal findings of fact by this Court binding in future proceedings in this case. They are intended only to summarize the underlying factual background germane to this Court's consideration whether all four Defendants are appropriately joined for trial.

[2] Later, the Cup Foods manager told Kueng that Floyd had used a counterfeit $20 bill to purchase cigarettes but that a Cup clerk had detected forged currency when the other man with Floyd attempted to use a counterfeit $20 bill to purchase other merchandise. (Kueng BWC Video at 8:32:20-8:36:30 p.m.)

[3] Minneapolis Police Department officer body-worn camera videos reflect time in so-called "military" time, showing the hour, minutes, and seconds. That is, times in the range from 00:00:00 to 11:59:59 denote a.m. times and times in the range from 12:00:00-23:59:59 denote p.m. times. The key events for present purposes recorded in the Lane, Kueng, and Thao BWC videos occur in roughly a 21-minute span from 20:08:00 to about 20:29:00 in military time, or between 8:08 and 8:29 p.m. on May 25, 2020. (The Lane BWC video records events from 8:08:00-8:42:16 p.m.; the Kueng BWC video records events from 8:08:00-8:38:33 p.m.; and the Thao BWC video records events from 8:16:37-8:38:42 p.m.) In this Memorandum Opinion, the military times shown on the BWC videos have been converted to the analogous "p.m." time for the reader's convenience.

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

Kueng and Lane left Cup Foods and crossed 38th Street to approach the vehicle, parked on 38th Street next to the Dragon Wok restaurant. (Kueng & Lane BWC Videos at 8:09:06-:28 p.m.) George Floyd was sitting in the vehicle's driver's seat; a male passenger was in the front passenger-side seat; and a woman passenger was in the back passenger-side seat.

Lane approached on the driver's side and tapped on the driver's side window with his flashlight. Floyd appears startled. (Lane BWC Video at 8:09:28-:32 p.m.) When Floyd cracked his door open and apologized, Lane instructed Floyd to show his hands. (*Id*. at 8:09:33-:40.) Seconds later, Lane pulled his gun, pointed it at Floyd, and yelled at him to "put your fucking hands up right now." (*Id*. at 8:09:41-:45.) Although asking what he had done wrong, Floyd put his hands up and then placed them on the steering wheel, complying with Lane's instructions. Intensifying the situation, Lane yelled at Floyd to "keep your fucking hands on the wheel" while keeping his gun trained on Floyd. (*Id*. at 8:09:46-:58.) Floyd immediately complied, at which point Lane instructed Floyd to put his hands on his head; when Floyd once again complied, Lane lowered his gun. (*Id*. at 8:10:00-:22.) Lane did not tell Floyd at any point during this initial interaction why he and Kueng had approached Floyd's vehicle.

Floyd, clearly upset, can be heard saying several times that he was "sorry"; he also started crying. (Lane BWC Video at 8:09:35-8:10:20 p.m.) Floyd told Lane several times that he had been shot before, even reporting that he had been shot "the same way." (*Id*. at 8:09:50-8:10:25.) Sobbing, he pleaded: "Mr. Officer, please don't shoot me." (*Id*. at 8:10:35-:37.) Over the next half minute or so, Floyd begged Lane not to shoot him several times. (*Id*. at 8:10:35-8:11:05.) He also explained to Lane that "I just lost my mom."

Lane told Floyd to step out of the car, while Kueng -- on the passenger side – told both

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

passengers to do the same. Kueng then walked around to the driver's side, and Kueng and Lane handcuffed Floyd while Kueng told Floyd to stop resisting. (Lane & Kueng BWC Videos at 8:11:05-:35 p.m.) Kueng walked the hand-cuffed Floyd to the sidewalk and told him to sit down on the ground with his back against the wall at the Dragon Wok restaurant. Floyd did so, immediately becoming calmer and saying "thank you" to Kueng.[4] (Kueng BWC Video at 8:11:35-8:12:15.) Floyd responded to Kueng's questions, telling Kueng his name and date of birth and reiterating he was scared because he had been shot before. (*Id*. at 8:12:15-8:13:05) It was only at this point, almost four minutes after Lane had first tapped on Floyd's window, that Kueng first explained to Floyd that they were detaining him because Cup Foods had reported that Floyd had used a fake bill in the store.[5] (*Id*. at 8:13:20-:25.) Floyd responded that he "didn't know what was going on" when Lane had approached him and drawn his weapon.

B. Lane and Kueng's Initial Efforts to Place Floyd in Their Squad

Although Floyd remained compliant while seated on the sidewalk conversing with Kueng, Kueng and Lane decided to detain Floyd in their squad car. (Kueng BWC Video at 8:13:35 p.m.) When Kueng stood Floyd up to walk him over to their squad, Floyd told Kueng he was in pain and that his wrists hurt from the handcuffs. (*Id*. at 8:13:55-8:14:10.) Lane asked Floyd if he was "on something right now," while Kueng noted there was foam around

[4] While Floyd was seated on the sidewalk talking to Floyd, Lane interviewed the other two passengers. (Lane & Kueng BWC Videos at 8:11:45-8:14:05 p.m.) One of the passengers explained to Lane that Floyd was scared of police officers and likely had been scared when Lane pointed his handgun at Floyd because Floyd had been shot before. (Lane BWC Video at 8:12:50-8:13:10.)

[5] It appears the Defendants did not tell Floyd he was under arrest for forgery for another five and a half minutes. (Kueng BWC Video at 8:18:57 p.m.) And this was at the point at which Lane and Kueng, joined by Chauvin, had been trying for force Floyd into the back seat of Lane and Kueng's squad for more than two and a half minutes.

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

Floyd's mouth and that Floyd was "acting real erratic." (Lane & Kueng BWC Videos at 8:14:05-:16.) Floyd responded that he was "scared." (Lane BWC Video at 8:14:12-:16.) Lane and Kueng walked the hand-cuffed Floyd from the Dragon Wok restaurant back across 38th Street to their squad parked outside Cup Foods. (Lane & Kueng BWC Videos at 8:14:05-:40.)

When they reached the squad car, Floyd stated: "I just want to talk to you, man." (Lane BWC Video at 8:14:55 p.m.) Kueng responded: "Man, you ain't listening to nothing we're saying, so we're not going to listen to nothing you're saying." (Kueng BWC Video at 8:14:57-8:15:01.) Floyd told Lane and Kueng several times that he was scared to get into the squad, told them repeatedly that he was "claustrophobic," and kept pleading with them "please, man." (Lane & Kueng BWC Videos at 8:14:45-8:15:10.) Kueng and Lane responded that they would have a conversation with Floyd only after he got into the squad car. They placed Floyd against the squad car and patted him down. While being patted down, Floyd stated: "I'm not resisting, man. I'm not." (Kueng BWC Video at 8:15:10-:15.) The pat search revealed a small pipe in Floyd's pocket but no weapons. (*Id*. at 8:15:15-:55.)

As Floyd stood outside the squad car, he asked Kueng and Lane not to leave him alone in the car and stated he would not do anything to hurt them. (Lane & Kueng BWC Videos at 8:15:30-:45 p.m.) Floyd repeatedly told Lane and Kueng that he was claustrophobic. (*Id*. at 8:14:45-8:15:05.) Lane responded: "Well, you're still going in the car." (Lane BWC Video at 8:15:40.)

After more than ninety seconds standing outside the squad (Lane & Kueng BWC Videos at 8:14:45-8:16:20 p.m.), Kueng and Lane tried to force a non-compliant Floyd inside the squad's open rear driver-side door. (*Id*. at 8:16:20.) Floyd exclaimed: "I'ma die in here, I'ma

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

die man," noting that he "just had COVID" and didn't "want to go back to that." (*Id*. at 8:16:40-:45.) As Floyd struggled with Lane and Kueng for about half a minute, a bystander engaged in a dialogue with Floyd, with the bystander telling Floyd he should get in the car because "you can't win" and Floyd responding to the bystander that he wasn't trying "to win" or hurt the officers but only that he was claustrophobic and had anxiety. (*Id*. at 8:17:00-:30.) Floyd repeated that he was "scared as fuck" and worried that his anxiety might make it hard for him to breathe in the back of the squad car. (*Id*. at 8:17:10-:20.) Floyd asked Kueng and Lane to allow him to count to three before getting into the back of the squad car, again insisting that he was not trying "to win." (*Id*. at 8:17:20-:25.) He pleaded for Kueng and Lane to allow him to get on the ground or do "anything" other than get in the car. (*Id*. at 8:17:25-:30.)

C. Chauvin and Thao Arrive As Lane and Kueng Continue Trying to Force Floyd into the Squad

Chauvin and Thao arrived on scene at 8:17 p.m. in response to a dispatch call for back-up. (Thao BWC Video at 8:17:09 p.m.) When Chauvin and Thao approached Lane, Kueng, and Floyd at 8:17:30, Lane and Kueng had been engaged with Floyd at the squad for about two minutes and forty-five seconds, and had physically been trying to force Floyd into the squad's back seat for more than a minute.

While Chauvin and Thao stood by watching upon their initial approach, Kueng and Lane continued trying to force Floyd into their squad. Lane walked around to the passenger side of the squad and began trying to pull Floyd into the back seat through the passenger-side door while Kueng tried to push Floyd into the squad through the rear driver-side door. (Lane & Kueng BWC Videos at 8:17:30-:55 p.m.)

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

D. Chauvin Joins Lane and Kueng in the Effort to Force Floyd into the Squad

After observing for about 30 seconds, Chauvin joined Lane on the passenger side of the squad at 8:18 p.m., struggling to pull on Floyd. (Thao BWC Video at 8:18:00 p.m.) Chauvin had his arm around Floyd's upper chest and neck, with Lane pulling on Floyd farther down on his body, collectively pinning Floyd against the back seat of the squad. At 8:18:06, Floyd is heard for the first time exclaiming "I can't breathe." (Lane & Kueng BWC Videos) At 8:18:15, Kueng walked around to the passenger side of the squad to assist Lane and Chauvin, at which point Chauvin and Kueng attempted to lift Floyd into the back seat of the squad.[6] In the ensuing struggle, Floyd fell partway through the rear passenger side door and asked to be laid on the ground. (Lane BWC Video at 8:18:15-:20.)

This struggle continued for about a minute, during which Floyd continued to yell "please," continuously telling the Defendants that he was claustrophobic and couldn't breathe. (Kueng, Thao & Lane BWC Videos at 8:18:00-8:19:00 p.m.) When the futility of the three officers continuing their efforts forcibly to seat Floyd in the squad's back seat became clear, Thao is heard saying "we'll have to hogtie him," and Lane said: "Let's take him out and just MRT."[7] (Lane, Kueng & Thao BWC Videos at 8:18:45-8:19:05.) The others agreed, and Floyd was pulled from the squad and made to lie down in the street next to the squad. (Lane, Kueng & Thao BWC Videos at 8:19:00-:15.)

---

[6] Thao was watching from the driver's side, and his BWC captures Chauvin and Kueng wrestling with Floyd, as Lane is off to the side.

[7] MRT is an acronym for "Maximal Restraint Technique," which employs a "Hobble" device to "secure a subject's feet to their waist in order to prevent the movement of legs." A Hobble "limits the motion of a person by tethering both legs together." (Minneapolis Police Department Policy & Procedure Manual (MPDPPM) § 5-316(III)) The Maximal Restraint Technique is accomplished using two Hobbles connected together. (MPDPPM § 5-316(IV)(A)(2))

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

E. The Critical Nine Plus Minutes (8:19:18 - 8:28:42 P.M.): Floyd Is Subdued and Restrained Prone on Chicago Avenue; Chauvin Kneels on the Back of Floyd's Neck, Pinning Floyd's Face to the Street; Kueng and Lane Assist Chauvin in Restraining Floyd by Pinning Floyd's Back and Legs to the Street; and Thao Maintains Watch, Observing the Other Three Officers Kneeling on Floyd as Well as the Gathering Bystander Crowd

At 8:19:18 p.m., Chauvin, Kueng, and Lane managed to subdue Floyd, and forced him to lie prone on the concrete of Chicago Avenue, with all three officers kneeling on him:[8]

- Chauvin pressed his left knee into the back of Floyd's neck, forcing Floyd's face, throat, and upper chest against the concrete
- Kueng knelt on Floyd's back, with his hand on Floyd's handcuffed left wrist
- Lane restrained Floyd's legs, kneeling on them as well as pressing down on Floyd's legs with his hands

(Lane & Kueng BWC Videos at 8:19:15-:45 p.m.)

While Chauvin, Kueng, and Lane kneeled on Floyd, Thao located a Hobble in the back of the squad and asked the other Defendants if they "want[ed] to hobble [Floyd] at this point." (Thao, Kueng & Lane BWC Videos at 8:19:22-8:20:30 p.m.) When the others did not answer immediately, after asking if we are calling for EMS, Thao suggested "why don't we just hold him until EMS" arrives, adding "if we hobble a Sergeant's going to have to come over."[9] (Thao BWC Video at 8:20:25-:40.) After deciding not to use the Hobble, Chauvin, Kueng, and Lane continued to maintain their positions directly on top of Floyd, keeping him pinned face-down on the street, while Thao stood watch, positioning himself between the other Defendants on

[8] Thus, the Lane and Kueng BWC videos show that Chauvin, Kueng, and Lane had subdued Floyd after a struggle of almost three full minutes in which they had attempted to force a resistant Floyd into the rear seat of Lane and Kueng's squad car incident to his arrest before eventually subduing him, and restraining him by pinning him face-down in the street at 8:19:18 p.m.

[9] Under MPD policy, whenever a Hobble is used in connection with the Maximal Restraint Technique, "[a] supervisor shall be called to the scene where a subject has been restrained," and the supervisor is required to "complete a Supervisor's Force Review." MPDPPM § 5-316(IV).

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

top of Floyd and a gathering group of concerned bystander citizens, observing from the sidewalk adjoining Chicago Avenue.

During the first four minutes and forty seconds after Chauvin, Kueng, and Lane had pinned Floyd face-down to the street, Floyd repeatedly cried for help, albeit with diminishing frequency and vigor as time wore on. (Lane & Kueng BWC Videos 8:19:18-8:24:00 p.m.) Floyd yelled "I can't breathe" more than two dozen times, called out for his deceased mother almost a dozen times, and asked the Defendants to "tell my kids I love them." (*Id*.) Chauvin twice responded to Floyd's repeated cries of not being able to breathe:

"You're doing a lot of talking, man." (Lane & Thao BWC Videos at 8:20:19-:21.)

"You're talking fine." (*Id*. at 8:21:35.)

Meanwhile, Thao rebuked the on-looking bystanders "He's [Floyd] talking so he's breathing." (Thao BWC Video at 8:21:39.)

Floyd continued to plead with Chauvin, as Chauvin continued pressing his left knee onto Floyd's neck: "I can't breathe. Please, your knee in my neck." (Lane BWC Video at 8:21:53-:57 p.m.) Lane and Chauvin then engaged in a discussion with Lane stating that Floyd's "got to be on something," and speculating – because they'd found a "weed pipe" – if Floyd was on "PCP or something" in response to which Chauvin asked Floyd "What are you on?" (Lane & Thao BWC Videos at 8:21:53-8:22:20.)

Floyd continued complaining that he was in significant pain: "My knee, my neck . . . I'm claustrophobic. My stomach hurt. My neck hurt. Everything hurt." (Lane & Kueng BWC Videos at 8:22:15-:30 p.m.) Floyd told the Defendants almost ten times that he feared he would die lying on the ground while being subdued in this manner, including the following

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

remarks:

"I'll probably just die this way."

"I'm through, I'm through."

"They're gonna kill me, they gonna kill me, man."

"They'll kill me."

(Lane BWC Video at 8:21:45-:47; 8:22:19-:22, 8:22:42-:45; 8:23:14.)

Defendants continued ignoring Floyd's pleas for help. Chauvin responded dismissively: "You're doing a lot of talking, a lot of yelling. . . . It takes a heck of a lot of oxygen to say things." (Lane, Kueng & Thao BWC Videos at 8:22:40-:50 p.m.) Kueng appears to have reacted to Chauvin's comment with a smirk. (Thao BWC Video at 8:22:48-:49.)

Meanwhile, as the gathered bystanders began echoing Floyd's pleas for help and noting that Floyd was not resisting arrest, Thao continued to stand guard, watching his fellow officers while telling the crowd: "He's talking, so he's fine" and "This is why you don't do drugs, kids." (Thao BWC Video at 8:23:15-:40 p.m.) When a bystander expressed concern that Chauvin was "trapping" and "stopping" Floyd's breathing, Thao responded: "He's talking. . . . It's hard to talk if you're not breathing." (*Id*. at 8:23:40-:59.)

Between 8:19:20 and 8:24:00 p.m., the frequency and volume of Floyd's pleas for help diminished and his breathing became increasingly labored. As time wore on, Floyd's audible words turned into mumbling, and the mumbling then degenerated into grunts. Floyd uttered his final words "Please," at 8:23:55 p.m., and "I can't breathe," at 8:23:59 p.m. (Lane, Kueng &

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

Thao BWC Videos at 8:23:55-8:24:00 p.m.) Floyd then fell silent.[10]

Even after Floyd ceased talking and moving and had become non-responsive, Defendants maintained their positions, with Chauvin continuing to press his knee into Floyd's neck, and with Kueng and Lane continuing to restrain Floyd's back and legs. Thao, meanwhile, while observing Chauvin, Kueng, and Lane keeping Floyd pinned face-down in the street, continued to stand between the other Defendants kneeling on Floyd and the bystanders gathered on the sidewalk, ensuring that the bystanders remained on the sidewalk and did not physically intervene to come to Floyd's aid. (Thao BWC Video at 8:24:00-8:26:43 p.m.)

As Floyd appeared to have lost consciousness and shortly before uttering his final words, Lane asked Chauvin and Kueng: "Should we roll him on his side?" citing a concern "about the excited delirium or whatever." (Lane & Kueng BWC Videos at 8:23:48-:56 p.m.) Chauvin rejected Lane's suggestion, stating the ambulance was en route.[11] (Lane BWC Video at 8:23:48-8:24:02.) Neither Lane nor Kueng challenged Chauvin's response, instead maintaining their positions, holding down Floyd's back and legs. (Lane & Kueng BWC Videos at 8:24:00-:30.)

By this point, the half-dozen or so bystanders gathered on the sidewalk had begun yelling at Defendants. One bystander yelled that Floyd was "not even resisting arrest right now" and was "passed out." (Thao BWC Video at 8:24:40-:45 p.m.) In apparent agreement with the bystander, Lane is heard saying "I think he's [Floyd] passed out." (Lane & Kueng BWC Videos at 8:24:43-:48.) Even so, Lane continued to hold down Floyd's right leg with his arm,

[10] After his last words "I can't breathe" at 8:23:59-8:24:00 p.m., Floyd can be heard making a few grunts, "ahs" and then finally some gurgling sounds until about 8:24:49 p.m. From that point on, he appears – from the Lane, Kueng, and Thao BWC Videos – to have been totally silent, apparently having lapsed into unconsciousness.

[11] A call had been made earlier, requesting an ambulance.

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

reporting to Chauvin and Kueng that even though his own "knee might be a little scratched . . . I'll survive." (Lane BWC Video at 8:25:00-:04.)

Meanwhile, one of the bystanders was becoming more animated and insistent, yelling at Chauvin, Kueng, Lane, and Thao that Floyd was not "breathing right now," "he's not responsive," and "he's not moving," to which Lane and Kueng responded "he's breathing." (Lane & Kueng BWC Videos at 8:25:08-:15 p.m.) The BWC videos appear to show that Floyd's shallow breaths stopped within seconds of those remarks. (Kueng BWC Video, at 8:25:20-:31.)

At 8:25:28 p.m., an out-of-uniform, off-duty Minneapolis firefighter arrived on scene and asked to provide Floyd medical assistance. The firefighter asked the Defendants if Floyd had a pulse and demanded they check for a pulse and tell her what it was. (Thao BWC Video at 8:25:30-:52.) Chauvin and Thao refused to allow her to tend to Floyd, with Thao shouting at her to "back off" and "get off the street." (Lane & Thao BWC Videos at 8:25:32-:47 p.m.) In light of concerns about Floyd's lack of responsiveness, Lane again asked Chauvin and Kueng: "should we roll him [Floyd] on his side." (Lane & Kueng BWC Videos at 8:25:38-:41.) Although none of the other three Defendants appears to have responded, once again Lane did not press the matter, but continued holding Floyd's legs down with his right arm. Chauvin, Kueng, and Thao likewise continued to maintain their positions. (Lane BWC Video at 8:25:40-8:26:00.)

The bystanders grew increasingly vocal about Floyd's lack of responsiveness, yelling at Chauvin, Kueng, Lane, and Thao that Floyd was "not moving" and was "not responsive"; they asked Defendants if Floyd was breathing and demanded that Defendants check Floyd's pulse. (Lane & Kueng BWC Videos at 8:25:40-8:26:05 p.m.) After hearing the bystanders' pleas to check Floyd for a pulse, Lane asked Kueng if he could detect a pulse. After checking Floyd's

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

wrist for about ten seconds, Kueng reported: "I can't find one [a pulse]." (Kueng & Lane BWC Videos at 8:25:45-8:26:00.) Thao responded by remarking to the bystanders: "Don't do drugs." (Thao BWC Video at 8:26:04.)

Chauvin responded: "Huh?" Kueng clarified that he was "check[ing] [Floyd] for a pulse." (Kueng & Lane BWC Videos at 8:26:00-:05 p.m.) After again checking for a pulse, Kueng sighed, leaned back slightly, and repeated: "I can't find one." (Kueng & Lane BWC Video at 8:26:07-:12.) Upon learning that Kueng could not find a pulse, Chauvin squeezed Floyd's fingers. Floyd did not respond. (Lane BWC Video at 8:26:12-:18.)

After 8:26:30, the bystanders' pleas to the Defendants became increasingly vocal and emphatic. Even though Floyd remained unresponsive, the Defendants did not move from their positions but continued to restrain Floyd -- Chauvin with his left knee pressed firmly into Floyd's neck, Kueng kneeling on Floyd's back, and Lane holding Floyd's legs -- while Thao kept bystanders back on the sidewalk. The Defendants ignored the off-duty firefighter's urgent demands that they check Floyd for a pulse and begin chest compressions if he had no pulse. (Thao BWC Video at 8:28:39-:48 p.m.) None of the Defendants ever attempted CPR while Floyd was restrained on the ground.

An ambulance arrived on the scene after 8:27 p.m., about three and a half minutes after Lane first asked if they should turn Floyd onto his side, almost two minutes after Floyd appears to have stopped breathing, and well over a minute after Kueng first stated he could not detect a pulse. Despite the ambulance's arrival and the lack of any movement or sounds from Floyd, Defendants continued restraining Floyd in the same manner they had since 8:19:18, with Chauvin continuing to press his knee into the back of Floyd's neck, Kueng and Lane holding

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

down Floyd's back and legs, and Thao watchfully keeping the crowd on the sidewalk. (Lane, Kueng & Thao BWC Videos at 8:27:00-8:28:40.) The crowd, which by this point had grown to nearly a dozen concerned onlookers, continued pleading with the officers, asking Thao if he was "gonna let [Chauvin] kill that man in front of you." (Thao BWC Video at 8:28:05-:13.)

It was not until 8:28:42 p.m., when the stretcher was ready, that Chauvin finally stood up, removing his knee from Floyd's neck. (*See* Lane & Kueng BWC Videos.) Floyd remained unresponsive as Chauvin, Kueng, and Lane rolled Floyd onto the stretcher. (Lane, Kueng & Thao BWC Videos at 8:28:50-8:29:00 p.m.) Lane got into the ambulance after the EMTs had loaded Floyd into the ambulance (Lane BWC Video at 8:29:40-8:42:15), Kueng returned to Cup Foods for further discussions with the Cup store manager (Kueng BWC Video at 8:32:30-8:36:30), and Chauvin and Thao departed from the scene in their squad. (Thao BWC Video.)

In total, the Defendants kept Floyd continuously restrained, pinned face-down on the concrete apron of Chicago Avenue in the same manner -- with Chauvin's knee pressing into the back of Floyd's neck, Kueng and Lane restraining Floyd's back and legs, and Thao preventing the crowd of concerned citizens from interceding -- for more than nine minutes and twenty seconds. (8:19:18-8:28:42 p.m.) Defendants did so notwithstanding that:

- Floyd neither moved nor spoke during the final four minutes and forty seconds. (8:24:00-8:28:42)
- Floyd appeared not to be breathing for almost three and a half minutes. (8:25:15-8:28:42)
- Defendants were unable to detect a pulse for more than two and a half minutes. (8:26:10-8:28:42)

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

F. Floyd's Death

Floyd was taken by ambulance to the Hennepin County Medical Center (HCMC) in downtown Minneapolis where he was pronounced dead at 9:25 p.m. on May 25, 2020. According to the Hennepin County Medical Examiner (HCME) Dr. Andrew Baker, Floyd's death resulted from "cardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression," HCME Autopsy Report & HCME Press Release Report, and the "manner of death" was "homicide."[12] *Id*. A separate autopsy review by the federal Armed Forces Medical Examiner System agreed with the HCME's autopsy findings and cause of death certification, concluding that Floyd's "death was caused by the police subdual and restraint in the setting of severe hypertensive atherosclerotic cardiovascular disease, and methamphetamine and fentanyl intoxication," and that the "subdual and restraint had elements of positional and mechanical asphyxiation."

DISCUSSION

I. THE FOUR-FACTOR TEST APPLIED IN DETERMINING IF TRIAL JOINDER IS APPROPRIATE.

Rule 17.03 subd. 2 of the Minnesota Rules of Criminal Procedure grants a trial court discretion to try two or more defendants charged with the same offense jointly. In determining whether to try defendants jointly or separately, a court considers four factors:

"(1) the nature of the offense charged;

(2) the impact on the victim;

[12] The Press Release Report indicated that Floyd experienced cardiopulmonary arrest while he was being restrained by law enforcement officers and reported as other significant conditions Floyd's "arteriosclerotic and hypertensive heart disease," "fentanyl intoxication," and "recent methamphetamine use."

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

(3) the potential prejudice to the defendant; and

(4) the interests of justice."

Minn. R. Crim. P. 17.03 subd. 2; *see generally State v. Powers*, 654 N.W.2d 667, 674 (Minn. 2003).

In their memoranda opposing joinder, Chauvin contends that "Minnesota . . . has a historical preference for separate trials," and although Thao concedes that he "does not have an absolute right to a separate trial," he maintains that "such a [separate] trial is favored." The historical precedents upon which Chauvin and Thao rely -- *e.g., State v. Southard*, 360 N.W.2d 376, 380 (Minn. App. 1985), *rev. denied* (Minn. Apr. 12, 1985) (noting "[s]tate policy favors strongly separate trials"); Minn. R. Crim. P. 17.03 subd. 2(1) (1975) ("When two or more defendants shall be jointly charged with a felony, they shall be tried separately provided . . . ."); Minn. Stat. § 631.03 (1969) (same) -- are no longer applicable due to the change in Minnesota law in 1987. That year, the Minnesota legislature enacted Minn. Stat. § 631.035 which removed the previous presumption in favor of separate trials and gave trial courts the discretion to decide whether to order joint or separate trials based on specified factors; that change made its way into the rules of criminal procedure by way of the 1990 amendments. *See, e.g., Santiago v. State*, 644 N.W.2d 425, 439-441 (Minn. 2002) (recounting this history).

Under current Minnesota law there is "no presumption that a joint trial will deny the defendant the right to a fair trial." *Powers*, 654 N.W.2d at 676. Rule 17 neither favors nor disfavors joinder. *State v. Jackson*, 773 N.W.2d 111, 118 (Minn. 2009); *State v. Johnson*, 811 N.W.2d 136, 142 (Minn. App. 2012), *rev. denied* (Minn. March 28, 2012). Because *State v. Stock*, 362 N.W.2d 351 (Minn. 1985), and *State v. Duncan*, 250 N.W.2d 189 (Minn. 1977) --

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

cases on which Chauvin and Thao rely for the presumption that separate trials are favored -- were decided under the prior version of Minn. R. Crim. P. 17.03 subd. 2(1) which explicitly provided that defendants charged jointly with the same felony "shall be tried separately"[13] and during the era when state public policy was said to strongly favor separate trials, *see, e.g., Stock*, 362 N.W. at 352, neither *Stock* nor *Duncan* has any continuing persuasive force in light of the current version of Minn. R. Crim. P. 17.03 subd. 2.

Here, joinder of Chauvin's, Thao's, Lane's, and Kueng's trials is appropriate because all four factors weigh in favor of joinder.

II. THE NATURE OF THE OFFENSES CHARGED FAVORS JOINDER.

The nature of the offenses charged favors joinder when the "overwhelming majority" of the evidence presented is admissible against joined defendants and the defendants worked in "close concert" with one another. *Jackson*, 773 N.W.2d at 118 (affirming joinder of two co-defendants on first-degree murder charges in gang-related shooting);[14] *State v. Blanche*, 696 N.W.2d 351, 371 (Minn. 2005) (affirming joinder with co-defendant on first-degree murder charges); *Powers*, 654 N.W.2d at 674 (affirming joinder with two co-defendants in multiple-count murder trial arising from shooting in which two victims died and another was injured); *State v. DeVerney*, 592 N.W.2d 837, 842 (Minn. 1999) (affirming joinder with co-defendant Greenleaf on aiding and abetting first-degree murder); *State v. Greenleaf*, 591 N.W.2d 488, 499 (Minn. 1999) (in affirming joinder with co-defendant DeVerney, court reasoned "The identical

[13] Although a trial court could order a joint trial "in the interests of justice," the permissible circumstances in which joinder was allowed were far more restrictive than the four-factor test under current law.

[14] The Supreme Court also affirmed Jackson's co-defendant Lamonte Martin's conviction, with similar reasoning on the joinder argument. *State v. Martin,* 773 N.W.2d 89 (Minn. 2009).

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

nature of the charged offenses and the nearly identical evidence against each defendant supports the trial court's decision to join [defendants] for trial."); *Johnson*, 811 N.W.2d at 142 (affirming joinder with co-defendant on first-degree aggravated robbery charge); *see also* Minn. Stat. § 631.035 subd. 1 (court can order two or more defendants jointly tried when they participated in the same "act or transaction" or "series of acts or transactions constituting an offense").

The "similarity of the charges and evidence" is a key consideration under this factor. *Jackson*, 773 N.W.2d at 118; *Blanche*, 696 N.W.2d at 371. Joinder is appropriate when it is "needed to facilitate the jury's comprehension and appreciation of each defendant's role." *Stock*, 362 N.W.2d at 352.

This factor strongly supports joinder of all four Defendants in a single trial. Although this factor largely turns on the "similarity of the charges and evidence" against the defendants, the charges and the evidence need not be identical against all defendants being joined for trial. Rather, this factor favors joinder so long as at least one of the following is true:

(i) the defendants are charged with the "same" or "similar[]" offenses, *Jackson*, 773 N.W.2d at 118;

(ii) the defendants worked "in close concert with one another," *Jackson*, 773 N.W.2d at 118; *Blanche*, 696 N.W.2d at 371; *Powers*, 654 N.W.2d at 675; or

(iii) a "great majority of the evidence" to be presented is admissible against all of the defendants, *Jackson*, 773 N.W.2d at 118; *Blanche*, 696 N.W.2d at 371.

Any one of these is sufficient to tilt this factor in favor of joinder. *Powers*, 654 N.W.2d at 674-675. Here, all three are present.

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

First, all four Defendants are charged with the "same" or "similar" offenses. Chauvin faces two charges:[15] (1) unintentional second-degree murder while committing a felony (third-degree assault), in violation of Minn. Stat. § 609.19 subd. 2(1); and (2) second-degree manslaughter, culpable negligence creating an unreasonable risk of causing death or great bodily harm, in violation of Minn. Stat. § 609.205 subd. 1. Lane, Kueng, and Thao each faces the same two charges: aiding and abetting Chauvin's alleged crimes of unintentional second-degree murder and second-degree manslaughter. Because "aiding and abetting is not a separate substantive offense" under Minnesota law, *DeVerney*, 592 N.W.2d at 846 (citing cases), for trial joinder purposes, the aiding and abetting charges against Lane, Kueng, and Thao are equivalent to Chauvin's unintentional second-degree murder and second-degree manslaughter charges. The same two substantive charges against all four Defendants stem from the same incident that unfolded over the course of less than twenty minutes in South Minneapolis on the evening of May 25, 2020. That strongly favors joinder of all four Defendants in a single trial.

Second, the evidence shows that all four Defendants worked "in close concert with one another" during the offense. *Jackson*, 773 N.W.2d at 119; *Blanche*, 696 N.W.2d at 371. The Minnesota Supreme Court has explained that defendants work "in close concert" either when "each [defendant] had a role in the scheme" or they "all worked together," *Powers*, 654 N.W.2d at 674-675, or when they all "had very similar involvement" in the criminal act. *DeVerney*, 592

[15] In addition to these charges, the State initially charged Chauvin with third-degree murder, perpetrating an eminently dangerous act and evincing a depraved mind, in violation of Minn. Stat. § 609.195(a). However, this Court dismissed the third-degree murder charge in the Order and Memorandum Opinion on Defense Motions to Dismiss for Lack of Probable Cause (filed October 21, 2020), leaving only these two counts for trial.

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

N.W.2d at 842. That is true even if one or more of the defendants denies that he was working in close concert with the other defendants, as Thao and Kueng do here. *Johnson*, 811 N.W.2d at 142. And it is true even where -- as is the case here -- the defendants did not plan the criminal act in advance. *Id*.

Here, Chauvin, Thao, and Kueng all dispute that the four Defendants worked in close concert, noting the different and separate roles each played. It is true that Lane and Kueng had been engaged with Floyd for about eight minutes before Chauvin and Thao arrived at the scene at 8:17 p.m.[16] Although Chauvin and Thao were aware only of a call for backup for an arrest at Cup Foods, and did not know the details of Lane's and Kueng's interactions with Floyd between 8:09:28 and 8:17:09 when Chauvin and Thao arrived at the scene, upon their arrival, Chauvin and Thao observed Lane and Kueng trying to force Floyd into the back seat of their squad for almost a minute. What matters here is that all four Defendants were actively working together during the critical period of less than 11 minutes, from 8:18:00 p.m. -- when Chauvin joined Lane and Kueng in the struggle trying to force Floyd into the back seat of the squad -- to 8:29:00 p.m. -- when the non-responsive and not breathing Floyd was loaded into the ambulance.

After Chauvin, Lane, and Kueng had subdued Floyd, prone on the street at 8:19:18 p.m., they restrained him for over nine minutes and twenty seconds, until 8:28:42 p.m., with Chauvin pressing his knee onto the back of Floyd's neck, forcing his face, throat, and upper chest into the concrete of Chicago Avenue, and with Kueng and Lane kneeling on Floyd's back and legs,

[16] Lane and Kueng arrived at Cup Foods about 8:08:25 p.m. They had their initial contact with Floyd in his car at 8:09:28. By 8:14:45, Lane and Kueng had the hand-cuffed Floyd at their squad. Chauvin and Thao responded to a dispatch call for backup, arriving at Cup Foods at 8:17:09. (*See* Lane, Kueng & Thao BWC Videos.)

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

with Kueng also holding Floyd's handcuffed wrists and Lane also pressing down on Floyd's legs with his hands, assisting Chauvin in keeping Floyd pinned face-down to the street. At the same time, although Thao was not physically involved in subduing Floyd or restraining him on the street, he placed himself between the other three Defendants -- kneeling on Floyd -- and the gathering crowd, keeping the onlookers on the sidewalk, preventing them from intervening to assist Floyd, thereby enabling the other Defendants to maintain their positions on top of Floyd. The Defendants also communicated with one another and coordinated their actions throughout the incident, including discussing whether to use a Hobble restraint, whether to roll Floyd over or keep him pinned face-down to the street, whether Floyd had lost consciousness, and whether Floyd had a pulse. These actions show that "each [Defendant] had a role in the scheme" and that they "all worked together" in restraining Floyd during the critical ten minutes leading to his death. *Powers*, 654 N.W.2d at 674-675. The evidence clearly demonstrates that all four Defendants worked "in close concert," which strongly supports joinder of all four Defendants in a single trial. *Jackson*, 773 N.W.2d at 119; *Blanche*, 696 N.W.2d at 371.

Third, the "great majority of the evidence presented" is likely to be admissible against all four Defendants. *Blanche*, 696 N.W.2d at 371. It appears the critical evidence at trial will likely include the following:

- videos from the body-worn cameras of Lane, Kueng, and Thao recording the events from 8:08:00 – 8:42:16 p.m., as well as from a cell-phone video taken by one of the bystanders, Darnella Frazier, standing on the sidewalk a few feet away and capturing more than ten minutes of footage, including Chauvin kneeling on Floyd's neck and Thao managing the bystander crowd, engaging in dialogue with some of those bystanders, while also watching Chauvin, Kueng, and Lane restraining Floyd face

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

down in the street[17]

- Minneapolis Police Department Policies and Procedures and Training Manuals
- Autopsy reports and medical and forensic testimony regarding the circumstances and manner of Floyd's death, and the cause, as well as any contributing causes, of his death
- Eyewitness testimony

All this critical evidence will be the same for all four Defendants and all of it would appear to be admissible to prove the charges against each of them. While there may potentially be slight differences in the evidence -- for example, each Defendant's personnel records, and, potentially, *Spreigl* evidence[18] -- presented against some of the Defendants, case law teaches that the evidence need not be identical to support joinder for trial. The jury can be expected to follow instructions informing it that some evidence may only be admissible against one Defendant (or, in any event, fewer than all four Defendants) and only considered by them in connection with the charges against that Defendants. Here, because the critical evidence as well as the "great majority of the evidence" will likely be the same against all four Defendants, this consideration strongly supports joinder. *Blanche*, 696 N.W.2d at 371.

Chauvin cites *State v. Green*, 2018 WL 3966343 (Minn. App. 2018) (unpublished), *rev. denied* (Minn. Nov. 13, 2018), for the proposition that joinder is improper when one

[17] The Lane, Kueng, and Thao BWC videos also include audio, capturing what all four Defendants were saying throughout the incident as well as comments from the bystanders who witnessed the incident. The Darnella Frazier cell-phone video contains only video evidence without any audio. There is also a surveillance video from the Dragon Wok restaurant, located across 38th Street from the Cup Foods store, which also contains only video evidence, without audio.

[18] The State has filed notices of its intent to seek to introduce, pursuant to Minn. R. Evid. 404(b) and *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965), certain evidence of prior conduct by Chauvin, Thao, and Kueng. The parties are still in the process of briefing the admissibility of the *Spreigl* evidence and this Court has not ruled whether any of this evidence will ultimately be admitted at the trial.

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

defendant's role is distinguishable from those of the co-defendants.[19] However, not only is *Green* an unpublished opinion, but the Court of Appeals in *Green* affirmed the defendant's convictions on two counts of aiding and abetting attempted second-degree murder, concluding the trial court had not erred in joining defendant for trial with his brother, one of three co-defendants.[20]

While it is true here that each of the four Defendants played a distinct role, what they did and said is captured in the Lane, Kueng, and Thao BWC videos as well as the Darnella Frazier cell-phone video. It is because of their different roles that Chauvin faces the unintentional second-degree murder and second-degree manslaughter charges while Thao, Lane, and Kueng each faces charges of aiding and abetting those crimes based on their respective roles. Caselaw from the Supreme Court teaches that the germane issue for this factor is whether the co-defendants worked "in close concert," regardless whether that took the form of each co-defendant having a separate "role in the scheme" or all co-defendants "actively all working together." Here, although each of the Defendants played a separate role, they all worked in

---

[19] Chauvin also cites *State v. Strimling*, 265 N.W.2d 423 (Minn. 1978). However, even though *Strimling* was decided under the prior version of Rule 17.03 subd. 2 with the presumption of separate trials, the *Strimling* Court affirmed the convictions of two co-defendants who had been tried jointly, concluding the trial court had not erred in determining that the interests of justice warranted a joint trial and that the co-defendants who had "acted in concert to spin a complex web of legal and illegal entrepreneurial activity" were not prejudiced by the joint trial. *Id*. at 431-32.

[20] Devon Green, the appellant in this appellate case, was tried jointly with his brother, Cornelius Green, in connection with the stabbing of two victims in downtown Minneapolis. The underlying Hennepin County District Court case numbers are 27-CR-16-892 (Devon Green) and 27-CR-16-895 (Cornelius Green). The other two co-defendants – Davon Tyree Matten, 27-CR-16-10172, and Nicholas Durham-Smith, 27-CR-16-10173 – were not charged until three months after the Green brothers and the State never sought to join either Matten or Durham-Smith with the Green brothers for trial. Matten and Durham-Smith both ultimately pled guilty to a single count of aiding an offender after the fact, each receiving 36-month stayed sentences. Devon Green, whom the evidence established had been the stabber, received consecutive prison sentences of 193 and 153 months; Cornelius Green received concurrent prison sentences of 173 and 153 months.

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

close concert regarding the subdual and restraint of George Floyd during the critical minutes between 8:17:30 and 8:29:00 on May 25, 2020.

III. JOINDER WILL PROTECT WITNESSES FROM RELIVING THE TRAUMA OF FLOYD'S DEATH AT MULTIPLE TRIALS.

The second factor -- the impact on eyewitnesses – also weighs in favor of joinder, albeit only slightly. Although Minn. R. Crim. P. 17.03 subd. 2(2) refers only to the impact on the "victim," the Minnesota Supreme Court has explained that "analysis of this factor" may also consider "the trauma to the eyewitnesses who would be compelled to testify at multiple trials." *Martin*, 773 N.W.2d at 100; *Blanche*, 696 N.W.2d at 371; *Powers*, 654 N.W.2d at 675. Courts may also consider whether the victim's "family members" may be "traumatized by multiple trials." *Jackson*, 773 N.W.2d at 119.

Emotional trauma from having to testify at repeated trials is a more important consideration in cases with a surviving victim, or even more so with surviving victims. Here, of course, Floyd died, so there is no victim testimony at play in these cases.

This factor cuts most strongly in favor of joinder where young children or other persons who are considered "vulnerable" would be forced to testify at multiple trials, *Blanche*, 696 N.W.2d at 371, or where "the violent nature of the crime charged" and the "number of people involved" are likely to exacerbate the trauma suffered by witnesses. *Powers*, 654 N.W.2d at 675. Because Rule 17.03 uses the word "impact," not the narrower word "trauma," impact" on the witnesses and family members may include things other than emotional "trauma."

In the absence of joinder, eyewitnesses at the scene outside Cup Foods on May 25, 2020 who may be called to testify would be required to relive the events of May 25 during four

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

separate trials. Requiring eyewitnesses to relive traumatic experiences across seriatim trials is disfavored under the victim-impact factor in Rule 17.03. *See Jackson*, 773 N.W.2d at 119.

Kueng argues that because Floyd's death was not particularly violent, the crime scene was not particularly bloody (stressing this case does not involve gun shots or stab wounds), and most all of the eyewitnesses appear to be "capable adults," there is nothing to suggest that the eyewitnesses are vulnerable or that it would be particularly traumatic for them to testify. Although the Court agrees with those observations, the fact remains that any eyewitnesses will be asked to recount the things they observed during the tragic nine minutes and twenty seconds that Chauvin, Kueng, and Lane restrained Floyd while the life drained out of him. They will relive watching Chauvin pressing his knee into the back of Floyd's neck for the first several minutes while Floyd pleaded with Chauvin that he couldn't breathe, hearing Chauvin's rejoinders that he must be breathing fine because he continued to talk, and Thao telling the crowd that Floyd was breathing because he was talking and this was why kids shouldn't "do drugs." They will be asked to recount Floyd telling the Defendants a couple dozen times that he could not breathe, pleading for his mother, and telling the Defendants he was dying. They will then recount the increasing agitation of the bystanders after Floyd had fallen silent and motionless, as the Defendants continued to restrain Floyd in the same manner and Thao prevented the bystanders from coming to Floyd's aid, imploring Chauvin to get off Floyd's neck and clamoring for the Defendants to check Floyd's pulse or to begin CPR. *See Powers*, 654 N.W.2d at 675 (noting "nature of the crime charged" likely exacerbates trauma suffered by witnesses).

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

The State also points out that the trauma eyewitnesses may suffer when testifying about Floyd's death may be compounded if defense counsel elect to cross-examine them about why they did not try harder to intervene to save Floyd. *See, e.g.*, Aila Slisco, Attorney for Officer Charged in George Floyd Death Questions Why Public Didn't Intercede to Prevent Floyd's Death, Newsweek (June 9, 2020), https://www.newsweek.com/attorney-officer-charged-george-floyd-death-questions-why-public-didnt-intercede-prevent-1509533.[21]

In addition to the emotional burden of testifying, witnesses may also face other logistical and financial burdens, such as the extra travel costs and, potentially, lost wages if required to testify at four separate trials. And, but for joinder of all four Defendants in a single trial, the eyewitnesses would face the added risk of testifying at multiple trials in person during an ongoing global COVID-19 pandemic.

The impact on eyewitnesses has greater import here where it appears at least two of the eyewitnesses watching the Defendants' restraint of Floyd and his death are minors, whom the law deems to be particularly "vulnerable." *See Blanche*, 696 N.W.2d at 371. According to the State, one of the bystanders who filmed Floyd's murder, Darnella Frazier, was seventeen years old.[22] Citing Joshua Nevett, George Floyd: The Personal Cost of Filming Police Brutality,

---

[21] During an appearance on CNN's *Cuomo Prime Time*, in responding to a question why Lane hadn't attempted to stop Chauvin, Lane's counsel, Earl Gray, was quoted saying: "All these people say why didn't my client intercede . . . well if the public is there and they're so in an uproar about this, they didn't intercede either."

[22] According to the State, another of the eyewitnesses was Ms. Frazier's nine-year-old cousin. In its Reply Brief (filed Sept. 10, 2020), the State indicates "at least three other witnesses from the scene may also be minors." The State offers no details regarding the age or gender of these three witnesses, the vantage point from which they witnessed any pertinent events and during what time period, the potential relevance of their testimony, or estimates as to the likelihood any of them would be called as witnesses at trial. In the absence of such details, the Court cannot accord much significance to the State's assertion that there could be as many as five minor eyewitnesses.

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

BBC News (June 11, 2020), https://perma.cc/U7H4-MT9M, the State reports that Ms. Frazier has been publicly shamed for not somehow stopping Defendants from their continuing restraint of Floyd after he had fallen silent and become nonresponsive, has been the subject of considerable media scrutiny, and has begun therapy to cope with the trauma of witnessing the events of May 25, 2020.

While testifying at multiple trials is likely to be traumatic for many eyewitnesses, that is especially true for Ms. Frazier and any other minors who were eyewitnesses standing on the sidewalk mere feet from where Chauvin, Kueng, and Lane restrained Floyd face-down on Chicago Avenue, with Thao holding the bystanders at bay. Although Thao's counsel contend they cannot fathom a situation in which they would call these eyewitnesses -- particularly the nine-year-old -- to testify at trial, given that Ms. Frazier recorded one of the apparently seminal video recordings that will almost certainly be introduced at trial, the Court has to presume, at this stage of the proceedings, that the State will almost certainly be calling Ms. Frazier at trial.

The State also points to the impact on any Floyd family members who may present testimony at trial. There is no indication in the record that any Floyd family members were present at Cup Foods on May 25, witnessing the manner of his subdual and restraint by the Defendants and his death. However, it remains possible, as Kueng anticipates, that the State may elect to call one or more of Floyd's family members to testify at trial for so-called "spark of life" testimony. If so, any of those Floyd family members are also likely to be similarly affected if required to provide testimony at multiple trials. *See Jackson*, 773 NW.2d at 119 (affirming joinder of defendants where family members would be traumatized by multiple trials).

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

The State contends that conducting separate trials would also impose on Floyd family members who live out of state additional financial and logistical burdens due to their having to travel from out of state to attend trial in Minnesota, as well as the risks and burdens of traveling during the COVID-19 pandemic. This Court need not decide whether that is a relevant consideration in these cases because the Court is ordering video and audio coverage of the trial so the Floyd family members will be able to watch this trial from their homes along with other members of the public, obviating any need for them to travel to and from Minnesota for multiple trials.

IV. BECAUSE NONE OF THE DEFENDANTS HAS GIVEN NOTICE OF ANY DEFENSES THAT ARE ANTAGONISTIC TO ANY OF THE OTHER DEFENDANTS, NONE OF THE DEFENDANTS WILL BE PREJUDICED BY JOINDER.

The third factor -- potential prejudice to the defendants in a joint trial -- weighs against joinder only if any of the Defendants shows that he and any of his co-Defendants will present "antagonistic defenses" at trial." *Jackson*, 773 N.W.2d at 119; *Santiago*, 644 N.W.2d at 440. Because none of the Defendants has presently made any actual showing of antagonistic defenses, and because suggestions by some of the Defendants that it is possible one or more of their co-Defendants might seek to blame him at trial are insufficient to establish antagonistic defenses that could preclude a joint trial, this factor also strongly favors joinder.

The Minnesota Supreme Court has defined the concept of "antagonistic defenses" narrowly: Defendants have "antagonistic defenses" only "when the defenses are inconsistent and when they [defendants] seek to put the blame on each other and the jury is forced to choose between the defense theories advocated by the defendants." *Santiago*, 644 N.W.2d at 446; *DeVerney*, 592 N.W.2d at 842; *Greenleaf*, 591 N.W.2d at 499-500; *State v. Hathaway*, 379

N.W.2d 498, 503 (Minn. 1985); *Johnson*, 811 N.W.2d at 143. Under this standard, "mere differences in trial strategy" between the defendants "do not constitute substantial prejudice." *Santiago*, 644 N.W.2d at 444. Nor is the mere potential for antagonistic defenses sufficient to mandate separate trials. *Powers*, 664 N.W.2d at 675 (holding that "absent an offer of proof or the identification of any inconsistent or antagonistic defenses," there was "no indication" that a joinder would prejudice the Defendant's trial).

It is not enough that each co-defendant's defense is different; the defenses must actually be inconsistent or seek to shift blame from one defendant to the other. *DeVerney*, 592 N.W.2d at 842. For example, in *Hathaway*, Hathaway and a co-defendant were tried on charges of first-degree murder, felony murder, and conspiracy to commit aggravated robbery arising from the shooting death of an off-duty police officer/security guard during the robbery of a hospital pharmacy. [23] The Court affirmed trial joinder where the record showed that the co-defendants had regularly adopted each other's motions and objections and had not presented antagonistic defenses, with one defendant seeking to blame the other. 379 N.W.2d at 503. Instead, the *Hathaway* Court observed that the jury was faced with choosing between the State's theory of the crime -- that the co-defendants had participated in the underlying robbery and murder with the shooter -- and the co-defendants' theory of the crime, which was that they were innocent and that two other men had participated in the crime with Eling.[24] *Id*. The jury was not required to choose between inconsistent defense theories of the crime with

[23] The shooter, Timothy Eling, charged with premeditated intentional murder and intentional felony murder, was tried separately. He was found guilty by a jury, and his conviction was affirmed on appeal. *State v. Eling,* 355 N.W.2d 286 (Minn. 1984).

[24] The evidence was that three armed men wearing ski masks has been involved in the robbery and shooting.

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

one co-defendant blaming the other. *Id*. The Court reasoned that mere differences in trial strategy (*e.g.*, which witnesses to call) do not constitute prejudice mandating separate trials.

Similarly, Greenleaf and DeVerney were co-defendants facing charges of aiding and abetting the first-degree murder of a teenager who had accidentally rear-ended the vehicle in which Greenleaf, DeVerney, and three of their friends were riding.[25] The evidence indicated that Greenleaf and DeVerney had similar involvement in the assault, kidnapping, and subsequent murder: both either admitted or were seen assaulting the murder victim, both admitted sitting in the front seat of the victim's car on the way to the murder site, and both admitted to attempting to wipe off fingerprints from the victim's car and to hide any evidence that could link them to the crime. Although the defendants presented different defenses at trial -- Greenleaf claiming intoxication, duress and his innocence; DeVerney merely claiming innocence -- the Supreme Court in *Greenleaf* and *DeVerney* held that although those defenses were different, they were not conflicting and antagonistic. As in *Hathaway*, the Supreme Court reasoned the Greenleaf and DeVerney jury was not forced to choose between testimonies of the defendants seeking to shift the blame to the other, but instead had to choose between the State's theory of the case and each defendant's theory of the case. *Greenleaf*, 591 N.W.2d at 499-500; *DeVerney*, 592 N.W.2d at 842. The Court noted that claims of lack of intent to kill the

[25] John Steven Martin, the shooter, was convicted of premeditated first-degree murder in a separate trial and his conviction was affirmed on appeal. *State v. Martin*, 614 N.W.2d 214 (Minn. 2000). Although the victim had also been badly beaten -- having sustained between 50 and 100 blows to his head, face, neck, shoulders, and chest -- the medical examiner determined the cause of death was gunshots fired by John Steven Martin to the victim's heart and right forehead. One of the other accomplices, John Alexander "Mike" Martin, entered into a plea agreement pursuant to which he testified against the other accomplices.

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

victim or an excuse (intoxication or duress) are not efforts to shift the blame onto the other, as required to establish an antagonistic defense. *Id*.

That some evidence may only be admissible against one of the defendants does not necessarily result in substantial prejudice to the co-defendant. *DeVerney*, 592 N.W.2d at 842. Varying levels of culpability or the fear of guilt by association do not amount to antagonistic defenses. The law is clear that this Court is not to assume defenses will be antagonistic unless and until antagonistic defenses have actually been asserted; a defendant must come forward with an offer of proof or present sufficiently specific evidence of incompatible, antagonistic defenses to warrant separate trials. *Powers,* 654 N.W.2d at 675.

The Minnesota Supreme Court has identified two narrow categories of cases in which antagonistic defenses are likely to be present.

First, antagonistic defenses may be present where "the state introduce[s] evidence that show[s] only one of the defendants killed the victim, thus forcing each defendant to 'point the finger' at the other." *Santiago*, 644 N.W.2d at 444 (quoting *Hathaway,* 379 N.W.2d at 503). Santiago involved a "classic example" of blame-shifting that rises to the level of an antagonistic defense. There, two defendants were charged with second-degree murder and attempted second-degree murder. Each defendant planned to introduce evidence and call witnesses showing that the other was the shooter and had acted alone. *Id*. at 435, 447. Each co-defendant's defense in *Santiago* "depended on proof" of the other co-defendant's guilt, and the jury "could not accept" both defenses in rendering its verdict. *Id.* at 449.

Second, antagonistic defenses may be present when the jury is "forced to believe either the testimony of one defendant or the testimony of the other" in order to reach a verdict. *Id*.

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

(quoting *Hathaway*, 379 N.W.2d at 503). In both types of cases, one co-defendant's defenses "depend[] on proof" of the other co-defendant's guilt, and the jury "could not accept" both defenses in rendering a verdict. I*d*. at 449.

By contrast, defenses are not considered "antagonistic" when the jury is "not forced to choose between [the co-defendants'] defenses." *Jackson*, 773 N.W.2d at 119. Consistent with that standard, arguments about disparate levels of responsibility among the defendants are not enough to render defenses antagonistic. For example, in *Powers*, attorneys for two of the three codefendants "ask[ed] questions highlighting [the third codefendant's] role in the aggravated robbery and murder." 654 N.W.2d at 677. Nonetheless, the Court concluded that "these questions did not present prejudicial antagonistic defense issues," as "the questioning in issue was not exculpatory as to any of the defendants but merely clarified the roles played by each of the participants in this joint crime." *Id.*

Critically, the burden to establish the existence of antagonistic defenses rests with Defendants. *See Powers*, 654 N.W.2d at 675 (defendant's "failure to show the existence of antagonistic defenses" basis for rejecting challenge to joinder). "General concern on the behalf of defense counsel . . . is not adequate to demonstrate the existence of inconsistent or antagonistic defenses." *Id.* That is especially true early in the case, as here. Because the district court has the "ability to address any potential prejudice that may arise at the trial with the power to sever pursuant to Minn. R. Crim. P. 17.03, subd. 3(3)," pretrial joinder may be denied based on prejudice only when the defendants can prove that the defenses they will raise at trial are in fact antagonistic. *Id*. Thus, if co-defendants oppose trial joinder, it is incumbent on them to "commit to [a] particular defense theory," and to show that the jury

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

would be "forced to choose" between their defenses to render a verdict. *Santiago*, 644 N.W.2d at 446-447 & n.6.

Here, Defendants have not demonstrated that their defenses are antagonistic. Nor does the State's case against any of the four Defendants fall into either of the narrow categories the Minnesota Supreme Court has recognized as involving antagonistic defenses.

First, Defendants cannot demonstrate that this is a case in which the State will introduce "evidence that show[s] only one of the defendants killed the victim, thus forcing each defendant to 'point the finger' at the other." *Santiago*, 644 N.W.2d at 446. Unlike in *Santiago*, where only one of the defendants could have pulled the trigger, all four Defendants here are accused of differing roles in Floyd's death. The State is charging Chauvin with unintentional second-degree murder and second-degree manslaughter, contending that by kneeling on Floyd's neck in the manner he did, for as long as he did, and pressing Floyd's head, face, throat (with compression from the back of the neck) and upper chest into the concrete of Chicago Avenue Chauvin caused Floyd's death. The State is charging Lane, Kueng, and Thao with aiding and abetting Chauvin's crimes by the separate things each of them did -- Kueng and Lane kneeling on and holding down Floyd's back and legs and Thao, after suggesting to the other Defendants that they should continue pinning Floyd face-down, standing watch and preventing the crowd of bystanders from intervening to come to Floyd's aid -- during the critical nine minutes and twenty seconds, contending each of them provided knowing assistance to Chauvin in the application of his neck restraint on Floyd and Floyd's resulting death. If the jury concludes any one of the Defendants is guilty, that would not exculpate any of the other Defendants. If the jury concludes that either Lane, Kueng, or Thao is not guilty of aiding and

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

abetting on either or both the unintentional second-degree murder or second-degree manslaughter charges, that would not prove the guilt of either (or both) of the other two Defendants facing the aiding and abetting charges. The State's case simply does not "forc[e] each defendant to 'point the finger' at the other." *Santiago*, 644 N.W.2d at 446.

Second, Defendants cannot show that this is a case in which the jury will be "forced to believe either the testimony of one defendant or the testimony of the other" in order to reach a verdict. *Santiago*, 644 N.W.2d at 446. Even if all Defendants choose to testify, this case will not turn on whether the jury believes one Defendant's version of the events or another's. The events between 8:08 and 8:29 p.m. on May 25 leading to Floyd's death are well-documented in Lane's, Thao's, and Kueng's BWC videos, the Frazier bystander cell-phone video, and the Dragon Wok surveillance video. No Defendant has as yet signaled that he intends to present a version of the facts that does not align with the evidence that is already known and publicly available, or that does not align with the version the other Defendants will present.

Finally, none of the Defendants has filed notice of any defense that is antagonistic to the defenses of any of the other Defendants. Chauvin, Thao, and Lane have all filed written notices of their anticipated defenses. All three indicate they intend to defend their conduct as the use of force expressly authorized for police officers under Minnesota law, Minn. Stat. § 609.06 subd. 1(1), and that the force used was reasonable force expressly authorized for police officers under Minnesota law, Minn. Stat. § 609.066. *See* Thao Notice of Defense (Aug. 28, 2020); Chauvin's Rule 9 Disclosure (Oct. 23, 2020); Lane's Rule 9 Disclosure (Oct. 23, 2020).

All Defendants are expected to defend on the ground that Floyd's death was not caused by the manner in which Chauvin, Lane, and Kueng restrained him on May 25, 2020 but rather

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

came about as a result of Floyd's various serious preexisting medical conditions coupled with the drugs he had taken that day. Thao has explicitly raised a causation defense in his Notice of Defense, and all Defendants have covered this in their briefs filed in support of their motions to dismiss for lack of probable cause. For example, in Part D of his brief in support of his motion to dismiss the Amended Complaint for lack of probable cause, Chauvin argued that Floyd's death was not caused by the manner in which Chauvin had restrained Floyd but rather by a fentanyl (or a combination of a fentanyl and methamphetamine) overdose in combination with Floyd's many serious underlying medical conditions involving his heart and lungs (including hypertension, arteriosclerosis, serious fluid in his lungs, and a drastically enlarged heart), his COVID-19 infection, and his sickle-cell trait. *See* Brief, at pp. 21-25 (Dk # 97, in 27-CR-20-12646). Chauvin and Lane have also indicated they will argue they are not guilty – meaning, putting the State to the burden of proving their guilt beyond a reasonable doubt at trial on all elements of all charges brought against them – and both Chauvin and Lane have also indicated they plan to argue self-defense.[26] Not only are none of these defenses antagonistic to any of the other Defendants but this indicates the presentation of a unified defense strategy contending the Defendants were acting in accordance with the law and were fully authorized to act as they did and that, moreover, Floyd's death was due to causes other than the manner in which they restrained him.

[26] Although Lane maintains he relied on the greater experience of Chauvin, when Chauvin declined to roll Floyd onto his side in responses to Lane's queries, such a position is not "antagonistic" to the defenses Chauvin has indicated he will raise at trial because it will not force a jury to choose between Lane's argument and Chauvin's defenses. A jury could accept Lane's argument and accept Chauvin's defenses that his actions were justified or did not cause Floyd's death. Or a jury could reject both Defendants' arguments. In no sense, however, does Lane's argument depend on proof of Chauvin's guilt. *Santiago*, 644 N.W.2d at 449.

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

Because Defendants cannot demonstrate that the jury would be "forced to choose between [their] defenses," their anticipated defenses are not antagonistic. *Jackson*, 773 N.W.2d at 119. Far from "shift[ing] blame to one another," as indicated all four Defendants intend to present unified and common defenses, not antagonistic defenses. *DeVerney*, 592 N.W.2d at 842. Although Chauvin, Thao, and Kueng conjure a few hypothetical scenarios in which one or more of them might point at trial to some facts that might tend to inculpate other of the co-Defendants, many joint trials present that potential, so absent an offer of proof or specific identification of actually antagonistic defenses, denying joinder on this possibility alone is little more than an argument against joinder generally and does not comply with Rule 17.03 and caselaw. *See, e.g., Blanche,* 696 N.W.2d at 372.

Although Chauvin contends that the other three Defendants "are prepared to place the blame for Mr. Floyd's death squarely on Mr. Chauvin's shoulders," none of them has given notice of any defenses that are in fact antagonistic to Chauvin. Rather, as noted, Thao and Lane have filed notices that they intend to defend on the ground that all Defendants were authorized in using force and that the force they used was reasonable. Those defenses actually support Chauvin's own noticed defenses. In addition, Thao has explicitly noticed causation -- that Defendants' conduct did not cause Floyd's death -- as a defense, which is also consistent with Chauvin's and Lane's "not guilty" defenses and Chauvin's detailed articulation of his causation defense as summarized above.

Although Lane argues in his "Objection to State's Motion for Trial Joinder" that there "are very likely going to be antagonistic defenses presented at trial" and that "it is plausible that all Officers have a different version of what happened and Officers place blame on one

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

another," he did not include in his Notice of Defenses any defenses that are in fact antagonistic to any of the other three Defendants. Nor has Lane made an offer of proof that fleshes out any specific defense he will offer at trial that actually is inconsistent with any known defenses by any of the other three Defendants, which seeks to put the blame on one or more of the other Defendants, and which would force the jury to choose between conflicting defenses as opposed to choosing between the State's theory of the case and the known, articulated defenses that Defendants' conduct did not cause Floyd's death, that all Defendants acted reasonably, and that the force used by Chauvin, Lane, and Kueng was reasonable and justified in the circumstances.

Kueng argues that he was a rookie officer, working only his third shift on May 25, that Chauvin had been his field training officer for well over half of his 730 hours of field training, and that he and Lane were working under Chauvin's supervision and control. Kueng points out that it was Chauvin who had his knee on Floyd's neck whereas he [Kueng] was at Floyd's back. Although Kueng argues that he, Lane, and Thao "are likely to argue that Chauvin caused Floyd's death and that [he and Lane and Thao] were merely present," Kueng has not filed any notice of defense[27] expressly seeking to blame Chauvin, nor does he explain how his intended defense that he did not know that Chauvin was committing a crime and that he did not intend his presence or actions to further a crime is antagonistic or inconsistent with Chauvin's. In fact, they are consistent, and Kueng obviously intends to defend on a ground common to all four

[27] Despite this Court's June 30, 2020 Scheduling Order directing the Defendants to file Notices of their Defenses prior to the September 11, 2020 first omnibus hearing (that Order directed the filing of notices required by Minn. R. Crim. P. 9.02, which requires a defendant to inform the State, in writing, of any defense it intends to assert at trial), Kueng does not appear to have filed a Notice of Defenses in 27-CR-20-12953.

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

Defendants that nothing any of them did, including Chauvin's kneeling on Floyd's neck, caused Floyd's death, and that Floyd's death was due to other causes:

> The [HCME] did not find physical findings supportive of mechanical asphyxia. [He] found that Floyd died from cardiopulmonary arrest while being restrained [and] that Floyd had arteriosclerotic and hypertensive heart disease. Toxicology screening found that Floyd had the presence of fentanyl and evidence of recent methamphetamine use. The [HCME] opined that the effects of the officers' restraint of Mr. Floyd, his underlying health conditions, and the presence of drugs contributed to his death.[28]

As with Chauvin and Lane, Kueng's defense is consistent with the other Defendants' defenses. Kueng's defense would only force the jury to choose between the State's theory of the case and its arguments as to how each Defendants' conduct and actions on May 25 establish their guilt for the crimes with which they are charged and the Defendants' arguments that everything they did on May 25 was authorized by law and constituted the use of reasonable force under the circumstances and, in any event, did not cause Floyd's death, which they contend came about because of Floyd' underlying medical conditions in combination with the fentanyl and methamphetamine toxicology tests revealed in Floyd's body at the time of his death.

Thao contends that a joint trial "would potentially prejudice [him] due to the likelihood of antagonistic defenses" and "would actually prejudice [him] due to the State's leaking of Mr. Chauvin's plea negotiations."[29] Although Thao may be correct that he is not required to present his theory of the case before trial, at this stage, given the State's motion for trial

---

[28] See, in 27-CR-20-12953, Defendant's Objection to the State's Motion for Joinder (Sept. 8, 2020), at 3.

[29] Although Thao complains about tainting of the jury pool by what he charges were "highly prejudicial" "leaks" by Attorney General Ellison and Hennepin County Attorney Freeman regarding alleged plea negotiations between the State and Chauvin, that is a subject to be explored during the jury selection process and is not a substantive reason not to join all Defendants for trial.

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

joinder, it simply is not sufficient for Thao to point to ***potential*** prejudice. The State's motion for trial joinder forces the issue for Thao. To defeat the State's trial joinder motion, he must demonstrate that his defense and those of any of the other Defendants is actually antagonistic and seeks to put the blame on one or more of the other Defendants in way that would require a jury to choose between inconsistent defenses between one or more of the Defendants rather than between the State's theory of the case and the Defendants'.

Thao, like Lane and Kueng, resists joinder by mischaracterizing the State's charges. Although the State's charges against all Defendants will require the State to prove beyond a reasonable doubt intent, the State is not contending that any of the Defendants restrained Floyd with the intent to kill him. Indeed, none of the three crimes to be presented to the jury at a joint trial with all four Defendants – unintentional second-degree murder and second-degree manslaughter against Chauvin and aiding and abetting both those crimes against Thao, Lane, and Kueng – could be sustained if any of the Defendants actually intended to kill Floyd. A joint trial would not necessarily result in classic "finger-pointing" between the Defendants, each seeking to blame one or more of the others for Floyd's death, because the State has only charged and will only be required to prove at trial that Chauvin's actions caused Floyd's death. The State has only charged and will only be required to prove at a joint trial that Thao – as well as Lane and Kueng – knew by his presence on the scene that Chauvin was in the process[30] of

[30] Despite Defense arguments to the contrary, the State need not prove, to establish aiding and abetting liability on the part of Thao, Lane, or Kueng, that they had advance knowledge that Chauvin intended to commit third-degree assault, the predicate felony to the unintentional second-degree murder charge. It is enough for the State to prove that Thao, Lane, and Kueng acquired the requisite knowledge while Chauvin was in the process of committing that assault, which the State contends each of them knew by virtue of what he saw and heard during the critical nine-plus minutes during which Lane and Kueng helped Chauvin restrain Floyd while Thao kept the bystanders at bay, while all three of

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

committing the crime of third-degree assault[31] or that he knew Chauvin by his culpable negligence had created an unreasonable risk and consciously took a chance of causing death or great bodily harm[32] and intended that his own presence or actions aided Chauvin's commission of those two crimes. All Defendants thus have an interest in mounting common defenses, rather than adversarial defenses seeking to blame each other.

And, that is precisely what the Notice of Defenses and memoranda of law filed on the Defendants' motions to dismiss for lack of probable cause manifest: all Defendants have argued they were justified under the law in using force and that the force used was reasonable under the circumstances, and all Defendants have argued that Floyd's death was not caused by the manner in which Chauvin, Lane, and Kueng subdued Floyd and restrained him prone on the street, with Chauvin kneeling on the back of his neck but was instead caused by a combination of Floyd's preexisting heart disease and the drugs in his system, as revealed by the autopsy and toxicology tests after Floyd's death.

There also is no reason for Thao, Lane, and Kueng to engage in finger-pointing and the "blame" game amongst the three of them. They are not in a zero-sum game for these purposes. If the jury should return a guilty verdict against Chauvin on either or both of the

---

them knew that Floyd had fallen silent, had stopped moving, had become unresponsive, appeared to have stopped breathing, and no longer had a detectable pulse. *State v. Smith*, 901 N.W.2d 657, 661-62 (Minn. App. 2017).

[31] Third-degree assault is the underlying felony the State has charged Chauvin with as the predicate for the unintentional second-degree murder count. This was covered in more detail in this Court's Order and Memorandum Opinion on Defense Motions to Dismiss for Lack of Probable Cause (Oct. 21, 2020), Parts II & V.

[32] The elements of second-degree manslaughter and aiding and abetting second-degree manslaughter were covered in more detail in this Court's Order and Memorandum Opinion on Defense Motions to Dismiss for Lack of Probable Cause (Oct. 21, 2020), Parts IV & VI.

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

charges against him, that would not necessitate the return of guilty verdicts against Thao, Lane, or Kueng for aiding and abetting Chauvin on the charge (or charges) on which Chauvin was found guilty. The jury, in considering the evidence about what each of those three Defendants did, saw, and heard during the critical minutes could conclude that none of them, all of them, or either one or two but not all three of them is guilty of aiding and abetting the crime(s) on which they determined Chauvin is guilty. There is no incentive for any of these three Defendants to seek to blame either of both of the others for aiding and abetting Chauvin. Just as the State will have to present evidence of conduct, knowledge, and inferred intent by each of Thao, Lane, and Kueng sufficient to persuade a jury beyond a reasonable doubt that each of them is guilty of aiding and abetting Chauvin's crime(s), Thao, Lane, and Kueng will each seek instead to focus the jury on how they maintain the State has failed to prove that each of them knew Chauvin was committing third-degree assault or by his culpable negligence created an unreasonable risk and consciously took a chance of causing death or great bodily harm to Floyd and failed to prove that each of them intended by his presence and actions during the critical minutes to aid Chauvin in his commission of his crime(s).

Finally, Thao posits a scenario in which the three Defendants other than Chauvin might engage in finger-pointing and blame-shifting amongst themselves if the State "were to argue that Mr. Floyd died from positional asphyxiation," creating a "who done it" between the three of them as to which of them "placed enough pressure correctly to cause a death." Again, that scenario is implausible given the facts and charges in these cases. The State is charging Thao, Lane, and Kueng with aiding and abetting liability, not with themselves having applied pressure that could have caused positional asphyxia to Floyd. Moreover, factually the State could not do

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

so in light of the basic facts which won't and can't be controverted at trial, in wake of the Thao, Lane, and Kueng BWCs and the Darnella Frazier cell-phone video: Thao was not involved physically in the subdual or restraint of Floyd; Lane was only kneeling on or otherwise restraining with his hands Floyd's legs; and Kueng was only kneeling on or otherwise restraining with his hands Floyd's midsection and arms.

Even if one or more of the Defendants should later decide to assert a defense that is antagonistic to any of the others, this Court would remain able to address any potential prejudice that may arise at the trial with the power to sever should this Court determine that "severance is necessary to fairly determine the guilt or innocence of one or more of the defendants." Minn. R. Crim. P. 17.03 subd. 3(3).

Because Defendants have not met their heavy burden to establish prejudice at this stage of this case, *Powers*, 654 N.W.2d at 675, this third factor also strongly favors joinder.

V. THE INTERESTS OF JUSTICE ARE SERVED BY JOINDER.

The interests of justice include promoting judicial efficiency and economy as well as providing a fair trial for the defendant and the State. *Jackson*, 773 N.W.2d at 119 (upholding joinder in the interests of justice where "separate trials would drag on for a lengthy period of time and . . . the evidence is likely to be nearly the same in each trial"); *see also Powers*, 654 N.W.2d at 675 (concern that separate trials could result in undue delay). There is no presumption that a defendant is denied his right to a fair trial when he is tried jointly with a co-defendant. *Id.* at 676. Joint trials not only promote efficiency but they also serve the interests of justice by avoiding the inequity of inconsistent verdicts. *Zafiro v. United States*, 506 U.S. 534, 537 (1993).

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

Several considerations relevant to the interests of justice favor joinder here.

First, joinder is appropriate because of the "length of separate trials." *Powers*, 654 N.W.2d at 675-76 (extended duration of multiple trials favors joinder); *Jackson*, 773 N.W.2d at 119 (same); Martin, 773 N.W.2d at 100 (length of trials legitimate factor in granting joinder). It seems likely that, even if conducted separately, trials here would last at least three or four weeks per trial.[33] Conducting four separate month-long trials could potentially take a couple years, delaying justice. The community and Floyd's family members as well as the Defendants would almost certainly "have to wait longer for the resolution of many separate trials than they would for one joined trial." Conducting a joint trial will save both time and the Court's resources. *Johnson*, 811 N.W.2d at 143. This factor takes on added importance here because – considering the number of bystanders standing on the sidewalk at Chicago Avenue witnessing the events unfolding between 8:16 and 8:30 p.m. on May 25, the likely complex issues in the case regarding Floyd's underlying medical conditions and the cause(s) of his death as well as factual and expert evidence regarding use of force and what constitutes reasonable force under the extent circumstances of that evening, as well as the high-profile nature of the case -- the parties are likely to call more witnesses than in a typical trial.

Second, because the evidence the State is likely to offer against all four Defendants will substantially overlap, separate trials would place an undue burden on the State and the court system. There is a strong thumb on the scale against conducting separate trials where, as here,

[33] The Mohamed Noor case, Hennepin District Court File No. 27-CR-18-6859, was another officer-involved homicide case, in which Noor was charged with unintentional second-degree murder, third-degree murder, and second-degree manslaughter. Tom Plunkett, who represents Kueng here, was one of Noor's trial lawyers. The *Noor* trial lasted the entire month of April 2019.

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

the evidence presented in each of four trials, if each Defendant was tried separately, is likely to be very similar. This factor tilts especially strongly in favor of joinder here because of the costs to the State and the court system that are likely to attend each trial, including added courthouse security, the administrative burdens in overseeing a trial that will attract global attention, the costs of separate appeals, 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.

Third, the availability and convenience of the witnesses favors joinder, avoiding the need for eyewitnesses to travel and potentially suffering lost income if required to testify at multiple trials. In addition, the risk of witnesses becoming "unavailable or unwilling to testify" at trial -- whether due to the trauma of testifying, the travel burdens imposed by testifying, or the ongoing COVID-19 pandemic -- increases when there are multiple trials. *Jackson*, 773 N.W.2d at 119. That risk harms both the State and the Defendants in the second and succeeding trials, if all four Defendants were to be tried separately.

Fourth, separate trials run the risk of "prejudic[ing] potential jurors through the publicity related to each trial." *Powers*, 654 N.W.2d at 675. The media coverage of these cases since June has been intense. The sustained levels of media attention show no sign of abating, and there certainly will be a swell of media coverage surrounding the proceedings and verdict in the first trial, whether that trial is conducted with only one Defendant, several of the Defendants, or all four Defendants. If there were subsequent trials of other Defendants, impaneling a fair and impartial jury in those subsequent trials likely would become more difficult after the first trial concludes. As it is, all four Defendants have already filed motions to

Filed in District Court
State of Minnesota
11/4/2020 7:50 PM

transfer venue due to the extensive pretrial publicity and the intense media interest these cases have generated. Because of this, joinder is a critical safeguard to help protect the fairness of a jury trial, which strongly supports a single trial, rather than four separate trials with four separate juries.

Finally, 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, as opposed to absorbing them in piecemeal fashion if the cases were tried seriatim. *State v. Higgins*, 376 N.W.2d 747, 748 (Minn. App. 1985). "[E]motions in the affected community" and throughout the State and the country "will inevitably be heated and volatile" following the verdict at the first trial, whether that trial is conducted with one or multiple defendants. *See Georgia v. McCollum*, 505 U.S. 42, 49 (1992). Forcing the community and this State to endure four separate trials, with four separate verdicts rendered at four different times, is likely to compound and prolong the trauma to the community and the State.

In sum, joinder would safeguard all four Defendants' right to a fair trial by an impartial jury and would mitigate the burdens on the State, the witnesses, and the court system. Trying these cases jointly would ensure that the jury understands, with adversarial testing by all four Defendants, all of the evidence and the complete picture of Floyd's death. And it would allow this community, this State, and the nation to absorb the verdicts for the four Defendants at once. As with the other three factors, the interests of justice strongly favor joinder of all four Defendants in a single trial.

PAC