

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Court File No. 27-CR-20-12646

State of Minnesota,

Plaintiff,

vs.

**MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS**

Derek Michael Chauvin,

Defendant.

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

INTRODUCTION

Defendant Derek Michael Chauvin, through his attorney Eric J. Nelson, Halberg Criminal Defense, has moved this Court to dismiss all three counts of the Amended Complaint against him for lack of probable cause, pursuant to Minn. R. Crim. P. 11.04. Based on the facts available to the parties, the record, and the laws of Minnesota, as demonstrated *infra*, there is insufficient probable cause to sustain the charges against the Defendant. Counts one through three of the Amended Complaint must, therefore, be dismissed.

FACTS

Unless otherwise indicated, the following facts are derived from Officer Thomas Lane's body-worn camera ("BWC") footage of the incident leading to the charges in this matter. (Ex. 1). On May 25, 2020 at approximately 8:08 p.m., Minneapolis Police Department ("MPD") Officers Thomas Lane and J. Alexander Kueng responded to a 911 call from Cup Foods, a business located at the intersection of Chicago Avenue and 38th Street in Minneapolis. The caller alleged that a man had made a purchase using a counterfeit \$20 bill and appeared under the influence of a substance.

When Officers Kueng and Lane arrived, store personnel directed the officers to a vehicle parked across 38th Street from the store and indicated that the man who had passed the bill was inside the vehicle. The officers approached the vehicle, where the man, later identified as George Floyd, was sitting in the driver's seat. Two other individuals were in the vehicle with Mr. Floyd: Shawanda Hill and Morris Hall.

While approaching vehicle, they observed Mr. Floyd moving furtively. In light of the furtive movements, Officers Lane and Kueng ordered Mr. Floyd to place his hands on the vehicle's steering wheel, which he refused to do until Officer Lane drew his sidearm. Mr. Floyd began to cry. When Mr. Floyd finally placed his hands on the steering wheel, Officer Lane immediately holstered his weapon and ordered Mr. Floyd to exit the vehicle. Mr. Floyd physically resisted exiting the car until the officers forcibly removed him. When officers initially approached Mr. Floyd, a white object was visible in Mr. Floyd's mouth. (Ex. 9). At one point, Mr. Floyd turned away from officers, and when he faced them again, the white object was no longer visible. (*Id.*). Outside the vehicle, Mr. Floyd continued to struggle and actively resist the officers as they attempted to handcuff him.¹ Officers noted that he was acting erratically and repeatedly inquired whether Mr. Floyd was drunk or "on something." (*See, e.g.* Ex. 2, Kueng BWC at 6:13 *et seq.*).

¹ In May, 2019, Mr. Floyd was stopped as part of a narcotics investigation. At the time he was stopped, as here, Mr. Floyd was acting nervously, talking, moving around and refusing to show his hands. As here, Mr. Floyd was agitated and would not listen to officers' commands. (Ex. 21 at Bates 6530). Similarly, he "had put something in his mouth and was attempting to eat them." (*Id.*). As in the present case, officers had to physically remove Mr. Floyd from the car, and as they did, he continued talking and began to cry. (*Id.*). Mr. Floyd had several Oxycodin (an opioid) pills in his possession. (*Id.*). Cocaine (a stimulant) was also located in the vehicle. (*Id.*). Police had Mr. Floyd transported to a hospital, where he admitted that he had ingested "oxycodone or percocet (obtained off street)... while under arrest." (Ex. 22 at Bates 6910). Clearly, Mr. Floyd had a *modus operandi* in the way he acted when approached by police officers while attempting to conceal narcotics.

Officers also noted that Mr. Floyd had foam coming from his mouth. (*Id.* at 6:20). As an explanation, Mr. Floyd appears to say, “I was just hooping earlier.” (*Id.* at 6:24).

When questioned by police later, both of the passengers in Mr. Floyd’s vehicle asserted their belief that Mr. Floyd was under the influence of narcotics. Ms. Hill told investigators that Mr. Floyd was “probably on some pills or something.” (Ex. 4, Hill Int. at Bates 023033). On the day after the Cup Foods incident, Mr. Hall fled the State. (*See* Ex. 5, Hall Int., *generally*). Ultimately, Minnesota BCA agents had to travel to Texas, where Mr. Hall had been arrested, and interview him at a Texas Rangers station. (*Id.*).

At the time officers approached George Floyd in the vehicle, there were outstanding felony warrants in the State of Minnesota for Mr. Hall, including one for being a felon in possession of a firearm. (*Id.*). When questioned at the scene, Mr. Hall provided officers with a false name and another person’s identification. (*Id.* at Bates 27351). However, because of George Floyd’s resistance, officers were unable to question Mr. Hall, search his person or his backpack. In fact, surveillance video from the nearby Dragon Wok restaurant shows that Mr. Hall appeared to use Mr. Floyd’s resistance as a distraction to destroy evidence. The video demonstrates that Mr. Hall watched through the windows of Mr. Floyd’s vehicle to ensure that he was not being observed by police. (Ex. 10 at 20:39:00, *et seq.*). Then, using Ms. Hill’s body and the vehicle to shield himself from view, Mr. Hall furtively dropped something into the sewer drain on the street. (*Id.*). Officer Lane did not feel that he could search the vehicle himself with two other subjects present while Officer Kueng monitored Mr. Floyd, so the officers made the decision to secure Mr. Floyd in their squad before continuing their investigation. (Ex. 11 at Bates 27312). Because of Mr. Floyd’s resistance, however, Mr. Hall was able to dispose of evidence and avoid being searched or arrested for his outstanding warrants.

When finally questioned in Texas, Mr. Hall, who had spent the entire day with Mr. Floyd up until and including the incident at Cup Foods, told investigators that he knew Mr. Floyd to use pills and that Mr. Floyd had stated his intention to do so on the day of his death. (Ex. 5, Hall Int. at Bates 27379). Hall told investigators that Mr. Floyd had a drug addiction. (*Id.*). Hall believed that Mr. Floyd had recently used a pill that Mr. Hall thought to be a combination of Adderall and “whatever they put in the ecstasy pill.” (*Id.* at 27380). Mr. Hall suspected that Mr. Floyd had ingested drugs just prior to the May 25, 2020, incident because Mr. Floyd had been acting normal all day but, after returning to the vehicle from Cup Foods, Mr. Floyd fell asleep in the driver’s seat of the car. (*Id.* at 27379). According to Mr. Hall, “it was so fast I look at him and I’m like all of sudden you know he’s just sleeping, he was sleeping.” (*Id.*; see Ex. 4. at Bates 23032-34 (Floyd “just nodded off”)).

Mr. Floyd continued to struggle, both actively and passively resisting officers’ attempts to effect his arrest as they walked Mr. Floyd across the street to their squad car. Upon arriving at the squad, Mr. Floyd increased his active resistance. A struggle ensued when Officers Lane and Kueng attempted to place Mr. Floyd, who was well over six feet tall, muscular, and weighed over two hundred pounds, into the back seat of their squad.

It was during this struggle that MPD Officers Tou Thao and Derek Chauvin, the Defendant herein, arrived on scene as backup for Officers Lane and Kueng and to assist with effecting the arrest of Mr. Floyd. Even with the assistance of Officers Thao and Chauvin, Mr. Floyd was able to resist, kicking and forcing himself out of the squad whenever officers managed to get him into the back seat. Ultimately, Officers Chauvin and Kueng were able to place Mr. Floyd in a prone position on the street next to the squad. This resulted in Officer Chauvin being positioned closest

to Mr. Floyd's shoulders and Officer Kueng near Mr. Floyd's waist, while Officer attempted to control Mr. Floyd's legs. (*See* Ex. 3, Thao BWC at 1:54, *et seq.*).

Mr. Floyd continued to struggle on the ground; Officer Chauvin restrained his shoulder and neck area using a knee and one of Mr. Floyd's hands with his own. Officer Kueng restrained Mr. Floyd's arms, and Officer Lane restrained Mr. Floyd's legs, effecting the first stage of MPD's Maximal Restraint Technique ("MRT"). (*Id.*). Maximal Restraint Technique is used "in situations where handcuffed subjects are combative and still pose a threat to themselves, officers or others, or could cause significant damage to property if not properly restrained." MPD Policy 5-316(IV)(A)(1).² A hobble restraint device ("hobble") is typically required to properly effect the MRT. *Id.*

Officer Chauvin asked Officers Lane and Kueng if they had a hobble, and receiving an affirmative response, then asked Officer Thao to retrieve the hobble from the back of their squad. (Thao BWC at 2:45, *et seq.*). Officer Chauvin asked if Officers Lane and Kueng had called EMS, and Officer Lane responded to him that EMS was "on their way." (*Id.* at 3:50). Officer Chauvin then asked Officers Lane and Kueng, "Do you want to hobble [Mr. Floyd] at this point, then?" (*Id.* at 3:52). Because they believed EMS arrival was imminent, the officers decided against using a hobble, which would have significantly delayed the transfer of Mr. Floyd into the ambulance and also have required an MPD sergeant to respond to the scene. Several seconds later, Officer Thao asked Officer Lane if had requested a "code 3" (i.e., lights and sirens activated) response from EMS. (*Id.* at 4:38). When Lane responded in the negative, Officer Thao immediately upgraded the EMS response to "code 3." The officers continued to restrain Mr. Floyd until EMS arrived. The

² Available from http://www2.minneapolis.gov/police/policy/mpdpolicy_5-300_5-300, last accessed Aug. 27, 2020.

responding ambulance arrived at 8:27 p.m. Emergency personnel placed Mr. Floyd on a stretcher and transported him to Hennepin County Medical Center, where he was later pronounced dead.

In the aftermath of the incident, Minneapolis Police Chief Medaria Arradondo met with several “local faith leaders... from the African American community,” and after conferring with them, made the decision to terminate Officer Chauvin from the Minneapolis Police Force on May 26, 2020, less than 24 hours after the incident. (Ex. 14 at Bates 8816-17). Mr. Chauvin was subsequently charged, on May 29, 2020, with one count of Third Degree Murder—Perpetrating Eminently Dangerous Act and Evincing Depraved Mind, in violation of Minn. Stat. § 609.195(a), and one count of Second Degree Manslaughter—Culpable Negligence Creating Unreasonable Risk, in violation of Minn. Stat. § 609.205, subdivision 1.

In a June 1, 2020, interview at the Attorney General’s Office, in the presence of Assistant Attorney General Frank, Hennepin County Medical Examiner Dr. Andrew Baker informally shared the findings of his May 26, 2020, autopsy of George Floyd. (*See* Ex. 6, Baker Int. at Bates 22935-36). According to Dr. Baker, he found

No petechiae in eyelids. No bruising in neck on any muscles or injuries to structures.... No bruises on back, or evidence of blunt trauma to back.... Heart is at upper limit of size, and [with] most cases of untreated hypertension can put you at risk for death—[You] get to death quicker because it needs more oxygen [which] ***certain intoxicants can exacerbate***.... Specimens for lab testing were drawn at HCMC—this is better than at autopsy, [because it] more accurately reflects actual [levels] at death.

Fentanyl at 11 ng/ml—this is higher than chronic pain patients. If [Mr. Floyd] were found dead at home alone and no other apparent causes, this could be acceptable to call an OD. ***Deaths have been certified [with] levels of 3[ng/ml]....***
Meth[amphetamine] 19 ng/ml—this is relatively low, but meth’s bad for your heart....

From videos I have seen it appears like his knee is on the side of his neck, not where the structures are.

(*Id.*) (emphasis added). Mr. Floyd’s lungs were two to three times their normal weight. (*Id.* at Bates 22943). In spite of the Medical Examiner’s findings, the State filed an Amended Complaint on June 3, 2020, adding one count of Second Degree Murder—Unintentional—While Committing a Felony, in violation of Minn. Stat. § 609.19, subdivision 2(1). The Amended Complaint alleged that Mr. Chauvin had perpetrated a third degree assault upon Mr. Floyd, resulting in Mr. Floyd’s death.

The Medical Examiner’s report released on June 4, 2020, noted that Mr. Floyd had cannabinoids in his system at the time of death, in addition to fentanyl and methamphetamine. It also revealed that Mr. Floyd had, as he told officers, recently been ill with COVID-19 and was still positive for the disease at the time of his death. The autopsy further revealed that Mr. Floyd had arteriosclerotic and hypertensive heart disease, hypertension, and sickle cell trait. According to the Hennepin County Medical Examiner, the cause of Mr. Floyd’s death was “cardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression.”

ARGUMENT

THERE IS INSUFFICIENT PROBABLE CAUSE TO BELIEVE THAT THE DEFENDANT COMMITTED THE OFFENSES CHARGED IN THE AMENDED COMPLAINT.

In Minnesota, every criminal complaint must set forth “the facts establishing probable cause to believe that the charged offense has been committed.” Minn. R. Crim. P. 2.01. Courts should dismiss any complaint that lacks such foundational facts. *See State v. Rud*, 359 N.W.2d 573, 579 (Minn. 1984) (“The purpose of allowing a defendant to challenge probable cause at the omnibus hearing is, as [the Court] stated in *Florence*, to ‘protect a defendant who is unjustly or improperly charged from being compelled to stand trial.’” (citing *State v. Florence*, 239 N.W.2d

892, 900 (1976)). On a defendant’s motion challenging probable cause, “[t]he court must determine whether probable cause exists to believe that an offense has been committed and that the defendant committed it.” Minn. R. Civ. P. 11.04, subd. 1(a).

In so doing, the Court applies a stricter legal standard of what constitutes sufficient probable cause than does a law enforcement officer who has made the decision to arrest a defendant — and the Court must do so without regard for the arresting officer’s probable cause determination. *See Florence*, 239 N.W.2d at 902 (“Even assuming the correctness of the decision that probable cause existed to warrant arrest, that decision does not of itself determine the proper resolution of a Rule [11.04] probable cause motion.”). The Court must examine the entire record, including evidence inadmissible at trial, such as police reports and hearsay, to make its determination. *Welfare of E.Y.W.*, 496 N.W.2d 847, 850 (Minn. App. 1993), *review denied* (Minn. Apr. 20, 1993).

“The test of probable cause is whether the evidence worthy of consideration . . . brings the charge within a reasonable probability.” *State v. Wood*, 845 N.W.2d 239, 243 (Minn. App. 2014) (citing *Florence*, 239 N.W.2d at 896), *review denied* (Minn. Jun. 17, 2014). Thus, the question before the Court is: “Given the facts disclosed by the record, is it fair and reasonable, applying Rule [11.04] as here interpreted, to require the defendant to stand trial?” *Florence*, 239 N.W.2d at 902. The answer, in light of available facts, is no—it is not reasonable to require Mr. Chauvin to stand trial for the crimes with which he has been charged.

A. Count I of the Amended Complaint, Second Degree Unintentional Murder, must be dismissed for lack of probable cause because Derek Chauvin did not commit an assault against George Floyd.

Mr. Chauvin has been charged with Second Degree Murder—Unintentional—While Committing a Felony, in violation of Minn. Stat. § 609.19, subdivision 2(1), *i.e.* second degree, unintentional felony murder. Minnesota law mandates that, to be guilty of unintentional felony

murder, the victim's death must have resulted from the defendant's commission of a felony. *Id.* Here, the State alleges that Mr. Floyd's death was the result of a Third Degree Assault, in violation of Minn. Stat. § 609.223, subd. 1, that Mr. Chauvin perpetrated against Mr. Floyd. To sustain the felony murder charge, then, the State must offer evidence showing 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). However, the State has offered no evidence to support the intent element of third-degree assault. Because there is insufficient probable cause to support assault, the second-degree felony murder charge cannot be sustained.

“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)). In the present case, when Mr. Chauvin arrived on the scene in front of Cup Foods, he encountered Officers Lane and Kueng struggling to effect the arrest of George Floyd, who was actively resisting arrest by refusing to get into the back seat of their squad and forcibly removing himself from the vehicle whenever the officers managed to get him inside again.

The Amended Complaint's probable cause statement describes the officers' struggle with Mr. Floyd, noting that “officers made several attempts to get Mr. Floyd into the back seat of their squad car.” The probable cause statement goes on to say that Mr. Chauvin “placed his left knee in the area of Mr. Floyd's head and neck.” At no point does the Amended Complaint allege that Mr. Chauvin possessed the intent to inflict bodily harm upon Mr. Floyd. Frankly, the facts demonstrate the exact opposite. Mr. Floyd was struggling in and around the squad at a busy Minneapolis

intersection. He was handcuffed and acting erratically. Continued struggle posed a risk of injury to Mr. Floyd and, potentially, to officers. The decision to use MRT allowed officers to restrain Mr. Floyd without injury until EMS arrived on scene. Mr. Chauvin, who arrived at the scene as officers were already struggling with Mr. Floyd, checked to ensure that EMS had been called. In the belief that EMS arrival was imminent, he asked if other officers felt a hobble was necessary. The decision not to use a hobble would permit officers to transfer Mr. Floyd into the ambulance more quickly. Mr. Chauvin demonstrated a concern for Mr. Floyd's well-being—not an intent to inflict harm.

The Medical Examiner found no bruising on Mr. Floyd's neck or on any neck muscles or any injury to neck structures. There was no bruising on Mr. Floyd's back or evidence of blunt trauma to his back. If Mr. Chauvin had intended to inflict harm to Mr. Floyd's back and neck with his knee, surely there would be evidence of bruising. But clearly, Mr. Chauvin was cautious about the amount of pressure he used to restrain Mr. Floyd—cautious enough to prevent bruising. Video evidence shows Mr. Chauvin was calm and professional throughout the application of MRT. (*See* Exs. 1-3, generally). The facts of record by no means demonstrate an intent on the part of Mr. Chauvin to inflict bodily harm upon George Floyd. The intent to inflict harm, clearly, was not present in Mr. Chauvin's mind on the night of May 25, 2020—nor, crucially, is evidence indicating an intent to inflict harm present in the Amended Complaint.

As noted, *supra*, every criminal complaint must set forth “the facts establishing probable cause to believe that the charged offense has been committed.” Minn. R. Crim. P. 2.01. A court should dismiss any complaint that lacks such foundational facts. *Rud*, 359 N.W.2d 573, 579 (Minn. 1984). The Amended Complaint does not set forth facts establishing that Mr. Chauvin intended to assault Mr. Floyd. Thus, probable cause does not exist to sustain the unintentional felony murder charge. Count I must be dismissed.

B. Count II of the Amended Complaint, Third Degree, Depraved Mind Murder, must be dismissed for lack of probable cause.

Count II of the Amended Complaint charges Mr. Chauvin with Third Degree Murder—Perpetrating Eminently Dangerous Act and Evincing Depraved Mind, in violation of Minn. Stat. § 609.195(a). Under Minnesota law, however, “[d]epraved mind murder cannot occur where the defendant’s actions were focused on a specific person.” *State v. Barnes*, 713 N.W.2d 325, 331 (Minn. 2006) (citing *State v. Wahlberg*, 296 N.W.2d 408, 417 (Minn. 1980)); see 10 Minn. Prac., Jury Instr. Guides—Criminal, 11.38 (6th ed.) (“the defendant’s intentional act, which caused the death... *may not be directed at the particular person whose death occurred*”) (emphasis added).

As the Minnesota Supreme Court has explained, “We have made clear that the statute covers only acts committed without special regard to the effect on any particular person or persons.” *State v. Zumberge*, 888 N.W.2d 688, 698 (Minn. 2017). “[T]he act must be committed without a special design upon the particular person or persons with whose murder the accused is charged.” *Id.* (appellant’s claims that he shot “toward” not “at” the decedent precludes a third-degree murder instruction) (citation omitted). Third degree murder is reserved to cover cases where the act was “reckless or wanton,” such as firing a gun into a bus or driving a vehicle into a crowd. *Wahlberg*, 296 N.W.2d at 417. That is simply not the case here.

In its Amended Complaint, the State makes no attempt to allege facts that Mr. Chauvin actions were directed generally and not specifically toward George Floyd. The probable cause statement only alleges that “The defendant placed his left knee in the area of Mr. Floyd’s head and neck” and remained in that position. As alleged by the State, Mr. Chauvin’s acts were neither reckless, not wanton.

Under these facts, Mr. Chauvin’s actions were directed toward no one but Mr. Floyd and could not have resulted in harm to any person other than George Floyd. See *State v. Stewart*, 276

N.W.2d 51 (Minn. 1979 (where victim was shot twice, and no bullets fired at anything or anyone else, and no other person in the vicinity was concerned for their own safety, trial court did not err by refusing to submit third degree murder to the jury). There is no evidence Mr. Chauvin directed his actions toward anyone else. Moreover, there is no evidence that anyone else in the vicinity of the incident was concerned for their own safety, as demonstrated by the crowd gathered on the sidewalk and on the street. The State's facts simply do not sustain the charge of third degree murder.

It is clear from the Probable Cause statement that the Defendant's actions were directed toward no person other than "the particular person whose death occurred." *Id.*; (see Amended Complaint at 3-4). Because the facts contained in the Complaint do not establish "probable cause to believe that the charged offense has been committed," Count II must be dismissed pursuant to *Florence, Rud*, and Minn. R. Crim. P. 2.01.

C. Because the Amended Complaint demonstrates neither gross negligence nor subjective recklessness, Count III must be dismissed for lack of probable cause.

Under Minnesota law, to be guilty of culpable negligence manslaughter, the defendant must have 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.*).

The State is, therefore, required to put forth facts that demonstrate 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). The objective gross negligence component “is satisfied by demonstrating that the act was ‘a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.’” *Id.* The subjective recklessness component requires proof of the “actor’s state of mind,” which is typically established through circumstantial evidence, “by inference from words or acts of the actor both before and after the incident.” *Id.* (quoting *State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000)). The State must also offer facts tending to demonstrate that Mr. Chauvin intended “the natural and probable consequences of [his] actions.” *Id.* at 507 (quoting *Johnson*, 616 N.W.2d at 726).

To begin, the State has not offered evidence demonstrating objective gross negligence on the part of the Mr. Chauvin. Again, at the time of the incident, the Defendant was a peace officer. A peace officer is “charged with the prevention and detection of crime and the enforcement of the general criminal laws of the state” and “has the full power of arrest.” Minn. Stat. § 626.84, subd. 1(c)(1). A peace officer's duties “include exercises of professional judgment that are legitimately calculated to protect the health, safety, and general welfare of the public.” *In re Claim for Benefits by Sloan*, 729 N.W.2d 626, 629–30 (Minn. App. 2007). “[T]he duties of a police officer in emergency situations require the exercise of significant independent judgment and discretion.” *Id.* at 630. “[P]olice are afforded a wide degree of discretion precisely because a more stringent standard could inhibit action.” *State v. Ivy*, 873 N.W.2d 362, 368 (Minn. App. 2015). Such discretion often comes into play when an officer must gauge how much force to use in order to effect an arrest. The amount of force authorized is dependent on the subject being arrested, the circumstances of the arrest, and the ever-developing fact pattern of any arrest scenario.

Here, at the time of the Cup Foods incident, Mr. Chauvin was acting within his duties to execute a legitimate legal process—assisting other officers with effecting their arrest of George

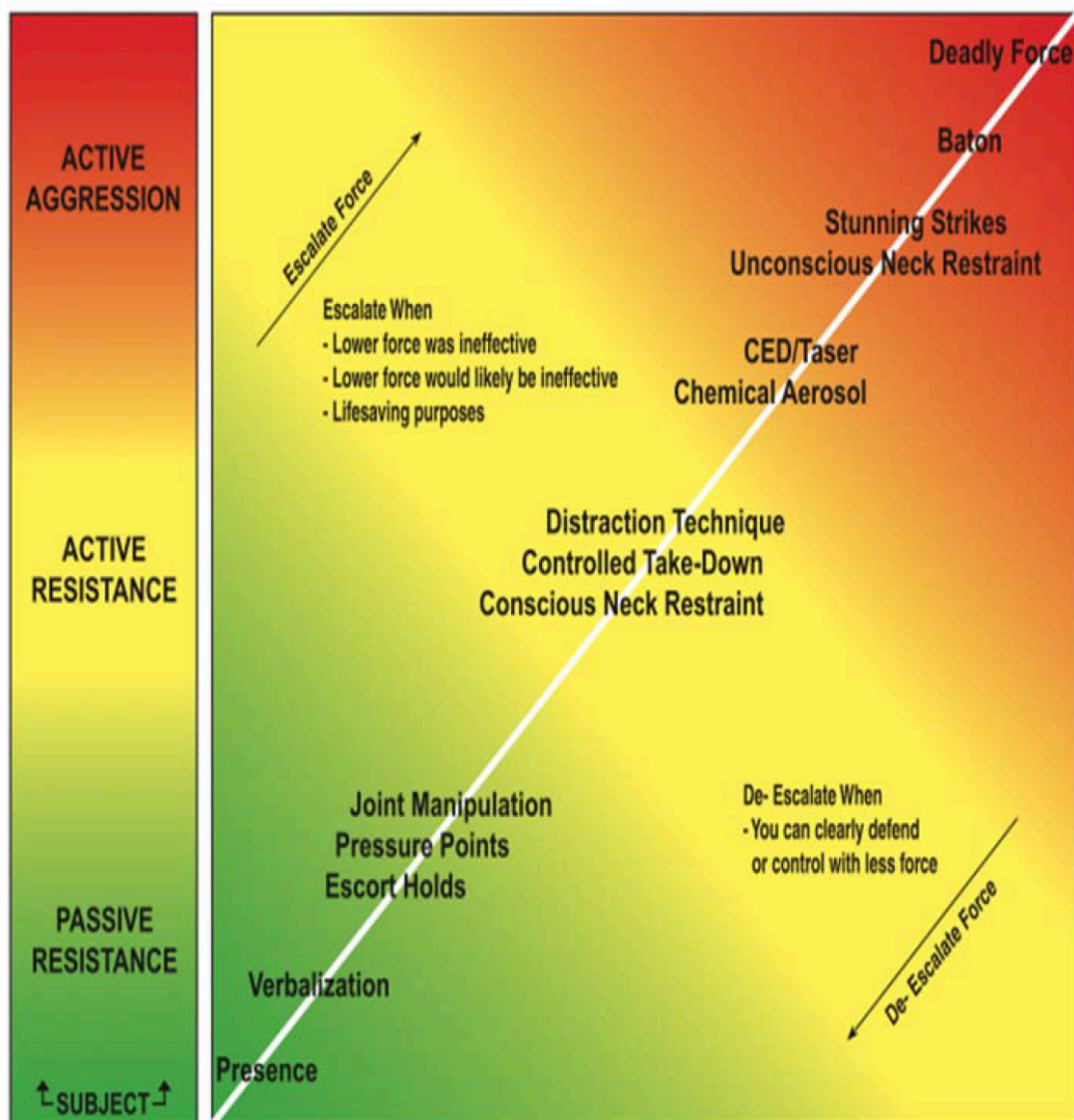
Floyd. When Mr. Chauvin arrived on scene, Mr. Floyd was obstructing the legal process of his arrest through active resistance. (*See* Lane BWC and Kueng BWC, generally). If a suspect “forcibly resists arrest, [an] officer may use all necessary and lawful means to make the arrest.” Minn. Stat. § 629.33. Minnesota law authorized Mr. Chauvin and the other officers to use “reasonable force... upon or toward the person of another without the other’s consent... in effecting a lawful arrest.” Minn. Stat. § 609.06, subd. 1(1)(a). When a suspect is resisting, officers are permitted to escalate their use of force, short of deadly force, as necessary. *Id.*; *see State v. Wick*, 331 N.W.2d 769, 771 (Minn. 1983); *Hill v. Scott*, 349 F.3d 1068, 1074 (8th Cir.2003) (rejecting appellant's claim that he had a right to resist arrest to defend himself from use of excessive force where officers used force in response to appellant's resistance).

After all other means of restraining Mr. Floyd had failed, the officers made the decision to implement MRT, which is authorized under MPD policy “in situations where handcuffed subjects are combative and still pose a threat to themselves, officers or others, or could cause significant damage to property if not properly restrained.” MPD Policy 5-316(IV)(A)(1); (*see* Ex. 16 at Bates 11225). All officers receive training on MPD policy (*see* Ex. 15) and authorized use of force (Ex. 16). They are trained how much force is permitted under Minnesota law and MPD policy in a given situation and when such force needs to be escalated (*Id.*).

Mr. Floyd was handcuffed and actively struggling into and out of a squad car at a busy intersection. He was in danger of falling and hitting his head on the sidewalk, being struck by an oncoming vehicle, or in his struggles, injuring himself against the squad car. In attempting to place the struggling George Floyd into the back seat of the squad, an officer could have been injured. The escalation of force to MRT was clearly justified by the circumstances, Minnesota law, and MPD policy. The department’s “Defense & Control – Response Training Guide” (Ex. 7) explains

to officers, using a color-coded continuum, when to escalate and when to de-escalate force in a given situation. According to the guide, force should be escalated when lower levels of force are ineffective, when lower levels of force would likely be ineffective, and for lifesaving purposes. (*See id.*). Here, all three circumstances were present. Officers had tried to reason with Mr. Floyd, had offered concessions such as rolling down windows and staying with him, in order to effect his arrest. But Mr. Floyd had consistently failed to comply with officers' requests and commands, as he had in a previous May 2019 arrest, from the moment the incident began. Mr. Floyd had been struggling with officers since the initiation of the encounter. By the time Mr. Chauvin arrived on scene, Mr. Floyd was actively resisting arrest, endangering himself and officers.

MPD Defense & Control - Response Training Guide



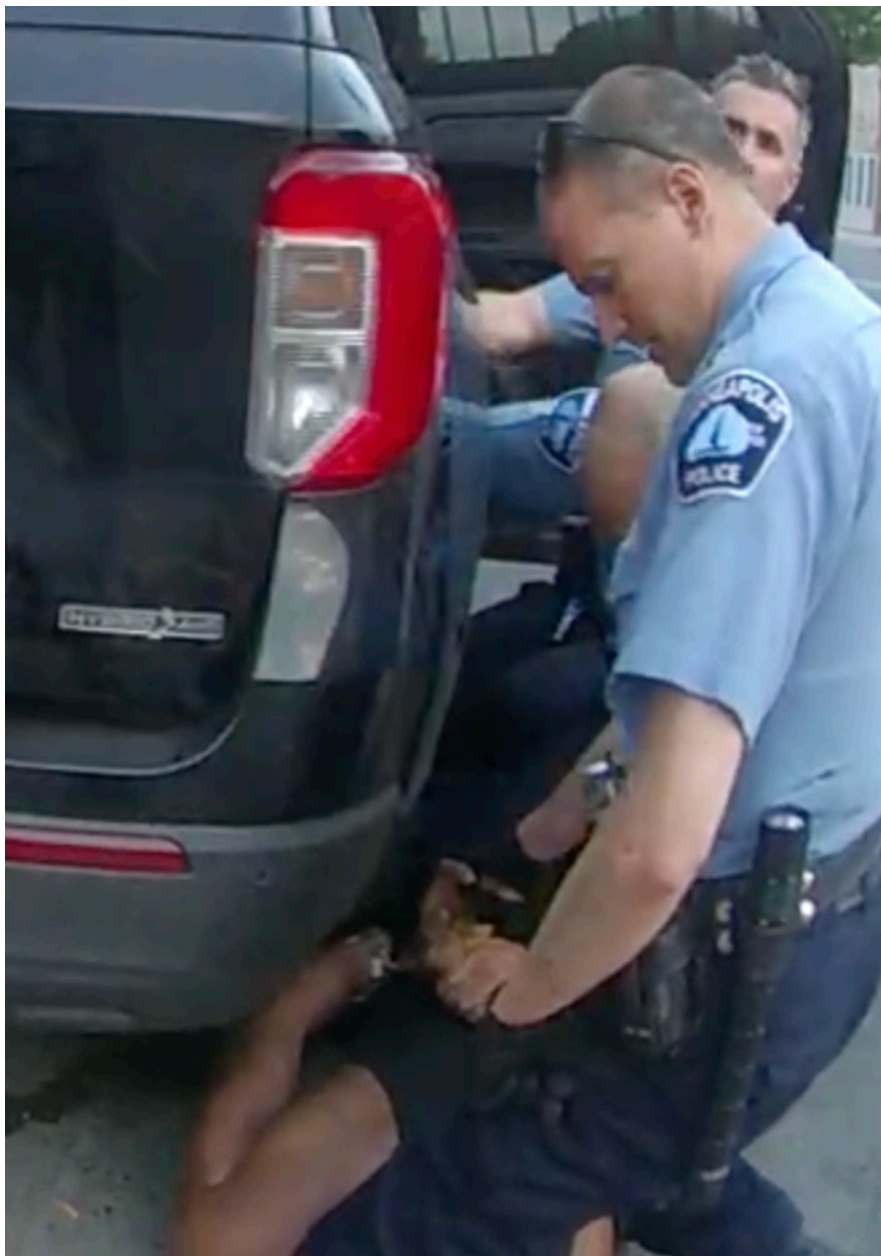
(Ex. 7). Officers' attempts to use verbalization, joint manipulation and escort holds on Mr. Floyd had all failed. Mr. Floyd's active resistance required an escalation of force.

Under MPD's use of force policy at the time, when a subject is actively resisting, officers are trained to use controlled take-downs and conscious neck restraints to subdue the subject. (See Ex. 13). When a suspect is handcuffed, however, MPD policy, as noted *supra*, permits use of MRT to restrain an actively resisting subject who is endangering himself. The effective use of MRT

requires multiple officers: one restrains the neck and shoulders, one restrains the arms, and at least one restrains the legs. After reviewing video footage of the Cup Foods incident, Chief Arradondo praised Lane's and Kueng's implementation of MRT, saying they "were in a position that would... seem absolutely in concert with what we would train." (Ex. 14 at Bates 8818). Conversely, Arradondo claimed that he hadn't seen "anything that says you place your knee on someone's neck when they're facedown, handcuffed." (*Id.*). Minneapolis Police Department training materials, however, contradict the Chief's statements. An illustration from 2018 MPD training materials clearly shows that officers are trained to place a knee on a subject's neck and shoulders when implementing MRT:



(Ex. 8 at Bates 2596). Mr. Chauvin and other officers executed the MRT takedown and holds as MPD policy allows and as Mr. Chauvin was trained:



(Ex. 3, Thao BWC at 6:55). Similarly, a 2019 MPD training video, which was used during an in-service to teach defensive tactics to MPD officers, demonstrates a maneuver called “take down to neck restraint” in which an officer completes the maneuver by placing his knee on a subject’s neck and shoulder (Ex. 13). A neck restraint is clearly authorized by MPD policy when a subject is actively resisting (Ex. 7), and officers are trained to use their knees to effect such restraints after a take down and when implementing MRT. (See Ex. 8 at Bates 2596; Ex. 13, *generally*).

Mr. Chauvin acted according to MPD policy, his training, and within his duties as a licensed peace officer of the State of Minnesota. If one compares the Defensive tactics training video with the training material photo, and the positioning of Mr. Chauvin, *supra*, it is clear that Mr. Chauvin did exactly as he was trained to do. The State has offered no evidence beyond its bald assertions to indicate otherwise. There was simply no “gross deviation from the standard of care” on the part of Mr. Chauvin. Mr. Chauvin, therefore, was not objectively, grossly negligent in his interactions with Mr. Floyd.

Nor did Mr. Chauvin evince a subjective recklessness—an actual conscious disregard of the risk created by [his] conduct.” *Frost*, 342 N.W.2d at 320. Subjective recklessness requires proof of the “actor’s state of mind,” which is typically established through circumstantial evidence, “by inference from words or acts of the actor both before and after the incident.” *Johnson*, 616 N.W.2d 720 at 726. First, Mr. Chauvin’s conduct, as shown *supra*, was dictated by Minnesota law, MPD policy, his training, and Mr. Floyd’s active resistance to officers’ attempts to arrest him. Thus, any risk created by Mr. Chauvin’s conduct lies largely with those who train MPD officers and those who approve such training.

Second, there is no evidence that Mr. Chauvin actually and consciously disregarded the risks associated with MRT. As noted above, the facts demonstrate the exact opposite. Mr. Floyd was struggling in and around the squad at a busy Minneapolis intersection. He was handcuffed and acting erratically. Continued struggle posed a risk of injury to Mr. Floyd and, potentially, to officers. The decision to use MRT allowed officers to restrain Mr. Floyd without injury until EMS arrived on scene. Mr. Chauvin, who arrived at the scene as officers were already struggling with Mr. Floyd, checked to ensure that EMS had been called. In the belief that EMS arrival was imminent, he asked if other officers felt a hobble was necessary. Officers decided that a hobble

was unnecessary and would delay the transfer of Mr. Floyd to the ambulance. Throughout his interaction with Mr. Floyd, Mr. Chauvin exuded a calm and professional demeanor. Further, he demonstrated a concern for Mr. Floyd's well-being and an awareness of the potential risks associated with MRT.

Again, the Medical Examiner found no bruising on Mr. Floyd's neck nor on any muscles nor any injury to neck structures. There was no bruising on Mr. Floyd's back or evidence of blunt trauma to his back. Mr. Chauvin was clearly being cautious about the amount of pressure he used to restrain Mr. Floyd—cautious enough to prevent bruising. A BCA agent's review of bystander video notes that Mr. Floyd raised his head several times while he was prone on the ground. (Ex. 12 at Bates 632-33). If Mr. Chauvin's knee had been on the structure of Mr. Floyd's neck, he would not have been able to lift his head. But, as Dr. Baker noted, *Mr. Chauvin appeared to have his knee only on the side of Mr. Floyd's neck* (Ex. 6 at Bates 22936)—as he was trained.

Ultimately, the State has not offered evidence that Mr. Chauvin *actually and consciously* disregarded the risks posed by his actions such that they could be described as subjectively reckless. Nor, for the same reason, can the State show that Mr. Chauvin *intended* “the natural and probable consequences of [his] actions.” *Johnson*, 616 N.W.2d at 726. Mr. Floyd's death was neither a natural nor a probable consequence of Mr. Chauvin's use of MPD-authorized restraint techniques, and Mr. Chauvin certainly did not intend such a consequence.

The facts alleged by the State in no way show that Mr. Chauvin acted (1) in an objectively, grossly negligent manner *and* (2) in a subjectively reckless manner *and* (3) that Mr. Chauvin intended the natural and probable consequence of his actions. All three elements must be present to sustain the charge. The Amended Complaint simply does not contain “facts establishing probable cause to believe that” Mr. Chauvin committed unintentional manslaughter. Because the

Amended Complaint lacks the necessary foundational facts for the charge, Count III must be dismissed. *Rud*, 359 N.W.2d 573, 579 (Minn. 1984).

D. The State has not offered sufficient evidence demonstrating that Derek Chauvin caused the death of George Floyd.

Notwithstanding the foregoing challenges to the State's charges against Mr. Chauvin, all three counts of the Amended Complaint required the State to allege and produce sufficient evidence that Mr. Chauvin "caused" the death of George Floyd. *See* Minn. Stat. §§ 609.19, subd. 2(1), 609.195(a), and 609.205(1). However, the evidence on which the State based its charges does not establish probable cause to believe that Mr. Chauvin caused the death of Mr. Floyd.

In a homicide prosecution, the State must show that "the act of defendant [was] the proximate cause of the death of [the victim] without the intervention of an efficient independent force in which defendant did not participate or which he could not reasonably have foreseen." *State v. Schaub*, 231 Minn. 512, 517, 44 N.W.2d 61, 64 (1950). Causation in a homicide case is established by proof that the defendant's conduct was a "**substantial** causal factor" in bringing about the victim's death. *State v. Hofer*, 614 N.W.2d 734, 737 (Minn. App. 2000), *review denied* (Minn. Aug. 15, 2000); *see State v. Gatson*, 801 N.W.2d 134, 146 (Minn. 2011) (explaining that when "cause" is used in homicide statute, prosecution must prove that defendant's acts were a "substantial causal factor" resulting in death); *State v. Olson*, 435 N.W.2d 530, 531, 534 (Minn. 1989) ("To prove defendant guilty of [second-degree murder and first-degree manslaughter], the state must prove the defendant's acts were a 'substantial causal factor' in causing the [victim's] death"). In this case, Mr. Chauvin was not the proximate cause of Mr. Floyd's death, because an "independent force" as *Schaub* describes, in which Mr. Chauvin "did not participate" and which "he could not reasonably have foreseen" intervened: Fentanyl.

By May 25, 2020, Mr. Floyd had been addicted to opiates for years.³ (*See* Ex. 22 at Bates 6910). It is clear from the evidence that Mr. Floyd was under the influence of narcotics when he encountered the officers and that he most likely died from an opioid overdose. As the Hennepin County Medical Examiner told prosecutors, ***“If [Mr. Floyd] were found dead at home alone and no other apparent causes,” it would have been “acceptable” to label his death an overdose.*** (Ex. 6 at Bates 22935-36). His body contained a lethal dose of fentanyl—11 ng/ml—as well as methamphetamine, at the time of his death. The Hennepin County Medical Examiner told prosecutors that overdose deaths from fentanyl “have been certified” with levels as low as 3 ng/ml. (*Id.*). A study based on a cluster of twelve fentanyl overdoses in Connecticut, published by the Centers of Disease Control, showed that fentanyl levels as low as 0.5/ml had resulted in overdose.⁴ The two patients in the study who later died had fentanyl levels of 11 ng/ml (the same level as Mr. Floyd) and 13 ng/ml. Both of the two decedents in the study arrived at the hospital in cardiac arrest, which was also the cause of Mr. Floyd’s death.

Even without the use of narcotics, Mr. Floyd was susceptible to cardiopulmonary arrest. He was a daily smoker of cigarettes. (Ex. 22 at Bates 6910). His heart was at the “upper limit of size” due to untreated hypertension. Mr. Floyd suffered from arteriosclerotic and hypertensive heart disease. He told officers that he had suffered from COVID-19 and was still positive for the virus at the time of his death. Recent studies have shown that COVID-19 has a significant impact

³ This is not an attempt to assail Mr. Floyd’s character. However, there must be probable cause evidence that demonstrates a substantial cause of death, and here, the most likely cause of Mr. Floyd’s death was fentanyl or a combination of fentanyl and methamphetamine in concert with his underlying health conditions.

⁴ <https://www.cdc.gov/mmwr/volumes/66/wr/mm6604a4.htm>, last accessed Aug. 27, 2020.

on the cardiovascular system by worsening heart failure in patients with preexisting cardiac diseases.⁵

However, Mr. Floyd did use drugs. In addition to fentanyl, toxicology reports show that Mr. Floyd had recently ingested methamphetamine, as well, which, according to Dr. Baker, is “bad for your heart.” (Ex. 6). The ingestion of an opioid with a stimulant like methamphetamine is known as “speedballing.” Speedballing can “result in uncontrolled and uncoordinated motor skills, and also the risk of death from stroke, heart attack, aneurysm, or respiratory failure.” (Ex. 17 at 21). In May 2019, Mr. Floyd was arrested with opioids and cocaine in his possession. (Ex. 21). Evidence, therefore, suggests that Mr. Floyd had been speedballing for some time.

The passengers in Mr. Floyd’s vehicle both expressed to law enforcement their belief that Mr. Floyd had recently taken pills. Ms. Hill told investigators that Mr. Floyd was “probably on some pills or something.” (Ex. 4 at Bates 023033). Mr. Hall, who had spent the entire day with Mr. Floyd up to and including the incident at Cup Foods, told investigators that he knew Mr. Floyd to use pills and that Mr. Floyd had stated his intention to do so on the day of his death. (Ex. 5 at Bates 27379). Mr. Hall indicated his belief that Mr. Floyd had ingested something while he was inside Cup Foods. Noting that Mr. Floyd was acting normally before entering the store, but when he got back to the vehicle, Mr. Floyd fell asleep in the driver’s seat of the car. (*Id.* at 27379). According to Mr. Hall, “it was so fast I look at him and I’m like all of sudden you know he’s just sleeping, he was sleeping.” (*Id.*; see Ex. 3 at Bates 23032-34 (Floyd “just nodded off”)). Rapid loss of consciousness⁶—falling asleep, snoring, or nodding⁷—is a common sign of a fentanyl

⁵ <https://www.cidrap.umn.edu/news-perspective/2020/07/research-reveals-heart-complications-covid-19-patients>, last accessed Aug. 27, 2020.

⁶ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6380613/>, last accessed Aug. 27, 2020.

⁷ <https://www.cdc.gov/mmwr/volumes/66/wr/mm6614a2.htm>, last accessed Aug. 27, 2020.

overdose. Body-worn camera video from the scene, combined with Mr. Floyd's previous conduct during his May 2019 arrest (Ex. 21) and the toxicology results, strongly suggests that Mr. Floyd ingested fentanyl in his car at the time Officers Lane and Kueng first approached. (Ex. 9).

When Officers Lane and Kueng encountered Mr. Floyd, they noted that he was acting erratically; he seemed confused and panicked about the situation in which he found himself. Confusion and strange affect are also signs of a fentanyl overdose,⁸ as well as speedballing. (Ex. 17 at 21). As they were trying to escort Mr. Floyd to their squad, Officers Lane and Kueng also noted that Mr. Floyd had foam coming from his mouth. (Kueng BWC at 6:20). Foaming at the mouth is also a sign of fentanyl overdose.⁹ As an explanation, Mr. Floyd appeared to say, "I was just hooping earlier." (*Id.* at 6:24). "Hooping" is a slang term¹⁰ for ingesting drugs, commonly methamphetamine (which was found in Mr. Floyd's system) or Ecstasy—which Mr. Hall believed Floyd had recently ingested. (Ex. 5 at Bates 27380)—rectally.¹¹

As they approached the squad, Mr. Floyd began to repeat the phrase, "I can't breathe." According to medical toxicologist Andrew Stolbach of Johns Hopkins University School of Medicine, "Opioids kill people by slowing the rate of breathing and the depth of breathing."¹²

⁸ *Id.*

⁹ *Id.*; see <https://www.health.state.mn.us/communities/opioids/data/deathreporting.html>; <https://www.cdc.gov/mmwr/volumes/66/wr/mm6614a2.htm>; <https://www.sciencenews.org/article/opioid-crisis-overdose-death>.

¹⁰ <https://www.urbandictionary.com/define.php?term=Hooping&page=2>, last accessed Aug. 27, 2020.

¹¹ https://www.acpjournals.org/doi/10.7326/0003-4819-145-1-200607040-00018?url_ver=Z39.88-2003&rfr_id=ori%3Arid%3Aacrossref.org&rfr_dat=cr_pub++0pubmed&fbclid=IwAR2r42E7FWuTSz4dVHLUYmuQvjKDoWcMvQd2qNkr6UJuZzCA5_44ejwzP6M&, last accessed Aug. 27, 2020.

¹² <https://www.sciencenews.org/article/opioid-crisis-overdose-death>, last accessed Aug. 27, 2020.

One of the telltale signs of opioid overdose is frothy fluid around the nose and mouth.... It's not clear how opioids trigger this, but filled with fluid, the lungs can't oxygenate blood very well, and a person may slip further into respiratory trouble.¹³

The Hennepin County Medical Examiner reported that Mr. Floyd's pulmonary parenchyma was "diffusely congested and edematous"—in other words, Mr. Floyd had fluid in his lungs. (Ex. 20 at Bates 6791). In fact, his lungs were *two to three times their normal weight*. (Ex. 6 at Bates 22943). The fact that Mr. Floyd had sickle cell trait is significant, as well. (*See* Ex. 19 at Bates 8132). People suffering from sickle cell "can develop high blood pressure in their lungs. This complication usually affects adults. Shortness of breath and fatigue are common symptoms of this condition, which can be fatal."¹⁴

Put simply, Mr. Floyd could not breathe because he had ingested a lethal dose of fentanyl and, possibly, a speedball. Combined with sickle cell trait, his pre-existing heart conditions, Mr. Floyd's use of fentanyl and methamphetamine most likely killed him. In fact, "respiratory failure is particularly likely with speedballs because the effects of stimulants wear off far more quickly than the effects of opioids." (Ex. 17 at 24). Adding fentanyl and methamphetamine to Mr. Floyd's existing health issues was tantamount to lighting a fuse on a bomb.

In spite of the signs overdose and medical trauma that Officers Lane and Kueng may have observed, *none of this information was shared with Mr. Chauvin*. What Mr. Chauvin knew when he arrived on scene was that Mr. Floyd was actively resisting arrest and, as he struggled against two officers, claiming that he couldn't breathe, that he was claustrophobic, and that he had COVID-19. (*See* Ex. 18, *generally*). It is not uncommon for subjects to make false claims about

¹³ *Id.*

¹⁴ <https://www.mayoclinic.org/diseases-conditions/sickle-cell-anemia/symptoms-causes/syc-20355876>, last accessed Aug. 28, 2020.

health issues to avoid arrest or to be transported to a hospital rather than jail,¹⁵ as Mr. Floyd was in May 2019. (See Exs. 21 and 22). What Mr. Chauvin saw was a strong man struggling mightily with police officers, which seemed contradictory to Mr. Floyd's claims about not being able to breathe. Mr. Chauvin could not have known about Mr. Floyd's underlying issues when he arrived on the scene.

Without knowledge of Mr. Floyd's fentanyl and methamphetamine use or symptoms of overdose, Mr. Chauvin was unaware of the potential dangers of using MRT on Mr. Floyd. Instead, he relied on his training and the information available to him to try and assist his fellow officers and to prevent Mr. Floyd from harming himself. Derek Chauvin did not cause George Floyd's death.

The Amended Complaint simply does not contain "the facts establishing probable cause to believe that" Mr. Chauvin was a substantial causal factor in the death of George Floyd. Because the Amended Complaint lacks the necessary foundational facts for the charges, all three counts against Mr. Chauvin must be dismissed. *Rud*, 359 N.W.2d 573, 579 (Minn. 1984).

CONCLUSION

Because there is insufficient probable cause to support the charges in the Amended Complaint, the Defendant respectfully requests that this Court dismiss all three counts therein.

¹⁵ See, e.g., <https://www.wfxg.com/story/42190487/woman-accused-of-lying-about-having-covid19-in-order-to-avoid-arrest>; <https://www.usnews.com/news/best-states/missouri/articles/2020-04-01/police-man-lied-about-having-coronavirus-to-avoid-arrest>; <https://nj1015.com/nj-woman-charged-with-lying-about-coronavirus-after-coughing-on-cops/>

Respectfully submitted,

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