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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

DEFENDANT'S MEMORANDUM IN OPPOSITION TO STATE'S MOTION FOR JOINDER

PLAINTIFF,

V.

TOU THAO,

DEFENDANT. COURT FILE NO. 27-CR-20-12949

TO: THE HONORABLE PETER A. CAHILL, JUDGE OF DISTRICT COURT, AND MR. MATTHEW G. FRANK, ASSISTANT ATTORNEY GENERAL

INTRODUCTION

Tou Thao ("Mr. Thao" hereinafter) opposes the State's Motion for Joinder filed on August 21, 2020. The State charged Mr. Thao with two criminal counts on June 3, 2020. This criminal case is a singular one with only one defendant – Mr. Thao. The State wishes to join Mr. Thao's criminal case with three other individual criminal cases (*State v. Derek Chauvin* 27-CR-20-12646; *State v. J. Alexander Kueng* 27-CR-20-12953; and *State v. Thomas Lane* 27-CR-20-12951). When cases are brought against singular defendants, there is no preference for or against joinder. *See State v. Johnson,* 811 N.W.2d 136 (Minn. Ct. App. 2012) review denied; *State v. Johnson,* 811 N.W.2d 136 (Minn. Ct. App. 2009) habeas corpus denied. Thus, the moving party bears the burden of demonstrating to the Court that joinder is proper and preferable. The State has not established that joinder is the correct route to take in the four cases. As such, the State's Motion for Joinder must be denied.

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ARGUMENT

The State's Motion for Joinder must be denied because the State has not demonstrated that Mr. Thao's above-captioned case and the three other criminal cases stemming from the death of George Floyd ("Mr. Floyd" hereinafter) should be joined under Minn. R. Crim. P. 17.03 subd. 2 (2020). At this point in time, Mr. Thao's case (*State v. Tou Thao,* 27-CR-20-12949) is a singular case. It is a lawsuit that the State has brought against Mr. Thao as an individual. Under the Minnesota Rules of Criminal Procedure, the trial court has the discretion whether to move the singular criminal case into a joint criminal case with other individual criminal cases. *See* Minn. R. Crim. P. 17.03 subd. 2 (2020). However, the State has not made a persuasive argument that would justify the joining of the cases of *State v. Chauvin* 27-CR-20-12646, *State v. Kueng* 27-CR-20-12953, *State v. Lane* 27-CR-20-12951 and Mr. Thao's case (27-CR-20-12949).

A defendant does not have an absolute right to a separate trial from a codefendant, albeit that such a trial is favored. *State v. Duncan,* 250 N.W.2d 189 (Minn. 1977). Although Minnesota historically has favored separate trials, the current joinder rule neither favors nor disfavors joinder. *See Santiago v. State,* 644 N.W.2d 425, 446 (Minn. 2002); *State v. Jackson,* 773 N.W.2d 111, 118 (Minn. 2009); and *State v. Johnson,* 811 N.W.2d 136, 142 (Minn. Ct. App. 2012). The trial court has the discretion to determine whether the trial of multiple defendants should be joined or severed. *Santiago v. State,* 644 N.W.2d 425 (Minn. 2002).

In determining whether or not to join multiple defendants, the court "must consider": (1) "the nature of the offense charged"; (2) "the impact on the victim", (3) "the potential prejudice to

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the defendant"; and (4) "the interests of justice." Minn. R. Crim. P. 17.03 subd. 2 (2020).[1] The four factors must be balanced. *State v. Johnson*, 811 N.W.2d 136, 142 (Minn. Ct. App. 2012).

When three of the four factors favor joinder, joinder is appropriate. *State v. Johnson*, 811 N.W.2d 136, 143 (Minn. Ct. App. 2012). Thus, the opposite would also be true. When three or four out of the four factors favor separate trials, the trials must be kept separate. The Minnesota Supreme Court has held where only two out of the four factors favor joinder, the cases should be kept separate. *Santiago v. State*, 644 N.W.2d 425, 446 (Minn. 2002).

Here, the State has argued that the four cases should be joined because (1) the similarity of charges and evidence for each of the four defendants, (2) multiple trials would traumatize eyewitnesses and family members, (3) the four defendants do not have antagonistic defenses and thus would not prejudice each other, and (4) separate trials would create more costs and potentially prejudice the subsequent jury pools. Additionally, the State makes and interwoven argument that in light of the COVID-19 pandemic, the four cases should be tried at once.

Each one of the State's arguments are not persuasive for joinder. Taken as a whole, the State has not demonstrated that the Court should join the four cases. In fact, all four factors favor separate trials. Thus, as the State has not met their burden, the motion for joinder should be denied and the trial of *State v. Thao* should remain separate.

[1] Contrary to what the State has argued, pretrial joinder and severance claims are only to be evaluated under the Minnesota Rules of Criminal Procedure, not Minnesota Statutes. *See* State's Memorandum of Law in Support of Motion for Joinder at 14. "Because severance is a matter of procedure, [defendant's] pretrial severance claims should be evaluated under Rule 17.03 … rather than under the statute." *Santiago v. State*, 644 N.W.2d 425, 444 (Minn. 2002); *see also State v. DeVerney*, 592 N.W.2d 837, 841-843 (Minn. 1999).

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I. THE NATURE OF THE OFFENSES AND EVIDENCE DO NOT FAVOR JOINDER.

The offenses and evidence do not favor joinder. "The nature of the offense charged favors joinder when 'the overwhelming majority of the evidence presented [is] admissible against both [defendants], and substantial evidence [is] presented that [codefendants] worked in close concert with one another.'" *State v. Johnson,* 811 N.W.2d 136, 142 (Minn. Ct. App. 2012)(citing to *State v. Martin,* 773 N.W.2d 89, 99-100 (Min. 2009)). It cannot yet be determined whether the same evidence will be presented for each potential codefendant. Although Mr. Thao was charged with a similar offense to the other three potential codefendants, his role was absolutely distinct from the others' and thus he did not work in close concert with them.

a. It is unknown whether the "overwhelming majority" of presented evidence will be the same in the case of State v. Thao and the other potential codefendants' cases.

Although Mr. Thao and the other three potential codefendants have been charged with similar offenses[2], the State has not shown that the presented evidence will be similar at each trial. The Court has not been privy to the potential evidence, none of the Defense counsels have been privy to their respective discovery, and – most notably – the State is expected to continue to disclose major portions of discovery (such at the Medical Examiner's entire file). Thus, there is no way to tell at this time whether the "overwhelming majority" of evidence presented against each defendant will be the same because the evidence has yet to be finalized or properly revealed. Joinder is not favored.

[2] The State has charged Mr. Thao with two counts: one count of aiding and abetting Second Degree Murder in violation of Minn. Stat. § 609.19.2(1) with reference to Minn. Stat. § 609.05.1; and one count of aiding and abetting Second Degree Manslaughter in violation of Minn. Stat. § 609.205(1) with reference to Minn. Stat. § 609.05.1. Mr. Lane and Mr. Kueng have been charged with the same two offenses. Mr. Chauvin – however – has been charged with three different offenses: one count of Second Degree Murder in violation of Minn. Stat. § 609.16 subd. 2(1); one count of Third Degree Murder in violation of Minn. Stat. § 609.195(a); and one count of Second Degree Manslaughter in violation of Minn. Stat. § 609.205 (1).

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b. Mr. Thao did not work in close concert with the other three potential codefendants and thus should not be joined at trial.

Joinder is proper when two or more defendant work in "close concert" with each other. *State v. DeVerney*, 592 N.W.2d 837, 842 (Minn. 1999). In *State v. DeVerney*, much like the cases at play here, four defendants were charged with aiding and abetting various degrees of murder. *Id.* at 841. The Minnesota Supreme Court found that two of the defendants were properly joined because they worked in close concert with each other. *Id.* at 842. The Minnesota Supreme Court reasoned the two defendants worked in close concert with each other because they had similar involvement in the murder. *Id.* For instance, the two defendants both admitted assaulting the victim, admitted to sitting in the front seat of the victim's car while driving to the murder site, and both admitted to attempting to wipe down the car for fingerprints/evidence. *Id.*

This is an important distinction to make in the decision of whether to join Mr. Thao with the cases of Mr. Lane, Mr. Kueng, and Mr. Chauvin. As discussed in prior filings, Mr. Thao had a different role to the other defendants. He was controlling the growing crowd of bystanders to secure the scene for officer and arrestee safety. The three other MPD officers were physically restraining Mr. Floyd during their lawful arrest of him. While Mr. Lane, Mr. Kueng, and Mr. Chauvin may have acted in close concert with each other, Mr. Thao had a very different and distinct role. The State clearly recognizes that Mr. Thao made distinct and different actions during the arrest of Mr. Floyd compared to the other defendants. *See* State's Memorandum of Law in Support of Motion for Joinder at 11 (stating "[t]hey continued to restrain Floyd – with Chauvin on his neck, Kueng on his back, and Lane holding his legs – while Thao pushed bystanders back onto the sidewalk"); *see also* Memorandum of Law in Support of Motion for Joinder at Statement of

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Facts (where of the 10 pages of facts, Mr. Thao's name is not mentioned until the fifth page). Mr. Thao did not work in close concert with the other officers. Joinder is not favored.

II. THE STATE HAS NOT SHOWN THAT JOINDER IS FAVORED BECAUSE OF TRAUMA OR UNAVAILABILITY OF WITNESSES.

The second factor – impact on the victim(s) – does not favor joinder under current Minnesota caselaw. *First,* the family members' trauma is not a factor to be considered when determining joinder. *Second,* no young children are expected to be called as a witnesses in *State v. Thao.*

a. Potential trauma to Mr. Floyd's family is not a factor when considering joinder.

Potential trauma to either the victim or an eyewitness to a crime favors joinder. *State v. Jackson,* 773 N.W.2d 111, 119 (Minn. 2009). Contrary to the State's assertion, *State v. Jackson* only favors joinder when the family members are "main witnesses" to a case. *See* Motion for Joinder at 16. The Supreme Court only looked at potential trauma to witnesses, not those who will be seated in the gallery. *State v. Jackson,* 773 N.W.2d 111, 119 (Minn. 2009)(reasoning that family members of the victim who were the state's "main witnesses" would be traumatized by multiple trials). The Minnesota Court of Appeals and the Minnesota Supreme Court have supported this rule: "[w]hen analyzing the impact on the victim, the supreme court has considered 'the impact on both the victim of the crime as well as the trauma to the eyewitnesses who would be compelled to testify at multiple trials.'" *State v. Johnson,* 811 N.W.2d 136, 143 (Minn. Ct. App. 2012)(citing to *State v. Blanche,* 696 N.W.2d 351, 371 (Minn. 2005)). Thus, under Minnesota caselaw potential trauma to those who would be testifying as a victim (although there is no victim here as the alleged victim – Mr. Floyd – is deceased) or an eyewitness would be analyzed. The question of whether Mr. Floyd's family would or would not be traumatized by more two or more trials is irrelevant. Joinder is not favored.

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b. Testimony of witnesses does not favor joinder.

Joinder is favored when young children will testify as eyewitness to a murder. *See State v. Jackson,* 773 N.W.2d 111, 119 (Minn. 2009)(finding that the potential trauma to a 10-year-old boy who would testify favored joinder). Here, there are two known child eyewitnesses to the death of Mr. Floyd. One was 17 years old at the time of the alleged crime. Under Minnesota caselaw she would not be considered a "young" child and thus her testimony does not favor joinder. *See State v. Jackson,* 773 N.W.2d 111, 119 (Minn. 2009). The other child eyewitnesses was nine years old at the time of the alleged crime. The State has not asserted that either of these children will be called as an eyewitness. The Defense does not anticipate at this time (or can fathom a situation where we would) call the nine-year-old to testify as an eyewitness at trial. Therefore, there will be no child eyewitnesses testifying in the case of *State v. Thao*. Joinder is not favored.

c. The nature of Mr. Floyd's death does not favor joinder.

The State argues that the nature of Mr. Floyd's death favors joinder under the impact on victims. The Minnesota Supreme Court has listed "the violent nature of the crime charged" as a factor when determining if victim impact favors or disfavors joinder. *State v. Powers,* 654 N.W.2d 667, 675 (Minn. 2003). However, in that case, the victim died when multiple masked men robbed him by gunpoint in his hotel room and shot him numerous times. Here, Mr. Floyd's cause of death has yet to be determined. *See* Notice of Motion and Motion to Compel Discovery, Exhibits 1 & 4 (where Dr. Andrew Baker stated Mr. Floyd had fatal amounts of fentanyl in his system and his death would have been ruled an overdose if he had been found "anywhere else"). Defense has found no binding or persuasive caselaw that has joined a case after determining that the nature of death by "positional" asphyxiation or fentanyl overdose is violent. Joinder is not favored.

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III. JOINDER WOULD PREJUDICE MR. THAO'S RIGHT TO A FAIR AND IMPARTIAL TRIAL.

The third factor – potential prejudice to the defendant – favors a separate trial for Mr. Thao. Mr. Thao is not required to show actual prejudice, only potential prejudice. Minn. R. Crim. P. 17.03 subd. 2 (2020). A joint trial would potentially prejudice Mr. Thao due to the likelihood of antagonistic defenses. A joint trial would actually prejudice Mr. Thao due to the State's leaking of Mr. Chauvin's plea negotiations.

a. Mr. Thao is not required to disclose any antagonistic defenses; however there is a high likelihood that one may arise during trial which in turn would require separate trials.

Defendant is presumed innocent of these charges until proven guilty beyond a reasonable doubt. Although the Defense is not required to present the theory of their case until the State has rested, Mr. Thao's right to a fair and impartial trial would be prejudiced by joinder because of antagonistic defenses and a tainted jury pool. "Joinder is not appropriate when there would be substantial prejudice to the defendant, which can be shown by demonstrating that codefendants presented 'antagonistic defenses.'" *State v. Jackson*, 773 N.W.2d 111, 119 (Minn. 2009)(citing to *Santiago v. State,* 644 N.W.2d 425, 446 (Minn, 2002)). An antagonistic defense occurs when the defenses of codefendants are "inconsistent and when they seek to put the blame on each other and the jury is forced to choose between the defense theories advocated by the defendants". *Santiago v. State,* 644 N.W.2d 425, 446 (Minn, 2002); *See State v. Johnson,* 811 N.W.2d 136, 143 (Minn. Ct. App. 2012).

Mr. Thao is not required to testify or even to elaborate on any antagonistic defenses he may raise at trial until the State rests its case. *See Santiago v. State,* 644 N.W.2d 425, 443 (Minn. 2002)(stating "[T]he court must keep in mind that, in a criminal trial, the defendant 'may remain

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inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion.'" citing to James H. Chadbourn, *Wigmore on Evidence* § 2511 (1981)).

The Defense is Constitutionally protected from disclosing any of their theories of the case beyond what was required in their submitted Rule 9 filing. However, the Defense does note that there is a high likelihood that mutually antagonistic defenses will arise in a joint trial. For instance, Mr. Lane has argued that Mr. Floyd did not die from asphyxia because there was no trauma to his neck. If the State were to argue that Mr. Floyd died from positional asphyxiation, a "who done it" could arise between which of the three officers on Mr. Floyd placed enough pressure correctly to cause a death. This pointing of the fingers and shifting blame between Mr. Lane, Mr. Kueng, and Mr. Chauvin would be considered "classic examples of antagonistic defenses". *Santiago v. State*, 644 N.W.2d 425, 446 (Minn. 2002). Moreover, Mr. Thao did not participate directly in any manner of the restraint of Mr. Floyd during the lawful arrest. Joinder is not favored.

b. *A joint trial would automatically and actually prejudice Mr. Thao because of the State's permanent tainting of the any potential jurors in the case of State v. Chauvin.*

A joint trial would prejudice Mr. Thao's Constitutional right to a fair and impartial jury. To show that a joint trial would prejudice his rights, "[a] defendant should demonstrate how the interests of justice are affected in a joint trial such that joinder would result in the denial of a fair trial." *State v. Powers*, 654 N.W.2d 667, 676 (Minn. 2003). The State argues that the interest of justice favors joinder because a joint trial would "protect the fairness of a jury trial" because it would limit prejudicing the potential jurors to publicity. This is an ironic argument coming from the State. As discussed in previous filings, the State is the only party is *State v. Thao* to make any prejudicial media comments. The State cannot have it both ways – they argue they should not be subject to a change of venue or gag order because of their highly prejudicial comments, but the

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Defense should be subjected to a joint trial because of the *possibility* of further prejudicing the jury. In actuality the State has argued a very valid point for the Defense; that their prejudicial comments regarding Mr. Chauvin preclude a joint trial. After announcing the Attorney General's Office and the Hennepin County Attorney's Office were working together to prosecute Mr. Thao and his fellow officers, Mike Freeman and Keith Ellison both made highly prejudicial comments. Specifically, the Hennepin County Attorney's Office told the press that Mr. Chauvin was negotiating a plea bargain to plead guilty.[3] This is highly prejudicial in general to the above-captioned case, but would be extraordinarily prejudicial if Mr. Thao were to be joined with Mr. Chauvin. Not only did Mr. Freeman violate the Rules of Professional Responsibility when he made comments on inadmissible evidence, but he permanently tainted any jury pool that would appear before Mr. Chauvin. *See* Minn. R. Prof Resp. 3.6(a); Minn. R. Prof. Resp. 3.8; and Rule 410. Therefore, any potential jurors for a joint trial would also be permanently prejudiced. A separate trial is favored to protect Mr. Thao's rights.

IV. THE INTERESTS OF JUSTICE FAVOR SEPARATE TRIALS.

The fourth factor – the interests of justice – favors a separate trial for Mr. Thao. The length of the trial is moot due to the unfair prejudice, the State has not shown that under current caselaw the travel expenses favors joinder, and joinder would ultimately cost the State and ultimately Minnesota taxpayers more money in the long run. The State has also shown prejudice against one defendant which would affect Mr. Thao's trial and ultimately the interest of justice. Lastly, where defendants have antagonistic defenses, any "potential prejudice" would also favor separate trials under the interests of justice factor. *See Santiago v. State*, 644 N.W.2d 425, 446 (Minn. 2002).

[3] Meredith Deliso, Alex Perez, and Andy Fies, *Derek Chauvin was considering guilty plea but deal fell apart: Prosecutor's office,* abcNEWS (June 10, 2020), https://abcnews.go.com/US/derek-chauvin-guilty-plea-deal-fell-prosecutors-office/story?id=71180109.

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a. ***The length of multiple trials is a moot point because of the substantial prejudice to Mr. Thao as discussed supra.***

The length of multiple trials is a moot point. The potential length of multiple trials is a factor for joinder, but not a determinative one. *See State v. Jackson,* 773 N.W.2d 111, 119 (Minn. 2009). The potential length of multiple trials only weighs in favor of joinder where there is not substantial prejudice to a defendant. *Id.* As discussed *supra*, Mr. Thao will experience substantial prejudice if joined with any of the other defendants. Thus, under *State v. Jackson,* the question of whether the length of the trial favors joinder is irrelevant. A delay in the date of verdict is actually a tool that would preserve Mr. Thao's rights. *See* Minn. R. Crim. P. 25.03 (2020)(where a continuance is a valid alternative to a gag order). Joinder is not favored.

b. The availability of witnesses is a moot point because of the prejudice of joinder on Mr. Thao as discussed above.

The witnesses ability or inability to travel is moot. The State has incorrectly argued that the unavailability of witnesses favors joinder. The State asserts that the interests of justice favor joinder because one trial would lessen the probability of witnesses' unavailability due to threats "by those opposed to this prosecution". *See* State's Memorandum of Law in Support of Motion for Joinder at 24. The unavailability of witnesses is only a factor when those witnesses are gang members or foreign nationals. *See State v. Jackson* 773 N.W.2d 111, 119 (Minn. 2009); *State v. Blanche,* 696 N.W.2d 351, 372 (Minn. 2005); and *State v. Power,* 564 N.W.2e 667, 675 (Minn. 2003). Additionally, the potential unavailability of witnesses only weighs in favor of joinder where there is not substantial prejudice to a defendant. *State v. Jackson* 773 N.W.2d 111, 119 (Minn. 2009). Again, there is prejudice to Mr. Thao as discussed *supra.*

Even if Mr. Thao suffered no prejudice, the availability of witnesses would not favor joinder. Defense knows of no witnesses who are gang members or foreign nationals. Even so,

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Defense notes that the State has not presented any evidence to support the notion that there are threats from "those opposed to this prosecution" and if those threats rise to the level where joinder is needed. (Defense additionally notes that the State has not supported this theory with caselaw). Even if threats to witnesses was a legitimate factor in determining joinder, it would neither disfavor or favor joinder as Defense would be happy to elaborate to the Court on the numerous venomous voicemails received threatening counsel and client alike. Thus, this point is moot.

c. The financial costs of a large joint trial with four codefendants favors separate trials.

The long-term financial cost of a joint trial favors separate trials. If the trial of Mr. Thao is joined with the three other potential codefendants, there is no certainty that the trials will be kept joined for their entireties. Once joined, codefendants' trials may be split with a midtrial severance motion. *See Santiago v. State,* 644 N.W.2d 425 (Minn. 2005). Cases must be severed during a trial if the court determines "severance is necessary to fairly determine the defendant's guilt or innocence of each offense or charge." Minn. R. Crim. P. 17.03 subd. 3(3). When antagonistic defenses arise during the course of a trial, the judge must sever. *See State v. Powers,* 654 N.W.2d 667, 676 (Minn. 2003); *Santiago v. State,* 644 N.W.2d 425 (Minn. 2005). As discussed *supra* Mr. Thao is not required to disclose his defense strategy and theory to the jury until the State closes its case. Thus, it is not unreasonable to consider that once the State closes its case halfway through a trial, the case would have to be severed if a codefendant brought forth evidence to support an antagonistic defense. This would mean that weeks into a trial at least one defendant would be sent back to square one: to have the State represent their case against him in a new trial. This would cost the Court, the State of Minnesota, and ultimately the taxpayers of Minnesota a large sum of money. Joinder would bring about the possibility of either a midtrial severance or a remand from the higher courts – both creating scenarios where Mr. Thao would need a new separate trial.

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d. Prejudicial statements or lines of questioning by other defense counsels favors separate trials.

Statements by potential codefendants' counsel favors separate trials. The State has made clear that statements made by Mr. Lane's attorney, Earl Gray, would affect Mr. Thao's trial. *See* State's Memorandum of Law in Support of Motion for Joinder at 17. The State has made the argument that the cases must be joined because Mr. Lane's attorney will further traumatize witnesses with his cross examination. Questioning by other attorneys should not have any persuasive value in limiting Mr. Thao's right to a fair and impartial trial. If anything, the State's commentary that witnesses will be traumatized by Mr. Lane's attorney should persuade the Court that the other defendants' trials (including Mr. Thao's) should be spared this trauma and kept separate from Mr. Lane's.

V. THE COURT CANNOT HAVE A 4-DEFENDANT JOINT TRIAL IN LIGHT OF THE COVID-19 PANDEMIC.

The State weaves an argument threaded throughout their motion that the COVID-19 pandemic favors joinder. Public heath emergencies are not a legitimate factor is determining joinder under Minn. R. Crim. P. 17. However, if it was a legitimate factor it would favor against joinder.

Having one joint trial would put an unnecessarily large group of people unmasked in one indoor space together. The Defense for Mr. Thao at this time would only have three people at counsel table – Robert Paule, Natalie Paule, and Mr. Thao. Defense cannot speak to the number of trial attorneys each one of the other potential codefendants will bring to their trials. At a minimum, Mr. Thao, the jury, and the witnesses would be exposed to six more persons each day (Mr. Lane and his attorney, Mr. Kueng and his attorney, and Mr. Chauvin and his attorney). Additionally, the

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State has hired a team of Special Assistant Attorney Generals for the case. *See* Memorandum In Support Of Motion To Find Keith Ellison In Contempt Of Court, Exhibit 1. It is unclear if these Special Assistant Attorney Generals will be seated at counsel table for which – if any – trials. To Defense's knowledge at least one of the State's attorneys on the case of *State v. Thao* works outside the state of Minnesota. If said attorneys are planning on attending trial the State will be placing other parties in contact with those traveling from outside of Minnesota. While Defense cannot speak for the jury, Court staff, witnesses, or State, Defense notes that at least one person on Defense has a comorbidity. While Defense wishes to not have their health be subject to public or private scrutiny, it behooves us to let the Court know that *State v. Thao* has an increased risk of severe illness and death from COVID-19 beyond age.

More unmasked persons in a courtroom would also increase the need for more space. We are aware that the Court has thought deeply about this and is mindful of social distancing. Defense argues that a joint trial would impair Mr. Thao's right to a public trial as more social distancing would decrease the amount of members of the public that would be able to observe from the gallery. The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trials.'" *Sheppard v. Maxwell,* 384 U.S. 333, 349 (1966)(citing to *In re Oliver,* 222 U.S. 257, 268 (1948)). COVID-19, while not a legitimate factor under the joinder rule, favors separate trials.

CONCLUSION

The case of *State v. Thao* must remain separate as all four factors disfavor. The four factors must be balanced. *Id.* When three of the four factors favor joinder, joinder is appropriate. *State v. Johnson,* 811 N.W.2d 136, 143 (Minn. Ct. App. 2012). Thus, the opposite would also be true. When three or four out of the four factors favor separate trials, the trials must be kept separate.

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Additionally, because the joinder rule neither favors or disfavors joinder, when only two out of the four factors favor joinder the Court should keep the course. As four out of the four factors favor separate trials, Mr. Thao's case shall remain singular.

Respectfully submitted,

Dated: This 8th day of September, 2020

/s/ Robert M. Paule
Robert M. Paule (#203877)
Robert M. Paule, P.A.
920 Second Avenue South, Suite 975
Minneapolis, MN 55402
T: (612) 332-1733
F: (612) 332-9951

Natalie R. Paule (#0401590)
Paule Law P.L.L.C.
5100 West 36th Street
P.O. Box 16589
Minneapolis, MN 55416
nrp@paulelaw.com