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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

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

State of Minnesota,

Plaintiff,

vs.

J. Alexander Kueng,

DEFENDANT'S OBJECTION TO THE STATE'S MOTION FOR JOINDER

Defendant.

TO: The Honorable Peter Cahill, Judge of Hennepin County District Court; Mathew Frank, Assistant Attorney General; Mike Freeman, Hennepin County Attorney.

The defendant, by and through his attorney objects to the state's motion for joinder of his case with codefendants Derek Chauvin (27-CR-20-12646), Thomas Lane (27-CR-20-12951), and Tou Thao (27-CR-20-12949).

FACTS

As alleged in the complaint[1], Kueng and Lane responded to a 911 caller at Cup Foods on Chicago Avenue in Minneapolis who reported a man bought merchandise with a counterfeit twenty dollar bill. Thomas Lane, a codefendant, went to the driver's side of the car. Kueng went to the passenger side of the car. Lane spoke to the driver, George Floyd. Lane pulled his gun and pointed it at

[1] The facts are taken from the probable cause statement of the complaint. Factual errors in the complaint have not been corrected.

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Floyd and directed him to show his hands. When Floyd put his hands on the wheel, Lane holstered his gun.

Lane ordered Floyd out of the car and handcuffed him. Lane walked Floyd to the sidewalk.[2] Lane talked to Floyd for less than two minutes and asked for Floyd's name and identification. During the conversation Lane asked Floyd if he was on anything and noted there was white foam on the edges of Floyd's mouth. Lane told Floyd he was being arrested for passing counterfeit currency.

The complaint notes that at 8:14 p.m. Lane and Kueng stood Floyd up and attempted to walk Floyd to their squad car. Floyd stiffened up as they tried to put him in the squad and Floyd fell to the ground. Even though Floyd said he was not resisting, he did not want to get into the backseat of the squad claiming, among other things, that he was claustrophobic.

Officer Chauvin and Officer Thao arrived on the scene. The officers tried to get Floyd into the squad car by pushing him from the driver's side. As they tried to get Floyd into the car, Floyd said he couldn't breathe. The officers struggled to get Floyd into the squad car. Floyd would not voluntarily sit in the back seat; he resisted.

Chauvin pulled Floyd out of the passenger side of the car at 8:18:38 and Floyd fell to the ground face down. Chauvin placed his left knee in the area of Floyd's head and neck. Kueng was at Floyd's back and Lane was at Floyd's feet.

[2] This is a factual error from the complaint.

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Floyd, who was still handcuffed, said he couldn't breathe, "Mama," "please," and "I'm about to die." One of the officers responded that he was talking fine.

Lane suggested that they roll Floyd onto his side, but Chauvin told him "No, staying put where we got him." The complaint alleges that Floyd stopped breathing and speaking at 8:25:31.[3] Lane again suggested that they roll Floyd over onto his side. Kueng checked Floyd's pulse and couldn't find one. Chauvin removed his knee from the area of Floyd's neck when the ambulance and emergency medical personnel arrived.

The Medical Examiner (ME) did not find physical findings supportive of mechanical asphyxia. The ME found that Floyd died from cardiopulmonary arrest while being restrained. The ME found that Floyd had arteriosclerotic and hypertensive heart disease. Toxicology screening found that Floyd had the presence of fentanyl[4] and evidence of recent methamphetamine use. The ME opined that the effects of the officers' restraint of Mr. Floyd, his underlying health conditions, and the presence of drugs contributed to his death.

Additional Evidence

Mr. Kueng had recently completed his field training and was in the midst of his third shift as a police officer when called to the Cup Foods to investigate Mr. Floyd's criminal conduct. Mr. Kueng's field training was largely conducted by co-

[3] This is a factual error from the complaint.
[4] The autopsy report reveal that Mr. Floyd's Fentanyl level in hospital blood was at a fatal level.

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defendant Chauvin. Mr. Kueng spent roughly 420 of his 730 hours of field training time being taught and evaluated by Chauvin.

On June 2, 2020 at 1555 hours Co-defendant Tou Thao met with the BCA and FBI for over an hour and a half. In the course of that interview Thao did his best to mitigate his involvement and place blame on his 3 co-defendants. He pointed out that he was not directly involved in Mr. Floyd's detention. He characterized his initial role as that of a "human traffic cone" and later just a provider of security. At times Thao intimated that Kueng and Lane were the responsible parties because this was "320's call"[5]. Thao made several remarks deflecting the specter of guilt upon the other 3 charged officers, claiming he was just backing them, providing security for them and operating in good faith that they knew what they were doing in addition to pointing out that he was not the contact officer. In contrast to these claims the interview also reveals that Thao directed to "prone him out" to control Mr. Floyd.

Before and after the filing of the complaint considerable media and social media attention was garnered by the cell phone videos which memorialized these events. By June 19, 2020 the violence in the Twin Cities stemming from these events had resulted in at least 2 deaths, 619 arrests, and upwards of $500 million in damage to 1,500 properties. The 4 charged officers have received differing degrees of attention in the media. This is confirmed by querying their individual names in

[5] 320 is the squad call sign for Kueng and Lane.

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Google's search engine. Officer Derek Chauvin's name receives about 6,110,000 results (0.51 seconds) while J. Alexander Kueng about 139,000 results (0.43 seconds). Negative public sentiment generally and specifically appears to be focused on Chauvin. Anecdotal information reveals that public sentiment against Chauvin has been and remains distinctly higher than the other 3 charged defendants.[6]

ARGUMENT

Kueng's case should not be joined for trial with the codefendants. Joinder is controlled by the rules of criminal procedure. While there is a statute addressing joinder, Minnesota Statute § 631.035, Subd.1, is unconstitutional to the extent it conflicts with the Rules of Criminal Procedure. "In matters of procedure rather than substantive rights, the rules of criminal procedure take precedence over statutes to the extent that there is any inconsistency. Because severance is a matter of procedure, [defendant's] pretrial severance claims should be evaluated under Rule 17.03, subd. 2(1), rather than under the statute." *Santiago v. State*, 644 N.W.2d 425, 444 (Minn. 2002)(internal citations omitted). Similarly, because joinder is a matter of procedure, the rule of criminal procedure controls over the statute. The statute is unconstitutional to the extent it conflicts with the rule, so the issue must be considered based on the rules of criminal procedure. The rule

[6] This fact could be confirmed by an analysis of the extent and character of the newspaper publicity and other possible sources of community bias, which Kueng presently lacks the funds to complete.

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"neither favors nor disfavors joinder." *State v. Jackson*, 773 N.W.2d 111, 118 (Minn. 2009)

To consider whether it's appropriate to join defendants for trial, the Court should consider (1) the nature of the charged offense; (2) the impact on the victim; (3) the potential prejudice to the defendant; and (4) the interests of justice. *See* Minn. R. Crim. P. 17.03, Subd. 2. These factors do not favor joinder.

1. Nature of the charged offense

The nature of the charged offense does 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)(internal punctuation omitted). The state must satisfy two distinct elements. First, there may be body worn camera, security camera, and eyewitness testimony that would be admissible against all four officers. However, there is not substantial evidence to show the codefendants worked in close concert with one another. Whether the four officers worked in close concert and intentionally aided and abetted each other, is at the heart of the case against Kueng.

Kueng is charged with aiding and abetting second felony degree murder. The state has to prove that Kueng intentionally aided, advised, hired, counseled, or

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conspired with or otherwise procured Chauvin to commit a crime. *See* Minn. Stat. § 609.05, subd. 1. "'[I]ntentionally aiding 'embodies two important and necessary principles: (1) that the defendant 'knew that his alleged accomplices were going to commit a crime,' and (2) that the defendant 'intended his presence or actions to further the commission of that crime.' *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012).

Whether Kueng acted in concert with the other officers is key to the case. Just because all four of the individuals charged in this case are police officers does not mean that the officers were acting in concert. Officer Lane and Thao's Body worn camera (BWC) video and their statement to the BCA demonstrate the differences. Lane suggested that they roll Floyd over onto his side; Chauvin said they have him and an ambulance is on the way. The rookie officers are trained to call senior officers "Sir." Chauvin was senior to both Lane and Kueng, who had only been patrolling on their own for a few days. Chauvin was Kueng's field training officer. Lane had contacted Chauvin while Lane was trained in as an officer. Kueng and Lane were working under the supervision and control of Chauvin.

In contrast to the facts here, the Minnesota Supreme Court found that joinder was proper and that the codefendants acted in concert with each other when the evidence "indicates that DeVerney and Greenleaf had very similar

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involvement in Antonich's murder. Both either admitted assaulting Antonich or were seen doing so, both admitted sitting in the front seat of Antonich's vehicle as they drove to the site of the murder, and both admitted attempting to wipe down Antonich's car for fingerprints in an effort to hide any evidence that would link them to the crime." *State v. DeVerney*, 592 N.W.2d 837, 842 (Minn. 1999). As compared to *DeVerney*, there is not substantial evidence to show that Kueng worked in close concert with the other three codefendants.

The state suggests that because all four defendants are charged in complaints that are nearly identical "confirms that the evidence at trial will be largely the same for all four." (State's Motion for Joinder at 15) This argument is absurd. The state drafted the complaints at issue here, not some neutral party. The complaint is simply a charging document, *see* Minn. R. Crim. Pro. 2.01, and has no bearing on what evidence is admissible at trial. The evidence does not establish that Kueng worked in concert with the three other officers.

2. Impact on the victims

The impact on the victims does not favor joinder. This is not a case where there is a child or other victim testifying about sexual assault or a physical assault. It may be true that testifying in court can be a difficult process for some lay witnesses, but that is wholly insufficient to justify joinder. The defense anticipates that there will be limited spark of life testimony from a family member of Mr.

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Floyd as allowed by caselaw. But again, talking about a loved one is not rise to the level of situations discussed in cases on point. This factor does not support joinder.

The impact on witnesses also does not support joinder. When considering the impact on the victims "we have 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. Blanche*, 696 N.W.2d 351, 371 (Minn. 2005). The Supreme Court noted that while the joinder rule "does not explicitly include the impact on the eyewitnesses to the crime, we nevertheless conclude that, while close, this factor favored joinder." *Id*. The facts in *Blanchard* appear to be unique and were an important consideration for the Supreme Court:

> Two of the witnesses were young children who saw the shooting and watched their young friend and cousin die. We agree with the district court that subjecting these children to giving testimony at separate trials for Blanche and Bernard would have been "unduly harsh." Moreover, these two witnesses, only by chance, avoided being shot themselves. Our conclusion here does not suggest that this factor should be swallowed by considerations of eyewitness convenience; we only conclude that in a case like this one, where the eyewitnesses were vulnerable and could be traumatized by having to testify at several trials, a court may consider the potential trauma to the eyewitness.
>
> *Id*.

The state is asking this Court to do what the Supreme Court has warned against. The state cites to a district court orders to suggest there doesn't have to be a finding that a victim is particularly vulnerable. (State's Joinder Motion at 16, 17).

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Obviously, a district court order that contradicts an opinion of the Minnesota Supreme Court is not binding or even persuasive authority for this Court.

There is nothing to suggest that the witnesses here were vulnerable. They all appear to be capable adults. Some of the adults tried to intervene in the encounter. While as tragic as Mr. Floyd's death was, his death was not particularly violent. The crime scene was not particularly bloody. There were no gunshots to the head or chest. There were no stab wounds. It is always difficult for a witness to testify at a trial about a traumatic event. There is nothing to indicate these witnesses were vulnerable so that testifying at multiple trials would cause them trauma. This factor does not support joinder.

The state speculates that there will be travel costs, lost work, and having to come to trial during a pandemic. Those concerns are all witness convenience issues that the Supreme Court has warned should not be considered.

The state raises concerns about witnesses that are minors and D.F. in particular who was seventeen years old at the time. (State's Joinder Motion at 18) D.F. was nearly considered an adult at the time and significantly older than the witnesses in *Blanche*. Given that she has started therapy, she should have the tools to be able to cope with the stress of testifying. Importantly, if the state choses, her testimony could be limited to the foundation for her video, or completely unnecessary if a stipulation on foundation is agreed to.

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The state also argues that the Floyd family would be required to sit through multiple trials. The Floyd family is not required to attend any of the trials. They have the option to attend the trial as does any member of the public. If the state were genuinely concerned about the Floyd family attending the trial, they could simply agree to media coverage of the trial. The Floyd family could then watch the trial in the privacy of their own home. They would not have to deal with travel costs, lost wages, and the risk of attending multiple trial in person during a global pandemic. Considerations of the Floyd family do not favor joinder. The impact on the victim of multiple trials does not favor joinder.

3. The potential prejudice to the defendant

There is significant potential prejudice to Kueng if his case is joined for trial with the three other officers. The Court should evaluate this factor to determine whether there is substantial prejudice to the defendant. *See Santiago v. State*, 644 N.W.2d 425, 446 (Minn. 2002). "Under this test, a defendant suffers substantial prejudice when he and his codefendant present antagonistic defenses." "Antagonistic defenses occur when the defenses are inconsistent, and the jury is forced to choose between the defense theories advocated by the defendants." *State v. Martin*, 773 N.W.2d 89, 100 (Minn. 2009)(internal punctuation omitted).

Contrary to the state's argument, the defenses here are antagonistic. A defense is antagonistic if one defendant seeks to put the blame on the other. *See*

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State v. Hathaway, 379 N.W.2d 498, 503 (Minn. 1985). The evidence shows that Chauvin had his knee on Floyd's neck and that Kueng was at Floyd's back. Defendants Kueng, Lane and Thao are likely to argue that Chauvin caused Floyd's death and that they were merely present. Kueng may argue that he did not know Chauvin was going to commit and crime and that he did not intend his presence or actions to further that crime. Chauvin is clearly going to argue that he was not responsible for Floyd's death. This would force a jury to choose among the different defense theories. Kueng's defense is clearly antagonistic to Chauvin. The state incorrectly argues that the court needs to consider whether jury verdicts exculpate one defendant is a factor. (State's Joinder Motion at 21) The antagonistic defenses do not have to rise to the level of exculpating a defendant. The issue is whether a defendant like Kueng is going to shift the blame to another codefendant, and Kueng will shift blame onto Chauvin during trial.

A review of Tou Thao's statement to the BCA shows similar competing interests. Thao goes as far as to point to all three officers as having blame, and maintains he was not fully aware what was going on behind him. At one point he compares his role in the events to that of a human traffic cone. Throughout his interview Thao maintains that he had to accept that the officers behind him were acting in good faith. All of these are examples of the finger pointing that was relied on in *Santiago* to find an abuse of discretion leading to a new trial.

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Chauvin has yet to make a statement, yet it seems likely he will parrot his partner who repeatedly mitigated and shifted blame during his BCA statement. Should Chauvin and Kueng be tried together the admission of Kueng's Recruit Officer Performance Evaluations, which were drafted by Chauvin, creates the potential for prejudice. Chauvin will be faced with his past opinions and directions given to Kueng – some written some merely spoken. Chauvin will be faced with past statements he has made about how to handle a subject being detained. Kueng does anticipate these written and unwritten statements being derogatory to the Chauvin's defense. This also creates a situation where either Kueng or Chauvin will be compelled to forego their Fifth Amendment privileges and forced to testify in their own defense to rebut the evidence not otherwise admissible. This factor does not favor joinder.

4. Interests of justice

The interests of justice do not favor joinder. This factor is not limited to concerns about the length of trial, concerns about the jury pool, or burdens on witnesses. In *Santiago*, the Supreme Court noted, "Because Santiago and Rodriguez had antagonistic defenses, the potential prejudice to Santiago favored severance. For the same reason, the interests of justice favored severance." *Santiago* at 446. As argued, the antagonistic defenses show that the interests of justice do not favor joining the four codefendants for trial.

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However, the length of separate trials does not warrant joinder. The length of separate trials can be considered in the interests of justice. *See Martin* at 100. The trials here may be weeks long, but typically as trial approaches the parties stipulate to certain evidence and witnesses who will testify and cumulative evidence will be eliminated. The concern is that if the case is improperly joined and pushed through a single jury trial, the convictions will be reversed. Whatever savings in judicial resources will be squandered. Following an appeal, witnesses will be more difficult to track down, their memory will not be as sharp, and retrials will be an even greater drain on resources. The interests of justice are served by having the defendants tried according to the Constitution and the Rules of Criminal Procedure, where they don't have to be concerned about antagonistic defenses, to make sure they are receiving a fair trial.

The state recycles their convenience of the witnesses' argument. (State's Motion for Joinder at 24). As noted in *Blanche*, this is not an appropriate factor to consider for joinder.

The potential for media exposure also does not warrant joinder. (State's Motion for Joinder at 24). There has been ongoing media coverage of the incident. Much of the initial coverage was from law enforcement and state officials proclaiming the officer's guilt, so the state has poisoned the pool. The state, having fouled the pool, cannot now say they need joinder to clear the water of

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their own waste. Issues relating to media exposure can be addressed during voir dire or through change of venue. *See State v. Curtis*, 905 N.W.2d 609, 615 (Minn. 2018)("When a defendant alleges that a potential juror has been biased by media exposure, the defendant must show actual prejudice: that the publicity influenced a specific juror."). Also, in a separate pleading, Kueng has moved for a change of venue, which would also help with media coverage of the trial. As part of the change of venue, initial surveys of the media coverage of the cases shows that Chauvin has been portrayed more negatively in the press than the other codefendants. Importantly, accurate reporting from the media may help defendants at later trials receive a fair trial. Any speculation about the nature and amount of media attention from a trial in the future is not an appropriate factor to grant a motion for joinder. The nature and amount of media coverage do not support joinder.

There will be issues if the state chooses to play Lane or Thao's statements in their case in chief in a joint trial based on *Bruton v. United States*, 391 U.S. 123 (1968)[7]. In considering a severance motion, Minnesota Rule of Criminal Procedure 17.03, Subd. 3(2), requires the Court to determine if the state intends to offer a codefendant's out of court statement in its case in chief when codefendants are

[7] Admission of codefendant's confession that implicated defendant at joint trial constituted prejudicial error even though trial court gave clear, concise and understandable instruction that confession could only be used against codefendant and must be disregarded with respect to defendant. *Bruton v. United States*, 391 U.S. 123 (1968).

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joined for trial. See Minn. R. Crim. Pro. 17.03, Subd. 3 (2). If so, there are three options: (A) The prosecutor must either agree to a joint trial where the statement is not offered. *See* Minn. R. Crim. P. 17.03, Subd. 3(2)(a); (B) A joint trial where the statement is received only after all reference to the defendant have been deleted. *See* Minn. R. Crim. Pro. 17.03, Subd. 3(2)(b); or (C) agree to defendant's severance motion. *See* Minn. R. Crim. Pro. 17.03, Subd. 3(2)(c). The state has apparently not considered this issue and does not address the *Bruton* issue in their brief.

Finally, co-defendant Thao has filed motions seeking to have an anonymous jury. He has also requested that the jury be sequestered during the trial. Kueng does not join in those motions. The interests of justice are not served if Kueng is forced to have an anonymous, sequestered jury when he does not agree to it.

The state concludes by arguing that joinder would serve the collective interests of the people. (State's Motion for Joinder at 24). There is obviously a strong community interest in the case. The people and the community do not have a right to fair trial guaranteed by the constitutions of the State of Minnesota and the United States. The defendants do. *See* Mn. Const. art. I §6, U.S. Const. amend VI. The community is best served by open and fair trials so that the community has confidence in the results, rather than having the cases railroaded through the courts. And again, the state seems to want to treat all four officers the

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same as a single unit. The officers had different roles in the incident and should not be treated as if they are all the same.

CONCLUSION

The defendant would respectfully request that the Court deny the State's motion for joinder. None of the four factors in Rule 17.03 support joinder. The nature of the charges does not show that the four defendants acted in concert with each other. The impact on the victims does not favor joinder. There is prejudice to the defendants because they have antagonistic defenses. Finally, the interests of justice do not favor joinder.

Respectfully submitted,

Dated: September 8, 2020

/s/ Thomas C. Plunkett

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