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State of Minnesota
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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Case Type: Criminal

State of Minnesota,

Plaintiff,

vs.

STATE'S REPLY IN SUPPORT OF MOTION FOR JOINDER

Derek Michael Chauvin, Court File No: 27-CR-20-12646

J. Alexander Kueng, Court File No: 27-CR-20-12953

Thomas Kiernan Lane, Court File No: 27-CR-20-12951

Tou Thao, Court File No: 27-CR-20-12949

Defendants.

TO**:** The Honorable Peter Cahill, Judge of District Court, and counsel for Defendants; Eric J. Nelson, Halberg Criminal Defense, 7900 Xerxes Avenue South, Suite 1700, Bloomington, MN 55431; Robert Paule, 920 Second Avenue South, Suite 975, Minneapolis, MN 55402; Earl Gray, 1st Bank Building, 332 Minnesota Street, Suite W1610, St. Paul, MN 55101; Thomas Plunkett, U.S. Bank Center, 101 East Fifth Street, Suite 1500, St. Paul, MN 55101.

INTRODUCTION

As the State explained in its motion, the four factors under Minnesota Rule of Criminal Procedure 17.03 all favor joinder. *First*, the nature of the offenses supports joinder because the charges and evidence against the Defendants are similar, and because the Defendants all acted in close concert. *Second*, eyewitnesses and Floyd's family members would likely be traumatized by multiple trials. *Third*, Defendants have not met their burden to show that their defenses are antagonistic. *Finally*, the interests of justice favor joinder because, among other things, separate trials would cause delay and impose burdens on the State, the Court, and witnesses.

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Defendants nonetheless urge the Court to conduct four separate trials with four separate juries at four different times. Defendants deny that the Defendants acted in close concert—even though the body worn camera footage plainly shows that Chauvin, Kueng, and Lane worked together to pin Floyd to the ground face-down for approximately nine minutes, while Thao encouraged the others to continue holding Floyd in that position and prevented a group of concerned bystanders from intervening. They deny that eyewitnesses are likely to be traumatized by testifying at trial—even though several of the eyewitnesses were minors, and even though the nature of the crime itself was traumatizing, as witnesses were forced to watch the Defendants murder Floyd while ignoring their cries that he was not moving or breathing. They deny that their defenses are likely to be consistent at trial—even though Defendants did not raise a single antagonistic defense across four separate motions to dismiss for lack of probable cause. And they deny that separate trials would impose significant costs on the State, the Court and the community—even though the case law (and common sense) makes clear that conducting four separate trials would be more costly and less efficient than conducting a single joint trial.

It is telling that, across four different briefs opposing joinder, Defendants did not cite even a *single* case in which a district court denied a motion for joinder. Not one. Defendants' position is inconsistent with the law, and with the facts of this case. The State's joinder motion should be granted, and Defendants Chauvin, Kueng, Lane, and Thao should be joined for trial.

ARGUMENT

If the Defendants' argument were accepted, it would be hard to imagine when joinder would ever be appropriate. That is presumably why, for example, Chauvin's brief begins with a misleading half-sentence quote from *Santiago v. State*, 644 N.W.2d 425, 446 (Minn. 2002): "Minnesota . . . *has* a historical preference for separate trials," Chauvin Opp. 2 (emphasis added).

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Of course, that is no longer true, as the rest of the sentence from *Santiago* (curiously omitted from his quote) makes clear. The very next words are "and our current version of subdivision 2(1) expresses neutrality on the issue of joinder." Unlike the 1878 rules, which gave defendants the power to control joinder, the current version of Minnesota Rule of Criminal Procedure 17.03 "neither favors nor disfavors joinder." *State v. Jackson*, 773 N.W.2d 111, 118 (Minn. 2009). It provides that a court "must consider" four factors: (i) "the nature of the offense charged"; (ii) "the impact on the victim"; (iii) "the potential prejudice to the defendant"; and (iv) "the interests of justice." Minn. R. Crim. P. 17.03, subd. 2. Here, viewed under that neutral standard, all four factors favor joinder. A decision to the contrary would threaten to reverse the sea change in joinder law brought about by the current version of Rule 17.03—a sea change recognized repeatedly by the Minnesota Supreme Court—and would render joinder a nullity.

I. THE NATURE OF THE OFFENSES CHARGED FAVORS JOINDER.

The nature of the offenses charged favors joinder for three reasons: (i) the Defendants are charged with the "same" or "similar[]" offenses, *Jackson*, 773 N.W.2d at 118; (ii) they worked "in close concert with one another," *id.* at 119 (quoting *State v. Blanche*, 696 N.W.2d 351, 371 (Minn. 2005)); and (iii) a "great majority of the evidence" to be presented will be the same for and likely admissible against all four Defendants, *Blanche*, 696 N.W.2d at 371. *See* State Br. 13-16. Defendants' arguments to the contrary on all three grounds are unpersuasive.

First, Defendants are all charged with the "same" or "similar[]" offenses. *Jackson*, N.W.2d at 118. Thao concedes as much, and Kueng and Lane do not dispute it. Thao Opp. 4 ("Thao and the other three potential codefendants have been charged with similar offenses"); *see* Kueng Opp. 6-8 (not disputing this point); Lane Opp. 1 (same). Only Chauvin disputes whether the charges are the "same" or "similar." His arguments fall flat.

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Chauvin is charged with second-degree murder, third-degree murder, and second-degree manslaughter. Kueng, Lane, and Thao are each charged with aiding and abetting second-degree murder and aiding and abetting second-degree manslaughter. Because "aiding and abetting is not a separate substantive offense" under Minnesota law, the second-degree murder and second-degree manslaughter charges are the same for all four Defendants. *State v. DeVerney*, 592 N.W.2d 837, 846 (Minn. 1999); *see* State Br. 14.

That leaves third-degree murder, which is substantially similar to the other charged offenses. Third-degree murder is considered an "included offense" of second-degree murder under Minnesota law, as "every lesser degree of murder is an included offense." *State v. Zumberge*, 888 N.W.2d 688, 697 (Minn. 2017); *see* Minn. Stat. § 609.04, subd. 1(1) ("An included offense may be . . . a lesser degree of the same crime."). For that reason alone, the third-degree murder charge against Chauvin is closely linked to the second-degree murder charges against all four Defendants. Indeed, second- and third-degree murder are treated as the "same offense" in at least one critical respect: "Minnesota law prohibits a criminal defendant convicted of one offense from also being convicted of any included offenses." *State v. Pflepsen*, 590 N.W.2d 759, 765 (Minn. 1999); *see* Minn. Stat. § 609.04, subd. 1 (a defendant "may be convicted of either the crime charged or an included offense, but not both").

Moreover, the elements of third-degree murder substantially overlap with the elements of the other charged offenses. 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; and (iii) the defendant's intentional act was "eminently dangerous to other persons and was performed without regard for human life," which requires a showing that "the defendant was aware that his conduct created a substantial and unjustifiable risk of death to another person and

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consciously disregarded that risk." *State v. Coleman*, 944 N.W.2d 469, 477, 479 (Minn. Ct. App. 2020); 10 Minn. Dist. Judges Ass'n, Minnesota Practice Jury Instruction Guides, Criminal 11.38 (6th ed.) ("CRIMJIG"). The first two elements of third-degree murder are also requirements of second-degree murder and second-degree manslaughter. *See* CRIMJIG 11.29, 11.56. And the third overlaps heavily with the requirements for both second-degree murder and second-degree manslaughter. Here, the second-degree murder charge requires proof that Chauvin intentionally inflicted bodily harm on Floyd. *See* Opp. to Kueng Mot. to Dismiss 18. And second-degree manslaughter requires proof that the defendant "gross[ly] deviat[ed] from the standard of care that a reasonable person would observe in the actor's situation," and that he "conscious[ly] disregard[ed] . . . the risk created by the conduct." *State v. McCormick*, 835 N.W.2d 498, 507 (Minn. Ct. App. 2013) (internal quotation marks omitted). Thus, evidence showing "the defendant was aware that his conduct created a substantial and unjustifiable risk of death," as is necessary for a third-degree murder charge, will likely also support a finding of gross negligence. *Coleman*, 944 N.W.2d at 479. And evidence that shows a conscious disregard of risk for third-degree murder will likely also show a conscious disregard of risk for second-degree manslaughter. *See id.*

Other courts have found joinder proper where the defendants are charged with similar but distinct offenses. In *Koester v. State*, for example, the Court of Appeals held that it was not error to jointly try a defendant charged with "aiding and abetting first-degree aggravated robbery, aiding and abetting second-degree intentional murder, . . . aiding and abetting first-degree burglary, [and] second-degree felony murder," and a second defendant charged with the same crimes and also "aiding an offender after the fact." No. A18-2083, 2019 WL 2495748, at *1 (Minn. Ct. App. June 17, 2019). Although these charges were not the same, they were "almost

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identical," and so "substantially the same evidence was admissible to prove both" defendants' guilt. *Id.* at *2. Likewise, in *State v. DeFoe*, the Minnesota Supreme Court found that a joint trial did not prejudice three defendants charged with aggravated robbery, even though one was also charged with aggravated assault. 280 N.W.2d 38, 40 (Minn. 1979); *see Minnesota v. Araiza*, No. 70-CR-12-11840, 2012 WL 8525625, at *2 & n.2 (Minn. Dist. Ct. Oct. 31, 2012) (ordering joinder where defendants were "charged with the same" burglary and theft "offenses," even though only some defendants were charged with an additional felon-in-possession offense).

Chauvin's primary argument is that, although "these charges may appear similar, . . . under the facts of this case, the nature of the offenses charged are considerably different." Chauvin Opp. 3. With respect to second-degree murder, he claims that the State must prove that he intended to assault Floyd, but it must prove that the other Defendants "knew of [his] intent to commit the assault before it happened." *Id.* Not so. Although the State must show that Kueng, Lane, and Thao knew that Chauvin was "going to [commit] or [was] committing a crime," they did not need to have "knowledge of [Chauvin's] criminal intent *before* the crime commence[d]." *State v. Smith*, 901 N.W.2d 657, 661-662 (Minn. Ct. App. 2017) (internal quotation mark omitted and emphasis added); *see* Opp. to Lane Mot. to Dismiss 19, 22-23. "A defendant who acquires the requisite knowledge while the accomplice is in the process of committing the offense" can be found liable for aiding and abetting. *Smith*, 901 N.W.2d at 662. As for the third-degree murder charge, Chauvin merely asserts that this is "an entirely separate charge and an entirely separate offense" that has "no similarity" to the charges against the other Defendants. Chauvin Opp. 4. But as explained, that assertion is false. *See supra* pp. 4-5.

Chauvin also claims that joinder is improper because the State must prove that he intended to commit second-degree murder and second-degree manslaughter, whereas it must

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prove that Kueng, Lane, and Thao knew Chauvin was committing a crime and intentionally aided its commission. *See* Chauvin Opp. 4-5. Insofar as Chauvin is arguing that joinder is improper where the State must prove each Defendants' own mental state, that would foreclose joinder in virtually every case. And insofar as he is arguing that a principal and accomplice may never be tried jointly, that too fails, for aiding and abetting is not considered a separate substantive offense. *See DeVerney*, 592 N.W.2d at 846. Indeed, courts in Hennepin County have previously found that the nature of the offense favors joining principals and accomplices for trial. *See, e.g.*, *State v. Wallace*, No. 27-CR-17-11978, 2017 WL 11486458, at *3 (Minn. Dist. Ct. Nov. 28, 2017) (explaining that the nature of the offense favored joinder where one defendant was charged with second-degree murder and the other with aiding and abetting second-degree murder, as the charges were "virtually identical" and "the majority of the evidence could be used against both defendants").

Thus, because the Defendants are charged with the same or similar offenses, that alone demonstrates that the "nature of the offense charged" favors joinder.

Second, there is "substantial evidence" that the Defendants "worked 'in close concert with one another.'" *Jackson*, 773 N.W.2d at 119 (quoting *Blanche*, 696 N.W.2d at 371). Defendants work "in close concert" when "each ha[s] a role in the scheme" or when "all work[] together" to commit the crime. *State v. Powers*, 654 N.W.2d 667, 674-675 (Minn. 2003). Here, all four Defendants worked together to murder Floyd: Chauvin, Kueng, and Lane pinned Floyd face-down, while Thao stopped the crowd from intervening, enabling the other Defendants to maintain their positions. Defendants also discussed and coordinated their actions throughout the incident. State Br. 15. That readily shows that they acted in close concert.

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Defendants disagree with that conclusion. Chauvin challenges the standard itself: He claims that, where a jury can understand each defendant's individual role without a joint trial, the defendants did not act in "close concert" with one another. Chauvin Opp. 6. Although Minnesota courts do sometimes consider whether "a joint trial was needed to facilitate the jury's comprehension and appreciation of each defendant's role," *State v. Stock*, 362 N.W.2d 351, 352 (Minn. Ct. App. 1985) (citing *State v. Strimling*, 265 N.W.2d 423, 432 (Minn. 1978), which involved a complex white-collar crime), that is far from dispositive of the "close concert" inquiry, *see State v. Martin*, 773 N.W.2d 89, 99 (Minn. 2009) (finding defendants acted in "close concert," even though they "were not alleged to have developed an intricate scheme" (internal quotation marks omitted)); *State v. Johnson*, 811 N.W.2d 136, 142 (Minn. Ct. App. 2012) (rejecting argument that the nature of the offense did "not favor joinder because cases in which defendants have been joined were more serious and more complex"). In any event, because the Defendants acted as a group to pin Floyd to the ground face-down and prevent anyone from interfering, and because Kueng, Lane, and Thao are charged with aiding and abetting Chauvin, it is impossible to evaluate any individual Defendant's conduct in a vacuum.[1]

Kueng and Thao, for their part, seek to distinguish their roles in Floyd's murder. Kueng, largely rehashing arguments from his motion to dismiss for lack of probable cause, focuses on the fact that Chauvin was the senior officer on the scene. Kueng Opp. 7. That has no bearing on whether Kueng acted in "close concert" with Chauvin and the other Defendants. Moreover, even

[1] Chauvin also contends that the Defendants did not work in close concert because "the pretrial pleadings filed by Lane, Thao, and [Kueng] disavow any knowledge of [his] intentions." Chauvin Opp. 6. But there is no requirement that an accomplice to second-degree murder know of the principal's intent in advance. *Smith*, 901 N.W.2d 657, 661-662. And the question is not whether the codefendants *admitted* to working in close concert; it is whether there is "substantial evidence" that they did so. *Jackson*, 773 N.W.2d at 119. Such evidence exists here.

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assuming *arguendo* that Chauvin was directing Kueng's actions, that only reinforces the conclusion that Kueng and Chauvin were working in close concert during the incident.

As for Thao, although he did not physically restrain Floyd, that does not mean he did not act in close concert with the other Defendants. Defendants who are "alleged to have played distinctive roles" can still act in close concert with one another. *Wallace*, 2017 WL 11486458, at *3. Thus, a getaway driver can act in "close concert" with the shooter. *See Powers*, 654 N.W.2d at 673-675; *Wallace*, 2017 WL 11486458, at *3. The same can be true of a lookout or a person who encourages others to commit a criminal act. *See State v. Parker*, 164 N.W.2d 633, 641 (Minn. 1969) (noting that "the 'lookout'" is "a classic example" of an "aider and abettor"). Nor does the fact that Thao and Chauvin arrived on the scene later mean that they could not act in close concert during Floyd's murder, as they were present for the entire time during which Floyd was pinned to the ground, lost consciousness, and died. *See* Chauvin Opp. 6; Thao Opp. 6. Indeed, a defendant can act in "close concert" with another to commit a crime even if he or she is not present at the scene during the crime itself. *State v. Meeks*, No. 27-CR-09-8498, 2009 WL 8603557 (Minn. Dist. Ct. Apr. 29, 2009) (ordering joinder where only one of two defendants was present when the victim died because both worked in "close concert").

Kueng and Thao also contrast this case with *DeVerney*, a case where defendants acted in "close concert." Kueng Opp. 7-8; Thao Opp. 5. Although the codefendants in that case acted in lockstep for much of the crime, *see DeVerney*, 592 N.W.2d at 842, the court never intimated that such lockstep behavior is required, and other cases suggest the opposite. *See supra* pp. 8-9. The question is not whether the defendants' actions were identical, but whether they each played a role in the crime or worked together to commit it. *Powers*, 654 N.W.2d at 674-675. Here, the evidence establishes that they did. The nature of the offenses charged favors joinder.

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Third, the nature of the offenses charged also favors joinder because a "great majority of the evidence" to be presented is likely admissible against all four Defendants. *Blanche*, 696 N.W.2d at 371. Once again, Kueng and Lane do not dispute this point. *See* Kueng Opp. 6; Lane Opp. 1. Thao, for his part, merely asserts that there is no way to evaluate this factor while discovery is ongoing. Thao Opp. 4. But the State routinely asks for—and courts routinely order—joinder where the allegations in the complaint and the State's representations make it "quite likely that the facts to prove each defendant's guilt or innocence are the same (or at least come from the same series of events)." *State v. Weinand*, No. K0-00-1116, 2000 WL 35486566, at *9 (Minn. Dist. Ct. Dec. 28, 2000). As one Hennepin County District Court has explained, so long as "it *appears* the majority of evidence *could be* used against both defendants," this factor favors joinder. *Wallace*, 2017 WL 11486458, at *3 (emphases added); *see State v. Acosta*, No. 27-CR-16-29743, 2017 WL 8780999, at *2 (Minn. Dist. Ct. May 02, 2017).[2]

Only Chauvin claims that the evidence presented against the Defendants may not substantially overlap. He contends that the State "may" admit each Defendant's personnel and training records, and that this evidence may "comprise the bulk of the evidence presented." Chauvin Opp. 5. That claim, of course, is belied by Chauvin's later acknowledgment that "[t]he charges filed against Mr. Chauvin were based largely on video and autopsy evidence." *Id.* at 7. Indeed, the overwhelming, key evidence with respect to the four Defendants will be common to all four—the body worn camera footage, witness testimony, evidence about the MPD's use-of-

[2] Contrary to Kueng's claim (at 8), these cases demonstrate that courts routinely look to the allegations in the complaint in evaluating the nature of the charged offenses. *See, e.g.*, *Wallace*, 2017 WL 11486458, at *1-3 (recounting facts as alleged in the complaint); *State v. McIntosh*, No. 27CR1534795, 2016 WL 8711385, at *2-3 (Minn. Dist. Ct. July 07, 2016) (same).

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force policies, autopsy reports, and evidence regarding causation.[3] Put simply, any "MPD personnel and training records" that differ between the Defendants—for example, information regarding when the Defendant became a police officer or received a particular training—will not "comprise the bulk of the evidence." *Id.* at 5. Because the "great majority" of the evidence will likely be admissible against all Defendants, this too favors joinder. *Blanche*, 696 N.W.2d at 371.

In sum, because the charges and the evidence against all four Defendants are similar, and because Defendants acted in close concert with one another, this first factor favors joinder.

II. JOINDER WILL PROTECT WITNESSES AND FLOYD'S FAMILY FROM RELIVING THE TRAUMA OF FLOYD'S DEATH AT MULTIPLE TRIALS.

The second factor—the impact on the victim and eyewitnesses—also strongly supports joinder. As the State has explained, joinder is necessary to protect eyewitnesses and the victim's family members from reliving Floyd's traumatic murder four times in four separate jury trials. *See* State Br. 16-18. Defendants' arguments to the contrary are unavailing.

First, Defendants contend that the impact on eyewitnesses does not support joinder. Defendants do not dispute that the impact on eyewitnesses who would be required to testify at multiple trials is a factor that may weigh in favor of joinder. Nor could they: The Minnesota Supreme Court has squarely held that courts may consider "the trauma to the eyewitnesses who would be compelled to testify at multiple trials." *Blanche*, 696 N.W.2d at 371. Instead, they

[3] Moreover, contrary to Chauvin's claim, evidence about his use of a neck restraint is indeed relevant to the other Defendants. Chauvin Opp. 7. To prove that Kueng, Lane, and Thao aided and abetted second-degree murder, the State must show that Chauvin committed the underlying crime, and that Kueng, Lane, and Thao knew Chauvin was intentionally committing an assault that inflicted substantial bodily harm on Floyd. And to prove that they aided and abetted second-degree manslaughter, the State must likewise show that Chauvin committed that crime, and that the other Defendants knew he grossly deviated from the reasonable standard of care and consciously disregarded the risk of death created by his conduct. *See supra*, pp. 4-5. Evidence about the risks associated with a neck restraint and the harm it caused speaks directly to those elements.

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assert that none of the eyewitnesses here would suffer trauma from testifying. But that assertion is entirely inconsistent with both the case law and the facts of this particular case.

Kueng and Thao argue that one of the eyewitnesses to the murder, D.F., is a 17-year-old and is therefore "nearly considered an adult." Kueng Opp. 10; *see* Thao Opp. 7. Kueng also claims that "she should have the tools to be able to cope with the stress of testifying" because she has begun therapy. Kueng Opp. 10. Those arguments fail for several reasons. The critical question is whether the eyewitnesses are "vulnerable and could be traumatized by having to testify at several trials." *Blanche*, 696 N.W.2d at 371. Kueng and Thao do not dispute that D.F. is indeed a minor, and no Defendant has cited case law suggesting that minors who witness murders are not "vulnerable," or that they would not be "traumatized by having to testify at several trials." *Id.* Moreover, regardless of her age, D.F. is "vulnerable" for other reasons: She has been publicly shamed by at least one of the Defendants' attorneys for not somehow stopping the Defendants and saving Floyd, and she has been the subject of considerable media scrutiny. *See* State Br. 18. The fact that D.F. is in therapy reflects the trauma she sustained as a result of witnessing Floyd's death, and her vulnerability. It is not a reason to disregard her vulnerability.

D.F. is also not the only minor who was an eyewitness to Floyd's murder. D.F.'s 9-year-old cousin witnessed the murder, and at least three other witnesses from the scene may also be minors. The vulnerability of these eyewitnesses is a strong thumb on the scale against forcing the witnesses to relive the trauma of watching Floyd's death at four separate times.

Kueng and Thao also assert that the eyewitnesses are not likely to be traumatized by testifying because the "nature of the crime charged" was not particularly traumatic. *Powers*, 654 N.W.2d at 675; *see* Kueng Opp. 9-10; Thao Opp. 7. That is wrong. Contrary to Kueng's and Thao's arguments, blood and gore are not the only factors that make a murder particularly

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traumatic. By any measure, Floyd's murder was "vicious, brutal, and dehumanizing." *Stock*, 362 N.W.2d at 353 (internal quotation marks omitted). As Chauvin knelt on Floyd's neck, Kueng and Lane pinned down Floyd's back and legs, and Thao prevented bystanders from intervening to save Floyd's life, Floyd cried out that he could not breathe, pleaded for his mother, told the Defendants he was dying, and then lost consciousness and fell silent. Eyewitnesses watched the life drain from Floyd's motionless body as the Defendants—whose duty as police officers was to protect and serve the public—continued to press Floyd face-down into the ground. Throughout, the bystanders screamed repeatedly that the Defendants were killing Floyd, begged them to stop, and pleaded that they or the Defendants offer medical aid to Floyd. Floyd's death was so harrowing that bystander video of his death caused significant protests, as Kueng acknowledges. Kueng Opp. 4. To argue that the nature of Floyd's death was not dehumanizing or that witnessing his death was not traumatizing belies reality. The nature of Floyd's death therefore reinforces that eyewitnesses will be traumatized by multiple trials.[4]

Second, "no showing of particular vulnerability or unusual violence need be made in order for" the victim-impact factor "to weigh in favor [of] joinder." *Meeks*, 2009 WL 8603557. The focus of "the language of Rule 17.03 includes the word 'impact,' not the narrower word 'trauma,'" and "[i]mpact may include things other than emotional trauma." *State v. Carlson*, No. 27-CR-11-29606, 2013 WL 9792447, at *3 (Minn. Dist. Ct. Aug. 1, 2013); *see State v. Bellfield*, No. 27-CR-07-127152, 2008 WL 7650412 (Minn. Dist. Ct. July 2, 2008) (considering the impact

[4] Rather than disagreeing with the conclusion that eyewitnesses would be traumatized by multiple trials, Chauvin contends that "the need for many eyewitnesses to the incident . . . has not been demonstrated by the State." Chauvin Opp. 7. But eyewitnesses are likely to play a critical role at trial in this case, just like any other. Eyewitnesses may testify to the events of May 25 from different vantage points than those captured on video, and can describe aspects of the incident that may not be apparent on video. Eyewitnesses may also testify to Defendants' demeanor, and to their interactions with one another during the course of the incident.

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of "travel costs and lost wages or other earned income" on witnesses, as well as delays to victims seeking closure); State Br. 16-17.

Kueng asserts that these decisions "contradict[] an opinion of the Minnesota Supreme Court," and brushes aside considerations other than trauma to witnesses as mere "witness convenience issues that the Supreme Court has warned should not be considered." Kueng Opp. 10. But the single decision Kueng cites, *Blanche*, says nothing of the sort. That decision notes that the victim-impact factor should not "be *swallowed* by considerations of eyewitness convenience." *Blanche*, 696 N.W.2d at 371 (emphasis added). The State agrees. That does not mean, however, that the Court's consideration of "the impact on the victim" and eyewitnesses must be limited only to the "trauma" suffered by eyewitnesses. Here, the considerable emotional, logistical, and financial burdens facing eyewitnesses who would be required to testify at four separate trials is a thumb on the scale favoring joinder. *See* State Br. 17-18.

Third, Defendants attempt to downplay the impact of separate trials on Floyd's family. Even though Chauvin readily concedes that the victim-impact factor includes the impact on "family members" of the victim, Chauvin Opp. 7, Thao argues that the impact on Floyd's family members cannot be considered in evaluating joinder, Thao Opp. 6. Thao's argument misses the mark. Minnesota courts regularly consider the impact on the family of the victim. *See Martin*, 773 N.W.2d at 100; *McIntosh*, 2016 WL 8711385, at *3 ("Victim A, Victim B's widow, Victim C, and Victim C's family would suffer additional trauma if they were required to testify at two separate trials."). That impact is an especially significant factor if any family members are called to testify at trial. When evaluating the impact on the victim's family, courts do not look only to whether that family member was present and potentially in harm's way during the incident, as Thao contends. Thao Opp. 6. In *Koester*, for example, the Court of Appeals found that the need

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for a victim's widow who was not present at the scene of the murder to testify at multiple trials regarding the defendants' violent crimes "weighed in favor of a joint trial." 2019 WL 2495748, at *2. In reaching that conclusion, the court treated her testimony in the same manner as testimony by a direct victim. *Id.*; *see McIntosh*, 2016 WL 8711385, at *3 (similar).

Chauvin, meanwhile, argues that "there is no evidence that it would be particularly burdensome" for the Floyd family to attend multiple trials. Chauvin Opp. 8. That argument is a curious one in light of Chauvin's concession several sentences earlier that multiple trials would be "emotionally difficult for the Floyd family." *Id.* at 7. Requiring the family to relive Floyd's murder in four separate trials would be extremely burdensome. In any event, as the State explained, Floyd's family members would also need to travel long distances for each trial during a pandemic, and then spend multiple weeks in Minnesota for each trial. *See* State Br. 18. Chauvin responds that "[t]he pandemic does not seem to have hindered the Floyd family from traveling for other purposes," but he points to a single trip to Virginia the family took to honor Floyd's memory. Chauvin Opp. 7. Traveling to Minnesota for seriatim trials, each of which could span several weeks during the midst of a pandemic, is likely to be far more burdensome.

Finally, Kueng asserts that "[t]he Floyd family is not required to attend any of the trials," and that the State could simply consent to "media coverage of the trial" instead. Kueng Opp. 7. That misses the point. No matter how the media is permitted to cover the trial, Floyd's family is entitled to be present to witness justice for their deceased family member. The law in Minnesota expressly contemplates as much. *See, e.g.*, Minn. Stat. § 611A.034 (detailing courthouse procedures related to victim attendance at trial). Requiring four separate trials will only cause the Floyd family to suffer through four separate retellings of the tragic murder of their beloved family member. This factor therefore strongly favors joinder.

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III. DEFENDANTS HAVE NOT MET THEIR BURDEN TO SHOW THE EXISTENCE OF ANTAGONISTIC DEFENSES.

Defendants bear the burden to establish that joinder will prejudice their defense because they plan to present antagonistic defenses at trial. They have not met it. They have not shown the existence of antagonistic defenses. Nor have they established that joinder will prejudice their defense in a manner that cannot be cured by a proper limiting instruction to the jury.

It is simply not the case, as Defendants suggest, that a defendant need not "even elaborate on any antagonistic defenses he may raise at trial" and successfully oppose joinder. Thao Opp. 8; *see* Chauvin Opp. 9. Just the opposite is true: The Defendants bear the burden of establishing that joinder will prejudice their defense, and vague or conclusory assertions of antagonistic defenses are not sufficient to meet that standard. *See Powers*, 654 N.W.2d at 675 ("We conclude that based on the failure to show the existence of antagonistic defenses, joinder did not create the potential for prejudice to the appellant."). That is particularly true at the early stages of a prosecution because the trial court has many tools at its disposal to address potential prejudice later in the case, if the need arises. *See Powers*, 654 N.W.2d at 675 (noting that the trial court acknowledged "its ability to address any potential prejudice that may arise at the trial with the power to sever"); *State v. Greenleaf*, 591 N.W.2d 488, 499 (Minn. 1999) (noting that "the trial court instructed the jury at the beginning and end of the trial that the cases were to be considered separately"). Here, all of Defendants' assertions of antagonistic defenses are conclusory and, in any event, plainly do not qualify as antagonistic. So this factor does not weigh against joinder.

Defendants' arguments rest on an overbroad understanding of Minnesota Supreme Court precedent governing what counts as an "antagonistic defense." They seize on language describing such defenses as being present when defendants "seek to put the blame on the other," *State v. Hathaway*, 379 N.W.2d 498, 503 (Minn. 1985), without acknowledging that this

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language has a specific meaning, *see* Chauvin Opp. 8; Kueng Opp. 11; Lane Opp. 1; Thao Opp. 8. Defenses that "seek to put the blame on the other" are antagonistic only when (i) "the state introduce[s] evidence that show[s] only one of the defendants" committed the crime; or (ii) the jury is "forced to believe either the testimony of one defendant or the testimony of the other" to reach a verdict. *Hathaway*, 379 N.W.2d at 503. The "classic example" of blame-shifting that rises to the level of an antagonistic defense occurred in *Santiago*, where two defendants were charged with second-degree murder and attempted second-degree murder and each defendant planned to introduce evidence and call witnesses showing that the other was the shooter and had acted alone. 644 N.W.2d at 435, 447. In other words, each codefendant's defense "depended on proof" of the other codefendant's guilt, and the jury "could not accept" both defenses in rendering its verdict. *Id.* at 449.

In their motions to dismiss for lack of probable cause, all four Defendants offered defenses that were consistent, not antagonistic. All four Defendants relied heavily on a common defense—that the decision to restrain Floyd was reasonably justified. *See* Chauvin Mot. to Dismiss 14; Kueng Mot. to Dismiss 5; Lane Mot. to Dismiss 14; Thao Mot. to Dismiss 6, 10-12; *see also* Minn. Stat. § 609.06, subd. 1(1). None offered any defense that "depended on proof" of another Defendant's guilt. *Santiago*, 644 N.W.2d at 449.[5]

Nonetheless, in a last-ditch effort to defeat joinder, Defendants now offer up hypothetical examples of how each might attempt to paint other codefendants as having behaved more

[5] Chauvin quotes language from the Kueng, Lane, and Thao motions to dismiss alleging that these three Defendants had no knowledge that Chauvin was committing a felony. Chauvin Opp. 8-9. Far from "blam[ing] Chauvin," these statements simply make the argument that Kueng, Lane, and Thao did not think Chauvin's actions constituted a felony. *Id.* That argument is entirely consistent with Chauvin's argument that he was not committing a felony.

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culpably than they did. But none of these defenses fits the "classic" example of an antagonistic defense, or otherwise meets the general definition of an antagonistic defense.

To start, that Defendants might offer *different* defenses does not make them antagonistic. Chauvin, for example, suggests that the other three Defendants will deny having the required mens rea for the aiding and abetting offenses they are charged with, but he will argue that an overdose was the cause of Floyd's death. *See* Chauvin Opp. 9-10. Similarly, Kueng claims that Thao plans to argue that he lacked knowledge of the other Defendants' actions as he held back the crowd. Kueng Opp. 12. None of these defenses are mutually exclusive in any way: A jury could find for Kueng, Lane, and Thao on the mens rea elements of their charges without finding Chauvin guilty, or it could find against Kueng, Lane, and Thao on the mens rea elements of their charges while still finding Chauvin guilty. *See, e.g.*, *Greenleaf*, 591 N.W.2d at 499 (noting that one defendant's defenses of "intoxication, duress, and . . . innocen[ce]" were not antagonistic to his codefendant's innocence defense because "these defenses did not conflict and the jury was not forced to choose between the testimony of [the defendants] to arrive at its verdicts").

As for the claim that Defendants may argue that the actions of each Defendant played a greater or lesser role in Floyd's death, that also does not amount to an antagonistic defense. For one thing, that defense is purely hypothetical, and it is mentioned nowhere in any of the four Defendants' motions to dismiss for lack of probable cause. *See* Chauvin Opp. 9-10 (suggesting that he "*could* reasonably argue" that other Defendants' action exacerbated Mr. Floyd's medical condition or led to a delay in Floyd's receiving medical care (emphasis added)); Thao Opp. 9 (stating that "[i]f the State were to argue that Mr. Floyd died from positional asphyxiation," then a dispute "*could* arise between defendants" over whose pressure on Floyd's back contributed to that result (emphasis added)). There is, at this stage, no certainty that Defendants would raise

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such an argument. Instead, as noted, Defendants' filings suggest that the most likely defense at trial would be that "all" are not guilty because "their actions were lawful." Chauvin Opp. 10; *see supra* p. 17 (noting arguments from motions to dismiss). And even if this were not speculative at this stage, it is plainly insufficient. Such a defense would resemble those in *Johnson*, where two defendants each tried to convince a jury that he was "the wrong person" to convict for a robbery committed by four men. 811 N.W.2d at 143. There, as here, the defendants had "regularly adopted the motions and objections of the other." *Id.* And there, as would be the case at trial here if Defendants' hypotheticals arise, the jury would not be "forced to choose between [the] defenses" but would "rather" have "to choose between the state's theory of the case and each defendant's theory of the case." *Id.* (quoting *Martin*, 773 N.W.2d at 100); *see Powers*, 654 N.W.2d at 677 (finding defenses were not antagonistic where defendants "ask[ed] questions highlighting [codefendant's] role in the aggravated robbery and murder" because they were not "exculpatory as to any of the defendants but merely clarified the roles played by each").

Finally, Kueng briefly argues that Chauvin might be prejudiced if Chauvin's evaluations of Kueng are introduced against Chauvin. Kueng Opp. 13. Kueng does not argue that those evaluations would be inadmissible against Chauvin; that is, he does not explain why that evidence would come in only during a joint trial. But even if that were the case, the admission of that evidence accompanied by a proper limiting instruction "does not constitute substantial prejudice." *Hathaway*, 379 N.W.2d at 503 (internal quotation marks omitted); *see Blanche*, 696 N.W.2d at 370 n.5 (noting one such limiting instruction). In any event, neither Kueng nor Chauvin explains how the admission of that evidence would give rise to an antagonistic defense: Even assuming that Chauvin made "past statements" to Kueng "about how to handle a subject being detained," Kueng Opp. 13, Kueng's defense based on those statements would not

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"depend[] on proof" of Chauvin's guilt, as the jury could accept one of Chauvin's defenses while still accepting Kueng's defense, *Santiago*, 644 N.W.2d at 449.

In sum, no Defendant has identified a defense he plans to raise that would "depend[] on proof" of the other codefendant's guilt, such that a jury "could not accept" both defenses when rendering a verdict. *Id*. Defendants have not met their burden to establish antagonistic defenses. This third factor—like the first two—thus favors joinder here.

IV. THE INTERESTS OF JUSTICE ARE SERVED BY JOINDER.

At least five considerations tip the interests-of-justice factor in favor of joinder. *See* State Br. 23-25. *First*, joinder will reduce the delay caused by lengthy separate trials. *See, e.g.*, *Jackson*, 773 N.W.2d at 118; *Bellfield*, 2008 WL 7650412. *Second*, a single trial will reduce the burden to the State and the Courts from having to repeat largely the same trial with largely the same evidence. *See Carlson*, 2013 WL 9792447, at *3. *Third*, a single trial increases the likelihood that witnesses will be available at trial, and reduces the inconvenience to witnesses. *See Jackson*, 773 N.W.2d at 119; *Bellfield*, 2008 WL 7650412. *Fourth*, joinder would protect against the risk that potential jurors may be prejudiced by publicity related to each trial. *See Powers*, 654 N.W.2d at 675. *Fifth*, joinder would allow the community to absorb the verdicts for the four Defendants at once, rather than forcing the community to endure four separate trials with four separate verdicts rendered at four different times over the coming years.

Defendants' arguments to the contrary are without merit. Defendants assert that, if the potential for prejudice weighs against joinder, the interests-of-justice factor necessarily weighs against joinder, as well. Chauvin Opp. 10; Kueng Opp. 13; Thao Opp. 10-12. That argument, of course, is irrelevant here because Defendants have not met their burden to establish the existence of antagonistic defenses. *See supra* pp. 16-20. In any event, Defendants' argument is also

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incorrect on its own terms. Under Rule 17.03, the potential for prejudice and the interests of justice are distinct, enumerated factors, and courts "must consider" each factor. Minn. R. Crim. P. 17.03, subd. 2. If the potential for prejudice was determinative of, or co-extensive with, the interests of justice, the interests-of-justice factor would be entirely superfluous. The Minnesota Supreme Court, moreover, did not adopt Defendants' interpretation of the interests-of-justice factor in *Santiago*, the case on which Defendants rely. Although the court concluded that antagonistic defenses weighed in favor of severance under both the prejudice and interests-of-justice factors, it never stated that the existence of antagonistic defenses was determinative of the interests of justice. *See Santiago*, 644 N.W.2d at 446. And because "the primary focus of [the court's] analysis" was "on whether the [lower] court properly evaluated the potential prejudice to Santiago," it had no occasion to conduct a thorough interests-of-justice analysis. *Id.* at 444.

Thao also argues that any prejudice from joinder would bar this Court from considering the "length of multiple trials" and the availability of witnesses. *See* Thao Opp. 11-12. But that argument misunderstands the case law. In evaluating the interests of justice, the Minnesota Supreme Court concluded in *Jackson* that both the length of multiple trials and the potential unavailability of witnesses weighed in favor of joinder, but that neither consideration was determinative. 773 N.W.2d at 119. The court then held that, "in the absence of substantial prejudice to Jackson," these factors "weigh[ed] in favor of joinder." *Id.* Far from conflating the potential prejudice and interest of justice factors, however, *Jackson* merely stands for the proposition that where there is not a demonstrated risk of prejudice, even slight interest-of-justice considerations can suffice to tip the scales in favor of joinder.

Defendants' arguments as to each of the specific interest-of-justice factors identified by the State also fail. *First*, Defendants argue that four separate trials will somehow be more

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efficient, take less time, and be less burdensome for the State and the Court. That argument is as wrong as it sounds. Kueng, for example, suggests that although the trials here may be "weeks long," "typically as trial approaches the parties stipulate to certain evidence and witnesses who will testify and cumulative evidence will be eliminated." Kueng Opp. 14. But that is true regardless of whether there is one trial or four, and it is certainly more efficient to have one post-stipulation trial than four. Moreover, such stipulations would not eliminate the need for the State and the Defendants to present substantially the same evidence and witnesses at successive trials. Joinder would. Kueng and Thao also suggest that a joint trial could drain judicial resources if any conviction is overturned on appeal, *id.*, or if there is a successful motion to sever midtrial, Thao Opp. 12. But those possibilities are entirely speculative. Defendants' purely conclusory assertion that an appeal or midtrial severance might be possible, without more, cannot justify the denial of joinder. *Cf. supra* pp. 16-19 (requiring more than conclusory allegations to support a finding of antagonistic defenses). In any event, Kueng's warnings about the possible consequences of an overturned conviction prove why joinder is necessary to avoid four lengthy, separate trials: As Kueng himself notes, a long delay means that "witnesses will be more difficult to track down, their memory will not be as sharp," and future trials "will be an even greater drain on resources." Kueng Opp. 14. Exactly.

Second, Chauvin contends that separate trials would aid efficiency because evidence introduced in his prosecution will be irrelevant to his codefendants, and because an acquittal in his prosecution may obviate the need for a second trial with the three other Defendants. Chauvin Opp. 11. But as noted, the substantial majority of the evidence—the body worn camera footage, police training evidence, eyewitness testimony, and testimony and evidence regarding causation—will overlap with evidence introduced at his codefendants' trials. *See supra* pp. 10-

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11. Even Chauvin acknowledges as much elsewhere in his brief. *See* Chauvin Opp. 7 ("The charges filed against Mr. Chauvin were based largely on video and autopsy evidence."). And even if Chauvin were acquitted, that would not obviate the need for a second trial against his codefendants. After all, the Minnesota Supreme Court has "indicated that the acquittal of a principal does not bar conviction of a defendant for aiding and abetting." *State v. Caldwell*, 803 N.W.2d 373, 382 (Minn. 2011); *see* Minn. Stat. § 609.05, subd. 4.

Third, Defendants' arguments regarding the availability and convenience of the witnesses rest on a misreading of the case law. Thao contends that the "unavailability of witnesses is only a factor when those witnesses are gang members or foreign nationals." Thao Opp. 11. But nothing in *Jackson* or the other cases he cites suggests that consideration of the availability of witnesses is so limited. In *Jackson*, the court focused on whether "there was some risk that the[] witnesses would be unavailable or unwilling to testify during another trial." 773 N.W.2d at 119; *see Blanche*, 696 N.W.2d at 372 (assessing whether "the risk existed that these witnesses would not have been available at a second trial"). The court answered that question in the affirmative because some of the witnesses "were gang members," but the court gave no indication that *only* gang members could be considered "unavailable or unwilling to testify." *Jackson*, 773 N.W.2d at 119. In fact, courts have approved joinder on this basis in other cases that did not involve gang members. *See Strimling*, 265 N.W.2d at 432 (affirming joinder in white-collar prosecution where "[t]he evidence thus described could not reasonably be expected to be available in two trials because of the number of contingencies affecting the various witnesses involved in the matter, its inherent complications and the demonstrated reluctance of two of the witnesses . . . to testify consistently regarding significant and material facts," even though the witnesses were not members of a gang (internal quotation marks omitted)); *State v. Mohamed*, No. A09-2238, 2010

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WL 5071271, at *1-2 (Minn. Ct. App. Dec. 14, 2010) (affirming joinder where the witness to a "violent encounter" was reluctant to testify). These cases demonstrate that witness availability is a proper consideration, and that this consideration favors joinder so long as witnesses may face outside pressure not to testify (whether from gangs or from persons opposed to the prosecution) or may otherwise become unavailable in future trials. *See* State Br. 24.

Kueng also argues that *Blanche* precludes the Court from considering convenience to witnesses as part of the interests-of-justice analysis. Kueng Opp. 14. As noted, however, that argument misinterprets the case law. *See supra* p. 14. In *Blanche*, the court warned that the joinder analysis should not be "*swallowed* by consideration of eyewitness convenience." 696 N.W.2d at 372 (emphasis added). But that does not entirely preclude courts from considering witness convenience in weighing the interests of justice.

Fourth, Defendants claim that the Court should not consider whether joinder would lessen the risk of trial-related publicity that could prejudice the jury pool. Kueng asserts that "[t]he nature and amount of media attention from a trial in the future is not an appropriate factor to grant a motion for joinder." Kueng Opp. 15. But the Minnesota Supreme Court has held otherwise: In *Powers*, it affirmed a decision ordering joinder because separate trials "could prejudice potential jurors through the publicity related to each trial." 654 N.W.2d at 675.

Defendants also complain that "it seems unlikely that the jury pool could be more prejudiced than it already is." Chauvin Opp. 12; Kueng Opp. 14-15. Even putting aside the fact that Defendants' counsel have engaged in extensive media interviews and have themselves attempted to taint the jury pool, there is an important difference between pre-trial publicity and publicity relating to the trial and verdict. Once the first trial concludes and the jury has announced a verdict, there may be a swell of media coverage, and it may become more difficult

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to impanel subsequent impartial juries. Notwithstanding Defendants' complaints about pretrial publicity, Defendants do not dispute that publicity regarding the *verdict itself* may make it more difficult to seat an impartial jury. This consideration supports a single trial, rather than four separate trials with four separate juries conducted at four separate times.

Finally, Defendants do not meaningfully dispute that joinder would allow the community and the nation to absorb the verdicts for the four Defendants at once, rather than in piecemeal fashion. *See* State Br. 24-25. Kueng even acknowledges that there is "obviously a strong community interest in the case." Kueng Opp. 16. Nonetheless, he asserts that this consideration does not support joinder because only the Defendants "have a right to fair trial," but the "people and the community do not." *Id.* But the community's interest and a defendant's right to a fair trial are not mutually exclusive. As the Minnesota Supreme Court has explained, "[u]nder Minnesota law," "there is no presumption that a joint trial will deny the defendant the right to a fair trial." *Powers*, 654 N.W.2d at 675. Kueng's mere invocation of Defendants' "right to fair trial" is no reason to ignore the community's strong interest in joinder.

Defendants also suggest a handful of additional interests-of-justice considerations that, in their view, demonstrate that joinder is inappropriate. These considerations are unpersuasive.

Kueng alleges that there is a risk that statements made by his codefendants may be prejudicial to his defense under *Bruton v. United States*, 391 U.S. 123 (1968). Kueng Opp. 15-16. But the mere "possibility . . . of offending *Bruton* statements" is not sufficient to deny joinder. *Blanche*, 696 N.W.2d at 372. As the Minnesota Supreme Court has explained, where the defendant has "not specified which statements might be admitted that would potentially violate *Bruton*," the defendant's invocation of *Bruton* is not a sufficient basis for denying joinder. *Id.* That is the case here: Kueng does not point to any specific statement that would

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even potentially violate *Bruton*. In any event, there are adequate safeguards against that concern. As Kueng acknowledges, Rule 17.03, subd. 3(2), protects against the admission of prejudicial statements by codefendants. Kueng Opp. 16. And the Minnesota model jury instructions provide further assurance that a codefendant's statements will not be used against other defendants in violation of *Bruton*:

> You may consider the statement of defendant ____ only in the case against (him) (her), and not in the case against the other defendant(s). This means that you may consider defendant ____'s statement in the case against (him) (her) and for that purpose rely on it as much or as little as you think proper, but you may not consider or discuss that statement in any way when you are deciding if the State has proven, beyond a reasonable doubt, its case against the other defendant(s).

CRIMJIG 3.28. Such jury instructions all but ensure that statements and actions by codefendants' counsel will not be wrongly attributed to another defendant. *See* Thao Opp. 13.

Kueng also says that, unlike Thao, he does not wish to have an anonymous or sequestered jury. Kueng Opp. 16. But "mere differences in trial strategy" between defendants do not justify separate trials. *Santiago*, 644 N.W.2d at 444. Moreover, it is not solely the defendant's choice as to whether to have an anonymous or sequestered jury. *See* Minn. R. Crim. P. 26.02, subd. 2(2) (noting that the jury may be made anonymous "[o]n any party's motion"); Minn. R. Crim. P. 26.03, subd. 5(2) (noting that "[a]ny party may move for sequestration"). Kueng, in other words, could be forced to have an anonymous or sequestered jury even if he is tried separately. Conversely, because the Court may deny Thao's pending motion, Kueng may not have an anonymous or sequestered jury even if the joinder motion is granted. Joinder is therefore not determinative of whether Kueng's jury will be anonymous or sequestered.

Finally, COVID-19 is a serious issue that has caused significant adjustments to the day-to-day lives of every Minnesotan. However, contrary to Thao's claims, the risks of COVID-19 weigh in favor of joinder, not against. *See* Thao Opp. 13-14. Thao asserts that it may be

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difficult to conduct a trial with all necessary parties in a single courtroom. But the Court's COVID-19 protocols would still allow a joined trial to be conducted in compliance with state social distancing requirements. During such a trial, the State will take all necessary steps to ensure that Defendants, their counsel, and the jurors will be safe, and that the public will have access to the proceedings in this case. Conducting separate trials, by contrast, would require impaneling separate juries and would attract additional crowds over longer periods, exposing more people over the course of those trials. Conducting separate trials would also require additional travel—in some cases from out of state—by witnesses and Floyd's family. In short, separate trials threaten to increase the risks from COVID-19, not decrease them.

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CONCLUSION

All four of the Rule 17.03 factors—the nature of the offenses charged, the impact on the victim and eyewitnesses, the potential prejudice to the defendant, and the interests of justice—favor joinder. The State therefore respectfully requests that the Court grant the motion and join Defendants Chauvin, Kueng, Lane, and Thao for trial.

September 10, 2020

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