

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

State of Minnesota,

Case Type: Criminal  
Court File No. 27-CR-20-12646

Plaintiff,

v.

Derek Michael Chauvin,

**STATE'S RESPONSE OPPOSING  
DEFENDANT'S MOTION TO DISMISS  
FOR LACK OF PROBABLE CAUSE**

Defendant.

**INTRODUCTION**

Defendant Derek Chauvin is charged by complaint with (i) second-degree murder, in violation of Minn. Stat. § 609.19, subd. 2(1); (ii) third-degree murder, in violation of Minn. Stat. § 609.195(a); and (iii) second-degree manslaughter, in violation of Minn. Stat. § 609.205(1). Chauvin and three codefendants, J. Alexander Kueng, Thomas Lane, and Tou Thao, are former police officers charged in connection with the death of George Floyd. Chauvin has filed a motion to dismiss the complaint for lack of probable cause. His motion should be denied.

There is probable cause for each charged offense in the complaint. On May 25, 2020, Chauvin, Kueng, and Lane pinned Floyd to the ground face-down after he was suspected of using a counterfeit \$20 bill to purchase a pack of cigarettes. Chauvin pressed his knee into Floyd's neck and held Floyd's handcuffed left hand behind his back. Kueng knelt on Floyd's back and likewise pinned Floyd's handcuffed arms behind his back. Lane restrained Floyd's legs with his hands and knees. And Thao—who saw what the other officers were doing and heard Floyd's cries for help—encouraged the others to continue pinning Floyd down, pushed back a group of concerned bystanders, and prevented them from intervening.

In the first five minutes Floyd was on the ground, he told the officers at least twenty times that he could not breathe. He told them nearly ten times that he was dying. And then he fell silent. He stopped moving. He stopped breathing. And the officers could not find a pulse. As Floyd lost consciousness, a crowd of bystanders pleaded with the officers. They told the officers they were killing Floyd. They screamed that Floyd had stopped moving. They alerted the officers that Floyd had stopped breathing. And they begged the officers to take Floyd's pulse. Nonetheless, the officers continued to pin him to the ground—with Chauvin kneeling on Floyd's neck, Kueng on Floyd's back, Lane on Floyd's legs, and Thao standing watch to prevent the bystanders on the sidewalk from approaching the other officers and Floyd.

All told, the officers held Floyd in that position for approximately nine minutes—about five times longer than the national anthem, and four times longer than President Lincoln's Gettysburg Address. During that time, Chauvin continued to kneel on Floyd's neck for about four minutes after Lane told the other officers that Floyd was "passing out," and for two and a half minutes after Kueng said Floyd did not have a pulse. Indeed, he continued to press his knee into Floyd's neck for a full minute after emergency medical personnel arrived on the scene, and even while emergency personnel tried to check Floyd's pulse.

Probable cause is manifest. The facts here "would lead a person of ordinary care and prudence to hold an honest and strong suspicion" that Chauvin committed second-degree murder, third-degree murder, and second-degree manslaughter. *State v. Ortiz*, 626 N.W.2d 445, 449 (Minn. App. 2001). The evidence is more than sufficient to establish probable cause for each offense. This Court should therefore deny Chauvin's motion to dismiss.

### **STATEMENT OF FACTS**

The following statement of facts is drawn from the complaint filed on June 3, 2020, and

has been supplemented with other available record evidence. The State incorporates here the statement of probable cause and finding of probable cause contained in the complaint.

**A. The Events of May 25, 2020**

1. At approximately 8 p.m. on May 25, 2020, Derek Chauvin and Tou Thao—both police officers at the time—were dispatched to Cup Foods at the corner of 38th Street and Chicago Avenue in Minneapolis on a report that an individual was suspected of using a counterfeit bill. (Thao, Bureau of Criminal Apprehension (“BCA”) Interview at 25:38-26:05.)<sup>1</sup> Before they could make their way to the scene, however, dispatch informed them that J. Alexander Kueng and Thomas Lane would handle the call instead. (Thao, BCA Interview at 25:40-57.)

At approximately 8:08 p.m., Kueng and Lane arrived at Cup Foods. When they entered the store, the manager showed them a \$20 bill that he believed was counterfeit. He stated that the man who had passed the \$20 bill was sitting in a blue vehicle across the street. (Kueng & Lane, Body-Worn Camera (“BWC”) at 20:08:47-20:09:06.) Kueng and Lane did not inspect the bill. (Lane, BCA Interview at 42:49-52.) Instead, they immediately approached the vehicle. (Kueng & Lane, BWC at 20:09:06-28.)

George Floyd was sitting in the vehicle’s driver’s seat. Lane approached and tapped on the window, startling Floyd. (Lane, BWC at 20:09:28-32.) Floyd cracked the door open and apologized. Lane instructed Floyd to show his hands. (Lane, BWC at 20:09:32-40.) Seconds later, Lane pulled his firearm on Floyd, pointed it at Floyd, and yelled at him to “put your fucking hands up right now.” (Lane, BWC at 20:09:41-44.) Visibly shaken, Floyd asked Lane what he had done wrong, put his hands up, and placed them on the steering wheel, complying

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<sup>1</sup> The body-worn camera videos for Kueng, Lane, and Thao, as well as Thao’s Bureau of Criminal Apprehension interview and the autopsy reports, were submitted in support of the State’s motion for joinder. The remaining exhibits cited here are filed with this memorandum.

with Lane's instructions. Instead of answering Floyd's question, Lane continued to curse at Floyd, telling him to "keep your fucking hands on the wheel." (Lane, BWC at 20:09:45-58.) Floyd immediately complied. Lane instructed Floyd to put his hands on his head, and Floyd again complied. Lane then lowered his gun. (Lane, BWC at 20:10:20-22.)

Floyd, clearly upset, continued to apologize to Lane, and explained repeatedly that he had been shot before. (Lane, BWC at 20:09:36-20:10:09.) Sobbing, he pleaded: "Mr. Officer, please don't shoot me." (Lane, BWC at 20:10:35-37.) As he pleaded for his life, he also told Lane that "I just lost my mom." (Lane, BWC at 20:10:35-20:11:02.)

Lane told Floyd to step out of the car. At this point, Lane asked dispatch for backup. (Lane, BWC at 20:10:45; Lane, BCA Interview at 58:00-15; Thao, BCA Interview at 27:30-35.) In response, Chauvin and Thao drove to Cup Foods with their squad car lights and sirens activated. (Thao, BCA Interview at 27:40-51; Thao, BWC at 20:11:30-20:12:14.)

After Floyd stepped out of the car, Kueng came around to the driver's side, and he and Lane handcuffed Floyd's arms behind his back. (Kueng, BWC at 20:11:10-49.) From this moment on, and for all of the remaining minutes of his life, Floyd's hands remained cuffed.

Kueng walked Floyd to the sidewalk and told him to sit down on the ground. Floyd did so, immediately becoming calmer and saying "thank you" to Kueng three times. (Kueng, BWC at 20:11:49-20:12:15.) While Floyd was seated on the sidewalk, Lane interviewed the other two passengers. (Lane, BWC at 20:11:43-20:14:02; Kueng, BWC at 20:12:14-20:13:54.) One of the passengers explained that Floyd was scared of the police, and was likely scared when Lane pulled out his weapon because Floyd had been shot before. (Lane, BWC at 20:12:52-20:13:07.)

While speaking with the passengers, Lane reported a "Code 4" to dispatch, which meant that the "[s]ituation [was] under control" and that "[r]esponding squads that have not arrived may

clear.” Exhibit 1, Minneapolis Police Department Policy and Procedure Manual, § 7-103. (Lane, BWC at 20:12:14-16.) Dispatch therefore told Chauvin and Thao that the request for backup had been canceled. Chauvin and Thao, however, continued to the scene anyway. (Thao, BCA Interview at 27:54-28:40; Thao, BWC at 20:12:14-27.)

2. Although Floyd remained compliant and conversant while seated on the sidewalk, Kueng and Lane decided to detain Floyd in their squad car. (Kueng, BWC at 20:13:32-36.) As they walked over to the squad car, Lane asked whether Floyd was “on something right now,” and Kueng said Floyd was “acting real erratic” while walking in handcuffs. (Lane, BWC at 20:14:10-13.) Floyd responded that he was “scared.” (Kueng, BWC at 20:14:13.)

When they reached the squad car, Floyd pleaded to talk with the officers. Kueng refused, telling him: “Man, you ain’t listening to nothing we’re saying, so we’re not going to listen to nothing you’re saying.” (Kueng, BWC at 20:14:14-20:15:01.) Floyd told Kueng and Lane several times that he was scared to get into the squad car, and he stated five times that he was “claustrophobic.” (Lane, BWC at 20:14:47-20:15:06.) But Kueng and Lane insisted they would have a conversation with Floyd only after he got into the squad car. They pinned Floyd against the squad car and patted him down. While being patted down, Floyd stated: “I’m not resisting, man. I’m not.” (Kueng, BWC at 20:15:11-15.) Kueng found a small pipe in Floyd’s pocket, but found no weapons on his person. (Kueng, BWC at 20:15:15-54.)

As Floyd stood outside the squad car, he begged Kueng and Lane not to leave him alone in the car. He stated that he would not do anything to hurt them. And he begged them not to “leave me by myself, man, please. I’m just claustrophobic.” (Kueng, BWC at 20:15:34-40.) In response, Lane told Floyd: “Well, you’re still going in the car.” (Lane, BWC at 20:15:39-41.)

Kueng and Lane then began forcing Floyd inside the open rear driver's side door of the squad car. (Lane, BWC at 20:16:20.) Floyd exclaimed: "I'ma die in here, I'ma die man." (Lane, BWC at 20:16:40-43.) Floyd also noted that he "just had COVID," and that he didn't "want to go back to that." (Lane, BWC at 20:16:44-46.) And he asked Kueng and Lane to allow him to count to three before getting into the back of the squad car, insisting that he was not trying to "win." (Lane, BWC at 20:17:20-26.)

3. At 8:17 p.m., Chauvin and Thao arrived on the scene. (Thao, BWC at 20:17:07.) As they approached, they saw Kueng and Lane trying to force Floyd into the back of the squad car, and heard a bystander yelling to Floyd that he should get in the car because "you can't win." (Thao, BWC at 20:17:19-48.) Floyd responded he was not "trying to win," and told the officers four times that he was claustrophobic and that he wanted to speak to them outside the squad car. (Thao, BWC at 20:17:22-47.) Floyd also pleaded for the officers to allow him to get on the ground or do "anything" other than get in the car. (Thao, BWC at 20:17:25-29.)

The officers, however, ignored Floyd's pleas. Chauvin watched from the sidewalk as Kueng pushed Floyd into the back seat from the driver's side. (Thao, BWC at 20:17:37-59.) Chauvin then circled to the passenger's side of the car and instructed Lane to pull Floyd into the car. (Thao & Lane, BWC at 20:17:59-20:18:05.) During this time, Floyd continued to plead with the officers, repeating "please, Mr. Officer, please" and "I'm not a bad guy." (Thao, BWC at 20:17:49-20:18:00.) Floyd also exclaimed: "I can't breathe, Mr. Officer. Please." (Thao, BWC at 20:18:05-08.)

Floyd fell partway through the rear passenger's side door, and he asked to be laid on the ground. (Thao, BWC at 20:18:15-20.) Chauvin and Lane, however, pinned Floyd against the passenger's side back seat, while Thao watched from the driver's side. (Thao, BWC at 20:18:22-

29; Thao, BWC at 20:18:30-48; Thao, BCA Interview at 32:34-40.) During this time, Floyd continued to yell “please,” and repeatedly said he couldn’t breathe, explaining that he “just had COVID” and telling the officers “I’m not going to run.” (Kueng, Thao, & Lane, BWC at 20:17:59-20:19:01.) But the officers dismissed his complaints. Chauvin told him: “You’re talking. . . . It takes a lot of oxygen to . . . say ‘I can’t breathe.’” (Thao, BWC at 20:18:40-46.)

When the other officers were unable to lift Floyd into the squad car, Thao said: “We’re just going to have to hogtie him.” (Thao, BWC at 20:18:48-50.) He then circled to the passenger’s side and repeated: “We’re just gonna have to tie him.” (Thao, BWC at 20:18:52-53.) Lane agreed, telling Chauvin and Kueng: “Let’s take him out and just MRT”—referring to the Maximal Restraint Technique, which utilizes the Hobble device to “secure a subject’s feet to their waist in order to prevent the movement of legs.”<sup>2</sup> Exhibit 1, MPD Policy & Procedure Manual 5-316 § III, Chauvin Mot. to Dismiss Ex. 15, at 22. (Lane, BWC at 20:19:02-04.) The others agreed, and Chauvin and Kueng took Floyd to the ground. (Thao, BWC at 20:19:06-11.)

4. At 8:19 p.m., Chauvin, Kueng, and Lane pinned Floyd to the pavement face-down. Chauvin pressed his knee into the back of Floyd’s neck and held down Floyd’s left hand. Kueng knelt on Floyd’s back, and held down Floyd’s handcuffed left wrist with his hand. Lane restrained Floyd’s legs, kneeling on them and pressing them down with his hands. (Lane, BWC at 20:19:14-45.) Shortly after they pinned Floyd to the ground, Lane called in an EMS “Code 2,”

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<sup>2</sup> A Hobble “limits the motion of a person by tethering both legs together.” Exhibit 1, MPD Policy & Procedure Manual 5-316 § III. The Maximal Restraint Technique is accomplished using two Hobbles connected together. *Id.* § IV.A.2; *see* Chauvin Mot. to Dismiss Ex. 15, at 22. MPD policy, however, also specifically provides: “*Do not* tie the feet of the subject directly to their hands behind their back. This is also known as a hogtie.” Exhibit 1, MPD Policy & Procedure Manual 5-316 § IV.A.2.d (emphasis added).

signaling that emergency medical services were needed but that emergency personnel were not required to use their sirens to reach the scene.<sup>3</sup> (Lane, BWC at 20:19:48-52.)

As Chauvin took up his position atop Floyd's neck, he asked the other officers whether they had their Hobble. (Kueng, BWC at 20:19:18-23.) Thao then began searching for a Hobble in the back of the squad car. (Thao, BWC at 20:19:17-23.) While Thao searched for a Hobble, Floyd pleaded with Chauvin that he could not breathe, and called for his recently deceased mother. (Thao, BWC at 20:19:24-20:20:24.) He also cried "I'm dead," and told the officers that what they were doing to him was "cold blooded." (Thao, BWC at 20:19:20-20:20:18.) Chauvin responded sarcastically: "Yeah, you're doing a lot of talking though." (Thao, BWC at 20:20:18-19.) He also told Floyd that he was "going to jail." (Kueng, BWC at 20:19:50-57.)

After Thao found a Hobble, he asked whether the other officers still "want to Hobble at this point then." (Thao, BWC at 20:20:25-31.) When the other officers did not answer immediately, Thao suggested "why don't we just hold him until EMS" arrives, and added that "if we Hobble a Sergeant's going to have to come over."<sup>4</sup> (Thao, BWC at 20:20:32-39.) The officers—Chauvin included—decided against using the Hobble. Chauvin, Kueng, and Lane therefore continued to maintain their positions directly on top of Floyd. Indeed, when Lane asked whether the other officers wanted to "get [Floyd's] legs up," Chauvin and Kueng both responded: "Just leave him." (Kueng, BWC at 20:20:47-52.) Thao, meanwhile, stood watch and guarded against any interference with the officers' actions by, among other things,

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<sup>3</sup> Thao later upgraded that to an EMS code 3, requiring emergency services to use red lights and sirens to reach the scene. (Thao, BWC at 20:21:12-27.)

<sup>4</sup> Under MPD policy, whenever a Hobble is used in connection with the Maximal Restraint Technique (MRT), "[a] supervisor shall be called to the scene where a subject has been restrained," and the supervisor is required to "complete a Supervisor's Force Review." Exhibit 1, MPD Policy & Procedure Manual 5-316(IV).

positioning himself between the other officers and the gathering group of concerned citizens, which included several children. (Thao, BWC at 20:21:38-20:22:40.)

For the first five minutes the officers pinned Floyd to the ground, Floyd repeatedly cried for help. He yelled “I can’t breathe” more than *twenty* times. He called for his deceased mother almost a *dozen* times. He pleaded with Chauvin, who continued to kneel on his neck:

I can’t breathe. Please, your knee in my neck.

(Lane, BWC at 20:21:53-59.) Floyd screamed that he was in significant pain:

My knee, my neck . . . I’m claustrophobic. My stomach hurt. My neck hurt.  
Everything hurt.

(Lane, BWC at 20:22:16-29.) He asked the officers to “tell my kids I love them.” (Lane, BWC at 20:20:07-08.) And he told the officers almost ten times that he feared he would die while lying on the ground, saying:

I’ll probably just die this way. . . . I’m through, I’m through. . . . They’re gonna kill me, they gonna kill me, man.

(Lane, BWC at 20:21:45-47, 20:22:19-22, 20:22:42-45.)

The officers, however, ignored Floyd’s desperate pleas for help. Chauvin, who continued to press his knee into Floyd’s neck, responded dismissively: “You’re doing a lot of talking, a lot of yelling. It takes a heck of a lot of oxygen to say things.” (Lane, BWC at 20:22:39-50.) Kueng reacted to Chauvin’s comment with a smirk. (Thao, BWC at 20:22:48-51.)

As Floyd yelled that he could not breathe, the bystanders shouted for Chauvin to take his knee off Floyd’s neck. One bystander yelled: “You can get off his neck, man. That’s wrong right there.” (Thao, BWC at 20:22:49-20:23:00.) Another bystander observed that Floyd was “not even resisting arrest.” (Thao, BWC at 20:23:05-09.) Chauvin heard the bystanders’ pleas

and periodically looked up at the crowd. (Exhibit 2, Darnella Frazier Facebook Video 2:38-43, 2:53, 3:21, 3:30-3:32.) But even as the bystanders pleaded with Chauvin to remove his knee from Floyd's neck, Chauvin rolled his knee back and forth, pressing it into Floyd's neck and maintaining pressure on Floyd's breathing. Thao, meanwhile, stood guard. He watched the other officers while telling the crowd: "He's talking, so he's fine" and "This is why you don't do drugs, kids." (Thao, BWC at 20:23:00-26.) And when one bystander expressed concern that Chauvin was "trapping" and "stopping" Floyd's breathing, Thao responded: "He's talking. . . . It's hard to talk if you're not breathing." (Thao, BWC at 20:23:40-20:24:04).

After four minutes, Floyd's cries for help became softer. His screams turned into grunts, and his grunts into mumbles. Floyd then said what would be his final words: "I can't breathe." (Lane & Kueng, BWC at 20:23:58-20:24:00.) He soon fell silent and lost consciousness.

But even after Floyd went limp, Chauvin continued to restrain him, pressing his knee into Floyd's neck and restraining Floyd's left hand. Kueng and Lane continued to restrain Floyd's back and legs. And Thao continued to stand between the other officers and the bystanders gathered on the sidewalk, pushing back anyone who stepped off the sidewalk and moved toward Floyd and the other officers. As Floyd lost consciousness, Lane asked the other officers: "Should we roll him on his side?" Chauvin rejected that option out of hand, telling Lane and Kueng to "stay[] put where you got him." (Kueng, BWC at 20:23:48-52.) Kueng agreed with Chauvin and told Lane: "No, just leave him." (Kueng BWC, 20:23:49-51.)

By this point, the half-dozen or so bystanders gathered on the sidewalk had begun yelling at the officers, expressing concern that Floyd was struggling to breathe. One bystander yelled that Floyd was "not even resisting arrest right now." (Thao, BWC at 20:24:40-44.) He also yelled that Chauvin was responsible for "stopping [Floyd's] breathing." (Thao, BWC at

20:25:08-10.) When a bystander screamed that Floyd was about to “pass out,” Lane remarked—in apparent agreement with the bystander—that Floyd was indeed “passing out.” (Lane & Kueng, BWC at 20:24:43-48.) But Chauvin continued to maintain his position, pressing his knee into the back of Floyd’s neck. (Exhibit 2, Darnella Frazier Facebook Video 3:42-4:00.) In fact, rather than checking to see whether Floyd was still breathing, Chauvin asked Lane, who was still restraining Floyd’s legs, whether *Lane* was “alright.” (Lane, BWC at 20:24:59-20:25:00.) Lane responded: “My knee might be a little scratched, but I’ll survive.” (Lane, BWC at 20:25:00-04.) Meanwhile, when a bystander said that Floyd was not “breathing right now,” Kueng and Lane both responded: “He’s breathing.” (Lane & Kueng, BWC at 20:25:10-15.) But the body camera videos appear to show that Floyd’s shallow breaths stopped about 10 seconds later. (Kueng, BWC at 20:25:20-31.)

At 8:25 p.m., a concerned bystander stepped toward Floyd, and asked Thao whether he was “just gonna let [Chauvin] choke [Floyd] like that?” (Thao, BWC at 20:25:17-19.) Chauvin pulled the mace from his belt and pointed it at the bystanders, while Thao moved to shield Chauvin. (Exhibit 2, Darnella Frazier Facebook Video 4:28-37.)

About ten seconds later, an off-duty Minneapolis firefighter arrived on the scene. After identifying herself as a firefighter, she asked to provide Floyd with medical assistance, and asked whether Floyd had a pulse. Chauvin—mace still in hand—warned her twice: “Don’t come over here.” (Exhibit 2, Darnella Frazier Facebook Video 4:33-46; Kueng, BWC at 20:25:26-20:26:47.) Lane and Thao likewise refused to allow her to tend to Floyd, with Thao shouting “back off” and Lane telling her to go “up on the sidewalk” (Thao & Kueng, BWC at 20:25:26-20:26:47.) Given the witnesses’ concerns about Floyd’s lack of responsiveness, Lane asked again whether the officers should “roll him on his side.” (Lane, BWC at 20:25:39-41.) No one

responded. The officers maintained their positions—Chauvin on Floyd’s neck, Kueng on his back, Lane on his legs, and Thao standing guard. (Lane, BWC at 20:25:40-20:26:00.)

As the bystanders grew increasingly vocal about Floyd’s lack of responsiveness, the off-duty firefighter urged the officers to take Floyd’s pulse. (Thao, BWC 20:25:53-20:26:03.) Another bystander also repeatedly pleaded for Thao to check Floyd’s pulse. (Thao, BWC 20:25:53-20:26:03.) After hearing the bystanders’ pleas to check Floyd for a pulse, Lane asked Kueng whether he could find a pulse. Kueng checked and said “I can’t find one.” (Kueng & Lane, BWC at 20:25:45-20:26:00.) Chauvin responded: “Huh?” Kueng clarified for Chauvin that he was “check[ing] [Floyd] for a pulse.” (Kueng & Lane, BWC at 20:26:00-05.) Kueng then continued to check Floyd for a pulse. About ten seconds later, Kueng sighed, leaned back slightly, and repeated: “I can’t find one.” (Kueng & Lane, BWC at 20:26:07-12.) After learning that Kueng could not find a pulse, Chauvin squeezed Floyd’s fingers. Floyd did not respond. (Lane, BWC at 20:26:12-18.) But Chauvin continued to kneel on Floyd’s neck.

The bystanders’ pleas, meanwhile, grew more frantic: “He’s not fucking moving.” (Thao, BWC at 20:27:11-17.) “What are you doing? He’s dying.” (Thao, BWC at 20:27:35-36.) “Why is he still on him? Y’all see that he’s not . . . what is wrong with you?” (Thao, BWC at 20:27:36-40.) “Get off of his fucking neck, bro.” (Thao, BWC at 20:27:41-42.) “You’re still on him . . . why?” (Thao, BWC at 20:27:44-46.) Through it all, Chauvin never attempted to place Floyd on his side in the recovery position. Instead, he continued to press his knee into the back of Floyd’s neck, ignoring the crowd’s pleas. The officers also ignored the off-duty firefighter’s plea for them to begin chest compressions. (Thao, BWC at 20:28:39-48.) Indeed, none of the officers ever attempted CPR while Floyd was on the ground.

5. At 8:27 p.m., an ambulance arrived on scene. Chauvin, Kueng, and Lane maintained their positions atop Floyd, and Thao continued to block bystanders from intervening. (Lane & Thao, BWC at 20:27:00-24.) Even as Lane explained to emergency personnel that Floyd was “not responsive right now,” Chauvin continued to press his knee into Floyd’s neck. (Lane, BWC at 20:27:36-38.) And even while emergency personnel leaned down and attempted to check Floyd’s neck for a pulse, Chauvin did not remove his knee from Floyd’s neck. (Lane, BWC at 20:27:43-50; Exhibit 2, Darnella Frazier Facebook Video 6:50-59.)

The crowd, which had grown to nearly a dozen horrified onlookers, continued to plead with the officers, asking Thao whether he was “gonna let [Chauvin] kill that man in front of you.” (Thao, BWC at 20:28:05-13.) Yet the officers continued to maintain their positions: For over a full minute after emergency personnel arrived, Chauvin and Kueng continued to press Floyd face-down into the pavement, Lane knelt over Floyd’s legs, and Thao continued to push back the crowd. (Lane, Kueng & Thao, BWC at 20:27:25-20:28:45.)

At 8:28 p.m., when the stretcher was ready, Chauvin finally removed his knee from Floyd’s neck. (Lane, BWC at 20:28:45.) Chauvin, Kueng, and Lane then rolled Floyd, who was still unresponsive, onto the stretcher and loaded him into the ambulance.

All told, Floyd was pinned to the ground—with Chauvin’s knee pressing into his neck, Kueng and Lane atop his back and legs, and Thao standing watch nearby—for approximately nine minutes. For over four and a half of those minutes, Floyd was silent. For at least three of those minutes, Floyd appeared not to be breathing. And for at least two and a half minutes, the officers were unable to locate Floyd’s pulse. After Floyd fell silent, the crowd alerted the officers ten times that Floyd was no longer moving, warned them nine times that Floyd was unresponsive, and pleaded with them nearly *thirty* times to check Floyd’s pulse. But over that

entire time period, the officers remained in the same position: Chauvin knelt on Floyd's neck, Kueng and Lane remained atop Floyd's back and legs, and Thao continued to prevent the crowd of concerned citizens from interceding.

6. Floyd was pronounced dead at the hospital later that evening. According to the Hennepin County Medical Examiner, Floyd's death resulted from "cardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression," Hennepin County Medical Examiner's Office, Autopsy Report for George Floyd, at 1 (June 1, 2020) ("Hennepin County Autopsy Report"), and the "manner of death" was "homicide," Hennepin County Medical Examiner, Press Release Report (June 1, 2020). A separate autopsy review by the federal Armed Forces Medical Examiner System concluded that Floyd's "death was caused by the police subdual and restraint," and that the "subdual and restraint had elements of positional and mechanical asphyxiation." Armed Forces Medical Examiner System, Autopsy Report for George Floyd, at 2 (June 10, 2020) ("Armed Forces Medical Examiner Autopsy Report").

#### **B. Minneapolis Police Department Policies and Training**

As officers in the Minneapolis Police Department (MPD), Chauvin, Kueng, Lane, and Thao held a position of public trust and were trained not to "willfully mistreat or give inhumane treatment to any person held in custody." Exhibit 1, MPD Policy & Procedure Manual 5-107.3. All officers agree to abide by a code of ethics that binds them to "enforce the law courteously and appropriately" and to "never employ[] unnecessary force or violence." *Id.* at 5-102.

"Sanctity of life and the protection of the public" are "the cornerstones of the MPD's use of force policy." *Id.* at 5-301.A. Consistent with those principles, it is "the duty of every sworn employee present at any scene where physical force is being applied to either stop or attempt to stop another sworn employee when force is being inappropriately applied or is no longer required." *Id.*

at 5-303.01(B).<sup>5</sup> Officers are also permitted to use only “the amount of force that is objectively reasonable in light of the facts and circumstances known to that employee at the time force is used,” and their use of force must “be consistent with current MPD training.” *Id.* at 5.301.01. Before using force, officers are required to consider using various de-escalation tactics short of force. *Id.* at 5-304(B). And in evaluating whether the use of force is appropriate, officers must “[c]onsider whether a subject’s lack of compliance is a deliberate attempt to resist or an inability to comply based on factors including, but not limited to”: (i) medical conditions; (ii) mental impairment; (iii) developmental disability; (iv) physical limitation; (v) language barrier; (vi) influence of drug or alcohol use; or (vii) behavioral crisis. *Id.* at 5-304(B)(1)(b).

Under MPD policies in effect at the time of Floyd’s death, the most extreme uses of force—MRT, Neck Restraints, and Deadly Force—are reserved for the most extreme situations. Officers are trained to use the MRT only “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.” *Id.* at 5-316(IV)(A)(1). “As soon as reasonably possible, any person restrained using the MRT who is in the prone position”—that is, on his or her stomach—“shall be placed” in “the side recovery position” if “the hobble restraint device is used.” *Id.* at 5-316(IV)(B)(1). Officers are instructed that, “as soon as possible,” they must “[p]lace a restrained subject on their side in order to reduce pressure on his/her chest and facilitate breathing.” Exhibit 3, 2019 MPD Use of Force Manual, at 3.

Officers are also trained not to employ a “neck restraint”—“[d]efined as compressing one or both sides of a person’s neck with an arm or leg”—“against subjects who are passively resisting.” Exhibit 1, MPD Policy & Procedure Manual 5-311(I), (II)(C). MPD policy defines

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<sup>5</sup> This policy, which was in effect when Floyd died, was subsequently updated on June 16, 2020.

“passive resistance” as “behavior initiated by a subject, when the subject does not comply with verbal or physical control efforts, yet the subject does not attempt to defeat an officer’s control efforts.” *Id.* at 5-302. “An officer who has used a neck restraint or choke hold shall inform” emergency medical personnel “accepting custody of the subject[] that the technique was used on the subject.” *Id.* at 5-311(II)(D)(2). And if unconsciousness occurs, officers are to “request EMS immediately by radio.” Exhibit 3, 2019 MPD Use of Force Manual, at 2.

In applying a Neck Restraint, MRT, or any other use of force, officers must render medical aid when their use of force necessitates it. All MPD officers who “use[] force shall,” “[a]s soon as reasonably practical,” “determine if anyone was injured and render medical aid consistent with training and request Emergency Medical Service (EMS) if necessary.” Exhibit 1, MPD Policy & Procedure Manual 5-306.<sup>6</sup> And they are trained to check the subject’s “airway [and] breathing,” and “start CPR if needed.” Exhibit 3, 2019 MPD Use of Force Manual, at 2, 4.

### **ARGUMENT**

The facts overwhelmingly demonstrate that probable cause exists to believe that Chauvin committed second-degree murder, third-degree murder, and second-degree manslaughter.

Probable cause exists if “the facts would lead a person of ordinary care and prudence to hold an honest and strong suspicion that the person under consideration is guilty of a crime.” *Ortiz*, 626 N.W.2d at 449. So long as the evidence “brings the charge against the prisoner within reasonable probability,” the motion to dismiss for lack of probable cause must be denied. *State v. Florence*, 239 N.W.2d 892, 896 (Minn. 1976) (quoting *State ex rel. Hastings v. Bailey*, 116 N.W.2d 548, 551 (Minn. 1962)). Thus, to defeat a motion to dismiss for lack of probable cause, “[i]t is not necessary for the state to prove the defendant’s guilt beyond a reasonable doubt.” *Id.*

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<sup>6</sup> This policy, which was in effect when Floyd died, was subsequently updated on July 17, 2020.

at 896 (quoting *Bailey*, 116 N.W.2d at 551). This rule reflects the strong public interest in having adjudications of guilt and innocence take place before a jury, drawn from the community, after the extensive adversarial testing of a criminal trial. See *State v. Trei*, 624 N.W.2d 595, 598 (Minn. App. 2001) (noting that a probable cause challenge should be rejected so long as it is “fair and reasonable to require the defendant to stand trial”).

In evaluating a motion to dismiss for lack of probable cause, a court must examine the “entire record, including reliable hearsay.” Minn. R. Crim. P. 11.04, subd. 1(c). That includes, among other things, “the complaint, the police reports, the statements of witnesses and the representations of the prosecutor, who is an officer of the court.” *State v. Dunagan*, 521 N.W.2d 355, 356 (Minn. 1994) (quoting *State v. Rud*, 359 N.W.2d 573, 579 (Minn. 1984)).

Critically, the court must “view the evidence and all resulting inferences in favor of the State.” *State v. Peck*, 773 N.W.2d 768, 782 n.1 (Minn. 2009). In deciding the motion, “the trial court is not to invade the province of the jury,” *Trei*, 624 N.W.2d at 598, and may not assess “the relative credibility or weight of . . . conflicting evidence,” *State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016) (quoting *State v. Hegstrom*, 543 N.W.2d 698, 702 (Minn. App. 1996)). So long as “the prosecutor possesses substantial evidence that will be admissible at trial and that would justify denial of a motion for a directed verdict of acquittal,” “the court should deny the motion to dismiss without requiring the prosecutor to call any witnesses.” *Dunagan*, 521 N.W.2d at 356 (quoting *Rud*, 359 N.W.2d at 579). In other words, the “test” for probable cause, as with a directed verdict of acquittal, is “whether the evidence is sufficient to present a fact question for the jury’s determination, after viewing the evidence and all resulting inferences in favor of the state.” *State v. Slaughter*, 691 N.W.2d 70, 74-75 (Minn. 2005). If the answer is yes,

the “production of exonerating evidence by a defendant at the probable cause hearing does not justify the dismissal of the charges.” *Rud*, 359 N.W.2d at 579.

Here, viewing the record in the light most favorable to the State, the evidence is more than “sufficient to present a fact question for the jury’s determination.” *Slaughter*, 691 N.W.2d at 75. The Court therefore should deny Chauvin’s motion to dismiss for lack of probable cause.

**I. THERE IS PROBABLE CAUSE TO BELIEVE THAT CHAUVIN COMMITTED SECOND-DEGREE UNINTENTIONAL MURDER.**

The available evidence easily brings the second-degree murder charge against Chauvin “within reasonable probability,” *Florence*, 239 N.W.2d at 896, and is clearly sufficient “to present a fact question for the jury’s determination,” *Slaughter*, 691 N.W.2d at 75. Chauvin’s motion to dismiss the second-degree murder charge therefore should be denied.

1. Minnesota law provides that a person is guilty of second-degree unintentional murder if he “causes the death of a human being, without intent to effect the death of any person, while committing or attempting to commit a felony offense other than criminal sexual conduct in the first or second degree with force or violence or a drive-by shooting.” Minn. Stat. § 609.19, subd. 2(1). As relevant here, the elements of that offense are: (i) the victim’s death; (ii) the person’s conduct was a “substantial causal factor” in the death; and (iii) the person, at the time of causing the death, “was committing or attempting to commit” a felony. 10 Minn. Dist. Judges Ass’n, Minnesota Practice Jury Instruction Guides, Criminal 11.29 (6th ed.) (“CRIMJIG”).<sup>7</sup>

With respect to the third element, the felony offense that gives rise to the second-degree murder charge in this case is third-degree assault. A person is guilty of third-degree assault if he “assaults another and inflicts substantial bodily harm.” Minn. Stat. § 609.223, subd. 1. As

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<sup>7</sup> For each of the relevant offenses in this case, the model jury instructions also list an additional element: that “the defendant’s act took place on (*or about*) \_\_\_ in \_\_\_ County.” *E.g.*, CRIMJIG 11.29. There is no dispute, however, as to the time or place of the defendants’ acts.

relevant here, the elements of third-degree assault are: (i) an assault, defined as “the intentional infliction of or attempt to inflict bodily harm” upon the victim; and (ii) the infliction of “substantial bodily harm” upon the victim, defined as “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member.” CRIMJIG 13.16; Minn. Stat. §§ 609.02, subd. 7a, 609.02, subd. 10(2).

Thus, putting these pieces together, the relevant elements of the second-degree unintentional murder charge in this case are: (i) the victim’s death; (ii) the accused’s conduct was a “substantial causal factor” in the death; (iii) the intentional infliction of bodily harm upon the victim; and (iv) “substantial bodily harm” to the victim.

2. Viewed in the light most favorable to the State, the evidence here “would lead a person of ordinary care and prudence to hold an honest and strong suspicion” that Chauvin committed second-degree unintentional murder. *Ortiz*, 626 N.W.2d at 449. Chauvin does not dispute that there is probable cause as to the first and fourth elements: Floyd died, and he suffered “substantial bodily harm.” *See State v. Larkin*, 620 N.W.2d 335, 337 (Minn. App. 2001) (even “temporary loss of consciousness” constitutes “substantial bodily harm” for purposes of third-degree assault). The evidence also overwhelmingly supports the other two elements of second-degree unintentional murder: Chauvin’s conduct was a “substantial causal factor” in Floyd’s death, and Chauvin intentionally inflicted bodily harm on Floyd.

*First*, Chauvin’s actions were a “substantial causal factor” in Floyd’s death. A defendant’s actions are a “substantial causal factor” so long as they “contributed to the death.” *State v. Torkelson*, 404 N.W.2d 352, 357 (Minn. App. 1987). The State does not need to “prove the specific mechanism of death.” *Id.* Nor does the State need to prove that the Chauvin’s acts

were “the sole cause of death.” *State v. Gatson*, 801 N.W.2d 134, 148 (Minn. 2011). Rather, the State need only prove that the defendant’s actions were a contributory cause to satisfy the “substantial causal factor” test. *See State v. Smith*, 119 N.W.2d 838, 848 (Minn. 1962).

Here, Chauvin pressed his knee into Floyd’s neck, and restrained his handcuffed left hand behind his back, for approximately nine minutes. *See supra* pp. 7-14. As Chauvin knelt on Floyd’s neck, Floyd lost consciousness and stopped breathing, and the officers could no longer find his pulse. After Floyd died, the Hennepin County Medical Examiner concluded that Floyd’s death resulted from “cardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression,” Hennepin County Autopsy Report, at 1, and the “manner of death” was “homicide,” Hennepin County Medical Examiner, Press Release Report. A separate autopsy concluded that Floyd’s “death was caused by the police subdual and restraint,” and that the “subdual and restraint had elements of positional and mechanical asphyxiation.” Armed Forces Medical Examiner Autopsy Report, at 2. Positional asphyxia “is a form of mechanical asphyxia that occurs when a person is immobilized in a position which impairs adequate pulmonary ventilation and thus, results in a respiratory failure.” Sigitas Chmieliauskas, *et al.*, *Sudden deaths from positional asphyxia*, *Medicine* 97:24, at 1 (2018). In other words, by restraining Floyd face-down and pressing his knee into Floyd’s neck, Chauvin immobilized him in a position that led to respiratory failure and death. Thus, viewed in the light most favorable to the State, these facts are more than sufficient “to present a fact question for the jury’s determination” on the issue of causation. *Slaughter*, 691 N.W.2d at 75.

*Second*, Chauvin intentionally inflicted bodily harm on Floyd. During the first five minutes Chauvin knelt on Floyd’s neck and restrained his left hand, Chauvin heard Floyd yell “I can’t breathe” at least twenty times, and heard him say nearly ten times that he feared he would

die. But even though Floyd told Chauvin that he could not breathe, Chauvin remained atop Floyd. Chauvin pressed his knee into Floyd's neck even while Floyd pleaded: "I can't breathe. Please, your knee in my neck." (Thao, BWC at 20:21:53-57.) And he responded dismissively to Floyd's cries for help, taunting him by telling him "[i]t takes a heck of a lot of oxygen to say things." (Thao & Kueng, BWC at 20:22:46-50.) Those facts by themselves raise, at a minimum, a fact question for the jury as to whether Chauvin intended to inflict bodily harm.

Moreover, regardless of whether Chauvin intended to inflict bodily harm on Floyd in the first moments after Floyd was pinned to the ground, the evidence shows that he possessed that intent once Floyd lost consciousness. As Floyd started to show signs of losing consciousness, Lane asked Chauvin and Kueng whether they should "roll him on his side" into the recovery position. Chauvin said no. Rather than moving Floyd out of an inherently dangerous position, he told Kueng and Lane to "stay[] put where you got him." (Kueng, BWC at 20:23:48-52.) Less than a minute later, Chauvin heard Lane remark that Floyd was "passing out." (Kueng & Lane, BWC at 20:24:45-50.) Another minute later, after hearing the bystanders' pleas to check Floyd for a pulse, Kueng checked for a pulse and said: "I can't find one." (Kueng & Lane, BWC at 20:25:45-20:26:00.) Chauvin responded: "Huh?" Kueng clarified for Chauvin that he was "check[ing] [Floyd] for a pulse." (Kueng & Lane, BWC at 20:26:00-05.) After continuing to check for a pulse for another ten seconds, Kueng repeated: "I can't find one." (Kueng & Lane, BWC at 20:26:07-12.) As a result, Chauvin knew that Floyd was not responsive and did not have a pulse. Even so, he continued to kneel on Floyd's neck and pin him face-down to the pavement for another two and a half minutes. And when emergency personnel arrived to provide Floyd medical aid, Chauvin heard Lane tell them what Chauvin certainly already knew as he continued to kneel on Floyd's neck: that Floyd was "not responsive." (Kueng & Lane, BWC at

20:27:36-38.) But Chauvin continued to kneel on Floyd’s neck for another minute anyway, maintaining pressure on Floyd’s neck even while emergency personnel attempted to check Floyd’s neck for a pulse. (Lane, BWC at 20:27:43-50; Exhibit 2, Darnella Frazier Facebook Video 6:50-59.) Chauvin’s conduct—particularly after becoming aware that Floyd was not resisting and no longer had a pulse—is strong evidence of his intent to inflict bodily harm.

That conclusion is also supported by the comments of bystanders at the scene. Bystanders screamed that Floyd was “not even resisting arrest right now”; that Chauvin was responsible for “stopping [Floyd’s] breathing”; that Floyd was not “fucking moving”; and that Floyd was “dying.” (Thao, BWC at 20:24:40-44, 20:25:08-10, 20:27:11-17, 20:27:35-36.) Chauvin could hear the screams of bystanders who cried out that Floyd was not moving or breathing, because Lane and Kueng—who were positioned further away from the crowd than Chauvin was—could hear the crowd’s screams too. *See supra* pp. 11-12. Chauvin also looked up at the crowd as they pleaded with him to remove his knee from Floyd’s neck and informed him in real-time of the consequences of his actions. (Exhibit 2, Darnella Frazier Facebook Video 2:38-43, 2:53, 3:21, 3:30-3:32.) But rather than removing his knee from Floyd’s neck when he heard the crowd’s pleas, Chauvin rolled his knee back and forth on Floyd’s neck, maintaining—and, at times, increasing—the pressure on Floyd’s breathing. *See supra* p. 10. That, too, is strong evidence that Chauvin intended to inflict bodily harm on Floyd.

Chauvin’s training also reinforces that he intended to inflict bodily harm on Floyd. MPD policy authorizes “only . . . the amount of force that is objectively reasonable in light of the facts and circumstances known to that employee at the time force is used.” Exhibit 1, MPD Policy & Procedure Manual 5-301.01; *see* Minn. Stat. § 609.06, subd. 1 (authorizing only the use of “reasonable force”). Consistent with that policy, officers are trained to “[p]lace a restrained

subject on their side in order to reduce pressure on his/her chest and facilitate breathing.” Exhibit 3, 2019 MPD Use of Force Manual, at 3. They are told that a “neck restraint” is not permissible on a subject who is “passively resisting,” or who is not resisting at all. Exhibit 1, MPD Policy & Procedure Manual 5-311(II)(C). And they are told to check the subject’s “airway [and] breathing,” and to cease a neck restraint and “start CPR” if the subject stops breathing. Exhibit 3, 2019 MPD Use of Force Manual, at 2, 4. Chauvin had been trained in these policies; he had been on the police force for 19 years, and had received numerous trainings during that time regarding the proper use of force. But even after Lane reminded him of these policies, asking whether the officers should “roll [Floyd] on his side” into the recovery position in accordance with their training, Chauvin disregarded all of his training. (Kueng, BWC at 20:23:48-52.) He continued to kneel on Floyd’s neck even after Floyd stopped talking, became unresponsive, stopped breathing, and no longer had a pulse. And he never attempted to place Floyd into the recovery position, check his airway, or start CPR, as he was trained to do.

In short, viewed in the light most favorable to the State, the evidence is more than sufficient “to present a fact question for the jury’s determination” as to whether Chauvin intended to inflict bodily harm on Floyd. *Slaughter*, 691 N.W.2d at 75.

3. Chauvin, however, argues that his actions did not cause Floyd’s death, and that he did not intend to inflict bodily harm on Floyd. Both of those arguments miss the mark. Indeed, neither argument comes anywhere close to demonstrating that the second-degree unintentional murder charge is not “within reasonable probability.” *Florence*, 239 N.W.2d at 896.

a. With respect to causation, Chauvin does not even attempt to engage with the conclusions of the two autopsy reports. *See supra* pp. 14, 20. Instead, he speculates that

“[f]entanyl” may have played a role in Floyd’s death, and that Floyd “most likely died from an opioid overdose.” Chauvin Mot. to Dismiss 21-22. That argument is entirely unpersuasive.

Chauvin’s allegations are legally insufficient to disprove that Chauvin’s actions caused Floyd’s death. A defendant is not criminally liable if a “superseding cause” intervenes and “cause[s] the [victim’s] death.” CRIMJIG 11.25. But a “superseding cause” exists only if the cause “comes *after* the defendant’s acts, alters the natural sequence of events, and produces a result that would not otherwise have occurred.” *Id.* (emphasis added). In other words, “[a] superseding, intervening cause” is an act committed by another “person, in no way caused by defendant’s [actions],” that “breaks the chain of causation set in operation by defendant’s [actions].” *Smith*, 119 N.W.2d at 846 (internal quotation marks omitted). To qualify as a “superseding cause” that breaks the causal chain, moreover, “the intervening conduct must be the *sole* cause” of the victim’s death. *Gatson*, 801 N.W.2d at 146 (quoting *State v. Olson*, 435 N.W.2d 530, 534 (Minn. 1989)) (emphasis added).

Here, Chauvin claims only that Floyd’s alleged drug use was “the most likely cause” of death, not that it was the sole cause of his death. Chauvin Mot. to Dismiss 22 n.3; *see id.* at 25. And he alleges that Floyd ingested fentanyl before Chauvin pinned Floyd to the ground, knelt on Floyd’s neck, and restricted Floyd’s breathing. *Id.* at 21-22. To qualify as a superseding cause, however, the independent action must *actually* intervene to break the causal chain, must occur “after the defendant’s acts,” and must be the “sole cause” of death. *See* CRIMJIG 11.25; *Olson*, 435 N.W.2d at 534. Chauvin’s speculative allegations therefore do not suffice as a legal matter to break the causal chain between Chauvin’s actions and Floyd’s death.

Chauvin’s arguments are also belied by the facts of this case. The evidence demonstrates that Floyd was not in fact suffering from a fentanyl overdose. During the officers’ confrontation

with Floyd, he did not display “common sign[s] of a fentanyl overdose,” such as falling asleep, snoring, or nodding off. Chauvin Mot. to Dismiss 23. Quite the opposite: Floyd was lucid throughout his interactions with the officers. He was compliant and conversant when officers pulled him out of the squad car, and he was wide awake and fully communicative as the officers attempted to stuff him into the back of the squad car. *See supra* pp. 4-7.

Nor did the fentanyl levels in Floyd’s blood after his death bespeak an overdose. Fentanyl levels in the body increase significantly after death. As one study found, “postmortem fentanyl blood concentrations were on average up to nine times higher than *in vivo* serum levels at the same dose.” Hilke Andresen et al., *Fentanyl: Toxic or Therapeutic? Postmortem and Antemortem Blood Concentrations After Transdermal Fentanyl Application*, 36 J. Analytical Toxicology 182, 182 (2012). Laboratory variability of up to 25 ng/mL, more than twice the concentration reported in Floyd’s autopsy, can also affect “[p]ostmortem fentanyl concentrations.” Clarissa S. Krinsky et al., *An Examination of the Postmortem Redistribution of Fentanyl and Interlaboratory Variability*, 59 J. Forensic Sciences No. 5, 1275, 1275, 1278 (Sept. 2014); *see* Hennepin County Autopsy Report, at 2. As a result, “[p]ostmortem fentanyl concentrations cannot be used in isolation to determine whether intoxication occurred. The physical state of the person, a possible drug tolerance and the pain level of the patient are also relevant.” Anderson, *supra*, at 192. Here, Floyd’s “physical state” in the minutes before he was pinned down—not to mention his “physical state” in the first minutes he was restrained on the ground, during which time he told Chauvin twenty times that he could not breathe and repeatedly yelled that it was Chauvin’s knee on his neck that was killing him, *see supra* pp. 7-10—demonstrates that Floyd was lucid and conversant until Chauvin’s actions caused Floyd to stop speaking, moving, and breathing. That evidence shows that Floyd did not die of an overdose.

The statement Chauvin selectively cites from Dr. Andrew Baker, the Hennepin County Medical Examiner, also does not support his overdose theory. *See* Chauvin Mot. 22. Dr. Baker explained that “*if* [Floyd] were found dead at home alone” *and* there were “no other apparent causes” besides the postmortem fentanyl levels, it “*could be* acceptable to call” his death an overdose. Chauvin Ex. 6, at 2 (emphasis added). Dr. Baker expressly clarified, however, that he was “not saying [the fentanyl] killed [Floyd].” *Id.* And the autopsy report he prepared made clear that there was another cause of death: “law enforcement subdual, restraint, and neck compression,” Hennepin County Autopsy Report, at 1, which led him to rule Floyd’s death a “homicide,” Hennepin County Medical Examiner, Press Release Report. In other words, Dr. Baker concluded that *Chauvin’s* conduct was the cause of Floyd’s death—not fentanyl.

As for Chauvin’s assertion that “Floyd ingested fentanyl in his car at the time Officers Lane and Kueng first approached,” Chauvin Mot. to Dismiss 24, that is pure speculation. The only thing Chauvin cites in support of that unfounded claim is a single still frame from Lane’s body-worn camera. *See id.* (citing Chauvin Ex. 9). But from the start of his interaction with the officers fifteen seconds earlier, Floyd was speaking normally, with no indication that he had any drugs in his mouth. What Chauvin claims is fentanyl is far more likely to be spittle or chewing gum. Indeed, Floyd had spittle in or around his mouth at other points during the incident, *see infra* p. 27 n.8, and surveillance videos appear to show that he was chewing gum earlier that evening. Chauvin himself, moreover, contradicts his own theory only a few sentences later: Despite claiming on the one hand that the still frame from Lane’s body-worn camera video is proof that Floyd ingested drugs orally and while the encounter with law enforcement was ongoing, Chauvin then advances the theory that Floyd had been “hooping,” which Chauvin

defines (based on a single citation to the crowdsourced website Urban Dictionary) as the practice of ingesting drugs rectally. *See Chauvin Mot. to Dismiss 24 & n.10.*<sup>8</sup>

Chauvin also argues that Floyd “was susceptible to cardiopulmonary arrest” based on several pre-existing medical conditions. *Chauvin Mot. to Dismiss 22*. But the victim’s condition does not matter for purposes of causation: “[T]he physical condition of the slain man at the time when the act was done, will not excuse or minimize its consequences, if the causal connection between it and the fact of death is made to appear.” *State v. King*, 367 N.W.2d 599, 602 (Minn. App. 1985) (quoting *Smith*, 119 N.W.2d at 848). As the Minnesota Supreme Court has held:

It is immaterial that defendant did not know that the deceased was suffering from a condition which facilitated the killing and that he did not reasonably anticipate that his act would cause death. Responsibility attaches for an injury which causes or contributes to death although the condition from which the victim was suffering might itself have caused death in time.

*Smith*, 119 N.W.2d at 848; *see State v. James*, 144 N.W. 216, 217-218 (Minn. 1913) (affirming second-degree murder conviction where the victim died from pneumonia, a condition to which he was particularly susceptible because of chronic alcoholism, that developed after being stabbed). In short, Floyd’s pre-existing medical conditions cannot defeat causation.

Ultimately, Chauvin’s theories of causation do not exonerate him. Even if Chauvin were right that these other causes contributed to Floyd’s death, “[t]he fact that other causes contribute to the death does not relieve the actor of responsibility.” *King*, 367 N.W.2d at 602 (quoting *Smith*, 119 N.W.2d at 847-848). Rather, so long as Chauvin’s actions “hasten[ed] or accelerate[d]” Floyd’s death and “contribute[d] to its cause,” it does not matter whether “other

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<sup>8</sup> In response to Kueng’s statement that Floyd had “foam around [his] mouth,” Floyd explained that he “was just hooping earlier.” (Kueng, BWC at 20:14:15-19.) Relying on a definition from Urban Dictionary, Chauvin claims that this serves not as confirmation that Floyd was merely playing basketball earlier, but rather as an admission that Floyd had recently ingested an illicit substance rectally. *Chauvin Mot. to Dismiss 24 & n.10*; *see Hooping*, Urban Dictionary, <https://bit.ly/33jAQD0> (“Administering psychoactive drugs via enema.”).

causes co-operate[d]” to cause his death. *Smith*, 119 N.W.2d at 847 (internal quotation marks omitted). Here, Chauvin’s actions easily meet that standard. The autopsy reports determined that Floyd’s death was “caused by the police subdual and restraint.” Armed Forces Medical Examiner Autopsy Report, at 2; *see* Hennepin County Autopsy Report, at 1 (Floyd’s death resulted from “cardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression”). And to the extent Chauvin disagrees, his arguments “present a fact question for the jury’s determination” on causation. *Slaughter*, 691 N.W.2d at 75. That is no basis for granting a motion to dismiss for lack of probable cause.

b. As for his intent, Chauvin alleges that the evidence shows that “Chauvin demonstrated a concern for Mr. Floyd’s well-being.” Chauvin Mot. to Dismiss 9. The evidence tells a different story. Chauvin repeatedly taunted Floyd after bringing him to the ground, telling Floyd “You’re doing a lot of talking, a lot of yelling. It takes a heck of a lot of oxygen to say things.” (Lane, BWC at 20:22:39-50.) Chauvin then continued to press his knee into Floyd’s neck even as Floyd repeatedly cried out that he could not breathe and that Chauvin was killing him, and even as bystanders told Chauvin that Floyd was not responsive. He maintained his position even when Floyd stopped talking, moving and breathing, and even when Lane acknowledged that Floyd was “passing out.” (Lane & Kueng, BWC at 20:24:43-48.) He did not move even when Kueng told him—twice—that Floyd no longer had a pulse, when EMS arrived on the scene and attempted to check Floyd for a pulse, or when Lane told EMS that Floyd was “not responsive.” *See supra* pp. 12-13. Those are not the actions of someone “concern[ed] for Mr. Floyd’s well-being.” Chauvin Mot. to Dismiss 9. They are exactly the opposite.

Chauvin also asserts that he could not have intended to harm Floyd because “[t]he decision to use MRT” complied with MPD policy. Chauvin Mot. to Dismiss 10; *see id.* at 14.

But Chauvin and the other officers did not actually use MRT. MRT involves using two Hobbles connected in front of the subject. Chauvin Ex. 15, at 22. But the Defendants did not Hobble Floyd at all. In fact, had they used the Hobble that was available to them, the officers could have restrained Floyd without kneeling on top of him and restricting his breathing. MRT also calls for the use of the “side recovery position ASAP.” *Id.* at 23. But the Defendants continued to restrain Floyd face-down in an inherently dangerous position, long after any justification for using MRT had evaporated. Moreover, under MPD policy, whenever the MRT is used, a supervisor must be called to the scene and complete a force review. *Id.* But the officers did not do that, either. In fact, they rejected the use of MRT in the first place because of this administrative reporting requirement, *see supra* p. 8—not, as Chauvin now claims, because they could get “Floyd into the ambulance more quickly” without a Hobble, Chauvin Mot. to Dismiss 10. The evidence plainly shows that Chauvin did not care about getting Floyd into the ambulance quickly: He continued to kneel on Floyd’s neck for more than a minute after the ambulance arrived, and even while EMTs tried to check Floyd’s pulse. *See supra* pp. 13-14.

Finally, Chauvin says that he could not have intended to inflict bodily harm on Floyd because “[t]here was no bruising on Mr. Floyd’s back or evidence of blunt trauma to his back.” Chauvin Mot. to Dismiss 10. But the State in this case need only establish at trial that Chauvin intended to perform “a physical act” that “results in bodily harm upon another.” *State v. Fleck*, 810 N.W.2d 303, 309 (Minn. 2012); *see* CRIMJIG 13.02 (defining “bodily harm” as “physical pain or injury, illness, or any impairment of a person’s physical condition”). In other words, at trial, the State must “prove that ‘the blows to [the victim] were not accidental but were intentionally inflicted.’” *State v. Dorn*, 887 N.W.2d 826, 830 (Minn. 2016) (quoting *Fleck*, 810 N.W.2d at 310). And here, there is no dispute that Chauvin’s actions were not “accidental”: In

pressing his knee into Floyd's neck for nine minutes and restraining Floyd's left hand, Chauvin intentionally performed a "physical act" that "result[ed] in bodily harm" to Floyd. *Fleck*, 810 N.W.2d at 309-310. Whether there is "bruising" or "evidence of blunt trauma" is thus entirely irrelevant to whether Chauvin had the requisite intent. *See Dorn*, 887 N.W.2d at 830 (rejecting the argument that "the intent to do" a particular "amount of harm" is required to establish the elements of assault). Moreover, the autopsy report concluded that—even without bruising—police subdual was a cause of Floyd's death. Hennepin County Autopsy Report, at 1.

In sum, Chauvin's arguments are wrong on the law and wrong on the facts. At most, these arguments raise fact questions for the jury. But under the probable cause standard, that is nowhere close to enough to warrant dismissal. Chauvin's motion to dismiss should be denied.

## **II. THERE IS PROBABLE CAUSE TO BELIEVE THAT CHAUVIN COMMITTED THIRD-DEGREE MURDER.**

Probable cause also exists to believe that Chauvin committed third-degree murder. The evidence brings this charge "within reasonable probability." *Florence*, 239 N.W.2d at 896.

1. The statute governing third-degree murder provides: "Whoever, without intent to effect the death of any person, causes the death of another by perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human life, is guilty of murder in the third degree." Minn. Stat. § 609.195(a). As relevant here, the elements of third-degree murder are: (i) the victim's death; (ii) the defendant's conduct was a "substantial causal factor" in the death; (iii) the defendant's intentional act was "eminently dangerous to other persons and was performed without regard for human life." CRIMJIG 11.38.<sup>9</sup>

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<sup>9</sup> As the comment to CRIMJIG 11.38 explains, the words "depraved mind" in the statute are "not susceptible of definition, except in terms of an 'eminently dangerous' act and the lack of regard for human life." CRIMJIG 11.38 n.2. The third element therefore captures the concept of

2. Viewed in the light most favorable to the State, the evidence is more than sufficient to “present a fact question for the jury’s determination” as to each of the elements of third-degree murder. *Slaughter*, 691 N.W.2d at 75. As already noted, the evidence readily supports the first two elements: Floyd died, and there is probable cause to believe that Chauvin’s conduct was a “substantial causal factor” in Floyd’s death. *See supra* pp. 19-20.

There is also probable cause to believe that Chauvin’s actions were “eminently dangerous to other persons and [were] performed without regard for human life.” CRIMJIG 11.38. With respect to this third element, the State need not prove that the defendant’s acts were “specifically intended to cause death” or that they were “specifically directed at the particular person whose death occurred.” *Id.* Rather, the State need only prove at trial that the defendant’s acts were “committed in a reckless or wanton manner with the knowledge that someone may be killed and with a heedless disregard of that happening.” *Id.*

Here, the evidence demonstrates that the State can easily make that showing at trial. Chauvin knelt on Floyd’s neck for approximately nine minutes. Over the first four minutes Chauvin pressed his knee into Floyd’s neck, Floyd told Chauvin over twenty times that he could not breathe, and told Chauvin almost ten times that he feared he would die. And then Floyd fell unconscious. After Floyd stopped moving, Chauvin heard bystanders scream that Floyd was not responsive and was not breathing. Chauvin refused to roll Floyd onto his side and into the recovery position, as his training required. Chauvin heard Kueng confirm twice that he could not find Floyd’s pulse. And Chauvin heard Lane tell emergency responders that Floyd was “not responsive.” *See supra* p. 13. Through it all, however, Chauvin continued to press his knee into Floyd’s neck, disregarding the grave threat his actions posed to Floyd’s life. Because the

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“depraved mind.” And because “the further use of the words ‘depraved mind’ is unnecessary and possibly prejudicial,” the model jury instructions do not use them. *Id.*

evidence is more than sufficient to present a fact question for the jury as to whether Chauvin acted “in a reckless or wanton manner with the knowledge that someone may be killed and with a heedless disregard of that happening.” probable cause exists to believe that Chauvin’s actions were “eminently dangerous” and “performed without regard for human life.” CRIMJIG 11.38.

Rather than dispute the overwhelming evidence against him, Chauvin argues that Minnesota law does not permit a conviction for third-degree murder “where the defendant’s actions were focused on a specific person.” Chauvin Mot. to Dismiss 11 (quoting *State v. Barnes*, 713 N.W.2d 325, 331 (Minn. 2006)). According to Chauvin, because his “actions were directed toward no one but Mr. Floyd and could not have resulted in harm to any person other than George Floyd,” probable cause does not exist for the third-degree murder charge. *Id.*<sup>10</sup>

Neither the text of the third-degree murder statute nor the case law supports Chauvin’s argument. Nowhere does the plain text of the statute say that a defendant’s acts must be directed at more than one person in order to form the basis for a third-degree murder conviction. *See* Minn. Stat. § 609.195(a); *State v. Padden*, No. C1-99-506, 2000 WL 54240, at \*2 (Minn. App. Jan. 25, 2000) (explaining that “the plain language of the statute” does not support such a requirement).<sup>11</sup> The case law does not support such a requirement, either. The Minnesota Supreme Court has “sustained a conviction of third-degree murder where the defendant’s shots were aimed at the decedent alone.” *State v. Wahlberg*, 296 N.W.2d 408, 417 (Minn. 1980)

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<sup>10</sup> The factual premise of that argument is itself mistaken. For instance, in attempting to maintain control over Floyd, Chauvin threatened the bystanders who stepped off the sidewalk with mace. *See supra* p. 11. It is therefore untrue that Chauvin’s actions “could not have resulted in harm to any person other than George Floyd.” Chauvin Mot. to Dismiss 11.

<sup>11</sup> The model jury instructions also do not support Chauvin’s argument. They say only that an act forming the basis for a third-degree murder charge “*may* not have been specifically directed at the particular person whose death occurred.” CRIMJIG 11.38 (emphasis added). In other words, the jury instructions state only that it is not a requirement for third-degree murder that the act be “specifically directed at the particular person whose death occurred.” *Id.* They do not say that the act *cannot* “have been specifically directed at the particular person.”

(citing *State v. Mytych*, 194 N.W.2d 276 (Minn. 1972)). And other courts have followed the Minnesota Supreme Court's lead, holding that a third-degree murder charge does not require a showing that the defendant's acts were aimed at multiple people. See *Padden*, 2000 WL 54240, at \*2 (sustaining a third-degree murder conviction where "only the victim and [defendant] were present when the victim was hanged"); *State v. Noor*, No. 27-CR-18-6859, at 4 (Minn. Dist. Ct., 4th Jud. Dist., Sept. 27, 2018) (denying a motion to dismiss a third-degree murder charge for lack of probable cause even though "[t]he record does not contain evidence suggesting that Defendant's conduct was 'not specifically directed at the person whose death occurred'").

Chauvin reaches the opposite conclusion only by misinterpreting the case law. As Chauvin notes, the Minnesota Supreme Court has explained that, for a jury to be instructed on third-degree murder in certain cases, "the act must be committed without a special design upon the particular person or persons with whose murder the accused is charged." *State v. Zumberge*, 888 N.W.2d 688, 698 (Minn. 2017) (quoting *Wahlberg*, 296 N.W.2d at 417); Chauvin Mot. to Dismiss 11. But that standard applies when the State has charged a defendant with *intentional* first- or second-degree murder and the *defendant* "request[s] instructions on third-degree murder as a lesser-included offense where the state presented evidence affirmatively proving intent." *Padden*, 2000 WL 54240, at \*3 (emphasis omitted); see Chauvin Mot. to Dismiss 11 (cases cited by Chauvin all arise in that context). In determining whether to grant a defendant's request to instruct the jury on a lesser-included offense, "the court's inquiry is whether the jury could reasonably find the defendant not guilty of the greater charge, but still find the defendant guilty of the lesser charge." *Padden*, 2000 WL 54240, at \*3. The cases Chauvin cites applied this standard in evaluating a defendant's request for a lesser-included third-degree murder instruction. They concluded that a lesser-included third-degree murder instruction was

impermissible: Because the State’s evidence in support of an intentional murder charge demonstrated that the defendant intended to kill, and because third-degree murder requires that the defendant be “without intent to effect the death of any person,” the third-degree murder charge could not go to the jury. Minn. Stat. § 609.195(a); *see, e.g., Zumberge*, 888 N.W.2d at 698; *Wahlberg*, 296 N.W.2d at 417. The court therefore clarified that a lesser-included third-degree murder instruction could not accompany an intentional murder charge unless some contrary evidence showed that the defendant’s act was “committed without a special design upon the particular person.” *Zumberge*, 888 N.W.2d at 698.

That holding does not apply here. Chauvin has not requested the third-degree murder charge as a lesser-included offense; rather, it was the State that separately charged him with both offenses. The case law applying the standard for evaluating a defendant’s request to instruct the jury on a lesser-included offense therefore has no bearing on the charge of third-degree murder here. The State also has not charged Chauvin with intentional murder; it has charged him with *unintentional* second-degree murder. Unlike an intentional murder charge, a second-degree unintentional murder charge is compatible with a third-degree unintentional murder charge because neither charge requires the State to “present[] evidence affirmatively proving [the defendant’s] intent” to kill. *Padden*, 2000 WL 54240, at \*3. And because the State does not need to introduce evidence showing an intent to kill as part of its case-in-chief on second-degree unintentional murder, it does not need to show that there is contrary evidence that the defendant’s acts were “committed without a special design upon” the victim in order to support the third-degree murder charge. *Zumberge*, 888 N.W.2d at 698; *see Mytych*, 194 N.W.2d at 282 (“affirmative proof of the lack of such intent” is not typically necessary for third-degree murder).

Moreover, even if the requirement that “the act must be committed without a special design upon the particular person” were to apply here, Chauvin’s conduct satisfies it. Contrary to Chauvin’s argument, this requirement does not mean that the defendant’s acts must put more than one person in harm’s way. Chauvin Mot. to Dismiss 11-12. Rather, it means only that the defendant actions must have been taken “without special regard” for the identity of the victim—in other words, that the defendant did not seek out the particular victim. *Wahlberg*, 296 N.W.2d at 417. After all, this requirement serves to distinguish unintentional third-degree murder from intentional first- and second-degree murders in which defendants have sought out a particular person with the intent to kill. *See supra* pp. 33-34. That is why the Court of Appeals held in *Padden*—a case where “only the victim and [the defendant] were present” at the scene of the murder, and where the defendant’s actions put only one person in harm’s way—that a third-degree murder conviction was proper because “[n]o evidence was introduced indicating [the defendant] had any animus for the victim.” 2000 WL 54240, at \*2. The same is true here: Chauvin has not pointed to any evidence of prior animus toward, or premeditated intent to kill, Floyd. Nor has Chauvin indicated that he knew who Floyd was at the time of his death. For that reason, even if “the act must be committed without a special design upon the particular person,” Chauvin did not kneel on Floyd’s neck with any “special design upon” Floyd.

In short, because the third-degree murder charge is “within reasonable probability,” Chauvin’s motion to dismiss this count should be denied. *Florence*, 239 N.W.2d at 896.

### **III. THERE IS PROBABLE CAUSE TO BELIEVE THAT CHAUVIN COMMITTED SECOND-DEGREE MANSLAUGHTER.**

Probable cause also plainly exists for the second-degree manslaughter charge.

1. The statute governing second-degree manslaughter provides: “A person who causes the death of another . . . by the person’s culpable negligence whereby the person creates an

unreasonable risk, and consciously takes chances of causing death or great bodily harm to another” is “guilty of manslaughter in the second degree.” Minn. Stat. § 609.205(1). The statute defines “great bodily harm” as “bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss of impairment of the function of any bodily member or organ.” *Id.* § 609.02, subd. 8.

Second-degree manslaughter requires proof of (i) “objective gross negligence on the part of the actor”; and (ii) “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 *State v. Frost*, 342 N.W.2d 317, 320 (Minn. 1983)). 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.* (quoting *Frost*, 342 N.W.2d at 319). The subjective recklessness component requires proof of the “actor’s state of mind.” *Id.* That is usually 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)). In conducting this inquiry, the fact-finder may infer that “a person intends the natural and probable consequences of their actions.” *Id.* at 507 (quoting *Johnson*, 616 N.W.2d at 726).

2. The evidence strongly supports the conclusion that probable cause exists for the second-degree manslaughter charge against Chauvin. As noted, Floyd died, and there is probable cause to believe that Chauvin “cause[d] the death” of Floyd. *See* Minn. Stat. § 609.205(1); *supra* pp. 19-20, 31. The evidence also demonstrates that there is probable cause to believe that Chauvin’s conduct was objectively grossly negligent and subjectively reckless.

*First*, Chauvin’s conduct “gross[ly] deviat[ed] from the standard of care that a reasonable person” would observe in the situation. *McCormick*, 835 N.W.2d at 507 (quoting *Frost*, 342 N.W.2d at 319). The training given to all police officers, including Chauvin, required him to “[p]lace the subject in the recovery position to alleviate positional asphyxia,” and to do so “[a]s soon as possible”; to stop using a “neck restraint” when the subject is not resisting or only passively resisting; and to “start CPR” if the subject stops breathing. Chauvin Mot. to Dismiss Ex. 8, at 5; Exhibit 1, MPD Policy & Procedure Manual 5-311(II)(C), 5-316(IV)(B)(1); Exhibit 3, 2019 MPD Use of Force Manual, at 2, 4. Chauvin did none of those things. Instead, as bystanders screamed that Floyd was not resisting, was not moving, and was not breathing, Chauvin continued to press his knee into Floyd’s neck. *See supra* pp. 9-13. At a minimum, that is extremely strong evidence of gross negligence.

*Second*, Chauvin’s conduct reflected his “actual conscious disregard of the risk created by [his] conduct.” *McCormick*, 835 N.W.2d at 507 (quoting *Frost*, 342 N.W.2d at 320). Chauvin could hear the screams of bystanders who cried out that Floyd was “not fucking moving.” (Kueng & Thao, BWC at 20:27:11-17); *see supra* p. 12. He could hear the crowd yelling that he was “stopping [Floyd’s] breathing,” and begging the officers to take Floyd’s pulse more than thirty times. (Kueng & Thao, BWC at 20:25:09-11, 20:25:41-20:27:07.) He could hear Kueng confirm that he could not find Floyd’s pulse. And he could hear Lane tell emergency personnel who arrived on the scene that Floyd was “not responsive.” *See supra* p. 13. Even so, Chauvin continued to press his knee into Floyd’s neck—for a matter of *minutes*, not seconds. *See supra* pp. 13-14. That evidence is more than sufficient to establish that Chauvin consciously disregarded the risk to Floyd that his conduct created.

Thus, viewed in the light most favorable to the State, the evidence against Chauvin is more than “sufficient to present a fact question for the jury’s determination” on the elements of second-degree manslaughter. *Slaughter*, 691 N.W.2d at 75.

3. a. Chauvin’s primary argument is that he was “acting within his duties to execute a legitimate legal process” and that “Floyd was obstructing the legal process of his arrest through active resistance.” Chauvin Mot. to Dismiss 13-14. According to Chauvin, because Floyd was resisting at some point during their interaction, his decision to kneel on Floyd’s neck for nine minutes was reasonable. *See id.*; Minn. Stat. § 609.06. That argument fails for two reasons.

*First*, it ignores the critical question for the jury: Whether Chauvin’s actions were reasonably justified for the *entirety* of his interaction with Floyd. *See* Minn. Stat. § 609.06, subd. 1 (authorizing only the use of “reasonable force”); *Graham v. Connor*, 490 U.S. 386, 396 (1989) (listing factors relevant to whether force is reasonable); Exhibit 1, MPD Policy & Procedure Manual 5-303 (same). Even assuming for the sake of argument that Chauvin was reasonably justified in restraining Floyd when he first pinned Floyd to the ground, Chauvin cannot escape criminal liability if kneeling on Floyd’s neck and pinning him face-down became unjustified at some point during the incident. That is the case here. For the first five minutes after Chauvin began kneeling on Floyd’s neck, Floyd cried for help, declaring over twenty times that he could not breathe. *See supra* p. 9. Floyd then went silent. Nonetheless, Chauvin continued to press his knee into Floyd’s neck, with Kueng and Lane restraining his back and legs, for over four more minutes. During the last three of these minutes, Floyd lay completely motionless, offering no resistance at all. *See supra* pp. 10-14. By that point, any plausible justification for restraining Floyd in that manner had evaporated. Yet Chauvin continued to kneel on Floyd’s neck and

refused to roll Floyd onto his side into the recovery position, even after Kueng told him—twice—that Floyd no longer had a pulse. *See supra* pp. 12-13.

*Second*, the jury could find that the defendants’ actions were not reasonably justified at the initial moment they restrained Floyd face-down on the ground. For one thing, the charge for which Floyd was arrested—passing a counterfeit \$20 bill—is a gross misdemeanor offense. *See* Minn. Stat. §§ 609.632, subd. 4(b)(4), 609.02, subd. 4. The “severity of the crime at issue”—a nonviolent property crime—thus did not support the level of force used against Floyd. Exhibit 1, MPD Policy & Procedure Manual 5-303; *see id.* at 9-103 (“[a]dult misdemeanor violators” generally “shall be issued citations in lieu of arrest”).

The jury could also find that the nature of Floyd’s alleged “resistance” to the defendants’ commands did not support the application of a neck restraint. Chauvin Mot. to Dismiss 14. The Defendants were required by their training to consider whether Floyd’s alleged “lack of compliance” was a “deliberate attempt to resist” or just “an inability to comply” based on Floyd’s self-identified claustrophobia, his assertion that he was recovering from COVID, and the “influence of drug or alcohol use,” among other things. *See* Exhibit 1, MPD Policy & Procedure 5-304(B)(1)(b); *see supra* p. 15. Based on those factors, a jury could conclude that Chauvin should have known that Floyd was, at most, engaged in “passive resistance,” and that a reasonable officer therefore would have known not to use a neck restraint on Floyd. *See* Exhibit 1, MPD Policy & Procedure 5-302 (defining “passive resistance” as “behavior initiated by a subject when the subject does not comply with verbal or physical control efforts, yet the subject does not attempt to defeat an officer’s control efforts”); *id.* at 5-311(II)(C) (forbidding the use of a “neck restraint against subjects who are passively resisting”). Moreover, to the extent Chauvin asserts that the evidence shows that Floyd’s resistance justified the initial neck restraint, the court

should not weigh that evidence itself. Rather, it should reserve that question for the jury. *See Trei*, 624 N.W.2d at 598 (“[T]he trial court is not to invade the province of the jury.”).

b. Chauvin’s other arguments fare no better. Chauvin claims that he “acted according to MPD policy” and “his training.” *See Chauvin Mot. to Dismiss* 14-18. That is wrong. The Defendants did not follow MPD’s use-of-force policy. They did not use the proper MRT. They did not consider whether to implement de-escalation tactics. They did not attempt CPR. And they did not attempt to inform emergency medical personnel that they had used a neck restraint, as their training required. *See supra* pp. 14-16, 22-23. The evidence to which Chauvin points does not support a contrary conclusion. The “Responsive Training Guide” chart he cites says that an officer must “de-escalate force” when he or she “can clearly defend or control with less force.” *Chauvin Mot. to Dismiss* 16. But Chauvin made no attempt to “de-escalate force” even after Floyd stopped moving, responding, or breathing. Chauvin also includes a photograph in his brief of three officers pinning down a subject in the prone position. *Id.* at 17. That photo demonstrates a particular procedure for getting an uncooperative subject handcuffed when the subject is resisting handcuffing. Floyd, however, was *already handcuffed*. The photo also shows that Chauvin’s technique while kneeling on Floyd’s neck was wrong: He placed all of his weight in the knee that was on Floyd’s neck, rather than distributing his weight as the officer in the photo did. *See Chauvin Mot. to Dismiss Ex. 8*, at 5. That photo, moreover, is accompanied in the training materials by the following warning: “[P]lace the subject in the recovery position to alleviate positional asphyxia.” *Id.* at 5; *see id.* at 7 (image demonstrating how to protect the airway when the subject is placed in the “recovery position”). Chauvin conveniently omits that warning from his brief, and he certainly ignored it when he pinned Floyd face-down for

approximately nine minutes. *See supra* pp. 13-14. In short, Chauvin’s own evidence shows that he did not act “according to MPD policy” and “his training.” Chauvin Mot. to Dismiss 19.

Finally, Chauvin contends that the State must show that “Chauvin *intended* ‘the natural and probable consequences of [his] actions.’” Chauvin Mot. to Dismiss 20. But that is not a separate requirement under the law. Rather the fact-finder is permitted to infer that “a person intends the natural and probable consequences of their actions.” *McCormick*, 835 N.W.2d at 507 (quoting *Johnson*, 616 N.W.2d at 726). The case law is clear: The State need not make any showing that Chauvin intended Floyd’s death to prove second-degree manslaughter. *See, e.g., State v. Swanson*, 240 N.W.2d 822, 825 (Minn. 1976) (upholding conviction for second-degree manslaughter where defendant intentionally shot the victim but did “not intend[] to kill him”).

Thus, at a minimum, the facts “would lead a person of ordinary care and prudence to hold an honest and strong suspicion” that Chauvin is guilty of aiding and abetting second-degree manslaughter. *Ortiz*, 626 N.W.2d at 449. Probable cause exists for this charge.

**CONCLUSION**

For the foregoing reasons, Defendant Derek Chauvin's motion to dismiss for lack of probable cause should be denied.

Dated: September 18, 2020

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