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STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Court File No. 27-CR-20-12646

State of Minnesota,

Plaintiff,

vs.

Derek Michael Chauvin,

Defendant.

MEMORANDUM OF LAW OPPOSING THE STATE'S JOINDER MOTION

TO: **THE HONORABLE PRESIDING JUDGE OF HENNEPIN COUNTY DISTRICT COURT; AND MATTHEW G. FRANK, ASSISTANT MINNESOTA ATTORNEY GENERAL.**

INTRODUCTION

On August 12, 2020, the State moved this Court to join the criminal trial of Defendant Derek Michael Chauvin, with those of his co-defendants Tou Thao, J. Alexander Kueng, and Thomas Lane. The State alleges that the requisite factors permitting joinder under Minn. R. Crim. P. 17.03 are present in this case. However, because Mr. Chauvin's circumstances are substantially different from those of his co-defendants, the State's argument must fail. Mr. Chauvin, through his attorney Eric J. Nelson, Halberg Criminal Defense, therefore, submits this memorandum of law in opposition to the State's joinder motion.

FACTS

For purposes of this Memorandum of Law Opposing Joinder, the Defendant Derek Chauvin relies on and incorporates herein by reference the Facts and Exhibits as contained and submitted to the Court in the Defendant's Memorandum of Law in Support of Motions to Dismiss the Complaint for Lack of Probable Cause filed with this court on August 28, 2020.

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ARGUMENT

MR. CHAUVIN MUST BE TRIED SEPARATELY FROM HIS CO-DEFENDANTS

"Minnesota… has a historical preference for separate trials[.]" *Santiago v. State,* 644 N.W.2d 425, 446 (Minn. 2002). Under Minnesota law, the trials of two or more defendants may be joined when the defendants "are charged with the same offense." Minn. R. Crim. P. 17.03, subd. 2. Before joinder may be ordered, however, this Court must consider four factors set forth in the Rules of Criminal Procedure: (i) "the nature of the offense charged"; (ii) "the impact on the victim"; (iii) "the potential prejudice to the defendant"; and (iv) "the interests of justice." *Id*. The rule, itself, is "neutral" on the issue of joinder. *Santiago*, 644 N.W.2d at 446. However, when the four requisite factors are considered, it is clear that joinder is not favored in this case. Mr. Chauvin must, therefore, be tried separately from his co-defendants.

A. The nature of the offense charged disfavors joinder.

The nature of the offense charged favors joinder where codefendants are charged with the same crimes, a majority of evidence is admissible against both, and the evidence shows that they worked in close concert. *State v. Jackson,* 773 N.W.2d 111, 118-19 (Minn. 2009). However, when one defendant's role is distinguishable from those of his codefendants, joinder is improper. *See, e.g., State v. Green,* No. A17-1328, 2018 WL 3966343 at *2 (Minn. App. Aug. 20, 2018, *review denied* (Minn. Nov. 13, 2018). Here, Mr. Chauvin's role in the offense charged is distinguishable from those of his co-defendants.

As noted, *supra,* the State has charged Mr. Chauvin with three offenses: Second-degree unintentional felony murder; third-degree depraved mind murder; and second-degree unintentional manslaughter. Contrarily, Mr. Thao, Mr. Kueng, and Mr. Lane were charged with two offenses each: Aiding and abetting second-degree murder and aiding and abetting second-

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degree manslaughter. While, on their faces, these charges may appear similar to those with which Mr. Chauvin is charged, under the facts of this case, the nature of the offenses charged are considerably different.

Under Minnesota law, for a defendant to be guilty of unintentional felony murder, the victim's death must have resulted from the defendant's commission of a felony. Minn. Stat. § 609.19, subdivision 2(1). Here, the State alleges that Mr. Floyd's death was the result of an intentional third-degree assault, in violation of Minn. Stat. § 609.223, subd. 1, perpetrated by Mr. Chauvin against Mr. Floyd. To meet its burden on a felony murder charge, the State must prove that Mr. Chauvin (1) intentionally (2) inflicted (3) substantial bodily harm to Mr. Floyd's person that (4) resulted in Mr. Floyd's death. *Id.;* Minn. Stat. § 609.02, subd. 10(2); *State v. Gorman*, 532 N.W.2d 229, 233 (Minn. App. 1995), *affirmed* 546 N.W.2d 5 (Minn. 1996) (felony murder is not a strict liability crime because the state must still prove that the defendant intended to assault the alleged victim). "Intent is an essential element of assault." *Gorman,* 532 N.W.2d at 233 (quoting *Johnson v. State,* 421 N.W.2d 327, 331 (Minn. App. 1988), *review denied* (Minn. May 4, 1988)).

Thus, with respect to Mr. Chauvin, the State must prove that Mr. Chauvin's intent to commit the assault against Mr. Floyd. As to the other defendants, however, the State needs to demonstrate that they knew of Mr. Chauvin's intent to commit the assault before it happened. This means that the State will be required to present the jury with a different theory of the case for Mr. Chauvin than it will for Defendants Thao, Lane, and Kueng. At the same time, Mr. Chauvin will be required to defend the case differently from the other defendants. While they will need to cast doubt on their knowledge of Mr. Chauvin's alleged intent—which, as is evident from their pretrial pleadings, they have already begun to do—Mr. Chauvin will need to dispute

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that he intended to assault Mr. Floyd.

With respect to the third-degree depraved mind murder charge against Mr. Chauvin, none of the other defendants were charged with this offense or accomplice liability for this offense. To meet its burden on this offense, the State must prove to the jury that Mr. Chauvin caused the death of Mr. Floyd by intentionally engaging in an act that "was eminently dangerous to other persons and was performed without regard to human life." *See* 10 Minn. Prac., Jury Instr. Guides—Criminal, 11.38 (6th ed.). Because it is an entirely separate charge and an entirely separate offense, there is no similarity between this charge against Mr. Chauvin and the offenses with which the other defendants have been charged. The elements of the crime are different, what the State is required to prove is different, and the act, as well as the intent, that must be proven are different. The offense is different, and the evidence need to prove it is different.

As to the final charge, to be guilty of culpable negligence manslaughter, the State must prove that Mr. Chauvin acted intentionally in a manner constituting "gross negligence coupled with an element of recklessness" that caused the death of another. *State v. Frost,* 342 N.W.2d 317, 320 (Minn. 1983). This is because

> Culpable negligence is more than ordinary negligence. It is more than gross negligence…. It is intentional conduct… which an ordinary and reasonably prudent person would recognize as involving a strong probability of injury to others.

(*Id.*).

With respect to Mr. Chauvin, then, the State is required to prove both (1) "objective gross negligence on the part of the actor" ***and*** (2) "subjective 'recklessness in the form of an actual conscious disregard of the risk created by the conduct.'" *State v. McCormick*, 835 N.W.2d 498, 507 (Minn. App. 2013) (quoting *Frost*, 342 N.W.2d at 320) (emphasis added). With respect to Defendants Thao, Kueng, and Lane, however, the State must prove their knowledge of Mr.

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Chauvin's intent to act, his objective gross negligence, and his conscious disregard of the risk. Again, as with the felony murder charge, the State must prove a different theory using different evidence in its case against Mr. Chauvin that it will in its cases against the other defendants.

Although there is definitely some overlap in the evidence that may be admitted against all four defendants, much of it will differ from one defendant to another. As the State points out in its memorandum of law, each defendant's MPD personnel and training records may be admitted. While it attempts to downplay the volume of this evidence, it is likely to comprise the bulk of the evidence presented against Mr. Chauvin. (State's Memo at 15-16). It certainly comprises the bulk of the State's discovery in this case. Such evidence is relevant to the intent and state of mind elements in each of the three offenses with which he is charged, as well as to whether Mr. Chauvin's actions actually caused the death of Mr. Floyd. In addition, it is possible the State may explore whether Mr. Chauvin had a prior relationship with Mr. Floyd,[1] and/or introduce expert testimony on the type of restraint that Mr. Chauvin, the only defendant who used a neck restraint, exhibited in the video evidence. This evidence will differ from trial to trial and defendant to defendant.

Finally, for the nature of the offense to favor joinder, there must be evidence that the defendants worked in "close concert" with one another. *Jackson*, 773 N.W.2d at 118-19. Close concert means that all defendants shared a criminal objective. *See State v. Powers*, 654 N.W2d 667, 675 (Minn. 2003). For this to be true, the State must present evidence that Mr. Chauvin intended to perpetrate a crime against Mr. Floyd, that the other defendants were aware of Mr. Chauvin's intent, and that the other defendants then intentionally aided Mr. Chauvin in the

[1] *See, e.g.*, https://bringmethenews.com/minnesota-news/george-floyds-brother-says-derek-chauvin-knew-floyd-didnt-like-him, last accessed Sep. 3, 2020.

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commission of his crime. Here, there is no evidence whatsoever that the defendants worked in close concert to achieve a criminal objective. In fact, the pretrial pleadings filed by Lane, Thao, and King disavow any knowledge of Mr. Chauvin's intentions. It simply cannot be said that the other defendants worked in close concert with Mr. Chauvin to perpetrate the charged offenses.

Moreover, if a jury would be able to comprehend and appreciate each defendant's role in the offense without a joint trial, then the defendants did not work in such close concert as to favor joinder. *See State v. Stock*, 362 N.W.2d 351, 352 (Minn. App. 1985); *State v. Strimling*, 265 N.W.2d 423, 432 (Minn. 1977). Here, the alleged acts of the defendants are by no means so intertwined that a jury could not comprehend and appreciate the roles of the other defendants in the alleged offense absent a joint trial.

Lane and Kueng initiated police contact with Mr. Floyd several minutes before Mr. Chauvin and Thao arrived on scene. Their interactions with Mr. Floyd was considerably longer and different from Mr. Chauvin's interaction with him. Mr. Chauvin entered the scene under circumstances that were entirely different from those of Lane and Kueng, and Mr. Chauvin's actions and alleged intentions at the scene were entirely different from those of Thao, Lane, and King. Mr. Chauvin's role in the alleged offense can be isolated and separated from those of the other defendants. A joint trial is not required for a jury to comprehend and appreciate the role of each defendant in the charged offense.

Because the offenses with which Mr. Chauvin is charged differ from those of the other defendants, because different evidence will be required for the State to prove its case against each defendant, and because the defendants cannot be said to have worked "in close concert" with one another, the nature of the offense charged does not favor joinder.

B. The potential impact on eyewitnesses and family does not favor joinder.

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Although the Rule 17.03 specifically directs the Court to address separate trials' "impact on the victim," who is deceased in the present case, appellate courts have interpreted this factor to include eyewitnesses and family members. Citing, therefore, to *Blanche*[2] and *Jackson,* the State alleges that, unless the trials of the four defendants are joined, "eyewitnesses and Floyd's family" would be traumatized "to relive Floyd's murder at multiple trials." (State's Memorandum at 16). To support its contention, the State dramatically recounts details of the incident and then opines about the impact this would have on potential eyewitnesses at trial. (*Id.* at 17). However, the need for many eyewitnesses to the incident, apart from taking the stand to authenticate video evidence, has not been demonstrated by the State. The charges filed against Mr. Chauvin were based largely on video and autopsy evidence. This same evidence is likely to be the cornerstone of the State's case at trial. Eyewitness accounts, with a few exceptions, would simply be cumulative and inflammatory.

At the same time, multiple trials may, understandably, be emotionally difficult for the Floyd family. Mr. Chauvin does not dispute this. However, the State further alleges that

> Floyd's family members would also need to travel long distances for each trial, imposing substantial financial and logistical burdens on them and making it harder for them to be present to witness justice for their deceased family member… Those burdens are heightened during the current COVID-19 pandemic, during which Floyd's family members would face added risks in traveling to Minnesota for multiple trials.

(State's Memorandum at 18). The pandemic does not seem to have hindered the Floyd family from traveling for other purposes. For example, in late July, the family traveled to Virginia, where their newly-created foundation introduced a hologram of George Floyd, which then toured several

[2] *State v. Blanche*, 696 N.W.2d 351, 371 (Minn. 2005).

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southern states.[3] Notwithstanding the potential for trauma, while multiple trials may be inconvenient for the Floyd family, there is no evidence that it would be particularly burdensome—not sufficiently burdensome to overcome Mr. Chauvin's right to a fair trial and his interest in a separate trial. The second factor is, at best, neutral with respect to joinder.

C. Joinder would prejudice Mr. Chauvin

A joint trial's potential for prejudicing a defendant can be demonstrated by showing that defendants will present "antagonistic" defenses at trial. *Jackson*, 773 N.W.2d at 119; *State v. Santiago*, 644 N.W.2d 425, 440 (Minn. 2002). Defenses are considered "antagonistic" when 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. As is evident from pretrial pleadings, the other three defendants are prepared to place the blame for Mr. Floyd's death squarely on Mr. Chauvin's shoulders. (*See, generally*, memoranda in support of motions to dismiss of Lane, Kueng, and Thao).

Lane claims that he was a rookie who relied on Mr. Chauvin's experience at the scene, and that he "did not know there was a felony being committed… when Chauvin was kneeling on Floyd." (Lane Memo. in Support of Dismissal at 13). Counsel for Kueng wrote that "there is no evidence that Kueng knew Chauvin was going to commit a crime at the time…Chauvin utilized the neck restraint." (Kueng Memo. in Support of Dismissal at 5). Thao claims that he "did not

[3] https://abcnews.go.com/US/wireStory/george-floyds-family-gathers-virginia-unveil-hologram-72218021, last accessed Sep. 3, 2020.

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intend to aid Officer Chauvin in the commission of any crimes." (Thao Memo. in Support of Dismissal at 6). The other defendants are clearly saying that, if a crime was committed, they neither knew about it nor assisted in it. They blame Chauvin.

Additionally, as previously noted, Mr. Chauvin faces a third charge that the other defendants do not—third-degree depraved mind murder. The other defendants do not face this charge or a charge of aiding and abetting third-degree murder. It is, therefore, possible, that the other defendants, who have a direct interest in Mr. Chauvin being found not guilty of felony murder or unintentional manslaughter, could work together to imply that Mr. Chauvin is guilty of third degree murder. This would result in giving the public a conviction for which, if the media is to be believed, they are ravenous while allowing Lane, Kueng, and Thao to walk free. Such a possibility is less likely if Mr. Chauvin were tried separately from the other defendants.

Mr. Chauvin, for his part, asserts that Mr. Floyd was suffering from a fentanyl overdose when he and Thao arrived on scene. (*See* Chauvin Memo. in Support of Dismissal). Lane and Kueng called for EMS before Chauvin and Thao arrived, but he called a "code 4," meaning no lights or sirens activated. Before Chauvin and Thao arrived, Lane and Kueng believed Mr. Floyd was "on something," noticed the foam coming from Mr. Floyd's mouth, heard Mr. Floyd say repeatedly that he couldn't breathe, and yet failed to render assistance or upgrade the EMS call to a code 3. Instead, they struggled to subdue Mr. Floyd and force him into their squad car, likely exacerbating his condition considerably.

It was not until after Mr. Chauvin and Thao arrived, after MRT was considered to restrain Mr. Floyd, and after Thao questioned Lane and Kueng about EMS, that Thao called and upgraded the EMS response to a code 3. Mr. Chauvin could reasonably argue that it was the inaction of Lane and Kueng—their failure to request EMS at a code 3 when they saw Mr. Floyd foaming from the

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mouth and calling out that he couldn't breathe, their failure to de-escalate the situation and try to calm Mr. Floyd down by sitting him on the sidewalk, and their failure to render aid instead of struggle with Mr. Floyd—that caused George Floyd's death. If EMS had arrived just three minutes sooner, Mr. Floyd may have survived. If Kueng and Lane had chosen to de-escalate instead of struggle, Mr. Floyd may have survived. If Kueng and Lane had recognized the apparent signs of an opioid overdose and rendered aid, such as administering naloxone, Mr. Floyd may have survived.

As shown, *supra*, all defendants assert their lack of guilt on the ground that their actions were lawful. However, Lane, Kueng, and Thao also put forth the notion that, if a crime was committed, they had no knowledge of it, and Mr. Chauvin acted alone. But Mr. Chauvin could reasonably assert that Lane and Kueng caused Mr. Floyd's death. As such, a jury would be forced to choose between Mr. Chauvin's defense theory and those of Lane, Thao, and Kueng. *Santiago*, 644 N.W.2d at 446. Because Mr. Chauvin's defenses are antagonistic to those of the other defendants, he would be prejudiced in a joint trial, and joinder is, therefore, inappropriate.

D. The interests of justice require Mr. Chauvin to stand trial separately.

When potential prejudice due to antagonistic defenses disfavor joinder, the interests of justice also disfavor joinder. *Santiago*, 644 N.W.2d at 446. Here, as shown above, Mr. Chauvin's defenses are antagonistic to those of the other defendants. The interests of justice, therefore, militate against joinder. Although they are discretionary, "[j]oint trials are the exception not the rule." *Stock*, 362 N.W.2d at 352. Mr. Chuavin would suffer prejudice from a joint trial.

Although the potential prejudice to Mr. Chauvin is dispositive to this fourth factor, the State offers five reasons why the interests of justice favor joinder. The first three relate to trial economy: the length of separate trials; overlapping evidence placing an undue burden on the State

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and Court system; and the availability and convenience of witnesses. As shown, *supra*, when it comes to Mr. Chauvin, it is anticipated that much of the State's evidence will not overlap with that it uses against the other defendants. The State will have to introduce evidence specifically regarding Mr. Chauvin's intentions, his training, his background on the MPD, personnel records, others who have worked him, et cetera. None of this is relevant to the other defendants.

In terms of judicial economy and witnesses, it makes sense to try Mr. Chauvin separately on the three counts he faces and first in time. The Court could then order joinder of the remaining defendants, who all face the same charges, and against whom very similar evidence will be needed: *e.g.*, what they knew about Mr. Chauvin's intentions, their MPD training and familiarity with the law, why they did not intercede to save Mr. Floyd.

The outcome of Mr. Chauvin's trial would essentially dictate the need for or scope of the second trial. If Mr. Chauvin is acquitted of felony murder and second-degree manslaughter, it is unlikely that a second trial would be necessary. This would also address the State's fifth interests of justice criterion—the "collective interest of the people"— which would be served because the people could "absorb" the result at once. If Mr. Chauvin is convicted of one count but not the other, it would likely limit the scope of the other defendants' trial. The people could then absorb the results in two, easily digestible pieces.

Finally, as its fourth "interests of justice" rationale, the State complains that the "separate trials run the risk of prejudicing potential jurors through the publicity related to each trial" (citation omitted). Frankly, thanks largely to the State and government representatives in the weeks after

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May 25, 2020,[4] it seems unlikely that the jury pool could be more prejudiced than it already is. The interests of justice simply do not favor joinder of Mr. Chauvin with the other defendants.

[4] *See, e.g.,* Mr. Chauvin's Objection to this Court's Gag Order ("We have not yet reached the omnibus hearing in this case, yet Mr. Chauvin has frequently been called a "murderer"[4] or "killer" in the press, and the death of George Floyd has been referred to as a "murder" in global media and across news headlines countless times. Since the week of the incident, Attorney General Keith Ellison, who was charged with prosecuting this case, has appeared in the local and national press, making statements like, "Nor would I be part of a prosecution unless I believed the person was guilty and… needed to be held accountable" and "This case is unusual because of the way Mr. Floyd was killed and who did it: at the hands of the defendant, who was a Minneapolis Police officer." The Hennepin County Attorney's Office, which initially charged Mr. Chauvin, unethically leaked plea negotiation information to the media, which was reported locally, at first, and then picked up by the national news media.

Minneapolis Police Chief Medaria Arradondo and Commissioner of Public Safety John Harrington have both called George Floyd's death a "murder" in the press. Minneapolis Mayor Jacob Frey also called the death a "murder" in the national news media. President Trump has weighed in, saying he "couldn't really watch" the bystander video and that "it doesn't get any more obvious or it doesn't get any worse than that." Senate Majority Leader Mitch McConnell referred to "the murder of George Floyd" in a public statement. On June 8, 2020, Minnesota Governor Tim Walz issued a proclamation, declaring a statewide 8 minutes and 46 seconds of silence to honor George Floyd, noting that the "world watched in horror as George Floyd's humanity was taken away from him." Singer Jon Bon Jovi has already written, recorded, and released for download, a song about the death of George Floyd, which is referred to as "a murder" in publicity surrounding the song's release. Finally, the Minnesota Attorney General's son, Jeremiah Ellison, who is a Minneapolis City Council member, referred to Floyd's death in at least one interview, saying, "I think it was murder. I think that's evident from the video. And not only on officer Chauvin's part[.]" Ellison is now spearheading the effort to dismantle and defund the Minneapolis police department while his father prosecutes this case.")

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CONCLUSION

The nature of the offense charged, the potential prejudice to Mr. Chauvin and the interests of justice all disfavor joinder. The remaining factor is, at best, neutral. Based on the foregoing, Mr. Chauvin respectfully requests that this Court deny the State's joinder motion as to the matter herein

Respectfully submitted,

HALBERG CRIMINAL DEFENSE

Dated: __September 8, 2020__

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