

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

DEFENDANT THAO'S
CLOSING ARGUMENT

PLAINTIFF,

V.

TOU THAO,

DEFENDANT.

COURT FILE NO. 27-CR-20-12949

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

As in all criminal cases, the defendant here – Mr. Tou Thao – is presumed innocent of the charges against him. As in all criminal trials, the prosecution bears the entire burden of proof – proof beyond all reasonable doubt. Reasonable doubt is defined as a doubt based upon reason and common sense, i.e. an alternative theory that is reasonable, logical, and based on common sense, which cannot be reasonably and logically disproven by the state.

The prosecution has alleged that Thao's actions on May 25, 2020, were undertaken and done with the intention of aiding the commission of a crime (either Second Degree Murder – Unintentional – While Committing a Felony or Second Degree Manslaughter – Culpable Negligence Creating Unreasonable Risk). This means the prosecution must prove that not only did Thao recognize that Derek Chauvin was committing a criminal act (assault), but also Thao intended his actions to aid in the commission of the criminal act.

In this case, the prosecution has proved neither of these theories beyond all reasonable doubt.

PROCEDURAL POSTURE

The prosecution has charged Thao with two counts: Count 1: Aiding and Abetting Second Degree Murder – Unintentional – While Committing a Felony; and Count 2: Aiding and Abetting Second Degree Manslaughter – Culpable Negligence Creating Unreasonable Risk.

On October 24, 2022, Thao waived his right to a jury trial and agreed to a stipulated evidence trial. The parties stipulated to the following evidence:

1. *State v. Chauvin* (court file no. 27-CR-20—12646) trial transcript;
2. All *State v. Chauvin* trial exhibits;
3. *U.S. v. Thao* (court file number 0:21-cr-00108 (PAM/TNL)) trial transcript;
4. All *U.S. v. Thao* trial exhibits (including exhibits admitted by co-defendants Kueng and Lane);
5. 24 Supplemental exhibits labeled State's Supplemental Exhibits:
 - State's Supplemental Ex. 1
 - Still Image from Alisha Oyler video 5 @ 55 Seconds – Kueng/Thao with hands in pockets facing bystanders
 - State's Supplemental Ex. 2
 - Still image of individuals on sidewalk – Thao BWC @ 20.27.27
 - State's Supplemental Ex. 3
 - Still image of Milestone/D.F. video (08:22:01)
 - State's Supplemental Ex. 4
 - Clip from Thao's BWC (Axon_Body_3_Video_2020-05-25_2017) from 20:22:17-20:22:52
 - State's Supplemental Ex. 5
 - Still image of Thao BWC (20:22:48) (#10)
 - State's Supplemental Ex. 6
 - Still image of individuals on sidewalk – Thao BWC @ 20.28.16
 - State's Supplemental Ex. 7
 - Billy Jones Video
 - State's Supplemental Ex. 8

- Still Image of McMillian Van Pulling onto 38th (from Ex. 55: Dragon Wok Video at 20:34:38)
- State's Supplemental Ex. 9
 - Still image of all 4 Officers – Billy Jones Video @ 00:42
- State's Supplemental Ex. 10
 - Still image of all 4 Officers – Billy Jones Video @ 00:50
- State's Supplemental Ex. 11
 - Still image of all 4 Officers – Billy Jones Video @ 00:42
- State's Supplemental Ex. 12
 - BWC from Officer Chauvin (2034) from 20:35:13 to 20:36:42
- State's Supplemental Ex. 13
 - BWC from Officer Thomas Lane #3951 from 20:07:57 to 20:29:41
- State's Supplemental Ex. 14
 - Thao BWC Clip: 20:36:12 to 20:36:35 (Axon_Body_3_Video_2020-05-25_2017)
- State's Supplemental Ex. 15
 - Still image of Stabilization Room Video_Trauma Bay at 20:54:18/ 1:49 (#15 Report 120 HCMC Stab Room video)(top-left quadrant)
- State's Supplemental Ex. 16
 - Still image of Lane's BWC at 20:37:26 (Axon_Body_3_Video_2020-05-25_2008)
- State's Supplemental Ex. 17
 - Thao BWC Clip: 20:32:46 to 20:33:19 (Axon_Body_3_Video_2020-05-25_2017)
- State's Supplemental Ex. 18
 - Stabilization Room Video_Trauma Bay Clip: 20:54:00/1:31 to 20:55:16/2:48)
- State's Supplemental Ex. 19
 - Stabilization Room Video_Trauma Bay Clip, 21:24:53/32:25 to 21:25:28/32:59
- State's Supplemental Ex. 20
 - Minneapolis Police Field Training Officer Manual (#9830-9868)
- State's Supplemental Ex. 21
 - Expert Report of Seth W. Stoughton and Jeffrey J. Noble (#41891-42199)
- State's Supplemental Ex. 22
 - Expert Report of Sergeant Jody Stiger (#42245-42705)
- State's Supplemental Ex. 23

- Transcript of Video Interview with Tou Thao (#27480-27525)
[ILLUSTRATIVE EXHIBIT]
- State's Supplemental Ex. 24
 - Video of BCA Interview with Tou Thao (#8128)

CHARGES AGAINST THAO

The prosecution has charged Thao with two counts:

1. Count 1: Aiding and Abetting Second Degree Murder – Unintentional – While Committing a Felony; and
2. Count 2: Aiding and Abetting Second Degree Manslaughter – Culpable Negligence Creating Unreasonable Risk.

The Court previously outlined the elements of the charges in this case. *See* Order and Memorandum Opinion of Defense Motions to Dismiss for Lack of Probable Cause (Index 183, filed on October 21, 2020, in the above-captioned case). Much of that discussion of elements is incorporated into the proposed finding of facts.

Under Minnesota law, “[a] person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.” Minn. Stat. § 609.05 subd. 1. Under Minnesota law, the requisite *mens rea* for Aiding and Abetting under Minn. Stat. § 609.19 is intentional. *State v. Huber*, 877 N.W.2d 519 (Minn. 2016); *State v. Milton*, 821 N.W.2d 789 (Minn. 2012). The phrase “intentionally aids” in Minn. Stat. § 609.05 subd. 1 encompasses two separate “important and necessary” *mens rea* elements. *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012).

Applying Minnesota law and the model jury instructions to the facts of this case, the State must prove each of the following beyond all reasonable doubt to find Thao guilty of Count 1:

- (i) Chauvin committed second-degree unintentional murder by the following elements:
 - a. Floyd's death;
 - b. Chauvin's conduct was a substantial causal factor in Floyd's death;
 - c. Chauvin intentionally inflicted or attempted to inflict bodily harm on Floyd or intended to cause Floyd to fear immediate bodily harm or death; and
 - d. Chauvin did inflict substantial bodily harm on Floyd.
- (ii) Thao knew Chauvin was intentionally committing an assault that inflicted substantial bodily harm on Floyd;
- (iii) Thao intended his presence or actions aided Chauvin's assault on Floyd.

Applying Minnesota law and the model jury instructions to the facts of this case, the State must prove each of the following beyond all reasonable doubt to find Thao guilty of Count 2:

- (i) Chauvin committed second-degree manslaughter by the following elements:
 - a. Floyd's death
 - b. Chauvin caused Floyd's death by culpable negligence, whereby Chauvin created an unreasonable risk and consciously took a chance of causing death or great bodily harm
- (ii) Thao knew Chauvin by, his culpable negligence created an unreasonable risk, and Thao knew Chauvin consciously took a chance of causing death or great bodily harm; and

- (iii) Thao intended that his presence or actions aided Chauvin's commission of that crime.

RELEVANT FACTS

The following compilation of facts are relevant to the burden of proof for each element. This factual background highlights only a portion of the evidence presented in the stipulated evidence back and does not foreclose this Court from using evidence stipulated to that is not mentioned in this closing argument.

A. Brief overview of the incident

On May 25, 2020, co-defendants and then rookie-officers J. Alexander Kueng ("Kueng" herein), and Thomas Lane ("Lane" herein) responded to a 911 call at Cup Foods on a report of a counterfeit bill. Dispatch provided information that the suspect was still on scene in a parked car and possibly under the influence. Kueng and Lane approached the suspect, George Floyd ("Floyd" herein), in a vehicle across the street from the store that was occupied by Floyd and two other persons. After observing furtive movements from Floyd and Floyd refusing to show both his hands, Lane draws his service handgun on Floyd in an effort to get Floyd to comply. *See* Chauvin Ex. 47 starting at 20:09:25. Lane removed Floyd from the vehicle and handcuffed him with the needed assistance of Kueng. *Id.* at 20:10:30-20:11:40. When he first spoke with Floyd, the officers asked Floyd if he "was on something" because he "was acting real erratic". Chauvin Ex. 43 at 20:14:05-20:14:22. The officers tell Floyd he has foam around his mouth, which Floyd responds with "yes, I was hooping earlier". *Id.* (A medical expert testified that "hoopin" refers to someone administering drugs via their rectum. *See* Federal Tr. 10 at 2213).

Lane and Kueng led Floyd in handcuffs to their squad car across the street. Chauvin Ex. 47 at 20:14:11. Floyd repeatedly dropped his weight while walking across the street. *See* Federal Tr. 15 at 3465. Floyd became uncooperative and resisted being placed into the squad car and then attempted to kick his way out of the back of the squad car while Lane and Kueng attempted to calm him down and persuaded him to cooperate with their orders. Shortly thereafter, Thao and co-defendant and then officer Derek Chauvin arrived on scene to assist in the arrest. Floyd was eventually pulled out of the squad car and Chauvin got Floyd down on the ground and held him in a prone restraint.

An ambulance was called to the scene on a Code 2. While waiting for the ambulance to arrive, Chauvin held Floyd down in the prone position by using his body weight and knee on Floyd's neck/upper back to keep him pinned to the street's asphalt. Kueng was positioned around Floyd's buttock area and Lane around Floyd's calves and feet.

Thao never touched Floyd. Thao placed himself between officers/Floyd and the street or between officers/Floyd and the sidewalk as a crowd of bystanders gathered.

Thao suggested an alternative to Chauvin – place Floyd in a hobble, which would have physically required Chauvin to release Floyd and place him on his side. Chauvin refused stating they were going to keep him here until medical personnel arrived. Thao turned on the emergency lights in the squad and asked the officers if they believed Floyd was high on drugs, Lane told Thao they he assumed so, Kueng backed this up and informed Thao that they found a pipe on Floyd. Floyd told Thao that he “ate too many drugs”

After waiting several minutes with no ambulance arriving, Thao stepped up the request and placed a Code 3 (lights and sirens, arrive as fast as possible). More than five

minutes passed before sirens from the incoming ambulance were heard. During that waiting period, Thao repeatedly inquired about Floyd's consumption of drugs.

Chauvin continued to pin Floyd down on the ground.

The ambulance eventually arrived and took Floyd to Hennepin Healthcare where he was ultimately pronounced dead. An autopsy was performed and declared the cause of death as "Cardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression". Chauvin Ex. 193; Federal Gov't Ex. 107.

A bystander video of Chauvin restraining Floyd went viral online and broke the news cycle. Days of protests, calls for action, and eventually rioting followed. The public outcry was to arrest and prosecute Chauvin and the other assisting officers.

On May 29, 2020, Chauvin was charged with third-degree murder and second-degree manslaughter. Five days later, June 3, 2020, Thao and his co-defendants were charged with aiding and abetting second-degree murder and aiding and abetting second-degree manslaughter.

B. TOU THAO'S BACKGROUND AND EDUCATION

On February 15, 2022, in the courtroom of the Honorable Paul A. Magnuson, Thao took the stand in his own defense in the trial of *U.S. v. Thao*. Thao's testimony has been stipulated to as evidence in this case. Thao testified to the following.

a. Childhood and first interaction with MPD.

Thao is a Hmong man who was born in Saint Paul, Minnesota. Federal Tr. 14 at p. 3040-3041. His parents fled to the United States from Laos as refugees from the Vietnam War. *Id.* at 3041. His father worked as a medical assembler and his mother stayed at home.

Id. at 3042. He and his six siblings grew up extremely poor in North Minneapolis. *Id.* As a child, Thao would eat once a day, twice if it was a school day and he was given a subsidized lunch. *Id.* at 3042-3043. He and his younger brother shared four set of clothes between the two of them, and rotated who wore what to conceal this fact. *Id.* at 3043. The children were restricted by their parents to their backyard to play due to the dangerousness of North Minneapolis at the time, and Hmong children being bullied. *Id.*

At the age of seven or eight, Thao was first exposed to the Minneapolis Police Department (“MPD” herein). *Id.* at 3048. Thao and his younger brother had gotten into a fight. *Id.* at 3050. His father was very strict and engaged in physical discipline. *Id.* Looking back, Thao sees that at times his father crossed the line from corporal punishment to physical abuse. *Id.* On this date, his father began to beat Thao and his brother with the extension cord. *Id.* His mother interceded, told his father it was enough, and tried to stop his father. *Id.* Instead of stopping, his father began to beat his mother with an extension cord. *Id.* His father eventually left to go to his room where he got his gun – a .22 pistol. *Id.* at 3050-51. His father threatened to kill the family. *Id.* at 3051. His father put the gun to all of their heads. *Id.* Thao, his siblings, and mother were able to flee the house. *Id.* They ran to his aunt’s home because she spoke English. *Id.* They were able to call 911 and MPD officers arrived. *Id.* at 3052. The police needed Thao to assist with the arrest of his father, so they took him back to his home, where he opened the door so police could make the arrest of his father. *Id.* Thao describes the two days that his father was in custody after the arrest as “the two most peaceful days of my childhood”. *Id.* From that point on, Thao had

dreamed of becoming a police officer for the MPD. *See id.* at 3048. He wanted to work in the North Minneapolis community where he grew up. *Id.*

Around the fifth grade, Thao's parents moved the family to Fridley, Minnesota, so that Thao and his siblings would not be enticed to join gangs like his cousins had. *Id.* at 3044. This move took him from a diverse neighborhood to finding himself as the only minority in his school. *Id.*

On the first day he could legally work – his fourteenth birthday – Thao started working at McDonalds. *Id.* at 3045. He worked 15-20 hours a week throughout high school with the entirety of his paycheck going to support his family. *Id.* at 3045-3046.

b. Postgraduate education and start at the MPD.

After graduating from high school, Thao went to Anoka-Ramsey Community College and completed one semester of college courses. *Id.* at 3046. He lived at the family's Fridley home at this time alone – the rest of the family had moved to Missouri to work on a turkey farm. *See Id.* at 3047. After flunking out after the semester of school, Thao continued worked at Cub (note: not *Cup*). *Id.* Eventually he reapplied and attended college at North Hennepin Community College to work on his associates degree in law enforcement, continuing the pursuit of his dream to work for the MPD. *Id.* at 3053. During his studies, he also worked as a security guard for Whelan Security at Boston Scientific in Maple Grove. *Id.* at 3053-54. Although the company provided him a radio and uniform, they gave him no training whatsoever. *Id.* Later in his studies, he applied to the MPD as a community service officer, and was hired. *Id.* Not yet a sworn officer, his roles including getting supplies, washing and gassing cars, and preparing to do physical training for the

academy. *Id.* He and other community service officers would run in formation around Lake Harriet and Lake Nokomis. *Id.* at 3056. After serving the MPD in this position for a year in a half, he graduated from college, obtained his POST license, and was hired by MPD as a recruit. *Id.*

C. THAO'S TRAINING

a. *The MPD Academy.*

Thao attended the MPD academy located at the Special Operations Center in North Minneapolis. *Id.* at 3057. The recruits also were taken at times to Fort Snelling to train. *Id.* At that time in 2009, the academy was roughly six months. *Id.*

Days in the academy would start at 8:00 a.m. *Id.* at 3058. The recruits went through daily defensive tactics as well as physical training. *Id.* They were trained on MPD policies and applicable law. *Id.* Daily defense tactics classes trained a set of skills that involved handcuffing, takedowns, and other use of force techniques, including the use of Tasers and batons. *Id.* at 3058-59. Photographs documented these specific trainings. *See* Federal Thao Ex. T-27A-T-27T.

Contrary to testimony of Inspector Katie Blackwell and Officer Nicole Mackenzie, MPD consistently trained its officers to restrain people in the prone position using their body weight, specifically including the use of putting a knee on the neck/upper back of the person being restrained. This is specifically and consistently demonstrated by Thao's academy photographs from 2009, the 2017 MPD Academy Restraint Videos, and the Excited Delirium PowerPoint (which was used until 2021 both in the academy and in in-service training). *See* Federal Thao Ex. T-12; Federal Thao Ex. T-20; Federal Thao Exhibit

T-21; Federal Thao Exhibit T-22; and Federal Thao Exhibits T-27A through T-27T. Of note are photographs showing MPD use of force trainers encouraging, observing, and at times smiling down at recruits pinning down pretend arrestees handcuffed in the prone position – at times with their knees on the back of the arrestee’s neck and head:



T27 - A

Federal Thao Ex. T-27A (yellow highlighted added for emphasis).



T27 - B

Federal Thao Ex. T-27B (yellow highlighted added for emphasis).



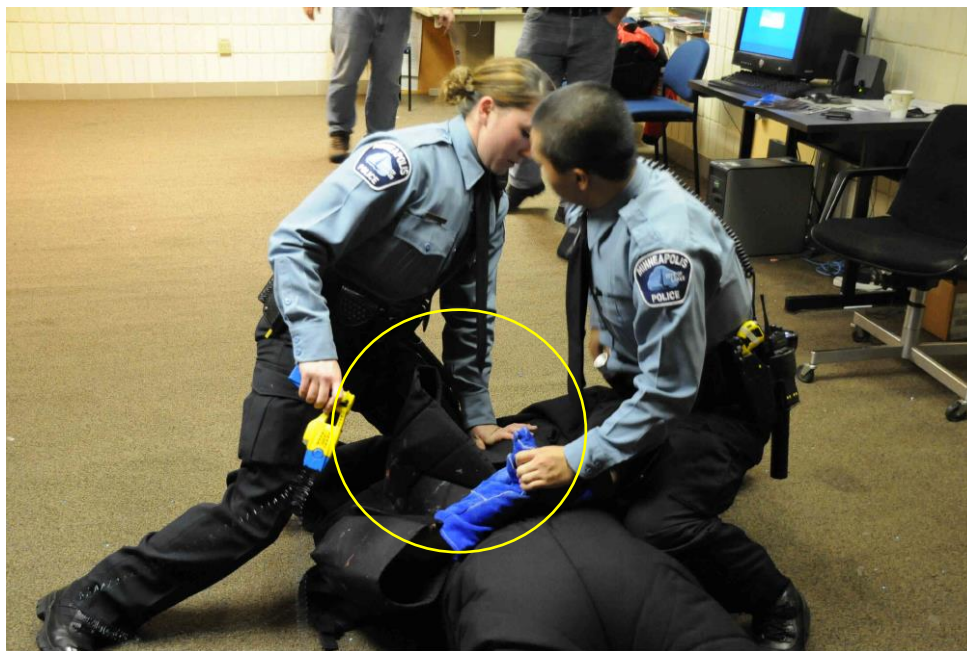
T27 - C

Federal Thao Ex. T-27C (yellow highlighted added for emphasis)(showing a use of force instructor smiling down while a recruit has his left knee on the neck of a handcuffed person).



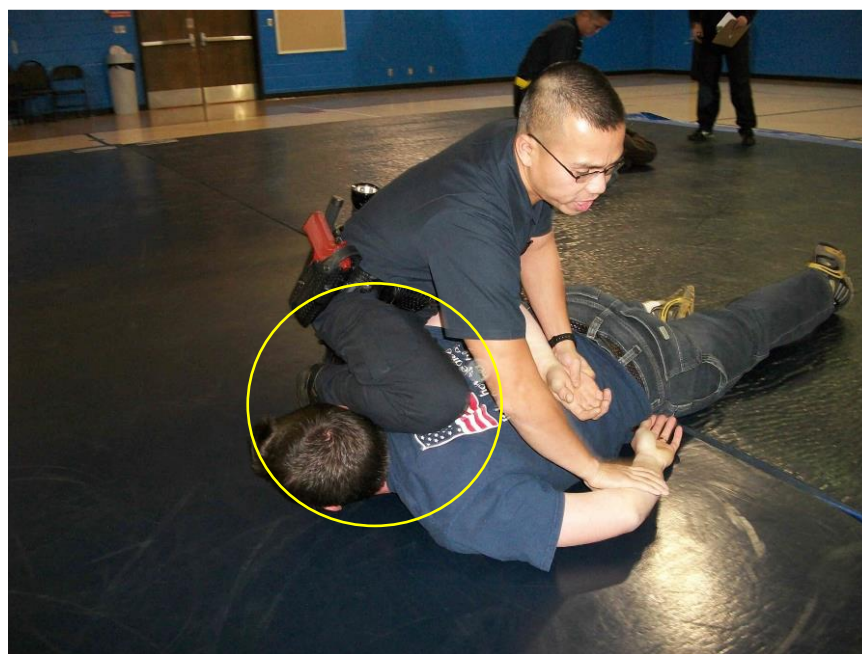
T27 - D

Federal Thao Ex. T-27D (yellow highlighted added for emphasis). This photograph shows a use of force instructor's feet pointing towards Thao and a female recruit. Thao and the other recruit are being trained and observed on how to restrain a person in the prone position using their body weight and knees. Two use of force instructors are observing in the backgrounds.



T27 - E

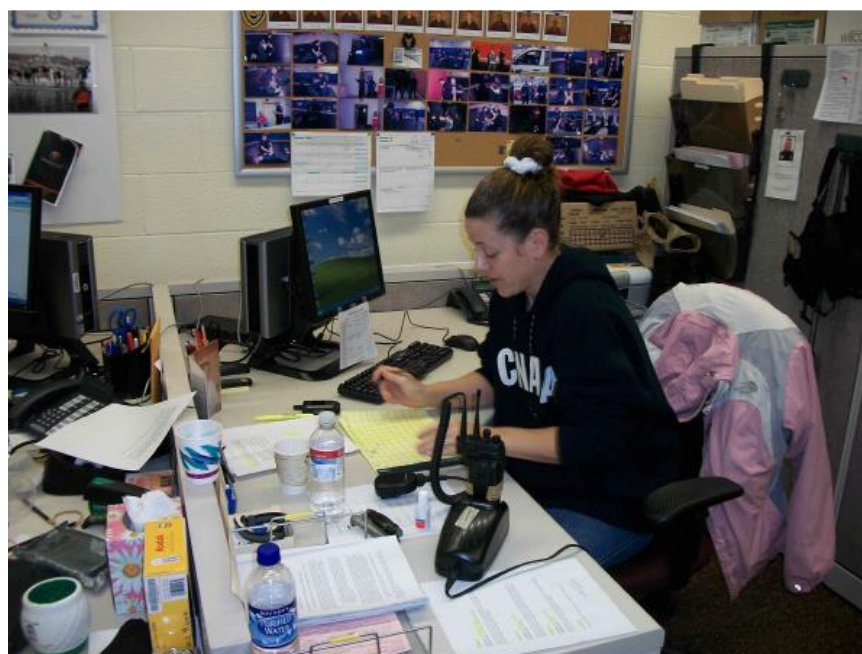
Federal Thao Ex. T-27E (yellow highlighted added for emphasis). This photograph shows Thao in the MPD academy being trained to restrain an arrestee in the prone position with his knee on the person's buttock while the other recruit has her knee on or about the arrestee's neck.



T27 - O

Federal Thao Ex. T-27O (yellow highlighted added for emphasis). This is not Thao, but another recruit. The recruit is using his knee on a person's neck to hold them in the prone position. In the background is a use of force instructor with a clipboard observing.

Another photograph from his academy days shows a training officer of the academy had displayed some of these prone restraint teaching photographs proudly on her bulletin board:



T27 - S

Federal Thao Ex. T-27S. When zoomed in, we can see that this instructor had displayed the above photographs of MPD academy recruits using their knees on necks. For instance, the highlighted photograph is Federal Thao Ex. T-27O (which is shown on the previous page):



Thao testified that the photographs show the fake-arrestees wearing protective headgear (with a hard plate covering the back of the volunteer's neck), confirming that (1) MPD academy trained recruits to use body weight and knees on the neck and head while handcuffing and restraining people in the prone position, and that (2) the MPD knew it had to protect the fake-arrestee's head and neck from injury during this specific training. *See* Federal Tr. 14 at 3066.

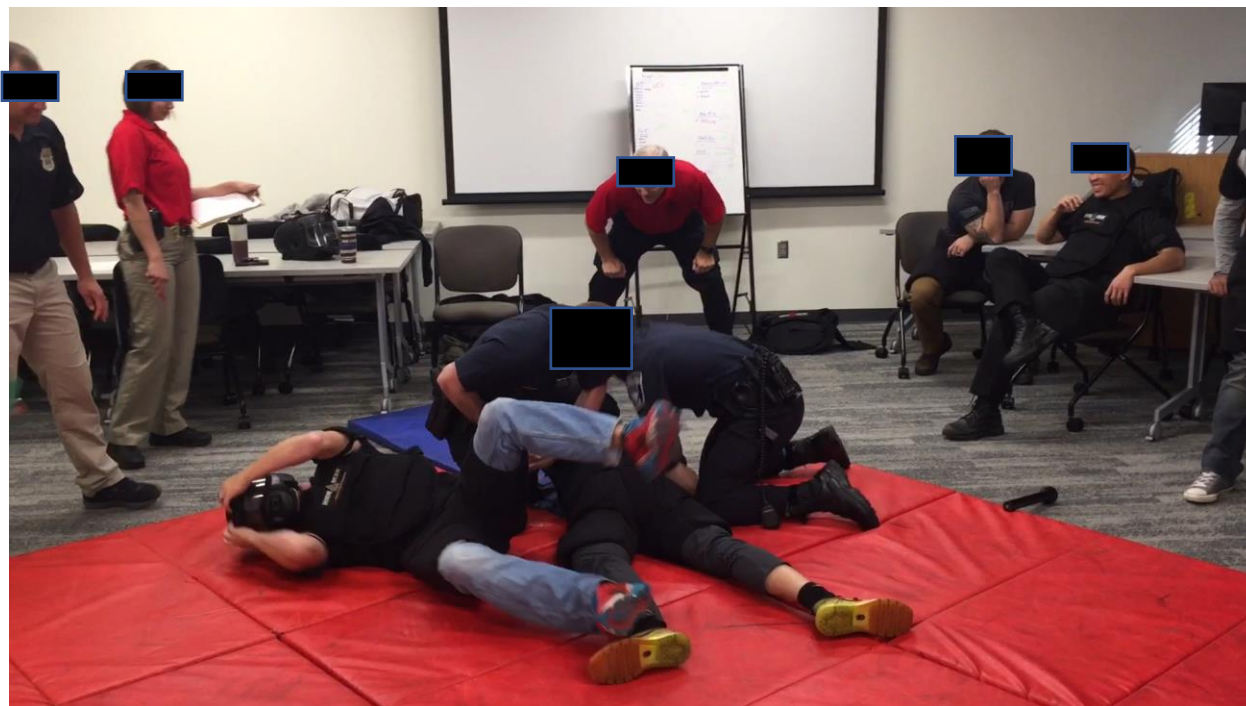
The MPD trained its academy recruits to use knees on the back of necks when arresting. Below are snapshots of the 2017 use of force academy training (Federal Thao Ex. T-20, T-21, and T22):



Federal T-22 at approximately 1:09 (yellow highlighted added for emphasis).



Federal T-22 at 3:05 (officer faces have been redacted since they still may be MPD officers)(yellow circles show that a recruit was using a knee on the back of a neck while a use of force instructors look on).



Federal Thao Ex. T-22 at 3:16 (showing the same scene as above, but now with all use of force officers and observing officers smiling as they watch the recruit continue to use a knee on the back of a neck).

Federal Thao Ex. T-21 is particularly telling. It shows recruits repeatedly pinning arrestees down using their knees on their neck while use of force officers smile and giggle.

Thao and his fellow recruits were trained to place arrestees in the prone position while handcuffed. They were trained to place their knees on the person's body and shift their body weight to control them. Federal Tr. 14 at 3078-79; and 3083. Instructors never

corrected that this was an improper technique. *Id.* at 3084. Quite the opposite: instructors showed Thao and other recruits how to use their legs around the neck of a person to restrain them, but recruits were never allowed to practice the moves themselves. *Id.* at 3085.

The academy at that time trained in a militarized way, having recruits dress the same (Federal Thao Ex. T-27G), running in formations while singing military cadences (*id.*; Federal Thao Ex. T28), dressed in full military gear complete with gas masks and batons (Federal Thao Ex. T-27I, T27J); and recruits trained to answer with “yes, sir; no, sir; yes, ma’am; no ma’am” (Federal Tr. 14 at 3072). Most revealing is a photograph of the MPD academy class in gas masks and batons in a v-formation with smoke around them with the caption “THE POPO. Go ahead, pick up that rock...”:



T27 - T

Federal Thao Ex. T-27-T.

The MPD trained Thao and his fellow recruits about a phenomenon called “excited delirium syndrome”. Federal Tr. 14 at 3099. The MPD’s lessons on excited delirium

contained a PowerPoint presentation that was used to train the recruits, including Thao during his time at the academy. *Id.* at 3099-3100; Federal Thao Ex. T-12. What the MPD trained Thao and his fellow officers about excited delirium is explained more thoroughly *infra*.

Thao graduated from the academy in 2009, but the MPD laid his entire class off due to budgetary reasons. Federal Tr. 14. at 3057 and 3091.

b. Fairview Hospital Security and Restraint Training.

MPD laid off its entire academy class immediately after graduation due to budgetary reasons from the Great Recession. Thao was hired at the Fairview Riverside Hospital as a security guard. Federal Tr. 14 at 3091. He received a two-day training on how to carry batons, handcuff patients, and use mace. *Id.* at 3092. While at work, he wore a uniform, carried a Taser, mace, and handcuffs. *Id.* at 3092-93. Thao's shifts included manning entry points, patrolling the hospital grounds, and in the emergency room watching patients. *Id.* at 3093. Many of the patients in the ER were in some form of crisis as the hospital was one of the largest mental health hospitals. *Id.* at 3094. The hospital also saw drug and alcohol patients. *Id.* at 3095.

If a patient came into the ER and was out of control, and medical staff could not de-escalate, Thao and other security officers would be brought in to restrain the patient. *See* Federal Tr. 14 at 3096. Thao was trained to and did restrain patients via handcuffs or by placing them in a locked and fully padded room. *See generally* Federal Tr. 14 at 3096-97. Thao never made the decision to restrain the patients, but instead did so only on the orders of a nurse or doctor. Federal Tr. 14 at 3097; 3102. Looking back and based on his training

and experience of excited delirium (discussed *infra*), Thao believes that some of the people he restrained at Fairview were experiencing excited delirium. *Id.* at 3102.

When patients were fully restrained at Fairview, they were often then sedated by medical personnel. *Id.* at 3103. If a person was fully restrained in handcuffs and continued to not calm down, “doctors would decide for them to be held down further and sedated to prevent them from essentially working themselves to death”. *Id.*

At Fairview, Thao had experience with people who were severely agitated. *Id.* Thao observed notations in the medical records of patients at Fairview about excited delirium syndrome. *Id.* at 3099. Thao personally dealt with around five people he believed were experiencing excited delirium at Fairview. *Id.* at 3139.

c. Return to MPD and in-service training/education as a sworn officer.

Around 2011, after working at Fairview for almost a year, the City of Minneapolis recalled Thao back as a police officer. Federal Tr. 14 at 3104-5. Thao and other officers recalled off the waiting list “went through a one-month process to get updated on department policies, law, and get recertified up to POST requirements.” *Id.* at 3105.

Subsequently, Thao completed the field training program (a.k.a. “FTO”) *Id.* at 3106. The field training program lasted about five to six months and encompassed a recruit riding along with a veteran officer who was tasked with training them. *Id.* 3106. As the program wore on, rookie officers would gain more responsibilities on the calls. *Id.* at 3107.

After completing the FTO program. Thao was assigned to the Third Precinct. *Id.* at 3108. Thao remained assigned to the Third Precinct until May 25, 2020 *Id.* at 3108-9.

MPD officers receive annual in-service training refreshers. Federal Tr. 14 at 3165. In-service included topics such as CPR training and defensive tactics. *Id.*

During the in-service training, instructors taught MPD policy that allowed for the use of leg restraints and showed the officers how to use their legs to cut off the blood flow of an arrestee's arteries. *Id.* at 3084.

Thao was trained on the use of the hobble restraint. Federal Tr. 14 at 3130-31. When a hobble is used on a handcuffed individual, “[y]ou may have to tie his ankle and then bring it up behind him into one of the belt loops of the pants; or if there’s none, then you might have to use a handcuff.” *Id.* When a hobble – also known as an MRT or Maximum Restraint Technique – is used, officers are trained that the arrestee must be rolled onto their shoulder and a sergeant is notified. *Id.* at 3134. A sergeant must respond to the scene and take photographs of the hobble to insure the officers applied it correctly before the arrestee can be transported. *Id.*

During his tenure as an MPD officer, Thao had interactions with people he believed met the criteria for excited delirium. *Id.* at 3139. He estimates – conservatively – he encountered 30 people who met the criteria on with MPD trained him to suspect excited delirium. *Id.* During those encounters, the person believed to be experiencing excited delirium was restrained until paramedics arrived, then the paramedics would handcuff them to the gurney and sedate them. *Id.* at 3139-40.

Thao was trained in basic first aid, including CPR. Federal Tr. 14 at 3145; 3163. The MPD trains officers to immediately start CPR if a person has no pulse. *Id.* at 3149.

d. Excited delirium training and experience.

The MPD taught their recruits about the phenomenon known as “excited delirium” while training the recruits at the academy and also retraining them about it throughout the in-service training. At the academy, the MPD taught ExD through the use of a PowerPoint. Federal Tr. 14 at 3099; Federal Thao Ex. T-12. Additionally, the in-service training consisted of more ExD PowerPoints that contained much of the same information and videos. Federal Tr. 14 at 3100.

Inspector Katie Blackwell testified to the MPD training on excited delirium at the federal trial. Specifically:

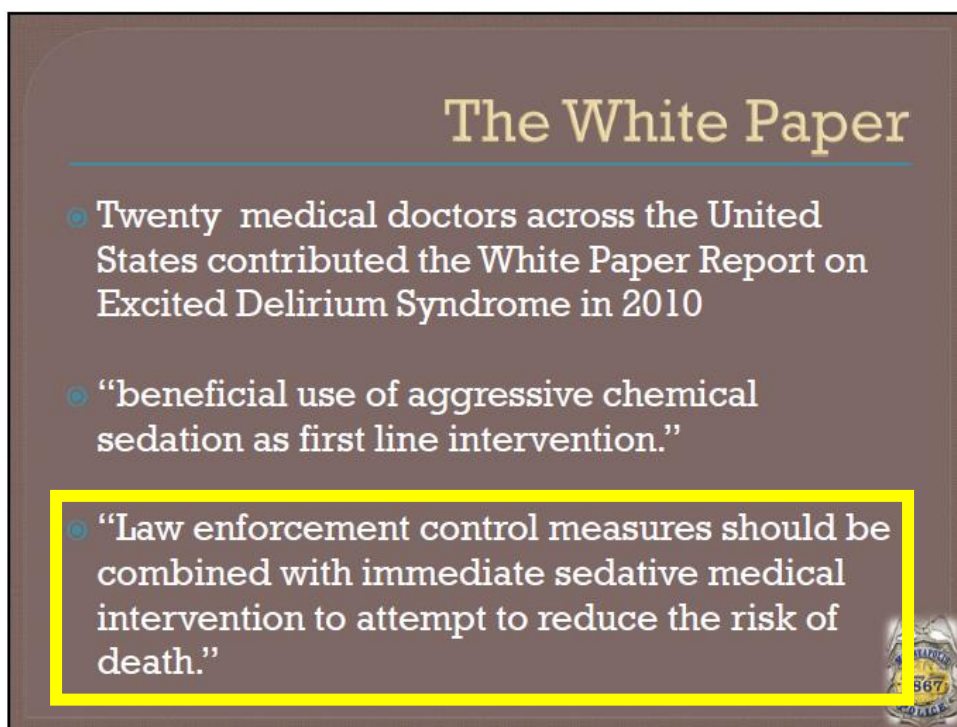
- MPD trains its officers on excited delirium during the academy and during in-service training. Federal Tr. 6 at 1224 and 1216.
- MPD regularly trained its officers to be aware of excited delirium, how to recognize excited delirium, and how to respond to it as an officer. Federal Tr. 6 at 1217.
- Thao went through an in-service training on excited delirium in 2019. *See* Federal Tr. 6 at 1227-1228. This excited delirium training included the PowerPoint labeled as Federal Thao Ex. T-12. *See* Blackwell testimony at Federal Tr. 6 at 1228-1229 (note: the PowerPoint was often mistakenly referred to as Exhibit T-13).
- MPD trained its officers that excited delirium is “a condition that manifests as a combination of delirium, psychomotor agitation, anxiety, hallucinations, speech

disturbances, disorientation, violent and bizarre behavior, insensitivity to pain, elevated body temperature and super-human strength.” Federal Tr. 6 at 1234.

- MPD trained its officers that when dealing with a person experiencing excited delirium person, “Law enforcement control measures should be combined with immediate sedative and medical intervention to attempt to reduce the risk of death.”

Federal Tr. 6 at 1265;

- Thao was specifically taught through the use of the ExD Power Point (Federal Thao Ex. T-12 at Slide 34 (emphasis by highlighted box added):





- Blackwell agreed that “the police restraint is actually a means of protecting [excited delirium] people from exhausting themselves and dying”, and that the point of the PowerPoint is to train them on this point. Federal Tr. 6 1265.

- MPD trained its officers to restrain people thought to be experiencing excited delirium until they can be sedated by EMS. Federal Tr. 6 at 1266.
- MPD trained its officers that if they are restraining a person experiencing excited delirium, “they will actually reduce the risk of death to the person”. Federal Tr. 6 at 1266.
- Inspector Blackwell personally approved the excited delirium PowerPoint (Federal Thao Ex. T-12). Federal Tr. 6 at 1273.
- Then-Chief Arradondo previewed and made sure the PowerPoint included “his vision” in the training. Federal Tr. 6 at 1273.

It is imperative that this fact finder view the PowerPoint in its entirety with both video and audio, paying special attention to the comment sections on the PowerPoint, which were read to the officers during training. The PowerPoint contains graphic and violent images and videos of police officers tackling, using force, and restraining persons thought to be experiencing excited delirium. Federal Thao Ex. T-12. MPD used these images and videos to train their officers that officers were authorized to and encouraged to use physical restraint to hold a person suspected of being in the throws of excited delirium in the prone position until medical personnel arrived and made a decision about sedation. MPD repeatedly trained officers – including Thao – with this PowerPoint. *See generally* Federal Tr. 14. Below are some portions of the PowerPoint.

Ok they are in handcuffs now what.

- Sudden cardiac arrest typically occurs immediately following a violent struggle
- Place the subject in the recovery position to alleviate positional asphyxia
- Once in handcuffs, get EMS on scene quickly to monitor and transport
- Sign a transport hold on these individuals
- Complete a CIC report




Federal Thao Ex. T-12 at Slide 31. This slide shows a training officer with his knee on the neck of a person restrained in handcuffs in the prone position. Other officers look on and also aid in holding down the man.

A comparison of the restraint depicted in the photograph used to train officers on excited delirium with the restraint of Floyd by Officer Chauvin demonstrates the technique he used placing his knee on Floyd's neck was exactly what MPD trained its officers to do.

EMS role in sedation

- Assist in controlling suspect for you, your partner and EMS safety on scene
- If EMS decides to medicate suspect they could use:
 - Benzodiazepines like versed
 - Antipsychotics like haldol
 - Dissociative agent ketamine



32

Federal Thao Ex. T-12 at Slide 32.



SAFETY FIRST
You never know when a cat is packed with explosives.

ICANHASCHEEZBURGER.COM



40

Federal Thao Ex. T-12 at Slide 40.

The PowerPoint disclosed by MPD contains videos. Some of the videos disclosed were titled “Slide 19 - excited delirium guy punches through a wall”, “Slide 24 – Naked Indiana Zombie Attacks 3 cops ‘Ninja Style’, Escapes After Being Continuously Tasered” and “Slide 26 – Graphic Video Police officers shoot naked man with Taser...Narcotics.Excited delirium”. *See* Federal Thao Ex. T-12 at Slide 16; Federal Tr. 6 at 1241 (Inspector Blackwell testifying that NOTACRIME is “an acronym that was used to put out the symptoms of or behaviors that someone with excited delirium would display.”). MPD used the mnemonic NOTACRIME to help officers identify the signs that a person may be experiencing excited delirium. Federal Thao Ex. T-12. The letters stand for:

- “N: Patient is **naked** and sweating”. Federal Thao Ex. T-12 at Slide 18;
- “O: Patient exhibits violence against **objects”. *Id.* at Slide 20;**
- “T: Patient is **tough** and unstoppable”. *Id.* at Slide 22;
- “A: Onset is **acute”. *Id.* at Slide 23;**
- “C: Patient is **confused”. *Id.* at Slide 25;**
- “R: Patient is **resistant”. *Id.* at Slide 27;**
- “I: Patient’s speech is **incoherent”. *Id.* at Slide 28;**
- “M: Patient exhibits **mental health”. *Id.* at Slide 29; and**
- “E: EMS should be requested **early”. *Id.* at Slide 30.**

The MPD trained its officers to do exactly what was done to Floyd. They trained their officers that restraint until EMS arrived was authorized, approved, and encouraged to save the lives of the ExD person.

Thao had previous experience with a MPD officer dealing with a person suspected of having excited delirium. Thao testified about a call he responded to in the Third Precinct where a person had crashed a car into a snow bank. Federal Tr. 14 at 3142. Fire, police, and EMS arrived on scene and the paramedics and firefighters got the driver out of the driver's seat. *Id.* at 3143. The driver was unconscious. *Id.* at 3142. The unconscious driver was loaded into the ambulance. *Id.* at 3143. "We're kind of just talking with the paramedics, and next thing we know this guy jumps out of the gurney and we're now fighting him and restraining him, trying to re-restrain him onto the bed." *Id.* at 3143-44. It took two paramedics and two officers and sedation to re-restrain the driver. *Id.* at 3144.

D. THAO'S ACTIONS ON MAY 25, 2020

a. Knowledge of incident before arriving on scene.

On May 25, 2020, Thao and Chauvin were partnered together and assigned to Squad 330 at the Third Precinct for the middle watch shift. Federal Tr. 14 at 3109; 3112. At the time of the call, they were ready to eat dinner at the Third Precinct. *Id.* at 3110. Thao and Chauvin were dispatched to an "out of sector" forgery call at Cup Foods. *Id.* "Out of sector" calls are calls that occur outside of a police officer's assigned geographic sub-section within their precinct. *See generally* Federal Tr. 14 at 3110. Thao and Chauvin were specifically called because they were the only squad car available at the time of the call. Federal Tr. 14 at 3110-11. The call was a "priority 1" call which means "get there fast.

Suspect may still be on scene. The crime is still in progress.” *Id.* at 3111. Dispatch provided information that the suspect was still on scene in a parked car and **possibly under the influence.** *Id.*

Squad 320 – Kueng & Lane’s squad – cancelled Thao and Chauvin responding and instead took the call. *See generally* Federal Tr. 14 at 3112. Shortly thereafter, squad 320 “stated that they’re taking one out of a SUV, so dispatch immediately dispatched us to assist them.” Federal Tr. 14 at 3112.

Before leaving the precinct, Thao and Chauvin received additional information: “we heard on the radio there’s some – it seemed like there was a struggle or something, so it seemed like – I believe dispatch asked 320 what was their status. And that means to us usually, if there’s a struggle going on, we increase, we go Code 3, lights and sirens.” Federal Tr. 14 at 3113.

Chauvin and Thao left in their squad to respond to the call. Halfway through the drive to Cup Foods, “320 had called a Code 4, so we slowed down.” *Id.* (Thao explaining further that code 4 means “scene okay”). Rather than turning around to go back to the station and resume their dinner, Chauvin and Thao continued to the call because “from [Thao’s] experience, Cup Foods is hostile to police.” *Id.* at 3114. While driving to the incident location, Thao can be heard telling Chauvin that “we’re going over there at least. It’s kind of uh Blood’s territory” Federal. Gov’t Ex. 9 at 20:12:24-20:12:36. Thao testified that “It’s a well-known Bloods gang hangout spot. And [Lane and Kueng] being new, I don’t think they would have known that.” Federal Tr. 14 at 3114. Thao elaborated: “I wanted to at least provide 320 with security just in case things got out of hand, because it

sounded like they were in a struggle near there, so I didn't know what potential environment they could be having there". *Id.* 3114-15. The Bloods street gang can be identified because they normally wear red. *Id.* at 3115.

b. Arrival and observations of Floyd's resistance in squad car.

Upon arriving on scene, Thao and Chauvin pull up to the left side of 38th street because Officer Chang "[w]as outnumbered two to one and one of them was wearing red" and "[h]e was by himself. So officer safety-wise it made sense to go to him" *Id.* at 3118 and 3119 respectively. Thao noted the entirely red outfit of a person as significant because it meant that "There may be gang members in the area." *Id.* at 3119. Officer Chang waived off Thao and Chauvin, so they proceeded to the north side of 38th street and parked near squad 320 where the struggle was ongoing. *See id.*

At 20:17:33, Thao and Chauvin arrived on the scene where Lane, Kueng, and Floyd struggled by squad 320. Federal. Gov't Ex. 9. At that time, Floyd was inside the squad car, physically resisting, and attempting to get out. Federal. Gov't Ex. 9. Thao observed Kueng and Lane struggling with Floyd to get him into their squad car. Federal Tr. 14 at 3121; Federal Thao Ex. T-29. Thao observed Floyd physically resisting getting inside the squad vehicle. Thao testified that "there seems to be a lot of physical force to kind of try to get him inside" and Floyd was stiffening up his leg. Federal Tr. 14 at 3121. In his eight years of experience as an MPD officer, Thao had experience getting resisting persons into a squad vehicle, but had "never seen this much of a struggle." *Id.*

While Floyd was inside of the squad car, he stated that he could not breathe. When Floyd said this, Thao did not observe anything that would have inhibited Floyd's ability to

breathe. Federal Tr. 14 at 3122. Thao was familiar with arrestee's claiming they cannot breathe. *Id.* He testified that "[p]retty much after the New York incident, it was pretty regular that when you arrest people, they kept saying they can't breathe, they can't breathe, so it became a pretty regular occurrence." *Id.* (New York incident is later explained as the 2014 arrest of Eric Garner who said 'I can't breathe'). Federal Gov't Ex. 9 at 20:18:06; Federal Thao Ex. T-29. Thao continued to observe Kueng, Lane, and Chauvin's attempts to get Floyd into the car, while Floyd physically resisted. Federal Gov't Ex. 9 at 20:18:06-20:19:04. At one point, Thao observed Floyd use his leg to "kind of launch himself out the other side of the door ... where Lane was." Federal Tr. 14 at 3123. Floyd again said he cannot breathe. Federal Gov't Ex. 9 at 20:18:35-42. Thao's BWC shows that Chauvin had his arm around Floyd's chest and his hands at the back of Floyd's neck while Floyd was still partially in the squad vehicle. *Id.* at 20:18:41.

At this time, Thao testified that he was thinking "It was obvious that he was under the influence of some sort of drugs." Federal Tr. 14 at 3125. Thao testified that he thought that because "[w]hen I first arrived, I saw kind of beads of sweat on him on his head, and he was kind of – very sweaty." *Id.* This observation was significant because "[i]t's a sign of potential drug use and a sign of excited delirium." *Id.* Thao also observed other signs that Floyd was under the influence:

We did receive the initial information from the caller that he appeared to be under the influence. He was kind of incoherent, not listening to direction, not able – we weren't able to reason with him or even get him calmed down. He's fighting off three officers consistent with super-human strength or more strength than all three officers could handle

Federal Tr. 14 at 3126. Of significance, was that Floyd was displayed all these signs while handcuffed. *Id.*

Around 20:18:50, Thao said that they may have to hog-tie Floyd. Federal Gov't Ex. 9 at 20:18-50-20:18:54; Federal Tr. 14 at 3128. Thao testified that when he said "tie", he was referring to using the hobble. Federal Tr. 14 at 3128. Thao suggested that they may have to tie Floyd "Because he's out of control. We can't control him. This may be a medical issue at this point, so we might have to put him on the ground and restrain him." *Id.* At this point, what Lane, Kueng, and Chauvin were doing was not working. *Id.* at 3129. Thao testified that "It's hard to put a big person who is not cooperating inside a squad car, so we kind of have to figure out a different solution." *Id.* After more than a minute passed of Lane, Kueng, and Chauvin unsuccessfully attempting to get Floyd back into the vehicle, Thao suggested to put him down on the ground, stating "Hey. Just take him out" and "Just lay him down." Federal Gov't Ex. 9 at 20:19:00; Federal Thao Ex. 29.

Floyd was laid down on the ground in the prone position, with Chauvin using his knee on the neck/head area of Floyd to control him during the restraint. Federal Gov't Ex. 9 at 20:19:15

c. Thao's actions and thoughts during prone restraint.

Thao testified that while on scene, he believed that Floyd may have been experiencing excited delirium. Federal Tr. 14 at 3138. Thao believed this based on his training and experience, explaining: "[Floyd] was acting erratic. He was very sweaty, unable to respond to us, violent. He was able to fight off three officers trying to get him in the squad car." *Id.* Thao hoped that the officers would be able to restrain Floyd until EMS

arrived, then the paramedics would do a medical evaluation and figure out the proper response. *Id.* at 3140. Based upon his knowledge of Minneapolis and the traffic, Thao expected that the ambulance would arrive within “probably five minutes” after being dispatched from Hennepin Healthcare (also referred to as “HCMC” at times) to the scene of 38th and Chicago. *Id.*

***i.* Thao suggested a hobble, but determined that using one would only delay medical attention.**

Thao immediately went to the back of the squad car and began to search for a hobble. *Id.*; Federal Tr. 14 at 3130. At 20:19:46 Lane radioed in Code 2 request for medical attention. Thao asked if EMS had been called, and Lane and Kueng confirm this. Federal Gov’t Ex. 9 at 20:20:25. Thao found and retrieved the hobble in Lane’s duty bag and handed it to Chauvin. Federal Tr. 14 at 3130; Federal Gov’t Ex. 9 at 20:19:15-20:20:22. The decision was made not to use the hobble. *See also* Federal Tr. 14 at 3242 (testimony from Thao that it was a group decision to not use the hobble). Thao testified that at this point in time he was aware EMS was coming, and it would have impaired their work if Floyd was hobbled upon their arrival: “Essentially when they would arrive, we would have to undo the thing, which would delay medical attention.” Federal Tr. 14 at 3133. Additionally, when a hobble is used, it is policy for a sergeant to be notified; a sergeant must arrive on scene and take photographs of the arrestee in the hobble to insure that the hobble was used correctly before the arrestee can be transported. *Id.* at 3134. Thao testified that this would have further delayed medical attention: “[W]e would have to essentially tell the paramedics; Hold on. He’s tied up. We have to wait for our sergeant to come to review

the hobble before we can release him, which logically makes no sense because we're trying to get him medical attention, not tie him up." *Id.* Thao relayed this reasoning to the other officers. Federal Gov't Ex. 9 at 20:20:29; 20:20:38.

ii. **Thao is given more information that Floyd is under the influence.**

At 20:20:56, Thao asked the other officers "Is he high on something" to which Lane responded with "I'm assuming so" and Kueng stated "I believe so. We found a pipe on him." Federal Thao Ex. T-29; Federal Gov't Ex. 9 at 20:20:56-20:21:02.

At 20:21:04, Floyd said he "ate too many drugs". Federal Thao Ex. T-29, Federal Gov't Ex. 9 at 20:21:04; Federal Tr. 14 at 3136-37 (Thao testified that "I heard him say he ate drugs"). Thao testified that "[i]t's not uncommon, from my experience, for people to eat drugs before cops show up." *Id.* at 3137. Thao testified that generally the motivation of a person trying to eat drugs would be to conceal the drugs or to avoid going through withdrawal in jail, rather than in a hospital setting *Id.* Thao had previous experience with someone eating drugs while he tried to detain them. *Id.*

At 20:21:48 Thao's BWC records Lane stating "He's gotta be on something". Federal Gov't Ex. 9 at 20:21:48. Shortly after, Thao asked Floyd "What are you on?", but is given no response. Federal Gov't Ex. 9 at 20:21:54. Lane told the other officers "We found a weed pipe on him. Might be something else with it, might be like PCP or something. Is that the the shaking of the eyes right – PCP?" *Id.* starting at 20:22:10; Federal Thao Ex. T-29.

Later, one of the bystanders (unprompted) said "He's on crack right now. He's probably OD-ed". Federal Gov't Ex. 9 at 20:26:39; Federal Thao Ex. T-29.

iii. Thao wanted to get medical attention to Floyd as quickly as possible.

At 20:20:48, Thao turned on the emergency lights on squad 320 which would “signify to paramedics that we’re right here.” Federal Tr. 14 at 3135.

At 20:21:14, Thao asked the other officers if EMS is coming on a Code 3 (as fast as they can), to which Lane says that EMS was called on Code 2 and they “could probably step it up”. Federal Thao Ex. T-29; Federal Gov’t Ex. 9. Thao immediately stepped up EMS to Code 3. Federal Thao Ex. T-29; Federal Gov’t Ex. 9 at 20:21:16. Dispatch confirmed with a “copy”. Federal Gov’t Ex. 9 at 20:21:28. Thao explained his reasoning for stepping up EMS:

So after he had said he might have taken some drugs and we’re suspecting -- I’m suspecting excited delirium and I know that we’re really running short on time, it’s -- so I’m asking Lane if we have EMS coming Code 3... Because we needed them there, like, right now.

Federal Tr. 14 at 3137-38. “Because he’s going through excited delirium. We’re running out of time and we need him potentially sedated to save his life”. *Id.* 3140-41.

After over five minutes passed since Thao originally called in Code 3, EMS had not yet arrived on scene. Federal Gov’t Ex. 9. Thao radioed dispatch again, and asked again for EMS to come to their location. *Id.* at 20:26:42. Dispatch told Thao that EMS is en route and within a minute, EMS arrived. *Id.* 20:26:42-20:27:26.

iv. Thao’s role in crowd control & scene security.

Thao did not participate in the restraint of Floyd. Instead, Thao took the role of crowd control “to allow [Chauvin, Kueng, and Lane] to attend to Mr. Floyd.” Federal Tr.

14 at 3146. This was in line with general police practices – Thao testified that a second squad arriving on scene is to act as a support unit. *Id.* at 3160. This is because the first officers who arrive on a scene are going to have the most information. *Id.*

At 20:20:48, Thao turned on the emergency lights on squad 320, “to signal the northbound lane that the police is there, so they don’t crash into or hit the officers or Mr. Floyd, and then also the rear lights to signify to paramedics that we’re right here.” Federal Tr. 14 at 3135.

For the majority of the time Floyd was in the prone position on the ground, Thao was charged with crowd control. He positioned himself in the road as a sort of human traffic cone. *Id.* Thao testified on his reasoning for traffic control: “Most people when they’re driving, they’re focused on what’s ahead of them, not really necessarily on the ground. So I put myself out in the traffic to – so they can see me and give distance to the officers.” *Id.*

When a crowd began to gather, Thao took over crowd control because some bystanders started getting off the sidewalk towards the officers and Floyd and Thao “wanted to give the officers the spacing to do what they needed to do”. *Id.* at 3145.

At some point a bystander – later identified as Genevieve Hanson – identified herself as a firefighter. Federal Gov’t Ex. 9 at 20:25:28. When she entered the scene, she did so by walking into Thao’s blind spot, from behind. 20:25:28-20:25:34. Thao testified that she did not show him any identification to confirm this, and he did not believe she was a fire fighter because “Generally speaking, most first responders don’t just jump onto a scene and especially behind a police officer, come right behind a police officer. That’s --

they should know that as first responders not to sneak up on another first responder like that.” Federal Tr. 14 at 3146-47. Essentially, Hanson’s behavior was inconsistent with the ways in which first responders are trained to safely interact with a scene, and thus Thao reasonably did not believe she was actually a firefighter at the time of the incident.

As time went on with the crowd, he heard them request the officers to perform medical checks on Floyd. Federal Tr. 14 at 3148. He did not perform the checks himself because he was dealing with crowd control. *Id.* Thao rightfully assumed that the other officers were monitoring Floyd as this was their role per training and policy. Thao told the crowd that EMS was coming as a way “[t]o reassure that we are taking care of him. We have medical professionals coming” and “Just to let them know that we’re not trying to hurt him. We have medical coming. The professionals are coming to handle him.” *Id.* at 3148-49; and 3153 respectively.

At several times, bystanders attempted to step off of the sidewalk and into the scene. *Id.* at 3152. Thao testified that he wanted people to stay on the sidewalk “to give paramedics and officers space to operate.” *Id.* Keeping bystanders off of the street and on the sidewalk would prevent bystanders from “potentially attacking the officers or disrupting the medical attention that they were doing.” *Id.* at 3153.

The role of crowd control limited Thao’s direct focus to what was going on in front of him, rather than the restraint and what was occurring behind him. For instance, he was unaware of when the ambulance left until Chauvin tapped him on his shoulder. Federal Tr. 14 at 3154. When asked by a bystander if Floyd had a pulse, Thao responded with “I’m busy trying to deal with you guys right now.” Federal Gov’t Ex. 9 around 20:27:05; Federal

Tr. 14 at 3329. Thao explained through testimony that he did not take steps to inquire whether Floyd had a pulse because he was preoccupied with his duty of crowd control. Federal Tr. 14 at 3330. Thao was depending on his fellow officers involved in the physical restraint to monitor Floyd's health status, including checking his pulse and breathing.

v. Thao's thoughts on Chauvin's restraint.

Thao saw Chauvin use his knee on Floyd's neck. Federal Tr. 14 at 3141. Thao testified that it was not uncommon to observe that, and that the MPD trained on it. *Id.* Thao testified that he had seen previous instances of police officers in Minneapolis restraining people in part by putting their knees on a person's neck. *Id.* It did not seem unusual to Thao. *Id.*

Thao initially observed Floyd trying to get up from the prone position and "could see that [Floyd's] body hit Mr. Chauvin's knees, so that led me to believe that there's not being force initially." *Id.* at 3229.

Thao testified that he was unaware of what was happening with Floyd at all times due to his role in the crowd control. *See id.* at 3246 (where Thao testifies that although Chauvin and Floyd generally remained in the same position, he can't be certain whether Chauvin kept his knee on Floyd's neck the entire time because "Obviously I wasn't watching him the entire time."); *see e.g.* at 3261 (Where Thao testifies that during the third minute of the restraint, he was not continuously watching Chauvin restrain Floyd). Thao also testified that his BWC is positioned lower than his eyes so at times his BWC may record things he did not personally see or entirely see because he was looking elsewhere. *E.g.* Federal Tr. 14 at 3248 (where Thao testifies at around 20:20:41 of his BWC, he is

watching the horizon while speaking to the officers while his BWC captures the three officers on top of Floyd (Federal Gov't Ex. 9 at 20:20:41)).

vi. Why Thao did not intervene in the restraint.

Thao testified that he assumed the other officers were restraining Floyd “[b]ecause they were waiting for an ambulance to arrive.” Federal Tr. 14 at 3145. Thao was trained in basic first aid. Federal Tr. 14 at 3145. Thao testified that the restraining officers would be expected to monitor Floyd’s medical condition. *Id.* Thao testified that he assumed this is what the three restraining officers were doing – monitoring Floyd’s medical condition. *Id.*

At no point did Thao observe the three officers roll Floyd over and do CPR on him. *Id.* at 3149. Thao testified that this was significant to him for the following reasons:

- The MPD trains officers to start CPR if a person has no pulse. *Id.* at 3149.
- If the other officers are not doing CPR, Thao assumed that Floyd is still breathing and doing fine. *Id.*
- By not seeing CPR performed at any time, it indicated to Thao that Floyd had a pulse. *Id.*

Thao testified that he was unaware of Floyd’s medical status, and it wasn’t until after the ambulance left, and the firefighters arrived that he first realized that something more serious may have happened. Federal Tr. 14 at 3154-55. “When the fire department arrived, and I was kind of confused why the fire department was coming and the paramedics were already gone probably three, four minutes ago. So I heard dispatcher said that they needed fire to go to 36th and Park to help with CPR.” *Id.* at 3155. “I kind of

connected the dots. It's like, oh, okay, so I guess this guy was in critical condition when they left." *Id.*

E. THE MEDICAL PROFESSIONALS WHO PERSONALLY EXAMINED FLOYD ALL RECOGNIZED EXCITED DELIRIUM AS A DIAGNOSIS AND SOME SUSPECTED FLOYD OF HAVING IT

a. Testimony of Derek Smith.

Derek Smith ("Smith" herein), a paramedic at Hennepin Healthcare, was dispatched to a call to Cup Foods at 20:20:48. Federal Tr. 3 at 589; Federal Gov't Ex. 109. The initial call notes to dispatch included that the patient "appears to be under the influence". Federal Gov't Ex. 109. Originally the call came in as a Code 2 for a mouth injury. Federal Tr. 3 at 590. A few minutes later, the call was updated to a Code 3. *Id.* Smith arrived in the ambulance with his partner – Seth Bravinder ("Bravinder" herein) – at 20:27:19.

Smith testified that going into the call he was thinking about it potentially involving excited delirium, due to the Code 3 call and the patient being in police custody. *Id.* at 633; and 634. As a paramedic, Smith has been trained on excited delirium. *Id.* at 634. Smith explained what excited delirium is:

Some people in the medical community believe there is an event that occurs called excited delirium, super-human strength and your body is just redlining and you can't stop it because -- due to drugs or a mental breakdown or whatever, and eventually you will go into cardiac arrest and die. And when that happens, my understanding is there's no way to resuscitate an individual once they've hit that point.

Id. Smith testified that he has personally encountered patient he suspected to be in excited delirium. *Id.* at 635. Smith testified that when he encounters a person he believes to be experiencing excited delirium he "can potentially provide ketamine if they are in

[excited delirium].” *Id.* at 638. Ketamine “essentially will sedate the individual, and then [EMS] can breathe and monitor their heart and provide medications and care for the patient, because they were not de-escalatable.” *Id.* at 638-639.

When Smith arrived on scene he took Floyd’s pulse, but could not find one. Federal Tr. 3 at 593. Smith checked and found that Floyd’s pupils were large, which indicated to him that “the patient was probably deceased.” *Id.* at 594. Smith observed that Floyd’s chest was not rising and falling. Smith testified that Floyd was in cardiac arrest. Smith turned to his partner and told him that he believed Floyd was dead, and wanted to “load him and go”. *Id.* at 595. Smith testified that he wanted to leave the scene with Floyd for a number of reasons: the large crowd, the dignity of the patient, and access to equipment in the ambulance. *Id.* Additionally, Smith testified that he told the FBI “I’m going to go home at the end of the night, the way they teach it is scene safe, and **that scene was not safe.**” *Id.* at 627 (emphasis added). Smith testified that “**I felt it was a hostile crowd.**” *Id.* He also testified that he previously told the FBI “And we had recent events of individuals trying to get into the back of our squad and ultimately losing his life”, further elaborating that “Yeah, it’s -- with the Jamar Clark incident, he, you know, unfortunately got shot trying to get in the back of one of our rigs. The community remembers that and then now I’ve got this and obviously burned half the city to the ground, so.” *Id.* at 627 and 628 respectively. Smith testified that at the scene on May 25, 2020 he did not feel safe. *Id.* at 628.

Smith testified that the crowd was in the double digits, maybe even twenty people. *Id.* at 617. **Smith testified that the crowd appeared to be very agitated and that he wanted to leave the scene due to the environment.** *Id.* at 626-627.

Moving away from the crowd and the scene would give Smith and Bravinder space to work with limited distractions. *Id.* at 619. Floyd was loaded into the ambulance and Lane got in the ambulance with him and the paramedics. *Id.* at 599; Federal Ex. 5. Prior to treating Floyd, Smith had to remove Floyd’s handcuffs “to better serve the patient”. *Id.* at 600.

b. Testimony of Dr. Langenfeld.

Dr. Robert Wankhede Langenfeld, the treating emergency medicine physician, testified on January 27, 2022 the following:

- “Excited delirium is typically someone who is delirious, someone who is acting irrationally, erratically, not redirectable, not able to be verbally de-escalated, someone who is often combative and someone who is classically is very sweaty due to their severe agitation. And this is typically thought of in the setting of either a mental health crisis or certain drug overdoses.” Federal Tr. 4 at 956-057.
- “Typically and classically someone who is very, very sweaty because of how heavily they are exerting themselves, and often, often combative. And this is classically thought of in the cases, in instances of either a mental health crisis or drug overdose.” Federal Tr. 4 at 942-943.
- Excited Delirium is related to certain drugs, including drugs mixed with fentanyl. Federal Tr. 4 at 943.
- Dr. Langenfeld has seen people in the emergency room who were suspected to be experiencing excited delirium. Federal Tr. 4 at 956.

- If Dr. Langenfeld had been told that Floyd was using illegal drugs and had been sweating profusely, that would have changed his perspective on whether excited delirium was a cause of Floyd’s cardiac arrest. Federal Tr. 4 at 957.

c. Testimony of Dr. Baker.

Dr. Baker has testified that:

- Excited delirium may include among other things “violent behavior, destruction of property, incoherent ability to speak” and super-human strength. Federal Tr. 7 at 1500-1501.
- The mortality rate of excited delirium is quite high. Federal Tr. 7 at 1501.
- Dr. Baker has listed excited delirium as a cause of death on a death certificate before. *Id.* at 1552.

ARGUMENT

The death of George Floyd was a tragic event. The loss of George Floyd is a tragedy. The defense and Thao acknowledge the pain and suffering the family and loved ones of George Floyd have endured.

The prosecution of Thao will not bring George Floyd back and the prosecution of Thao should not be determined by the tragedy, suffering, or public outcry. As a brilliant legal mind once stated, the rule of law must prevail.

This case is just like all other criminal cases: to find Tou Thao guilty of either charge, each and every element must be proven beyond all reasonable doubt. If not, Thao must be found not guilty. Thao, like any else charged in America of a crime – is presumed innocent of this crime. Unless and until this Court finds that the State has proven guilt

beyond all reasonable doubt, he is innocent of these charges. This is a bedrock principle of the criminal justice system in America – protected by both the United States Constitution and the Minnesota State Constitution – and separates our justice system from those of other countries.

Despite the public opinion declaring him already guilty of these two crimes, Tou Thao stands innocent today. The presumption of innocence insulates the defense against having to prove anything. The burden of proof sits squarely and solely upon the shoulders of the prosecution. Unless the prosecution proves *each and every* element of the crime *beyond all reasonable doubt*, Thao must be found not guilty. Proof beyond reasonable doubt means proof to a point where there is no rational, reasonable, or logical explanation for what the evidence is in court, other than Thao being guilty. The prosecution has not met its burden of proof.

At its core, the seminal questions are: *Has the State proven that Thao recognized that Chauvin was committing a crime*; and *Did Thao intend that his actions assist in the commission of a crime*? And the answer is no. Thao did not intend his actions to help Chauvin commit a crime.

Based on his training and experience, Thao reasonably believed that Floyd could be experiencing excited delirium. This was a reasonable belief, and other officers and treating medical professionals had the same suspicions.

Thao believed that Chauvin was within the bounds of his legal authority. Thao observed Chauvin using a knee on the back of a prone person's back and neck – something

the MPD had repeatedly trained Thao to do, and repeatedly trained Thao that this was a proper restraint tactic.

Thao believed Floyd was potentially experiencing excited delirium and Thao acted in accordance with his training to get him the proper medical attention. Thao acted repeatedly and intentionally to get Floyd medical attention as swiftly as possible. Thao was not aware that Floyd was not breathing or without a pulse, because he did observe the other officers administering CPR – something MPD officers are trained to do as soon as there is no pulse detected.

Thao's actions were directly in accordance with exactly what MPD trained him to do when a person is suspected of experiencing excited delirium. His intent was to follow his training and MPD policy. He observed other officers following the trainings MPD had given them. What he saw was exactly what MPD trained their officers to do in this situation.

This case cannot be looked at with 20/20 hindsight. *Graham v. Connor* mandates the finder of fact to consider the officer's intent only from what he knew and he observed at the time the incident occurred. *Graham v. Connor*, 490 U.S. 386 (1989). Thao did not know Chauvin was committing illegal acts at the time. Thao was trained and he believed at the time that the officers were restraining Floyd until medical professionals arrived on scene to sedate Floyd. Thao thought he was saving Floyd by getting medical attention.

The prosecution bears the burden to prove beyond all reasonable doubt that Thao intended his actions to help Chauvin commit a crime. They cannot. They have not. Here,

the prosecution has not and cannot prove all elements beyond all reasonable doubt and Thao must be found not guilty of each count¹.

I. THAO CANNOT BE FOUND GUILTY BECAUSE HE DID NOT POSSESS THE REQUISITE *MENS REA*

a. Thao believed Floyd was experiencing excited delirium.

Thao observed many of the symptoms MPD trained for when attempting to discern whether a person may be experiencing excited delirium.

Thao saw that Floyd was sweaty. Federal Tr. 14 at 3125; *see* Federal Thao Ex. T-12 at Slide 18 (MPD trained Thao to look out the sign that a person is naked or sweaty). Kueng testified that from his point of view, Floyd’s behavior took a 180 degree turn once Floyd was placed into the squad car. Federal. Tr. 15 at 3464 (“his behavior just went to extreme measures.”) Specifically, Kueng testified that “[Floyd] started shaking very violently. He ended up smashing his face against the plexiglass that separates the front and back seat of the squad car and was flailing his legs very aggressively.”. Federal Tr. 15 at 3464. Floyd exhibited violence against objects and had an acute onset, signs MPD officers were trained to look out for. Federal Thao Ex. T-12 at Slide 20 (“Patient exhibits violence against **objects**.”) and Slide 23 (“Onset is **acute**.”). Thao also observed Floyd being tough, unstoppable, and physically resistant, signs he was trained to observe as potential symptoms of excited delirium cases. Federal Thao Ex. T-12 at Slide 22 (“Patient is **tough** and unstoppable.”); Federal Thao Ex. T-12 at Slide 27 (“Patient is **resistant**.”). Thao also

¹ Thao agrees the prosecution meets its burden as to elements (i)(a) and (i)(d) in Count 1 as well as element (i)(a) in Count 2. Thao does not argue but does not concede elements (i)(b), (i)(c) in Count 1. Thao does not argue but does not concede element (i)(b) in Count 2.

observed Floyd's speech pattern when he spoke to him, Floyd seemed confused and incoherent at times. Federal Thao Ex. T-12 at Slide 25 ("Patient is **confused.**") and Slide 28 ("Patient's speech is **incoherent.**").

Thao testified that at the time of the incident while on scene, he was thinking "It was obvious that [Floyd] was under the influence of some sort of drugs." Federal Tr. 14 at 3125. Thao testified that he thought that because "[w]hen I first arrived, I saw kind of beads of sweat on him on his head, and he was kind of – very sweaty." *Id.* This observation was significant because "[i]t's a sign of potential drug use and a sign of excited delirium." *Id.* Thao also observed other signs that Floyd was under the influence:

We did receive the initial information from the caller that he appeared to be under the influence. He was kind of incoherent, not listening to direction, not able – we weren't able to reason with him or even get him calmed down. He's fighting off three officers consistent with super-human strength or more strength than all three officers could handle.

Federal Tr. 14 at 3126. Of significance, was that Floyd was displaying all these signs while handcuffed. *Id.*

Based on his training and experience, Thao believed Floyd was experiencing excited delirium. This conclusion was obviously reasonable as three other trained professionals on scene: Officer Lane, Officer Kueng, and Paramedic Derek Smith all testified they suspected Floyd may be experiencing excited delirium based on their individual training and observations. *See* Federal Tr. 15 at 3465, 3494 (where Kueng testified that Floyd could be suffering from excited delirium based on his observations on scene); Chauvin Ex. 47 at 20:23:53 (where Lane is captured on body worn camera saying "I just worry about the

excited delirium.”); Federal Tr. 3 at 633-634 (where Smith testified that going into the call be thought excited delirium was a possibility due to the Code 3 call and the patient being in police custody).

Whether or not Floyd was actually experiencing excited delirium is not determinative as to the element of *mens rea*/Thao’s intent. Instead, its importance is on the effect this reasonable belief had on Thao and how it illustrates the intent of Thao’s actions. Whether or not Floyd was experiencing excited delirium, Thao reasonably believed it to be a possibility under the circumstances and undertook his actions to help Floyd in that state, just as Thao was trained to do by the MPD.

b. Thao followed the MPD training on excited delirium. He believed others were doing the same.

Thao followed the last letter of the mnemonic – “E: EMS should be requested **early**”. Federal Thao Ex. T-12 at Slide 30.

At 20:20:48, Thao turned on the emergency lights on squad 320 which would signify to paramedics that we’re right here.” Federal Tr. 14 at 3135.

At 20:21:14, Thao asks the other officers if EMS is coming on a Code 3 (as fast as they can), to which Lane says that EMS was called on Code 2 and they “could probably step it up”. Federal Thao Ex. T-29; Federal Gov’t Ex. 9. Thao immediately steps up EMS to Code 3. Federal Thao Ex. T-29; Federal Gov’t Ex. 9 at 20:21:16. Dispatch confirms with a “copy”. Federal Gov’t Ex. 9 at 20:21:28. Thao explained his reasoning for stepping up EMS:

So after he had said he might have taken some drugs and we’re suspecting -- I’m suspecting excited delirium and I know that

we're really running short on time, it's -- so I'm asking Lane if we have EMS coming Code 3... Because we needed them there, like, right now.

Federal Tr. 14 at 3137-38. "Because he's going through excited delirium. We're running out of time and we need him potentially sedated to save his life". *Id.* 3140-41.

After over five minutes had passed since Thao originally called in Code 3, EMS had not yet arrived on scene. Federal Gov't Ex. 9. Thao radioed dispatch again, and asked again for EMS to their location. *Id.* at 20:26:42. Dispatch told Thao they EMS was en route and within a minute, EMS arrived. *Id.* 20:26:42-20:27:26.

MPD trained its officers that "the police restraint is actually a means of protecting [excited delirium] people from exhausting themselves and dying". Federal Tr. 6 1265. MPD trains its officers to restrain people thought to be experiencing excited delirium until they can be sedated by EMS. Federal Tr. 6 at 1266. MPD trained its officers that if they are restraining a person experiencing excited delirium, "they will actually reduce the risk of death to the person". Federal Tr. 6 at 1266.

Thao testified that he assumed the other officers were restraining Floyd "[b]ecause they were waiting for an ambulance to arrive." Federal Tr. 14 at 3145. Thao was trained in basic first aid. Federal Tr. 14 at 3145. Thao testified that the restraining officers would be expected to monitor Floyd's medical condition. *Id.* Thao testified that he assumed this is what the three restraining officers were doing – monitoring Floyd's medical condition. *Id.*

MPD repeatedly trained Thao that excited delirium patients can work themselves to death if they are not sedated and restrained. Officers are taught that it is important to restrain the person and to continued to restraint them until EMS arrives to sedate them.

Officers are trained to continue the restraint in the prone position because at any second the person may exhibit irrational and incredible superhuman strength which could put the officer's lives, civilian lives, and medical professional lives in danger. Not only did Thao repeatedly receive this training by MPD, Thao was trained at Fairview to restrain the person until a medical professional could sedate them. Thao has been repeatedly trained, by both MPD and Fairview Hospital, to restrain, hold in restraint, and wait for sedation when he encounters a person he suspects is experiencing excited delirium. Whether or not this medical phenomenon is real, Thao was taught that people in these highly agitated states are extremely dangerous to themselves and others, unless they are restrained until they are sedated.

What Thao observed that day was in line with his years of excited delirium training. The other officers were holding a highly agitated man who was displaying superhuman strength in a prone position to prevent him from overworking himself to death until EMS could sedate him. This was not just based upon observations. The other officers told Thao they that Floyd was being held until EMS arrived. Chauvin Ex. 49 at 20:20:23-20:20:35 (where the officers agree that they will "hold until EMS.").

Thao observed a senior officer deploying a trained and commonly used restraint. Thao observed a senior officer following the restraint training with a person who was suspected of having excited delirium. Thao was not aware that Chauvin's actions exceeded the authorized use of force protected by Minnesota law. To suggest that Thao should have known this is to review Thao's intent with 20/20 hindsight and the benefit of expert opinions and violate the mandates of *Graham v. Connor*.

c. Thao believed he was observing an authorized use of force.

Minnesota law authorizes reasonable force upon a person of another without the person's consent "when used by a public officer or one assisting a public officer under the public officer's direction in effecting a lawful arrest." Minn. Stat. § 609.06 subd. 1(1)(i).

The State claims that police officers are "trained that this type of restraint with a subject in a prone position is inherently dangerous". Complaint at 4. However, stipulated evidence directly contradicts that statement. MPD repeatedly trained its officers to use a knee restraint on the neck/head area. Thao personally was trained to use a knee restraint while he was in the academy. His fellow recruits practiced knee on neck restraints while use of force officers watched, smiled, and encouraged this. The MPD trained officers to use a knee on a neck to restrain a person suspected of having excited delirium. *See* Federal Thao Ex. T-12 at Slide 31.

Even if "inherently dangerous", the restraint used by Chauvin is still a reasonable use of force, was repeatedly trained by the MPD to its officers – included Thao during the academy and in-service training – and was authorized via the MPD policy handbook.

During his lawful arrest, Floyd became agitated and resisted both actively and passively. To subdue Floyd, Chauvin utilized his training and experience to administer a non-deadly, MPD-approved restraint.

Thao testified that Chauvin's use of a knee restraint was not unusual to him because it was not uncommon to observe MPD officers use knee restraints and that they were trained to do so. *See* Federal Tr. 14 at 3141. Thao specifically testified that he personally

had seen previous instances of MPD officers restraining people by putting their knees on the person's neck. Federal Tr. 14 at 3141. Thao saw Chauvin do what MPD had trained its officers to do – restrain a person experiencing excited delirium in the prone position in an effort to hold them until medical professionals arrive.

d. Thao intended his actions to help Floyd get medical attention. He did not believe Floyd was pulseless and was acting in accordance with the MPD excited delirium training.

During and after the restraint, Thao did the following with the intent of getting Floyd medical attention as fast as possible:

- Thao turned on squad 320's emergency lights to signify where paramedics should go. Federal Tr. 14 at 3135.
- Thao asked the other officers if they had called EMS yet right after Floyd was placed on the ground. Federal Gov't Ex. 9 at 20:21:14
- When Lane informed Thao that EMS had been called, but only as a Code 2, Thao immediately called dispatch to escalate the call to a Code 3 to get EMS on scene as fast as possible. Federal Gov't Ex 9 starting at 20:21:16. Federal Tr. 14 at 3137-3138.
 - Thao testified that he wanted EMS on scene as fast as possible to “potentially sedate to save [Floyd's] life.” Federal Tr. 14 at 3140-41.
- When the ambulance had not arrived on scene within 5 minutes – the time Thao estimated it would take them to get there from HCMC – he took it upon himself radio dispatch again to get an update. Federal Gov't 9 at 20:26:42.

- Thao determined that the use of a hobble would delay Floyd's medical care.
Federal Tr. 14 at 3133; 3134.

The evidence clearly demonstrates that Thao wanted Floyd to receive medical care. There is no evidence contrary. Thao's actions follow in line with his intent to get Floyd medical care.

At no point did Thao observe the three officers roll Floyd over and perform CPR on him. *Id.* at 3149. Thao testified that this was significant to him for the following reasons:

- The MPD trains officers to start CPR if a person has no pulse. *Id.* at 3149.
- If the other officers are not doing CPR, Thao reasonably assumed that Floyd was still breathing and doing fine. *Id.*
- By not seeing CPR performed at any time, it indicated to Thao that Floyd had a pulse. *Id.*

Based on his training, the MPD policy, and his observations on scene, Thao reasonably believed that the other officers who were in closer proximity were monitoring Floyd's medical needs. He reasonably believed that they were following the MPD training that if there is no pulse, CPR must be administered. Since he saw no CPR administered, he reasonably believed that Floyd still had a pulse.

CONCLUSION

The death of George Floyd was a tragedy. Yet the fact that a tragic death occurred does not transfer it into a criminal act. Thao is innocent of the charges against him because he did not intend that his specific actions were done to assist in the commission of a crime. Every one of Thao's actions was done based upon the training he received from the Minneapolis Police Department. These actions were taken because Thao reasonably believed that Floyd was experiencing excited delirium, and were done with the intention of saving Floyd's life. Rightly or wrongly, this was his intention at the time, and it was reasonably based upon the situation he was in at the time. The state has failed to prove the requisite *mens rea* required for conviction. Thao is not guilty of all charges.

Respectfully submitted,

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

Natalie R. Paule (#0401590)
Paule Law P.L.L.C.
101 East Fifth Street
Suite 1500
St. Paul, MN 55101
T: (612) 440-3404
nrp@paulelaw.com