

STATE OF MINNESOTA
IN COURT OF APPEALS

State of Minnesota,

Plaintiff,

vs.

J. Alexander Kueng,

Thomas Kiernan Lane

Tou Thao,

Defendants.

**STATEMENT OF THE CASE BY
APPELLANT STATE OF
MINNESOTA**

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

Court File No.: 27-CR-20-12951

Court File No.: 27-CR-20-12949

1. This case originated in Hennepin County District Court, Honorable Peter Cahill presiding.
2. Jurisdictional statement.

(A) Appeal from district court.

Statute authorizing appeal: Minn. R. Crim. P. 28.04, subd. 1(1).

Date of entry of judgment or date of service of notice of filing of order from which appeal is taken: The District Court's order denying the State's motion to reinstate the charge of Murder in the Third Degree was entered on February 11, 2021.

Authority fixing time limit for filing notice of appeal (specify applicable rule or statute): Minn. R. Crim. P. 28.04, subd. 2.

Date of filing any motion that tolls appeal time: Not applicable.

Date of filing of order deciding tolling motion and date of service of notice of filing: Not applicable.

(B) Certiorari appeal.

Statute, rule or other authority authorizing certiorari appeal:

Authority fixing time limit for obtaining certiorari review (cite statutory section and date of event triggering appeal time, *e.g.*, mailing of decision, receipt of decision, or receipt of other notice):

(C) Other appellate proceedings.

Statute rule or other authority authorizing appellate proceeding:

Authority fixing time limit for appellate review (cite statutory section and date of event triggering appeal time, *e.g.*, mailing of decision, receipt of decision, or receipt of other notice):

(D) Finality of order of judgment.

Does the judgment or order to be reviewed dispose of all claims by and against all parties, including attorney fees? Yes No

If no:

Did the district court order of entry of a final partial judgment for immediate appeal pursuant to MINN. R. CIV. APP. P. 104.01? Yes No or

If no, is the order or judgment appealed from reviewable under any exception to the finality rule? Yes No

If yes, cite rule, statute, or other authority authorizing appeal: Minn. R. Crim. P. 28.04, subd. 1(1).

(E) Criminal only:

Has a sentence been imposed or imposition of sentenced stayed?
Yes No

3. State type of litigation and designate any statutes at issue, and critical impact.

This is a felony prosecution in connection with the death of George Floyd on May 25, 2020. Defendants J. Alexander Kueng, Thomas Lane, and Tou Thao were charged with aiding and abetting second-degree unintentional felony murder, Minn. Stat. § 609.19, subd. 2(1), with reference to Minn. Stat. § 609.05, subd. 1, and aiding and abetting second-degree manslaughter, Minn. Stat. § 609.205(1), with reference to Minn. Stat. § 609.05, subd. 1. On February 4, 2021, three days after the Court of Appeals' decision in *State v. Noor*, __ N.W.2d __, 2021 WL 317740 (Minn. App. Feb. 1, 2021), the State moved to

amend the complaint to add a third-degree murder charge against the three Defendants. On February 11, 2021, the District Court denied the motion.

This Court has authority to hear this appeal under Rule 28.04 because the District Court's decision will have a "critical impact" on the outcome of the trial. The Minnesota Supreme Court has held that a decision dismissing or barring prosecution of one charge against a defendant has "a critical impact" "even when other charges remain." *State v. Underdahl*, 767 N.W.2d 677, 684 (Minn. 2009). The Court of Appeals has likewise held that the denial of leave to add an offense to the complaint satisfies the "critical impact" standard so long as the "series of incidents that were the basis for the charges in the original complaint are the exact same incidents that are the basis for the added counts in the proposed amended complaint." *State v. Baxter*, 686 N.W.2d 846, 851 (Minn. App. 2004). As the Court of Appeals has explained, when the added counts "are part of the same behavioral incidents, the state would be barred from prosecuting on the additional counts at a later time if the [defendant] is convicted on all counts in the original complaint." *Id.* This "potential bar" satisfies the "critical impact" standard. *Id.* Here, the second-degree murder and second-degree manslaughter charges against the Defendants are based on the "exact same incident[]" as the third-degree murder charge—namely, the events that led to George Floyd's death. *Id.* Thus, the District Court's decision readily satisfies the critical impact standard.

4. Brief description of claims, defenses, issues litigated and result below. For criminal cases, specify whether conviction was for a misdemeanor, gross misdemeanor, or felony offense.

This case arises from the events surrounding the death of George Floyd on May 25, 2020. The State has charged four Defendants—Derek Michael Chauvin, J. Alexander Kueng, Thomas Kiernan Lane, and Tou Thao—with felony offenses committed in connection with that event. Following this Court's decision in *State v. Noor*, __ N.W.2d __, 2021 WL 317740 (Minn. App. Feb. 1, 2021), the State moved to reinstate the third-degree murder charge against Chauvin, and moved to add a third-degree murder charge against Kueng, Lane, and Thao. The District Court denied that motion on February 11, 2021.

The District Court erred in preventing the State from amending its complaint to reinstate or add the third-degree murder charge against the four Defendants. The District Court held that it would not submit the third-degree murder charge to a jury because the "death-causing act" in this case "was solely directed at a single person." Order and Memorandum Op. Denying State's Mot. to Reinstate or Add Third-Degree Murder Charge 6 (Feb. 11, 2021). But as the District Court itself recognized, this Court held in its published opinion in *Noor* "that a Murder in the Third Degree charge may be submitted to a jury under a fact pattern in which the death-causing act was solely directed at a single person and was not eminently dangerous to others." *Id.* In light of the holding in *Noor*, the District Court erred in denying the State's motion and preventing the State from reinstating or adding the third-degree murder charge.

5. List specific issues proposed to be raised on appeal.

- I. Whether the District Court erred in denying the State leave to amend the complaint to add a third-degree murder charge based on its conclusion—contrary to this Court’s published decision in *State v. Noor*, __ N.W.2d __, 2021 WL 317740 (Minn. App. Feb. 1, 2021)—that a third-degree murder charge cannot be submitted to the jury where the defendant’s act was directed at a single person.

6. Related appeals.

List all prior or pending appeals arising from the same action at this appeal. If none, so state. *State v. Derek Michael Chauvin*, No. A21-0133 (appeal dismissed February 12, 2021; time for seeking further review has not elapsed); *State of Minnesota v. J. Alexander Kueng, Thomas Kiernan Lane, and Tou Thao*, No. A21-0135 (appeal dismissed February 12, 2021; time for seeking further review has not elapsed); *State v. Derek Michael Chauvin*, No. __ - __ (notice of appeal filed February 12, 2021).

List any known pending appeals in separate actions raising similar issues to this appeal. If none are known, so state. *State v. Mohamed Noor*, No. A19-1089 (decision issued February 1, 2021; time for seeking further review has not elapsed).

7. Contents of record.

Is a transcript necessary to review the issues on appeal? Yes No

If yes, full or partial transcript?

Has the transcript already been delivered to the parties and filed with the trial court administrator? Yes No

If not, has it been ordered from the court reporter? Yes No

If a transcript is unavailable, is a statement of the proceedings under Rule 110.03 necessary? Yes No

In lieu of the record as defined in Rule 110.01, have the parties agreed to prepare a statement of the record pursuant to Rule 110.04? Yes No

8. Is oral argument requested? Yes No

If so, is argument requested at a location other than that provided by Rule 134.09, subd. 2? Yes No

If yes, state where argument is requested:

9. Identify the type of brief to be filed.

- Formal brief under Rule 128.02.
- Informal brief under Rule 128.01, subd. 1 (must be accompanied by motion to accept unless submitted by claimant for reemployment benefits)
- Trial memoranda, supplemented by a short letter argument, under Rule 128.01, subd. 2.

10. Names, addresses, zip codes and telephone numbers of attorney for appellant and respondent.

Attorneys for Appellant, the State of Minnesota:

Keith Ellison
Attorney General
State of Minnesota
Suite 1800, Bremer Tower
445 Minnesota Street
St. Paul, MN 55101-2134

Matthew Frank
Assistant Attorney General
Atty. Reg. No. 021940X
445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 757-1448 (Voice)

Neal Kumar Katyal
Sundeep Iyer
Special Attorneys for the State of Minnesota
Hogan Lovells U.S. LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600 (Voice)
neal.katyal@hoganlovells.com

Attorneys for Respondents:

Thomas Plunkett
U.S. Bank Center
Suite 1500
St. Paul, MN 55101
(651) 222-4357
Attorney for Defendant Kueng

Earl Gray
1st Bank Building
332 Minnesota Street Suite W1610
St. Paul, Minnesota 55101
(651) 223-5175
Attorney for Defendant Lane

Robert Paule
920 Second Avenue South, Ste. 975
Minneapolis, MN 55402
(612) 332-1733
Attorney for Defendant Thao

Dated: February 12, 2021

KEITH ELLISON
Attorney General
State of Minnesota

/s/ Matthew Frank

By: MATTHEW FRANK
Assistant Attorney General
Atty. Reg. No. 021940X
445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 757-1448 (Voice)
(651) 297-4348 (Fax)
matthew.frank@ag.state.mn.us

NEAL KUMAR KATYAL
SUNDEEP IYER
Special Attorneys for the State of Minnesota
Hogan Lovells U.S. LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600 (Voice)
neal.katyal@hoganlovells.com

ATTORNEYS FOR APPELLANT