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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

Plaintiff,

vs.

DEREK MICHAEL CHAUVIN,
TOU THAO,
THOMAS KIERNAN LANE, and
J. ALEXANDER KUENG,

Defendants.

ORDER AND MEMORANDUM OPINION ON DEFENSE MOTIONS TO DISMISS FOR LACK OF PROBABLE CAUSE

Court File No. 27-CR-20-12646
Court File No. 27-CR-20-12949
Court File No. 27-CR-20-12951
Court File No. 27-CR-20-12953

This matter is before the Court in all four listed cases on the separate motions of all four Defendants -- Derek Michael Chauvin (Chauvin); Tou Thao (Thao); Thomas Kiernan Lane (Lane); and J. Alexander Kueng (Kueng) -- to dismiss all charges for lack of probable cause.

A hearing was held on various motions filed by all parties in these cases on September 11, 2020. Matthew Frank and Neal Katyal appeared on behalf of the State of Minnesota. Eric Nelson appeared on behalf of Chauvin. Robert Paule and Natalie Paule appeared on behalf of Thao. Earl Gray appeared on behalf of Lane. Thomas Plunkett appeared on behalf of Kueng. All four defendants were also present at that hearing.

Based upon all the files, records, and proceedings herein, and the parties' written submissions, the Court enters the following Order.

ORDER

1. Chauvin's motion, in 27-CR-20-12646, to dismiss the Amended Complaint for lack of probable cause is **GRANTED IN PART AND DENIED IN PART**. The motions to dismiss

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the charges of unintentional second-degree murder (Amended Complaint, Court I) and second-degree manslaughter (Amended Complaint, Court III) are **DENIED**. The motion to dismiss the charge of third-degree murder is **GRANTED** and that charge is dismissed. The dismissal is stayed for five days to allow the State to consider a pretrial appeal.

2. Thao's motion, in 27-CR-20-12949, to dismiss the Complaint for lack of probable cause is **DENIED**.

3. Lane's motion, in 27-CR-20-12951, to dismiss the Complaint for lack of probable cause is **DENIED**.

4. Kueng's motion, in 27-CR-20-12953, to dismiss the Complaint for lack of probable cause is **DENIED**.

5. The attached Memorandum Opinion is incorporated herein.

BY THE COURT:

Digitally signed by Cahill, Peter
Date: 2020.10.21 23:34:14 -05'00'

Peter A. Cahill
Judge of District Court

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MEMORANDUM OPINION

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SUMMARY

Chauvin, Thao, Lane, and Kueng are all former Minneapolis Police Department officers charged in the wake of George Floyd's death in Minneapolis on May 25, 2020.[1] Lane and Kueng had arrested Floyd on a forgery charge (passing counterfeit money at Cup Foods). Floyd did not accede to Lane and Kueng's efforts to place him in their squad car for transport to the Hennepin County Public Safety Facility (Jail) for booking: while the officers would characterize Floyd as being disruptive, irrational, and actively resisting their efforts to place him into the back seat of their squad for transport, he was at a minimum non-compliant with their requests to take a seat in the back of their squad for transport to the Jail. A call went out for back-up.

Thao and Chauvin responded to the call for backup a few minutes later. Upon their arrival, all four officers engaged in efforts initially to place a non-compliant Floyd into Lane's and Kueng's squad car for transport downtown to the Jail. When those efforts proved unsuccessful, Chauvin, Kueng, and Lane subdued Floyd, pinning him lying prone in the street,

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[1] The State has charged Chauvin in the Amended Complaint with three counts:

(i) unintentional second-degree murder while committing a felony (third-degree assault), in violation of Minn. Stat. § 609.19 subd. 2(1);

(ii) third-degree murder, perpetrating an eminently dangerous act and evincing a depraved mind, in violation of Minn. Stat. § 609.195(a); and

(iii) second-degree manslaughter, culpable negligence creating an unreasonable risk of causing death or great bodily harm, in violation of Minn. Stat. § 609.205 subd. 1.

Lane, Kueng, and Thao each faces identical charges of:

(i) aiding and abetting unintentional second-degree murder while committing a felony (third-degree assault), in violation of Minn. Stat. § 609.19 subd. 2(1); and

(ii) aiding and abetting second-degree manslaughter, culpable negligence creating an unreasonable risk of causing death or great bodily harm, in violation of Minn. Stat. § 609.205 subd. 1.

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with Chauvin pressing his left knee squarely onto Floyd's neck, forcing his face into the street, Kueng kneeling on Floyd's back, holding his handcuffed arms behind his back, and Lane restraining Floyd's legs using his hands and knees for more than nine minutes and twenty seconds, from 8:19:18 to 8:28:42, until an ambulance arrived and Chauvin got off Floyd's neck and Floyd was loaded onto a stretcher.[2] Thao, while watching the manner in which Chauvin, Kueng, and Lane kept Floyd pinned face-down on the street, actively held at bay a small crowd of bystanders and prevented them from interceding to assist Floyd during that entire period.

During the first half of the period when the Defendants had Floyd pinned face-down in the street (just over four minutes and forty seconds), Floyd repeatedly told the Defendants that he could not breathe and was dying. Despite the pressure Chauvin was applying to the back of Floyd's neck with his knee, Floyd can be seen occasionally trying to lift his right shoulder from the street and moving his face and head. Then, at the half-way point, Floyd stopped talking, stopped moving, and fell totally silent.

For the last four minutes and forty seconds, still face-down and pinned to the street by Chauvin, Kueng, and Lane, Floyd did not speak. For the last three and a half minutes, Floyd appeared to have stopped breathing. During this time, bystanders on the sidewalk at Chicago Avenue just a few feet away from Floyd and the Defendants became increasingly agitated and vocal, shouting at Defendants that they were killing Floyd, alerting the Defendants that Floyd had stopped moving, was unresponsive, and appeared to have stopped breathing, and pleading with the Defendants to check Floyd's pulse. To no avail.

[2] Floyd was taken to the Hennepin County Medical Center (HCMC) in downtown Minneapolis, where he was pronounced dead at 9:25 p.m.

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All four Defendants are now asking this Court to dismiss all of the State's criminal charges against them. The legal hook upon which Defendants seek dismissal is their contention that the State lacks probable cause to charge the Defendants criminally for their actions and Floyd's death while he was being detained and subdued.

These cases have generated prodigious publicity not only in the Twin Cities and throughout the entire State of Minnesota but also nationally and even internationally. Although the parties have filed almost sixty exhibits including hours of video recordings and more than 850 pages of documents in connection with the pending motions to dismiss,[3] this Court's task under the law is not to sift through all that evidence, make credibility determinations, weigh the evidence in light of the parties' arguments, and arrive at a determination whether any of the Defendants is guilty of any of the charges the State has filed against them. Rather, this Court's task, in light of the Defendants' probable cause challenges, is to assess whether the State has come forward with sufficient admissible evidence on each element of the charges it has filed against each of the Defendants to warrant binding each of the Defendants over for trial. The law mandates that, in making that evaluation, this Court must not only accept as true all the allegations made by the State in its Statements of Probable

[3] The video evidence includes: body-worn camera videos recorded by Thao, Lane, and Kueng, as well as "still shots"/freeze frames extracted from those videos; cell phone video footage from a bystander as well as surveillance video from a neighboring store; video-recorded interviews of Lane and Thao conducted by the Minnesota Bureau of Criminal Apprehension (BCA) and the FBI; and video training materials from the Minneapolis Police Department. Documentary exhibits include: transcripts of interviews or notes from interviews conducted shortly after Floyd's death on May 25, 2020 of a number of certain as well as other potential trial witnesses; extensive portions of Minneapolis Police Department Policy and Procedure and Training Manuals; as well as other information and documents, including some that almost certainly are not relevant and will not be admissible at trial. These exhibits are summarized *infra* at pp. 10-15.

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Cause in the Complaints but also must draw in the State's favor all inferences that may reasonably be drawn from those facts. It is for a jury at trial, not for this Court on these pretrial motions – provided this Court finds evidence sufficient to establish probable cause – to decide, after hearing and considering all the evidence admitted at trial subjected to the normal adversarial process and hearing all parties' arguments, if the State has proved beyond a reasonable doubt the guilt of any of these Defendants on any of the charges the State has brought against them.

In this Court's view, with one exception, the State has met its burden of showing probable cause that warrants proceeding to trial against each of these Defendants on each of the criminal charges the State has filed against them. This Court is neither discounting nor rejecting substantive arguments Defendants and their counsel have made. This Court is not concluding that the evidence proffered by the State to support its decision to charge each of these Defendants and to proceed to trial is ultimately entitled to greater weight or is more credible than any of the countervailing evidence the Defendants have submitted or focused upon in the briefing of these motions to dismiss. This Court also is not concluding that any of the inferences to be drawn from the evidence urged by the State are necessarily more compelling or reasonable than contrary inferences the Defendants have urged. It is simply that all those tasks are properly the domain of the jury, acting as the ultimate trier of fact in rendering verdicts on each Defendant's innocence or guilt as to each of the charges against them after a trial, and not the function of this Court in this preliminary, procedural step of assessing whether the State has met its threshold burden of coming forward with sufficient

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evidence to establish probable cause that the crimes charged were committed and that each of these defendants was a person who committed the charged crime.

BRIEFS AND EXHIBITS

On July 7, 2020, Lane filed his notice of motion and motion to dismiss for lack of probable cause, together with a supporting Memorandum of Law and eight exhibits. On August 10, 2020, the State filed its memorandum in opposition to the Lane motion to dismiss, together with a supporting Affidavit of Matthew Frank with six exhibits. On August 17, Lane filed a Reply Brief in support of his motion to dismiss, together with an additional eleven exhibits.

On July 29, 2020, Thao filed his notice of motion and motion to dismiss for lack of probable cause. On August 5, 2020, he filed a supporting Memorandum of Law and four exhibits. On August 24, 2020, the State filed its memorandum in opposition to the Thao motion to dismiss, together with a supporting Affidavit of Matthew Frank with three exhibits.

On August 27, 2020, Kueng filed his notice of motion and motion to dismiss for lack of probable cause, which incorporated his legal arguments.[4] On September 8, 2020, the State filed its memorandum in opposition to the Kueng motion to dismiss for lack of probable cause, together with two exhibits.

On August 28, 2020, Chauvin filed his notice of motion and motion to dismiss for lack of probable cause, together with a supporting Memorandum of Law and 22 exhibits. On

[4] Kueng did not file either a separate Memorandum of Law or any exhibits in connection with his motion to dismiss.

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September 18, 2020, the State filed its memorandum in opposition to the Chauvin motion to dismiss for lack of probable cause, together with three exhibits.

At the conclusion of the September 11, 2020 hearing, during the course of which the Court heard argument on numerous motions filed by all parties in all four of these cases, the Court took the defense motions to dismiss for lack of probable cause under advisement in *Thao*, *Lane*, and *Kueng* as the motions had been fully briefed in those three cases. The motion to dismiss for lack of probable cause in *Chauvin* was taken under advisement on September 18, upon the filing of the State's memorandum opposing Chauvin's motion to dismiss.

The parties have filed the following exhibits[5] in connection with the motions to dismiss for lack of probable cause:

I. Re: Lane Motion to Dismiss (Lane Exhs. 1-19 & State's Exhs. 1-6)

Lane Exh. 1: Transcript of Off. Lane's May 31, 2020 interview by Minnesota Bureau of Criminal Apprehension (BCA) Special Agents Brent Peterson and Michelle Presconi (also present are FBI Special Agent Kevin Keane, Defense Counsel Earl Gray, and Law clerk Kevin Gray) [60 pages]

Lane Exh. 2: Transcript of Body-worn camera video of Off. Lane recording events during Floyd's May 25, 2020 detention, arrest, subdual and his resulting death [25 pages]

Lane Exh. 3: Body-worn camera video of Off. Lane recording events during Floyd's May 25, 2020 detention, arrest, subdual and his resulting death

[5] Some of the exhibits – *e.g.*, the body-worn camera (BWC) videos recorded by Lane, Kueng, and Thao on May 25, 2020; excerpts from the Minneapolis Police Department Policies and Procedures and Training Manuals; excerpts from the Hennepin County Medical Examiner (HCME) autopsy report, *etc*. – were filed by different parties and thus appear several times in this list. For purposes of completeness, this listing includes all exhibits filed by the State and Defense in all four cases in connection with the motions to dismiss for lack of probable cause, with a brief summary description of each exhibit.

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Lane Exh. 4: Transcript of Body-worn camera video of Off. Kueng recording events during Floyd's May 25, 2020 detention, arrest, subdual and his resulting death [57 pages]

Lane Exh. 5: Body-worn camera video of Off. Kueng recording events during Floyd's May 25, 2020 detention, arrest, subdual and his resulting death

Lane Exh. 6: Five photographs of inside front seat of Floyd car, depicting various views of crumpled currency between seat and center console

Lane Exh. 7: Pages 8-11 from Minneapolis Police Department Manual regarding "multi-officer response options," "neck restraint," and "maximal restraint technique," and pages labelled "Levels of Resistance," "Authorized Use of Force," "Neck Restraints and Choke Holds," "Conscious Neck Restraint," "Maximal Restraint Technique," and fourteen pages from Minneapolis Police Training Manual on these same subjects [23 pages total]

Lane Exh. 8: *Lombardo v. City of St. Louis*, 8th Circuit slip opinion affirming summary judgment to law enforcement officers in section 1983 action (April 20, 2020)

Lane Exh. 9: Screen-shot from Lane BWC video at 8:09:41 p.m., May 25, 2020

Lane Exh. 10: Screen-shot from Lane BWC video at 8:09:44 p.m., May 25, 2020

Lane Exh. 11: Screen-shot from Lane BWC video at 8:09:45 p.m., May 25, 2020

Lane Exh. 12: Screen-shot from Lane BWC video at 8:09:48 p.m., May 25, 2020

Lane Exh. 13: Image depicting quantity of two milligrams of fentanyl powder

Lane Exh. 14: Minneapolis Police Department Report, Narcotics Violation, May 6, 2019, MP 2019-127538 (35 pages)

Lane Exh. 15: Complaint, *State of Texas v. George Floyd*, Case No. 1143230, Harris County District Court (Nov. 27, 2007) & Judgment of Conviction by Court, *State of Texas v. George Floyd*, Case No. 1143230, Harris County District Court (April 3, 2009) [4 pages]

Lane Exh. 16: Judgment of Conviction by Court, *State of Texas v. George Perry Floyd*, Case No. 1050473, Harris County District Court (Sept. 6, 2006) [2 pages]

Lane Exh. 17: Judgment of Conviction on Guilty Plea, *State of Texas v. George Perry Floyd*, Case No. 976589, Harris County District Court (July 21, 2004) [2 pages]

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Lane Exh. 18: Judgment of Conviction on Guilty Plea, *State of Texas v. George Lee Floyd*, Case No. 928869, Harris County District Court (March 3, 2003) [2 pages]

Lane Exh. 19: Ten screen-shots from Lane BWC video at 8:23:46, 8:24:18, 8:25:16, 8:26:03, 8:26:54, 8:27:03, 8:27:41, 8:28:40, 8:30:13, and 8:30:47 p.m., May 25, 2020

State Exh. 1: Body-worn camera video of Off. Thao recording events during Floyd's May 25, 2020 detention, arrest, subdual and his resulting death

State Exh. 2: Video of Off. Thao's interview by Minnesota Bureau of Criminal Apprehension (BCA) and FBI personnel on June 2, 2020

State Exh. 3: Policies 1-100 to 1-112, 5-100 to 5-107, 5-301 to 5-318, 9-101 to 9-115 from Minneapolis Police Department Policy and Procedures Manual (45 pages)

State Exh. 4: Hennepin County Medical Examiner's Office Autopsy Report on George Floyd (June 1, 2020) [3 pages]

State Exh. 5: Hennepin County Medical Examiner Press Release Report announcing results of the Floyd Autopsy [1 page]

State Exh. 6: Case Consult Report by the Defense Health Agency, Armed Forces Medical Examiner system (June 10, 2020) issued after an independent evaluation of the HCMC Medical Examiner's Report by the United States Department of Justice [2 pages]

II. <u>Re: Thao Motion to Dismiss (Thao Exhs. 1-4 & State's Exhs. 1-3)</u>

Thao Exh. 1: Body-worn camera video of Off. Thao recording events during Floyd's May 25, 2020 detention, arrest, subdual and his resulting death

Thao Exh. 2: Video from Minneapolis Police Department Training Materials

Thao Exh. 3: Minneapolis Police Department Policy and Procedure Manual, §§ 5-301 to 5-317 (15 pages)

Thao Exh. 4: Body-worn camera video of Off. Lane recording events during Floyd's May 25, 2020 detention, arrest, subdual and his resulting death

State Exh. 1: Pages from Minneapolis Police Department Policy and Procedure Manual [42 pages]

State Exh. 2: Cell phone video recorded by Darnella Frazier on May 25, 2020

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State Exh. 3: Pages from Minneapolis Police Department 2019 Use of Force Manual [4 pages]

III. Re: Kueng Motion to Dismiss (State's Exhs. 1-2)

State Exh. 1: Pages from Minneapolis Police Department Policy and Procedure Manual [42 pages]

State Exh. 2: Pages from Minneapolis Police Department 2019 Use of Force: Academics and Techniques Manual (2019) [4 pages]

IV. Re: Chauvin Motion to Dismiss (Chauvin Exhs. 1-22 & State's Exhs. 1-3)

Chauvin Exh. 1: Body-worn camera video of Off. Lane recording events during Floyd's May 25, 2020 detention, arrest, subdual and his resulting death

Chauvin Exh. 2: Body-worn camera video of Off. Kueng recording events during Floyd's May 25, 2020 detention, arrest, subdual and his resulting death

Chauvin Exh. 3: Body-worn camera video of Off. Thao recording events during Floyd's May 25, 2020 detention, arrest, subdual and his resulting death

Chauvin Exh. 4: BCA Investigative Supplement, Investigative Supplement 2020-338/77, re: interview of Shawanda Hill (6/18/2020) [29 pages]

Chauvin Exh. 5: BCA Investigative Supplement, Investigative Supplement 2020-338/183, re: interview of Morries Hall (7/27/2020) [61 pages]

Chauvin Exh. 6: Notes and File Memoranda of various meetings and phone calls between Hennepin County Attorney's Office personnel and Hennepin County Medical Examiner Andrew Baker and other potential expert witnesses for the State between May 26 and June 3, 2020 and summaries of Dr. Baker's autopsy findings and findings by Drs. Michael Baden and Allecia Wilson [10 pages]

Chauvin Exh. 7: Page from Minneapolis Police Department manual on "Impact Weapon Striking Chart" and "Defense & Control – Response Training Guide"

Chauvin Exh. 8: History of EXD [Excited Delirium], from Minneapolis Police Department training materials [7-page slide presentation]

Chauvin Exh. 9: Four screen-shots from Lane BWC video at 8:09:41, 8:09:44, 8:09:45 and 8:09:48 p.m., May 25, 2020

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Chauvin Exh. 10: Surveillance video from Dragon Wok restaurant

Chauvin Exh. 11: Transcript of Off. Lane May 31, 2020 Interview with personnel from BCA and FBI [69 pages, covering 97-minute interview]

Chauvin Exh. 12: BCA Investigative Supplement, Investigative Supplement 2020-338/166, re: review of Darnell Frazier cell phone video (6/3/2020) [10 pages]

Chauvin Exh. 13: Minneapolis Police Department Defensive Tactics Training Video

Chauvin Exh. 14: Transcript of June 11, 2020 Interview of Minneapolis Police Chief Medaria Arrandondo by personnel from BCA and FBI [24 pages, covering 65 minutes]

Chauvin Exh. 15: Pages from Minneapolis Police Department Policy Manual regarding "authorized use of force," "use of deadly force," "proportional force," "use of neck restraints," "MRT [Maximal Restraint Technique] – USE, -Safety, and –Reporting," and "Reporting & Post Incident Requirements," among others. [32 pages]

Chauvin Exh. 16: Pages from Minneapolis Police Department Training Manual, "2019 Defensive Tactics In-Service Phase 3" covering, inter alia, "proportional force," "authorized use of force," "duty to intervene," "threatening force & de-escalation," "use of deadly force," "choke holds," "taser, chemical agents, impact weapons, neck restraints," "use of neck restraints," "MRT – Use, -Safety, -Reporting," "Reporting & Post Incident Requirements," "Supervisor Force Review," [76 pages]

Chauvin Exh. 17: Training Materials from Florida Alcohol & Drug Abuse Association re "Speed-Balling: Mixing Stimulants and Opioids Micromodule" [40 pages]

Chauvin Exh. 18: BCA Investigative Supplement, Investigative Supplement 2020-338/64, re: review of Off Thao body-worn camera video (5/29/2020) [3 pages]

Chauvin Exh. 19: U.S. Armed Forces Medical Examiner Report of Case Consult on HCME Floyd Autopsy (June 10, 2020) [2 pages]

Chauvin Exh. 20: Hennepin County Medical Examiner Autopsy Report on George Floyd death June 1, 2020) [22 pages]

Chauvin Exh. 21: Minneapolis Police Department Report, Narcotics Violation, May 6, 2019, MP 2019-127538 (27 pages)

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Chauvin Exh. 22: Hennepin County Medical Center Hospital medical records from May 6, 2019 admission of George Floyd [8 pages]

State Exh. 1: Minneapolis Police Department Policy and Procedures Manual, Policies 5-100 to 5-107, 5-300 to 5-318, 7-100 to 7-121, and 9-100 to 9-115 regarding code of conduct/ethics, use of force, communications, and adult arrests [52 pages]

State Exh. 2: Cell phone video recorded by Darnella Frazier on May 25, 2020

State Exh. 3: Minneapolis Police Department Use of Force Manual: Academics and Techniques (2019) [4 pages]

FACTUAL BACKGROUND[6]

A. Lane and Kueng Arrive at Cup Foods and Detain Floyd

On the evening of May 25, 2020, Cup Foods, located at Chicago Avenue and 38th Street in South Minneapolis, reported an incident in which customers had used (and attempted to use) counterfeit $20 bills to purchase merchandise. Kueng and Lane responded to the dispatch report, arriving at Cup Foods about 8:08 p.m. Upon arriving, Kueng and Lane entered Cup Foods to check in with the store manager. The manager showed them a $20 bill he believed was counterfeit. The manager told Kueng and Lane that two men had been involved, one had used a counterfeit $20 bill to purchase cigarettes and the other had tried to use a counterfeit $20 bill which the cashier had rejected.[7] The manager informed Kueng and Lane that the men

[6] The facts summarized here are derived from the Statements of Probable Cause in the Complaints as well as the voluminous evidentiary submissions filed by the parties in connection with the defense motions to dismiss for lack of probable cause in all four cases, as summarized *supra*, at pp. 10-15. These are not intended as, and do not constitute, formal findings of fact by this Court binding in future proceedings in this case. Rather, they are a summary of the underlying factual background germane to the probable cause determinations in all four cases.

[7] Later, the Cup Foods store manager told Kueng that Floyd had used a counterfeit $20 bill to purchase cigarettes in the store and that it was the other man with Floyd whose attempt to use a counterfeit $20 bill had been rejected by the clerk who detected the forged currency. (Kueng BWC Video at 8:32:20-8:36:30 p.m.)

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involved were sitting in a blue vehicle across the street. (Kueng & Lane BWC Videos at 8:08:40-8:09:06 p.m.)[8] Kueng and Lane did not inspect the bill. Instead, they left Cup Foods and crossed 38th Street to approach the vehicle, which was parked on 38th Street next to the Dragon Wok restaurant. (*Id*. at 8:09:06-:28.)

George Floyd was sitting in the vehicle's driver's seat. A male passenger was in the front passenger-side seat and a woman passenger was in the back passenger-side seat. When Lane approached on the driver's side, Floyd was speaking to the other passengers. Floyd appears startled when Lane tapped on the driver's side window with his flashlight. (Lane BWC Video at 8:09:28-:32 p.m.) Floyd cracked his door open and apologized. Lane instructed Floyd to show his hands. (*Id*. at 8:09:33-:40.) Seconds later, Lane pulled his gun, pointed it at Floyd, and yelled at him to "put your fucking hands up right now." (*Id*. at 8:09:41-:45.) Floyd asked Lane what he had done wrong but put his hands up and then placed them on the steering wheel, complying with Lane's instructions. Intensifying the situation, Lane yelled at Floyd to "keep your fucking hands on the wheel," while keeping his gun trained on Floyd. (Id. at 8:09:46-:58.) Floyd immediately complied, at which point Lane instructed Floyd to put his hands on his head; when Floyd once again complied, Lane lowered his gun. (*Id*. at 8:10:00-:22.)

Floyd, clearly upset, can be heard saying several times that he was "sorry"; he also

[8] Minneapolis Police Department officer body-worn camera videos reflect time in so-called "military" time, showing the hour, minutes, and seconds. That is, times in the range from 00:00:00 to 11:59:59 denote a.m. times and times in the range from 12:00:00-23:59:59 denote p.m. times. The key events for present purposes recorded in the Lane, Kueng, and Thao BWC videos occur between 20:08:00 and 20:42:16 in military time, or between 8:08 and 8:42:15 p.m. on May 25, 2020. (The Lane BWC video records events from 8:08:00-8:42:16 p.m.; the Kueng BWC video records events from 8:08:00-8:38:33 p.m.; and the Thao BWC video records events from 8:16:37-8:38:42 p.m.) In this Memorandum Opinion, the military times shown on the BWC videos have been converted to the analogous "p.m." time for the reader's convenience.

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started crying. (Lane BWC Video at 8:09:35-8:10:20 p.m.) Floyd told Lane several times that he had been shot before, even saying that he had been shot "the same way." (*Id*. at 8:09:50-8:10:25.) Sobbing, he pleaded: "Mr. Officer, please don't shoot me." (*Id*. at 8:10:35-:37.) Over the next half minute or so, Floyd begged Lane not to shoot him several times. He also explained to Lane that "I just lost my mom." (*Id*. at 8:10:35-8:11:05.)

Lane told Floyd to step out of the car, while Kueng -- on the passenger side -- told the two passengers in the vehicle to do the same. Kueng then walked around to the driver's side, and Kueng and Lane handcuffed Floyd while Kueng told Floyd to stop resisting. (Kueng BWC Video at 8:11:05-:35 p.m.) Kueng walked the hand-cuffed Floyd to the sidewalk and told him to sit down on the ground with his back against the wall at the Dragon Wok restaurant. Floyd did so, immediately becoming calmer and saying "thank you" to Kueng. (*Id*. at 8:11:35-8:12:15.) While Floyd was seated on the sidewalk talking to Floyd, Lane interviewed the other two passengers. (Lane & Kueng BWC Videos at 8:11:45-8:14:05.) One of the passengers explained to Lane that Floyd was scared of police officers and likely had been scared when Lane pointed his handgun at Floyd because Floyd had been shot before. (Lane BWC Video at 8:12:50-8:13:10.)

Meanwhile, Floyd pleaded with Kueng and Lane to talk to him. While sitting on the sidewalk, Floyd responded to Kueng's questions (while Lane was questioning the other passengers several feet away). Floyd told Kueng his name and date of birth and reiterated that he was scared because he had been shot before. (Kueng BWC Video at 8:12:15-8:13:05 p.m.) At this point, Kueng told Floyd that he and Lane were there responding to a report that Floyd

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was accused of giving "a fake bill" to the employees at Cup Foods.[9] (*Id*. at 8:13:15-:25.) This was the first mention of the counterfeit bill or explanation – and it was by now three minutes and forty-five seconds since Lane had first tapped on Floyd's window -- the officers had given Floyd for why they had detained him, pulled him from the car, and handcuffed him. Floyd responded that he "didn't know what was going on" when Lane had approached him and drawn his weapon. (*Id*. at 8:13:20-:25.)

B. Lane and Kueng's Initial Efforts to Place Floyd in Their Squad

Although Floyd remained compliant and conversant while seated on the sidewalk, Kueng and Lane decided to detain Floyd in their squad car. (Kueng BWC Video at 8:13:35 p.m.) When Kueng stood Floyd up to walk him over to their squad, Floyd told Kueng he was in pain and that his wrists hurt from the handcuffs. (*Id*. at 8:13:55-8:14:10.) Lane asked Floyd if he was "on something right now"; Kueng noted there was foam around Floyd's mouth and that Floyd was "acting real erratic." (Lane & Kueng BWC Videos at 8:14:05-:16 p.m.) Floyd responded that he was "scared." (Lane BWC Video at 8:14:12-:16 p.m.) Lane and Kueng walked the hand-cuffed Floyd from the Dragon Wok restaurant back across 38th Street to their squad parked outside Cup Foods. (Lane & Kueng BWC Videos at 8:14:05-:40 p.m.)

When they reached the squad car, Floyd stated: "I just want to talk to you, man." (Lane BWC Video at 8:14:55 p.m.) Kueng responded: "Man, you ain't listening to nothing we're saying, so we're not going to listen to nothing you're saying." (Kueng BWC Video at 8:14:57-8:15:01.) Floyd told Lane and Kueng several times that he was scared to get into the squad,

[9] The officers later told Floyd he was under arrest for forgery. (Kueng BWC Video at 8:18:57 p.m.)

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told them repeatedly that he was "claustrophobic," and kept pleading with them "please, man." (Lane & Kueng BWC Videos at 8:14:45-8:15:10.) But Kueng and Lane insisted they would have a conversation with Floyd only after he got into the squad car. They pinned Floyd against the squad car and patted him down. While being patted down, Floyd stated: "I'm not resisting, man. I'm not." (Kueng BWC Video at 8:15:10-:15.) The pat search revealed a small pipe in Floyd's pocket but no weapons. (*Id*. at 8:15:15-:55.)

As Floyd stood outside the squad car, he asked Kueng and Lane not to leave him alone in the car. He stated that he would not do anything to hurt them. And he begged them not to "leave me by myself, man, please. I'm just claustrophobic." (Lane & Kueng BWC Videos at 8:15:30-:45 p.m.) Floyd repeatedly told Lane and Kueng that he was claustrophobic. (*Id*. at 8:14:45-8:15:05.) Lane responded: "Well, you're still going in the car." (Lane BWC Video at 8:15:40.)

After more than 90 seconds standing outside the squad (Lane & Kueng BWC Videos at 8:14:45-8:16:20 p.m.), Kueng and Lane tried to force Floyd inside the squad's open rear driver-side door. (*Id*. at 8:16:20.) Floyd exclaimed: "I'ma die in here, I'ma die man." (*Id*. at 8:16:40-:45.) Floyd also noted that he "just had COVID" and that he didn't "want to go back to that." (*Id*.) While Floyd struggled with Lane and Kueng for about half a minute, a bystander on the street in front of the Cup Foods engaged in a dialogue with Floyd, with the bystander telling Floyd he should get in the car because "you can't win" and Floyd responding to the bystander that he wasn't trying "to win" or hurt the officers but only that he was claustrophobic and had anxiety. (*Id*. at 8:17:00-:30.) Floyd repeated that he was "scared as fuck" and worried that his anxiety might make it hard for him to breathe in the back of the squad car. (*Id*. at 8:17:10-

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:20.) Floyd asked Kueng and Lane to allow him to count to three before getting into the back of the squad car, again insisting that he was not trying "to win." (*Id*. at 8:17:20-:25.) He pleaded for Kueng and Lane to allow him to get on the ground or do "anything" other than get in the car. (*Id*. at 8:17:25-:30.)

C. Chauvin and Thao Arrive As Lane and Kueng Continue Trying to Force Floyd into the Squad

Chauvin and Thao arrived on scene at 8:17 p.m. in response to a dispatch call for back-up. (Thao BWC Video at 8:17:09 p.m.)[10] When Chauvin and Thao approached Lane, Kueng, and Floyd at 8:17:30, Lane and Kueng had been engaged with Floyd at the squad for about two minutes and forty-five seconds.

Kueng and Lane continued trying to force Floyd into their squad car. Lane walked around to the passenger side of the squad and began trying to pull Floyd into the vehicle through the rear passenger-side door while Kueng tried to push Floyd into the squad through the rear driver-side door. (Lane & Kueng BWC Videos at 8:17:30-:55 p.m.) During this struggle, Floyd hit his head on the glass dividing the front and back seats of the squad. (Kueng BWC Video at 8:17:52-:58)

D. Chauvin Joins Lane and Kueng in the Effort to Force Floyd into the Squad

At 8:18 p.m., Chauvin joined Lane on the passenger side, struggling to pull on Floyd. (Thao BWC Video at 8:18:00 p.m.) Chauvin had his arm around Floyd's upper chest and neck, with Lane pulling on Floyd farther down on his body, collectively pinning Floyd against the back seat of the squad. At 8:18:06, Floyd is heard for the first time exclaiming "I can't breathe."

[10] Although the dispatcher informed Chauvin and Thao before they arrived at the scene that the request for backup had been canceled, they nevertheless proceeded to the scene.

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(Lane & Kueng BWC Videos) After Kueng walked around to the passenger side of the squad car to assist Lane and Chauvin at 8:18:15 p.m., Kueng and Chauvin attempted to lift Floyd into the back of the squad car.[11] In the ensuing struggle, Floyd fell partway through the rear passenger side door and asked to be laid on the ground. (Lane BWC Video at 8:18:15-:20.)

This struggle continued for about a minute, during which Floyd continued to yell "please" and repeatedly said he couldn't breathe and was claustrophobic. (Kueng, Thao & Lane BWC Videos at 8:18:00-8:19:00 p.m.) When the futility of three officers continuing their efforts forcibly to seat Floyd in the squad's back seat became clear, one of the Defendants can be heard saying "we'll have to hogtie him," and Lane said: "Let's take him out and just MRT"— a reference to the "Maximal Restraint Technique," which employs a "Hobble" device to "secure a subject's feet to their waist in order to prevent the movement of legs."[12] (Lane, Kueng & Thao BWC Videos at 8:18:45-8:19:05; Minneapolis Police Department Policy & Procedure Manual (MPDPPM) § 5-316(III).) The others agreed, and Floyd was pulled from the squad and made to lie down in the street next to the squad. (Lane, Kueng & Thao BWC Videos at 8:19:00-:15.)

[11] Thao was watching from the driver's side, and his BWC captures Chauvin and Kueng wrestling with Floyd, as Lane is off to the side.

[12] A Hobble "limits the motion of a person by tethering both legs together." (MPDPPM § 5-316(III)) The Maximal Restraint Technique is accomplished using two Hobbles connected together. (MPDPPM § 5-316(IV)(A)(2))

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E. The Critical Nine Plus Minutes Between 8:19:18 and 8:28:42 P.M.: Floyd Is Subdued and Restrained Prone in the Street, with Chauvin Kneeling on the Back of Floyd's Neck, Pinning His Face to the Street, Kueng and Lane Restraining and Pinning Floyd's Back and Legs to the Street, and Thao Maintaining Bystander Watch

At 8:19:18 p.m., Chauvin, Kueng, and Lane pinned Floyd to the pavement, face-down, with all three officers kneeling on him:[13]

- Chauvin -- with his left hand stuffed into his left pants pocket to apply extra force -- pressed his knee into the back of Floyd's neck, forcing Floyd's face against the pavement
- Kueng knelt on Floyd's back, with his hand on Floyd's handcuffed left wrist
- Lane restrained Floyd's legs, kneeling on them and pressing them down with his hands

(Lane & Kueng BWC Videos at 8:19:15-:45 p.m.) Shortly after Floyd had been subdued in this manner, Lane called in an EMS code 2, which signaled that emergency medical services were needed on the scene but that emergency personnel were not required to use their lights and sirens to reach the scene.[14] (Lane BWC Video at 8:19:48-:50.)

While Chauvin, Kueng, and Lane kneeled on Floyd, Thao located a Hobble in the back of the squad, and asked the other Defendants if they "want[ed] to hobble [Floyd] at this point." (Thao, Kueng & Lane BWC Videos at 8:19:22-8:20:30 p.m.) When the others did not answer immediately, after asking if we are calling for EMS, Thao suggested "why don't we just hold him

[13] Thus, the Lane and Kueng BWC videos show that Chauvin, Kueng, and Lane had subdued Floyd after a struggle of almost three full minutes in which they had attempted to force a resistant Floyd in the rear seat of Lane and Kueng's squad car incident to his arrest before eventually subduing him, pinning him face-down in the street at 8:19:18 p.m.

[14] Thao later upgraded that to an EMS code 3, requiring emergency services to use red lights and sirens to reach the scene. (Thao BWC Video at 8:21:12-27.)

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until EMS" arrives, adding "if we hobble a Sergeant's going to have to come over."[15] (Thao BWC Video at 8:20:25-:40.) After deciding not to use the Hobble, Chauvin, Kueng, and Lane continued to maintain their positions directly on top of Floyd, keeping him pinned face-down on the street, while Thao stood watch positioning himself between the other Defendants on top of Floyd and a gathering group of concerned bystander citizens.

For about four minutes and forty seconds from the point at which Chauvin, Kueng, and Lane initially pinned Floyd face-down to the street, Floyd repeatedly cried for help. (Lane & Kueng BWC Videos 8:19:18-8:24:00 p.m.) He yelled "I can't breathe" more than two dozen times, called out for his deceased mother almost a dozen times, and asked the Defendants to "tell my kids I love them." (*Id*. at 8:20:07-08.) About a minute into this subdual, Chauvin responded to Floyd's repeated cries of not being able to breathe: "You're doing a lot of talking, man" (Lane & Thao BWC Videos at 8:20:19-:21) and "you're talking fine." (*Id*. at 8:21:35.) Thao rebuked the on-looking bystanders "He's [Floyd] talking so he's breathing." (Thao BWC Video at 8:21:39.)

Floyd continued to plead with Chauvin, as Chauvin continued pressing his left knee onto Floyd's neck: "I can't breathe. Please, your knee in my neck." (Lane BWC Video at 8:21:53-57 p.m.) Lane and Chauvin then engaged in a discussion with Lane stating that Floyd's "got to be on something," and speculating – because they'd found a "weed pipe" – if Floyd was on "PCP or something" in response to which Chauvin asked Floyd "What are you on?" (Lane & Thao BWC

[15] Under MPD policy, whenever a Hobble is used in connection with the Maximal Restraint Technique, "[a] supervisor shall be called to the scene where a subject has been restrained," and the supervisor is required to "complete a Supervisor's Force Review." MPDPPM § 5-316(IV).

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Videos at 8:21:53-8:22:20.)

Floyd continued complaining that he was in significant pain: "My knee, my neck . . . I'm claustrophobic. My stomach hurt. My neck hurt. Everything hurt." (Lane & Kueng BWC Videos at 8:22:15-:30 p.m.) Floyd told the Defendants almost ten times that he feared he would die lying on the ground while being subdued in this manner, including the following remarks:

"I'll probably just die this way."

"I'm through, I'm through."

"They're gonna kill me, they gonna kill me, man."

"They'll kill me."

(Lane BWC Video at 8:21:45-:47; 8:22:19-:22, 8:22:42-:45; 8:23:14.)

Defendants continued ignoring Floyd's pleas for help. Chauvin responded dismissively: "You're doing a lot of talking, a lot of yelling. . . . It takes a heck of a lot of oxygen to say things." (Lane, Kueng & Thao BWC Videos at 8:22:40-:50 p.m.) Kueng appears to have reacted to Chauvin's comment with a smirk. (Thao BWC Video, at 8:22:48-:49.) Meanwhile, as the gathered bystanders began echoing Floyd's pleas for help and noting that Floyd was not resisting arrest, Thao continued to stand guard, watching his fellow officers while telling the crowd: "He's talking, so he's fine" and "This is why you don't do drugs, kids." (Thao BWC Video at 8:23:15-:40.) When a bystander expressed concern that Chauvin was "trapping" and "stopping" Floyd's breathing, Thao responded: "He's talking. . . . It's hard to talk if you're not breathing." (*Id*. at 8:23:40-8:23:59 p.m.)

During the four minutes and forty seconds between 8:19:20 and 8:24:00 p.m., Floyd's

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cries for help and his other talking became softer and his breathing increasingly labored. As time wore on, Floyd's audible words turned into mumbling, and the mumbling then degenerated into grunts. Floyd uttered his final words "Please," at 8:23:55 p.m., and "I can't breathe," at 8:23:59 p.m. (Lane, Kueng & Thao BWC Videos at 8:23:55-8:24:00 p.m.) Floyd then fell silent.[16]

Even after Floyd ceased talking and moving and went limp, Defendants maintained their positions. Chauvin continued to press his knee into Floyd's neck, and Kueng and Lane continued to restrain Floyd's back and legs. Thao, meanwhile, while observing Chauvin, Kueng, and Lane keeping Floyd pinned face-down in the street, continued to stand between the other Defendants perched atop Floyd and the bystanders gathered on the sidewalk, watching the bystanders to ensure they remained on the sidewalk. (Thao BWC Video at 8:24:00-8:26:43 p.m.) As Floyd lost consciousness and shortly before uttering his final words, Lane asked Chauvin and Kueng: "Should we roll him on his side?" citing a concern "about the excited delirium or whatever." (Lane & Kueng BWC Videos at 8:23:48-:56.) Chauvin rejected Lane's suggestion, stating that the ambulance was en route. (Lane BWC Video at 8:23:48-8:24:02.) Neither Lane nor Kueng did anything to challenge Chauvin's answer. Instead, they remained in the same position and continued to hold down Floyd's back and legs. (Lane & Kueng BWC Videos at 8:24:00-:30.)

By this point, the half-dozen or so bystanders gathered on the sidewalk had begun

[16] After his last words "I can't breathe" at 8:23:59-8:24:00 p.m., Floyd can be heard making a few grunts, "ahs" and then finally some gurgling sounds until about 8:24:49 p.m. From that point on, he appears – from the Lane, Kueng, and Thao BWC Videos – to have been totally silent, apparently having lapsed into unconsciousness.

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yelling at Defendants, expressing concern that Floyd was struggling to breathe. One bystander yelled that Floyd was "not even resisting arrest right now" and was "passed out." (Thao BWC Video at 8:24:40-:45 p.m.) In apparent agreement with the bystander, Lane is heard saying "I think he's [Floyd] passed out." (Lane & Kueng BWC Videos at 8:24:43-:48.) Even so, Lane continued to hold down Floyd's right leg with his arm, reporting to Chauvin and Kueng that his own "knee might be a little scratched, but I'll survive." (Lane BWC Video at 8:25:00-:04.)

Meanwhile, one of the bystanders was becoming more animated and insistent, yelling at Chauvin, Kueng, Lane, and Thao that Floyd was not "breathing right now," "he's not responsive," and "he's not moving," to which Lane and Kueng responded "he's breathing." (Lane & Kueng BWC Videos at 8:25:08-:15 p.m.) The BWC videos appear to show that Floyd's shallow breaths stopped about 10 seconds later. (Kueng BWC Video, at 8:25:20-:31.)

At 8:25:28 p.m., an out-of-uniform, off-duty Minneapolis firefighter arrived on scene and asked to provide Floyd medical assistance. Lane ordered her to stay away, telling her to go "[u]p on the sidewalk." (Lane & Thao BWC Videos at 8:25:28-:30 p.m.) The firefighter then asked the Defendants if Floyd had a pulse and demanded they check for a pulse and tell her what it was. (Thao BWC Video at 8:25:28-:45.) Chauvin and Thao refused to allow her to tend to Floyd, with Thao shouting "back off!" (Thao & Kueng BWC Videos at 8:25:28-8:26:47.) In light of concerns about Floyd's lack of responsiveness, Lane again asked Chauvin and Kueng: "should we roll him [Floyd] on his side." (Lane & Kueng BWC Videos at 8:25:38-:41.) This time, no one responded. Once again, Lane did not press the matter, and continued to hold Floyd's legs down with his right arm. Chauvin, Kueng, and Thao likewise continued to maintain their positions. (Lane BWC Video at 8:25:40-8:26:00.)

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The bystanders grew increasingly vocal about Floyd's lack of responsiveness, yelling at Chauvin, Kueng, Lane, and Thao that Floyd was "not moving," was "not responsive," asked if he was breathing, and demanding that they check Floyd's pulse. (Lane & Kueng BWC Videos at 8:25:40-8:26:05 p.m.) After hearing the bystanders' pleas to check Floyd for a pulse, Lane asked Kueng if he could detect a pulse.[17] After checking Floyd's wrist for about ten seconds, Kueng reported: "I can't find one [a pulse]." (Kueng & Lane BWC Videos at 8:25:45-8:26:00.) Thao again remarked to the bystanders: "Don't do drugs." (Thao BWC Video at 8:26:04.)

Chauvin responded: "Huh?" Kueng clarified that he was "check[ing] [Floyd] for a pulse." (Kueng & Lane BWC Videos at 8:26:00-:05 p.m.) Kueng continued to check Floyd for a pulse. About ten seconds later, Kueng sighed, leaned back slightly, and repeated: "I can't find one." (Kueng & Lane BWC Video at 8:26:07-12.) Upon learning that Kueng could not find a pulse, Chauvin squeezed Floyd's fingers. Floyd did not respond. (Lane BWC Video at 8:26:12-:18.)

After 8:26:30, the bystanders' pleas to the Defendants became increasingly vocal and emphatic. At 8:26:43 p.m., there was confirmation with EMS of the upgrade to Code 3. (Lane & Kueng BWC Videos at 8:26:43.) Even though Floyd remained unresponsive, the Defendants did not move from their positions. They continued to restrain Floyd -- Chauvin with his left knee pressed firmly into Floyd's neck, Kueng kneeling on Floyd's back, and Lane holding Floyd's legs -- while Thao kept bystanders back onto the sidewalk. They also ignored the off-duty firefighter's urgent demands that they check Floyd for a pulse and begin chest compressions if

[17] In an interview following Floyd's death, Lane noted that he "might've" checked for a pulse "on [Floyd's] leg," but that he "said maybe to Kueng at that point, you know, 'See if you can find something up there. Just double check.'" Lane BCA Interview Transcript, at p. 53. Consistent with Lane's statement, Lane appears to have checked for a pulse on Floyd's leg after Kueng said he could not find one. (Lane BWC Video at 8:26:53-57 p.m.)

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he had no pulse. (Thao BWC Video at 8:28:39-:48.) None of the Defendants ever attempted CPR while Floyd was on the ground.

At 8:27 p.m., an ambulance arrived on scene, about three and a half minutes after Lane first asked whether they should turn Floyd onto his side, about two minutes after Floyd appears to have stopped breathing, and almost a minute and a half after Kueng first stated that he could not find Floyd's pulse. Still, Chauvin, Kueng, Lane, and Thao did not move from their positions. (Lane BWC Video at 8:27:00-:24 p.m.) Indeed, even as Lane explained to emergency personnel that Floyd was "not responsive right now," Chauvin kept his knee on Floyd's neck. (*Id*. at 8:27:36-:38.) The crowd, which by this point had grown to nearly a dozen concerned onlookers, continued to plead with the officers, asking Thao if he was "gonna let [Chauvin] kill that man in front of you." (Thao BWC Video at 8:28:05-:13.) Still, Defendants continued to maintain their positions: for more than a minute after emergency personnel arrived, Chauvin and Kueng continued to press Floyd face-down into the pavement, Lane knelt over Floyd's legs, and Thao continued to push back the crowd. (Lane, Kueng & Thao BWC Videos at 8:27:25-8:28:45.)

At 8:28:42 p.m., when the stretcher was ready, Chauvin finally stood up, removing his knee from Floyd's neck. (Lane & Kueng BWC Videos at 8:28:42 p.m.) Floyd remained unresponsive. Chauvin, Kueng, and Lane rolled Floyd onto the stretcher, and EMTs then loaded Floyd into the ambulance. (Lane, Kueng & Thao BWC Videos at 8:28:50-8:29:00.) Lane got into the ambulance with Floyd and the EMTs (Lane BWC Video at 8:29:40-8:42:15), Kueng returned to Cup Foods for further discussions with the Cup store manager (Kueng BWC Video at 8:32:30-8:36:30), and Chauvin and Thao departed from the scene in their squad. (Thao BWC Video)

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In total, Floyd was subdued, pinned face-down in the street -- with Chauvin's knee pressing into his neck and Kueng and Lane restraining his back and legs -- for more than nine minutes and twenty seconds. (8:19:18-8:28:42 p.m.) For over four minutes and forty seconds, Floyd did not speak. (8:24:00-8:28:42). For almost three and a half minutes, Floyd appeared not to be breathing. (8:25:15-8:28:42). And for more than two and a half minutes, the Defendants were unable to locate a pulse. (8:25:10-8:28:42). Yet over that entire time period, Defendants remained in the same positions: Chauvin continued to kneel with his left knee pressed firmly down on Floyd's neck pinning Floyd's face against the street, Kueng and Lane remained atop Floyd's back and legs, and Thao continued to prevent the crowd of concerned citizens from interceding.

F. <u>Floyd's Death</u>

Floyd was taken by ambulance to the Hennepin County Medical Center (HCMC) in downtown Minneapolis where he was pronounced dead at 9:25 p.m. on May 25, 2020. According to the Hennepin County Medical Examiner (HCME) Andrew Baker, Floyd's death resulted from "cardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression," HCME Autopsy Report & HCME Press Release Report, and the "manner of death" was "homicide."[18] *Id*. A separate autopsy review by the federal Armed Forces Medical Examiner System agreed with the HCME's autopsy findings and cause of death certification,

[18] The Press Release Report indicated that Floyd experienced cardiopulmonary arrest while he was being restrained by law enforcement officers, and reported as other significant conditions Floyd's "arteriosclerotic and hypertensive heart disease," "fentanyl intoxication," and "recent methamphetamine use." That Report is also careful to note that the HCME's classification of the manner of death as a homicide is a statutory function of the medical examiner's office for purposes of vital statistics and public health, but does not constitute a legal determination of culpability or intent, which are left to the judicial system.

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concluding that Floyd's "death was caused by the police subdual and restraint in the setting of severe hypertensive atherosclerotic cardiovascular disease, and methamphetamine and fentanyl intoxication," and that the "subdual and restraint had elements of positional and mechanical asphyxiation."

G. MPD Policies and Training

As MPD officers, the State contends that Chauvin, Thao, Lane, and Kueng held positions of public trust and were trained not to "willfully mistreat or give inhumane treatment to any person held in custody." MPDPPM § 5-107.3. Upon joining the MPD, Chauvin, Thao, Lane, and Kueng agreed to abide by a code of ethics that bound them to "enforce the law courteously and appropriately" and "never [to] employ[] unnecessary force or violence." *Id.* § 5-102.

According to the MPDPPM, "sanctity of life and the protection of the public" are "the cornerstones of the MPD's use of force policy." MPDPPM § 5-301.A. Consistent with those principles, it is "the duty of every sworn employee present at any scene where physical force is being applied to either stop or attempt to stop another sworn employee when force is being inappropriately applied or is no longer required." *Id.* § 5-303.01(B). Officers may use only "the amount of force that is objectively reasonable in light of the facts and circumstances known to that employee at the time force is used," and their use of force must "be consistent with current MPD training." *Id.* § 5.301.01. Before using force, officers must first consider various de-escalation tactics short of force. *Id.* § 5-304(B). When evaluating whether the use of force is appropriate, officers must "[c]onsider whether a subject's lack of compliance is a deliberate attempt to resist or an inability to comply based on factors including, but not limited to":

(i) medical conditions;

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(ii) mental impairment;

(iii) developmental disability;

(iv) physical limitation;

(v) language barrier;

(vi) influence of drug or alcohol use; or

(vii) behavioral crisis.

Id. § 5-304(B)(1)(b).

Under MPD policies in effect at the time of Floyd's death, the most extreme uses of force -- MRT, Neck Restraints, and Deadly Force -- are reserved for the most extreme situations. Officers are trained to use the MRT only "where handcuffed subjects are combative and still pose a threat to themselves, officers or others, or could cause significant damage to property if not properly restrained." *Id.* § at 5-316(IV)(A)(1). "As soon as reasonably possible, any person restrained using the MRT who is in the prone position" -- that is, on his or her stomach -- "shall be placed" in "the side recovery position" if "the hobble restraint device is used." *Id.* § 5-316(IV)(B)(1). Officers are instructed that, "as soon as possible," they must "[p]lace a restrained subject on their side in order to reduce pressure on his/her chest and facilitate breathing." 2019 MPD Use of Force Manual, at 3.

Officers are also trained not to employ a "neck restraint"—"[d]efined as compressing one or both sides of a person's neck with an arm or leg"—"against subjects who are passively resisting." MPDPPM § 5-311(I), (II)(C). MPD policy defines "passive resistance" as "behavior initiated by a subject, when the subject does not comply with verbal or physical control efforts, yet the subject does not attempt to defeat an officer's control efforts." *Id.* § 5-302. "An officer

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who has used a neck restraint or choke hold shall inform" emergency medical personnel "accepting custody of the subject[] that the technique was used on the subject." *Id.* § 5-311(II)(D)(2). And if unconsciousness occurs, officers are to "request EMS immediately by radio." 2019 MPD Use of Force Manual, at 2.

In applying a Neck Restraint, MRT, or any other use of force, officers must render medical aid when their use of force necessitates it. MPDPPM 5-306 (all MPD officers who "use[] force shall," "[a]s soon as reasonably practical," "determine if anyone was injured and render medical aid consistent with training and request Emergency Medical Service (EMS) if necessary").[19] MPD officers are trained to check the subject's "airway [and] breathing," and "start CPR if needed." 2019 MPD Use of Force Manual, at 2, 4.

DISCUSSION

I. STANDARDS ON MOTIONS TO DISMISS FOR LACK OF PROBABLE CAUSE

To be charged with a crime, probable cause must exist to believe the person is guilty. *State v. Lopez*, 778 N.W.2d 700, 703 (Minn. 2010). On a motion to dismiss for lack of probable cause, the court must decide if sufficient evidence exists to establish probable cause to believe that the crime charged has been committed and that it was the defendant who committed the crime. *Lopez*, 778 N.W.2d at 703 (probable cause arises "where facts have been submitted to the district court showing a reasonable probability that the person committed the crime."); *State v. Florence*, 239 N.W.2d 892, 896 (Minn. 1976) (probable cause requires determination that it is more probable than not that a crime was committed and that the defendant

[19] This policy, which was in effect when Floyd died, was subsequently updated on June 16, 2020.

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committed the crime); *State v. Knoch*, 781 N.W.2d 170, 177 (Minn. App. 2010) (purpose and function of motion to dismiss for lack of probable cause is "to inquire concerning the commission of the crime and the connection of the accused with it"); *State v. Dunston*, 770 N.W.2d 546, 550-52 (Minn. App. 2009) (same); *State v. Trei*, 624 N.W.2d 595, 597 (Minn. App. 2001) (Probable cause exists "where the facts would lead a person of ordinary care and prudence to hold an honest and strong suspicion that the person under consideration is guilty of a crime"); *State v. Carlson*, 267 N.W.2d 170, 173 (Minn. 1978) (same); Minn. R. Crim. P. 2.01 subd. 1 & 11.04 subd. 1(a).

Because the purpose of permitting the defendant to challenge probable cause is to "protect a defendant unjustly or improperly charged from being compelled to stand trial," when a defendant challenges probable cause, the district court must exercise independent judgment to determine if it is fair and reasonable to require the defendant to stand trial. *Florence*, 239 N.W.2d at 896, 899, 902; *State v. Ortiz*, 626 N.W.2d 445, 449 (Minn. App. 2001). In doing so, the court may review the complaint and the entire record, including police reports and statements of witnesses and victims -- including reliable hearsay -- and representations of the prosecutor. *State v. Dunagan*, 521 N.W.2d 355, 356 (Minn. 1994); *State v. Rud*, 359 N.W.2d 573, 579 (Minn. 1984); Minn. R. Crim. P. 11.04 subd. 1(c). The district court must view the evidence in the light most favorable to the State, with every inference which may fairly be drawn from the evidence drawn in favor of the State. *State v. Peck*, 773 N.W.2d 768, 782 n.1 (Minn. 2009); *Knoch*, 781 N.W.2d at 178; *Trei*, 624 N.W.2d at 598. The court may not assess the relative credibility or weight of conflicting evidence, *State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016), so as "not to invade the province of the jury." *Trei*, 624 N.W.2d at 598.

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The court may grant a motion to dismiss for lack of probable cause only if the facts appearing in the record together with all inferences drawn therefrom would not "present a fact question for the jury's determination on each element of the crime charged." *Lopez*, 778 N.W.2d at 704. The evidence produced by the State need not rise to the level of proof required to convict, *Knoch*, 781 N.W.2d at 178; *State v. Clark*, 134 N.W.2d 857, 870-71 (Minn. 1965), because probable cause does not require proof beyond a reasonable doubt. *Florence*, 239 N.W.2d at 896; *State v. Fish*, 159 N.W.2d 786, 790 (Minn. 1968); *Knoch*, 781 N.W.2d at 178. This rule applies due to the strong public interest in having a jury, drawn from the community, decide the issue of guilt or innocence after extensive adversarial testing during a criminal trial. *Trei*, 624 N.W.2d at 598.

The court should deny a motion to dismiss for lack of probable cause when the facts appearing in the record, if proved at trial, would preclude the grant of a motion for a directed judgment of acquittal. *Lopez*, 778 N.W.2d at 703-04; *Dunagan*, 521 N.W.2d at 356; *Florence*, 239 N.W.2d at 903; *State v. Gerard*, 832 N.W.2d 314, 317 (Minn. App. 2013), *rev. denied* (Minn. Sept. 17, 2013). A "motion for acquittal is procedurally equivalent to a motion for a directed verdict," *State v. Slaughter*, 691 N.W.2d 70, 74 (Minn. 2005), the test for which is whether the evidence is sufficient to present a question of fact for the jury when the evidence and all reasonable inferences to be drawn therefrom are viewed in the light most favorable to the State. *Lopez*, 778 N.W.2d at 703-04; *State v. Simon*, 745 N.W.2d 830, 841 (Minn. 2008); *Slaughter*, 691 N.W.2d at 74-75; *Trei*, 624 N.W.2d at 598; *Paradise v. City of Minneapolis*, 297 N.W.2d 152, 155 (Minn. 1980); Minn. R. Crim. P. 26.03 subd. 18(1) (a). So long as the State possesses substantial evidence that will be admissible at trial and would justify denial of a

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motion for motion for directed verdict of acquittal, the production of exonerating evidence by a defendant at a probable cause hearing or in connection with a motion to dismiss for lack of probable cause does not justify dismissal on lack of probable cause grounds. *Rud*, 359 N.W.2d at 579.

The dispositive issues on Defendants' motions to dismiss for lack of probable cause are whether, taking all the specific factual allegations in the State's Complaint and other documents in the record as true, *Dunston*, 770 N.W.2d at 550; *Rud*, 359 N.W.2d at 579, with all reasonable inferences that may be drawn therefrom in the light most favorable to the State, the State has sufficient evidence giving rise to a genuine issue of fact with respect to every element of the charged offenses.

II. PROBABLE CAUSE EXISTS TO BELIEVE THAT CHAUVIN COMMITTED SECOND-DEGREE UNINTENTIONAL MURDER.

A. Elements

Under Minnesota law, a person is guilty of second-degree unintentional murder if he "causes the death of a human being, without intent to effect the death of any person, while committing or attempting to commit a felony offense other than criminal sexual conduct in the first or second degree with force or violence or a drive-by shooting." Minn. Stat. § 609.19 subd. 2(1). To prove that Chauvin is guilty of unintentional second-degree murder, the State must prove at trial the following elements:

(i) Floyd's death;

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(ii) that Chauvin caused Floyd's death, where "caused" means that Chauvin's conduct was a "substantial causal factor in causing [Floyd's] death";[20] and

(iii) that Chauvin, at the time of causing Floyd's death, "was committing or attempting to commit" another felony offense.[21]

CRIMJIG 11.29.[22]

With respect to the third element, the underlying felony offense the State relies upon in charging Chauvin with unintentional second-degree murder charge is third-degree assault. Chauvin is guilty of third-degree assault if he "assaults another and inflicts substantial bodily harm." Minn. Stat. § 609.223 subd. 1. To prove that Chauvin is guilty of third-degree assault, the State must prove at trial that:

(i) Chauvin assaulted Floyd, defined either as "the intentional infliction of or the attempt to inflict bodily harm" upon the victim or "an act done with intent to cause [Floyd] to fear immediate bodily harm or death"; and

(ii) Chauvin inflicted "substantial bodily harm" on Floyd, where "substantial bodily harm" is defined as "bodily harm that involves a temporary but substantial

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[20] The jury may be instructed that Chauvin "is criminally liable for all the consequences of his actions that occur in the ordinary and natural course of events, including those consequences brought about by one or more intervening causes, is such intervening causes were the natural result of [Chauvin's] acts. The fact that other causes contribute to the death does not relieve [Chauvin] of criminal liability. However, [Chauvin] is not criminally liable if a 'superseding cause' – a cause that comes after [Chauvin's] acts, alters the natural sequence of events, and produces a result that would not otherwise have occurred – caused [Floyd's] death. CRIMJIG 11.29.

[21] The jury would also be instructed that it is not necessary for the State to prove that Chauvin intended to kill Floyd, but only that he committed or attempted to commit the underlying felony. CRIMJIG 11.29.

[22] For each of the crimes charged against all four Defendants, the applicable CRIMJIGs require that the State prove that the Defendant's conduct occurred on May 25, 2020 in Hennepin County. *See, e.g.*, CRIMJIG 11.29 (as to the unintentional second-degree murder charge against Chauvin). There is no indication on the record before this Court that any of the Defendants intends to contest the time or place of any of their actions upon which the State has charged them in connection with Floyd's death, so this element will not be mentioned or discussed further in this Memorandum Opinion in connection with any of the other charges against the Defendants.

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> disfigurement, causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or causes a fracture of any bodily member."

See CRIMJIGs 13.01, 13.02, 13.16; Minn. Stat. §§ 609.02 subd. 7a, 609.02 subd. 10, 609.223 subd. 1.

Putting this altogether, to prevail on its unintentional second-degree murder charge against Chauvin, the State will have to prove at trial:

(i) Floyd's death;

(ii) that Chauvin's conduct was a substantial causal factor in Floyd's death;

(iii) that Chauvin intentionally inflicted or attempted to inflict bodily harm on Floyd or intended to cause Floyd to fear immediate bodily harm or death; and

(iv) that Chauvin inflicted substantial bodily harm on Floyd.

Viewed in the light most favorable to the State, the evidence here "would lead a person of ordinary care and prudence to hold an honest and strong suspicion" that Chauvin committed second-degree unintentional murder. *Ortiz*, 626 N.W.2d at 449. On the record before this Court for probable cause purposes, there is no issue as to the first and fourth elements: Floyd died and he suffered "substantial bodily harm." *See State v. Larkin*, 620 N.W.2d 335, 337 (Minn. App. 2001) (even "temporary loss of consciousness" constitutes "substantial bodily harm" for purposes of third-degree assault). For purposes of the probable cause challenge, the issue is whether the State has alleged evidence warranting proceeding to trial on the elements of whether Chauvin's conduct was a substantial causal factor in Floyd's death and whether Chauvin intentionally or attempted to inflict bodily harm on Floyd or intended to cause Floyd to fear immediate bodily harm or death. In this Court's view, the answer to both is "yes."

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B. The State Has Evidence Sufficient for Probable Cause Purposes that Chauvin's Conduct Was a Substantial Causal Factor in Floyd's Death

The State has alleged sufficient evidence that Chauvin's actions were a substantial causal factor in Floyd's death. A defendant's actions are a substantial causal factor so long as they "contributed to the death." *State v. Torkelson*, 404 N.W.2d 352, 357 (Minn. App. 1987). The State is not obliged to "prove the specific mechanism of death." *Id.* Nor is the State required to prove that Chauvin's acts were "the sole cause of death." *State v. Gatson*, 801 N.W.2d 134, 148 (Minn. 2011). Rather, the State need only prove that Chauvin's actions were a contributory cause to satisfy the substantial causal factor test. *See State v. Smith*, 119 N.W.2d 838, 848 (Minn. 1962).

Here, Chauvin pressed his knee into Floyd's neck while Floyd was lying prone and face-down on the street, effectively pinning Floyd's neck and face into the unforgiving concrete of Chicago Avenue for more than nine minutes and forty seconds. Based on the BWC videos from Officers Lane, Kueng, and Thao, the State can be expected to argue that Chauvin maintained that forceful pressure on Floyd's neck for more than four minutes and forty seconds after he uttered his final words, for almost four minutes after Lane first raised the possibility that Floyd had passed out and inquired if they should roll him on his side, for more than three minutes and twenty-five seconds after it appears that Floyd may have drawn his last breath, and for more than two minutes and forty seconds after Kueng reported not detecting a pulse.

After conducting an autopsy, the HCME concluded that Floyd's death resulted from "cardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression," and ruled the "manner of death" was "homicide." The United States Armed Forces Medical Examiner was asked to consult and, upon its independent review, issued a

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report indicating its agreement with the HCME's autopsy findings and cause of death certification, concluding that Floyd's "death was caused by the police subdual and restraint," and that the "subdual and restraint had elements of positional and mechanical asphyxiation."[23] In other words, the State has presented evidence that by restraining Floyd in a prone position on the street and pressing his knee forcefully into Floyd's neck, Chauvin effectively immobilized Floyd in a position that caused respiratory failure, leading to his death. Viewed in the light most favorable to the State, these facts more than suffice "to present a fact question for the jury's determination" on the issue of causation. *Slaughter*, 691 N.W.2d at 75.

C. The State Has Evidence Sufficient for Probable Cause Purposes that Chauvin Intentionally Inflicted Bodily Harm on Floyd or Intended to Cause Floyd to Fear Bodily Harm or Death.

During the first four minutes and forty seconds while Chauvin pressed his knee on Floyd's neck forcing his face into the street concrete, Floyd called out "I can't breathe" a couple dozen times and desperately pleaded that he was dying. (Lane, Kueng, and Thao BWC Videos at 8:19:18-8:24:00.) Yet the BWC video recordings indicate that Chauvin never relented and never lessened the pressure of his knee against Floyd's neck even while Floyd pleaded: "I can't breathe. Please, your knee in my neck." (Thao BWC Video at 8:21:53-57.) Chauvin – in a tone the State characterizes as dismissive and taunting -- responded to Floyd's cries for relief by telling Floyd "[i]t takes a heck of a lot of oxygen to say things." (Thao & Kueng BWC Video at 8:22:46-50.) Those facts alone raise, at a minimum, a fact question for the jury regarding

[23] Positional asphyxia "is a form of mechanical asphyxia that occurs when a person is immobilized in a position which impairs adequate pulmonary ventilation and thus, results in a respiratory failure." Sigitas Chmieliauskas (and seven co-authors), *Sudden deaths from positional asphyxia*, Medicine 97:24, at 1 (2018).

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Chauvin's intent, and whether Chauvin either intended to inflict bodily harm or intended to cause Floyd to fear bodily harm or death.

In any event, whatever Chauvin's actual intent during the early stages of the Defendants' subdual of Floyd lying prone of the street, the inferences to be drawn in the State's favor as to Chauvin's intent as time progressed suffice for probable cause purposes. During the first five and a half minutes after his arrival, Chauvin was dealing with Floyd as he was talking incessantly and constantly moving.[24] Over the next minute, the vigor of Floyd's physical movement of his shoulder and head declined, as did the frequency and volume of his speech; his speech was deteriorating gradually, with words turning to mumbles, and then mumbles to grunts. As Floyd was manifesting signs of losing consciousness, Lane asked Chauvin and Kueng if they should "roll him on his side" into the recovery position. (Lane & Kueng BWC Videos at 8:23:48) Chauvin said no. Rather than moving Floyd out of that inherently dangerous position, Chauvin told Kueng and Lane to "stay[] put where you got him." (Kueng BWC Video at 8:23:48-52.) Less than ten seconds later, Floyd uttered what proved his final words, "I can't breathe." (Lane Kueng BWC Videos at 8:23:59-8:24:00.) Less than a minute later, Chauvin heard Lane remark that Floyd was "passing out." (Kueng & Lane BWC

[24] As noted in the Factual Background, Chauvin arrived at the scene with Thao at 8:17:09, and they made their way to Lane and Kueng's squad where Lane and Kueng were trying to force Floyd into the squad by 8:17:30. At 8:18:00, Chauvin had himself engaged, and was working with Kueng and Lane in an effort to force Floyd into the squad, which efforts continued until shortly after 8:19:00 when they determined to change course, and take Floyd to the street. From the time they first pinned Floyd to the street, with Chauvin pressing his knee into Floyd's neck (at 8:19:18) until about 8:23:00, Floyd remained vocally active and was physically struggling, occasionally lifting his right shoulder off the street and trying to move his head, presumably to obtain relief from the mechanical asphyxiation he appeared to be experiencing. (Lane, Kueng, and Thao BWC Videos)

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Videos at 8:24:45-50.) It appears from the officer BWC videos that Floyd may have stopped breathing about 8:25:15. Shortly after that, in response to an increasing chorus of pleas from bystanders to check Floyd's pulse based on their observations that Floyd was no longer moving or resisting and didn't appear to be breathing, Kueng checked Floyd's wrist for a pulse, telling Chauvin and Lane: "I can't find one." (Kueng & Lane BWC Videos at 8:25:45-8:26:00.) Chauvin responded: "Huh?" to which Kueng clarified that he was "check[ing] [Floyd] for a pulse." (Kueng & Lane BWC Videos at 8:26:00-05.) After this second brief check for a pulse, Kueng repeated: "I can't find one." (Kueng & Lane BWC Videos at 8:26:07-12.)

Notwithstanding Floyd having gone silent and motionless, the mounting evidence of his lost consciousness, the plaintive cries and demands from the bystanders, and the obvious reality that Floyd was no longer resisting and non-compliant, Chauvin's demeanor never changed, and he continued kneeling on Floyd's neck applying constant pressure to pin Floyd's face to the pavement for an additional two and a half minutes. When the EMTs arrived to provide Floyd medical aid, Chauvin heard Lane tell them what Chauvin certainly already knew notwithstanding his continuing to kneel on Floyd's neck: that Floyd was "not responsive." (Kueng & Lane BWC Videos at 8:27:36-38.) Even so, Chauvin continued to kneel on Floyd's neck for another minute, maintaining pressure on Floyd's neck even while emergency personnel attempted to check Floyd's neck for a pulse. (Lane BWC Video at 8:27:43-50; Darnella Frazier Cell-phone Video at 6:50-59.[25]) Because the Court must draw all favorable

[25] Unlike the Lane, Kueng, and Thao BWC Videos which record the actual time of day of the events (albeit in military time, as noted above), the Darnella Frazier cell-phone video does not record the time of day, but simply the running time from when she started recording on her cell phone.

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inferences from this evidence in favor of the State for purposes of Chauvin's probable cause challenge, Chauvin's conduct during these final four minutes and forty seconds is strong evidence of Chauvin's intent to inflict bodily harm.

That conclusion is further supported by bystanders' comments. Bystanders screamed at Chauvin and the other Defendants that Floyd was "not even resisting arrest right now"; that Chauvin was responsible for "stopping [Floyd's] breathing"; that Floyd was not "fucking moving"; and that Floyd was "dying." (Thao BWC Video at 8:24:40-44, 8:25:08-10, 8:27:11-17, 8:27:35-36.) Chauvin occasionally looked directly at the crowd as they pleaded with him to remove his knee from Floyd's neck and informed him in real-time of the consequences of his actions. (Darnella Frazier Cell-phone Video at 2:38-43, 2:53, 3:21, 3:30-3:32.) Rather than removing his knee from Floyd's neck, however, Chauvin rolled his knee back and forth on Floyd's neck, maintaining the pressure on Floyd respiratory system, which the State contends led to his positional and mechanical asphyxiation. That, too, given the inferences that must be drawn in the State's favor for purposes of Chauvin's motion to dismiss for lack of probable cause, is strong evidence that Chauvin intended to inflict bodily harm on Floyd.

Chauvin's training also reinforces, given the inferences this Court must draw in the State's favor, that he intended to inflict bodily harm on Floyd. MPD policy authorizes "only . . . the amount of force that is objectively reasonable in light of the facts and circumstances known to that employee at the time force is used." MPDPPM § 5-301.01; *see* Minn. Stat. § 609.06 subd. 1 (authorizing use only of "reasonable force"). Consistent with that policy, officers are trained to "[p]lace a restrained subject on their side in order to reduce pressure on his/her chest and facilitate breathing." 2019 MPD Use of Force Manual, at 3. Officers are told that a

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"neck restraint" is not permissible on a subject who is "passively resisting," or not resisting at all. MPDPPM § 5-311(II)(C). Moreover, they are told to check the subject's "airway [and] breathing," and to cease a neck restraint and "start CPR" if the subject stops breathing. 2019 MPD Use of Force Manual, at 2, 4. Chauvin had been trained in these policies. Chauvin was a 19-year veteran on the MPD. Chauvin had received numerous trainings during his time on the MPD regarding the proper use of force. But even after Lane implicitly reminded him of these policies by asking if they should "roll [Floyd] on his side" (Kueng BWC Video at 8:23:48-52) into the recovery position in accordance with their training, Chauvin persisted in acting in disregard of his training by continuing to kneel on Floyd's neck even after Floyd had stopped talking, had become totally unresponsive, appeared to have stopped breathing, and no longer had a detectable pulse. Chauvin never attempted to place Floyd into the recovery position, to check his airway, or to start CPR, as he was trained to do.

Viewed in the light most favorable to the State, the evidence more than suffices "to present a fact question for the jury's determination" whether Chauvin intended to inflict bodily harm on Floyd or cause him to fear bodily harm or death. *Slaughter*, 691 N.W.2d at 75.

D. None of Chauvin's Arguments or the Other Evidence Chauvin Maintains Is Exculpatory Exonerate Him on this Charge, Warranting Dismissal for Lack of Probable Cause. Rather, All the Evidence and Arguments on Which Chauvin Relies Are Matters Properly Reserved for Trial.

Chauvin argues that his actions did not cause Floyd's death and that he did not intend to inflict bodily harm on Floyd. Both of those arguments miss the mark: they are arguments for a jury's consideration at trial. Here, however, on his motion to dismiss for lack of probable cause, this Court is required by law to view all evidence in favor of the State and to draw all reasonable inferences from that evidence in favor of the State.

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In any event, as to causation, Chauvin does not even attempt to engage the conclusions of the HCME autopsy report or those of the independent consulting review by the Armed Forces Medical Examiner. That course would, of course, be futile because this Court must view all the evidence of record in the light most favorable to the State. Chauvin instead speculates that "[f]entanyl" may have played a role in Floyd's death and that Floyd "most likely died from an opioid overdose." Such speculation is legally insufficient for a probable cause challenge whether Chauvin's actions caused Floyd's death.

A defendant is not criminally liable if a "superseding cause" intervenes and "cause[s] the [victim's] death." CRIMJIG 11.25. An "intervening, superseding act 'breaks the chain of causation set in operation by a defendant's negligence, thereby insulating his negligence as a direct cause of the injury.'" *State v. Hofer*, 614 N.W.2d 734, 737 (Minn. App. 2000). To qualify as a superseding intervening cause, an "occurrence must:

(1) come between the negligence and the occurrence at issue;

(2) not have been brought about by the original negligence;

(3) turn aside the natural sequence of events producing a result which otherwise would not have followed the original negligence; and

(4) not have been foreseeable from the original negligence."

State v. Jaworsky, 505 N.W.2d 638, 641 (Minn. App. 1993), *rev. denied* (Minn. Sept. 30, 1993); *In Re Welfare of C.P.W.*, 601 N.W.2d 204, 209 (Minn. App. 1999), *rev. denied* (Minn. Nov. 23, 1999).

As the Court of Appeals observed in *Lennon v. Pieper*, 411 N.W.2d 225, 228 (Minn. App. 1987), a superseding intervening cause of harm "is generally the act of a third party occurring after a defendant's negligent act and operating as an independent force to produce the injury."

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See also CRIMJIG 11.25 (A "superseding cause" exists only if the cause "comes after the defendant's acts, alters the natural sequence of events, and produces a result that would not otherwise have occurred."). In other words, "[a] superseding, intervening cause" is an act committed by another "person, in no way caused by defendant's [actions]," that "breaks the chain of causation set in operation by defendant's [actions]." *Smith*, 119 N.W.2d at 846. Moreover, to qualify as a "superseding cause" that breaks the causal chain, "'the intervening conduct must be the sole cause'" of the victim's death. *Gatson*, 801 N.W.2d at 146 (quoting *State v. Olson*, 435 N.W.2d 530, 534 (Minn. 1989)).

Here, Chauvin alleges that Floyd ingested fentanyl before Chauvin pinned Floyd to the ground, knelt on Floyd's neck, and restricted Floyd's breathing. Chauvin contends only that Floyd's alleged drug use was "the most likely cause" of death, not that it was the sole cause of his death. To qualify as a superseding cause, however, the independent action must actually intervene to break the causal chain, must occur "after the defendant's acts," and must be the "sole cause" of death. *See* CRIMJIG 11.25; *Olson*, 435 N.W.2d at 534. Chauvin's speculative allegations therefore are legally insufficient to break the causal chain between Chauvin's actions and Floyd's death.

Chauvin's arguments also founder on the shoals of the law that obligates this Court to view the evidence in favor of the State and to draw all reasonable inferences to be drawn from that evidence in the State's favor. Notwithstanding Chauvin's contention that Floyd was suffering from a fentanyl overdose Floyd did not, during his interactions with the Defendants display some of the "common sign[s] of a fentanyl overdose," such as falling asleep, snoring, or nodding off. Although excitable and partially non-compliant in the earliest moments of his

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interactions with Lane after he was startled by Lane's tapping on his window, by the time Kueng walked Floyd over to the Dragon Wok restaurant and had him sit on the sidewalk, Floyd was at least responsive, compliant, and conversant during his approximate two-minute conversation with Kueng, answering Kueng's questions and having calmed down. (Kueng BWC Video at 8:11:35-8:13:35)

Nor did the fentanyl levels in Floyd's blood after his death revealed by the autopsy necessarily demonstrate an overdose, according to the State. In response to Chauvin's motion to dismiss, the State counters that fentanyl levels in the body increase significantly after death, pointing to various studies.[26] Here, Floyd's physical state in the minutes before he was pinned down -- not to mention his physical state in the first minutes after he was restrained prone on the street, with Chauvin's knee firmly pressing his face into the concrete and with Kueng and Lane kneeling on his back and legs, respectively, during which time he continually told the Defendants that he could not breathe and exclaimed that it was Chauvin's knee on his neck that was killing him – viewed in the light most favorable to the State and with all reasonable inferences drawn in favor of the State suggest it was Chauvin's actions that caused Floyd to

[26] One study cited by the State found that "postmortem fentanyl blood concentrations were on average up to nine times higher than *in vivo* serum levels at the same dose." Hilke Andresen et al., *Fentanyl: Toxic or Therapeutic? Postmortem and Antemortem Blood Concentrations After Transdermal Fentanyl Application*, 36 J. Analytical Toxicology 182, 182 (2012). Another concluded that laboratory variability of up to 25 ng/mL – an amount almost two and one-half times the concentration reported in Floyd's autopsy (*see* Hennepin County Autopsy Report, at 2) -- can also affect "[p]ostmortem fentanyl concentrations." Clarissa S. Krinsky et al., *An Examination of the Postmortem Redistribution of Fentanyl and Interlaboratory Variability*, 59 J. Forensic Sciences No. 5, 1275, 1275, 1278 (Sept. 2014). As a result, the State counters that "[p]ostmortem fentanyl concentrations cannot be used in isolation to determine whether intoxication occurred. The physical state of the person, a possible drug tolerance and the pain level of the patient are also relevant." Anderson, 36 J. Analytical Toxicology at 192.

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stop speaking, moving, and breathing, not an overdose. Moreover, although the MCME autopsy report disclosed that the toxicology results revealed several drug and "psychoactive substances" present in Floyd's system, the autopsy report classifies Floyd's manner of death as a homicide, not an accidental drug overdose, and also lists the cause of death as "cardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression" not a drug overdose.

The statement Chauvin cites from Dr. Andrew Baker, the Hennepin County Medical Examiner, does not rise to the level of legal exoneration establishing incontrovertibly that Floyd's death was caused by a drug overdose rather than Chauvin's conduct. Dr. Baker had commented that "if [Floyd] were found dead at home alone" and there were "no other apparent causes" other than the fentanyl levels revealed by the toxicology tests, it "could *be* acceptable to call" his death a drug overdose. (Chauvin Ex. 6, at 2) Dr. Baker expressly clarified, however, that he was "not saying [a fentanyl overdose] killed [Floyd]." *Id.* And, as previously indicated, Dr. Baker's final autopsy report reported his actual conclusion that the cause of Floyd's death was "cardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression," on the basis of which Dr. Baker ruled Floyd's death a "homicide." Stated simply, Dr. Baker concluded that Floyd's death was not caused by a fentanyl overdose but rather by "complications" arising from the manner in which Defendants had subdued and restrained Floyd and Chauvin had compressed his neck.

While Chauvin remains free at trial to contest the medical evidence and Floyd's cause of death, as well as to cross-examine Dr. Baker on his conduct of the autopsy, his conclusions, and his discussions with others on those subjects, including lawyers from the Hennepin County

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Attorney's Office he met with in the week after Floyd's death, those remain matters to be presented at trial for the jury's ultimate determination and do not provide a basis upon which this Court may dismiss the charge against Chauvin at this preliminary stage. It must again be stressed that, at this stage and on this motion, this Court must view the evidence in the light most favorable to the State, not in the light most favorable to Chauvin.

As for Chauvin's assertion in his brief that "Floyd ingested fentanyl in his car at the time Officers Lane and Kueng first approached," that at best is a subject for argument at trial,[27] but provides no basis to dismiss this charge for lack of probable cause on causation grounds. The only evidence Chauvin cites in support of this assertion is a single still frame photograph extracted from Lane's BWC Video. (*See* Chauvin Ex. 9.) But from the start of his interaction with the officers fifteen seconds earlier before the time depicted in this still frame, although

[27] The State posits other explanations, such as that what Chauvin claims to be a fentanyl pill in Floyd's mouth may well be – in the State's view, is "far more likely to be" – "spittle" or "chewing gum." The State maintains that Floyd had spittle in or around his mouth at other points during the incident, and also contends that unspecified "surveillance" videos – the State does not indicate if it is relying on security footage shot within Cup Foods earlier that evening (which is not in the record before this Court), on the surveillance video from the Dragon Wok restaurant (Chauvin Exh. 10), or on any of the Defendants' BWC Videos, appear to show that Floyd had been chewing gum earlier that evening.

Additionally, the State points out that Chauvin contradicts this very theory just a few sentences later in his brief: after arguing this still frame from Lane's BWC is proof that Floyd ingested drugs orally while in his car during the early seconds of his encounter with Lane, Chauvin then advances the theory that Floyd had been "hooping," which Chauvin defines as the practice of ingesting drugs rectally. In response to Kueng's statement that Floyd had "foam around [his] mouth," Floyd explained that he "was just hooping earlier." (Kueng BWC Video at 8:14:15-19.) Relying on the crowdsourced website "Urban Dictionary" definition -- *see Hooping*, Urban Dictionary, https://bit.ly/33jAQD0 ("Administering psychoactive drugs via enema.") -- Chauvin claims that this serves not as confirmation that Floyd had been playing basketball earlier but rather as an admission that Floyd had recently ingested an illicit substance rectally.

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obviously startled to see Lane, Floyd had been speaking normally, giving no indication that he had any drugs in his mouth.

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

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

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

Ultimately, as the State rightly observes, Chauvin's theories of causation do not exonerate him. Even were Chauvin correct that these other causes contributed to Floyd's death, "[t]he fact that other causes contribute to the death does not relieve the actor of responsibility." *King*, 367 N.W.2d at 602 (quoting *Smith*, 119 N.W.2d at 847-848). So long as Chauvin's actions "hasten[ed] or accelerate[d]" Floyd's death and "contribute[d] to its cause," it does not matter if "other causes co-operate[d]" to cause his death. *Smith*, 119 N.W.2d at 847. Chauvin's actions here meet that standard for the reasons articulated earlier. *See, supra*,

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Part II.A, pp. 36-37 & p. 45. To the extent Chauvin disagrees, his arguments "present a fact question for the jury's determination" on causation, *Slaughter*, 691 N.W.2d at 75, but not a basis for granting a motion to dismiss for lack of probable cause.

As for his intent, Chauvin alleges that the evidence shows that "Chauvin demonstrated a concern for Mr. Floyd's well-being." The State contends the evidence tells a different story. Viewed in the light most favorable to the State, this Court must agree. For example, the State notes that Chauvin on a couple occasions responded to Floyd's exclamations that he couldn't breathe by telling[28] Floyd "You're doing a lot of talking, a lot of yelling. It takes a heck of a lot of oxygen to say things." (Lane BWC Video at 8:22:39-50; *see also id.* at 8:20:19-:21, 8:21:25.) Chauvin continued to press his knee into Floyd's neck even as Floyd repeatedly cried out that he could not breathe and that Chauvin was killing him, and even as bystanders told Chauvin that Floyd was not responsive and was not breathing. Chauvin maintained his position for several minutes after Floyd had stopped talking, moving, and breathing, and even after Lane acknowledged that Floyd had "passed out" and twice asked if they should roll Floyd onto his side. Chauvin did not move when Kueng told him – twice, in the space of less than half a minute -- that Floyd no longer had a pulse, or even when EMS arrived on the scene and

[28] Actually, the State maintains that Chauvin was "taunting" Floyd with these statements. For purposes of this motion to dismiss for lack of probable cause, this Court must view such matters in the light most favorable to the State, drawing all reasonable inferences in the State's favor, as has this Court has taken pains to emphasize throughout this Memorandum Opinion. The State's characterization of Chauvin's behavior as taunting Floyd is one that might reasonably be drawn from Chauvin's demeanor, his tone of voice, and from the context of the actions in the several minutes leading up to these statements. To the extent relevant to the ultimate determination of innocence or guilt, that ultimate determination is one the law reserves to the jury at trial, not to this Court on a motion to dismiss for lack of probable cause.

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attempted to check Floyd for a pulse." Viewed in the light most favorable to the State, those are not the actions of someone "concern[ed] for Mr. Floyd's well-being."

Chauvin also asserts that he could not have intended to harm Floyd because "[t]he decision to use MRT" complied with MPD policy. But Chauvin and the other officers did not actually use MRT, which involves using two Hobbles connected in front of the subject. The Defendants did not Hobble Floyd at all. Had they used the Hobble available to them – Thao had retrieved it from the rear of Lane and Kueng's squad just as Chauvin, Kueng, and Lane had decided to stop trying to force Floyd into the back of the squad and take him to the street -- Defendants could have restrained Floyd without kneeling on top of him and restricting his breathing. MRT also calls for the use of the "side recovery position ASAP." In contrast, the Defendants continued to restrain Floyd face-down in an inherently dangerous position, with Chauvin kneeling directly on Floyd's neck, long after any justification for using MRT had evaporated. Finally, under MPD policy, whenever the MRT is used, a supervisor must be called to the scene to complete a force review. The Defendants did not do that, either. In fact, taking the evidence in the light most favorable to the State, the jury as trier of fact could ultimately conclude that the Defendants decided not to use MRT in the first place because of this administrative reporting requirement, not, as Chauvin now claims, because they could get "Floyd into the ambulance more quickly" without a Hobble. The State is clearly entitled, for purposes of this motion, to the inference that Chauvin did not care about getting Floyd into the ambulance quickly: he continued kneeling on Floyd's neck for more than a minute after the ambulance arrived, and even while EMTs tried to check Floyd's pulse.

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Finally, Chauvin says that he could not have intended to inflict bodily harm on Floyd because "[t]here was no bruising on Mr. Floyd's back or evidence of blunt trauma to his back." The answer to this is that the State here need only establish at trial either that Chauvin intended to perform "a physical act" that "results in bodily harm upon another," *State v. Fleck*, 810 N.W.2d 303, 309 (Minn. 2012); *see* CRIMJIG 13.02 (defining "bodily harm" as "physical pain or injury, illness, or any impairment of a person's physical condition"), or intended that to cause Floyd to fear immediate bodily harm or death. In other words, at trial, the State can "prove that 'the blows to [the victim] were not accidental but were intentionally inflicted.'" *State v. Dorn*, 887 N.W.2d 826, 830 (Minn. 2016) (quoting *Fleck*, 810 N.W.2d at 310). Because there is no dispute here that Chauvin's actions were not "accidental" -- in pressing his knee into Floyd's neck for more than nine minutes and forty seconds, Chauvin intentionally performed a "physical act" that "result[ed] in bodily harm" to Floyd -- whether there is "bruising" or "evidence of blunt trauma" is entirely irrelevant to whether Chauvin had the requisite intent. *See Dorn*, 887 N.W.2d at 830 (rejecting argument that "the intent to do" a particular "amount of harm" is required to establish elements of assault). But, in any event, the autopsy report does report a number of blunt force injuries to Floyd's forehead, face, upper lip, shoulders, hands, elbows, and legs due to the manner in which Chauvin, Kueng, and Lane had subdued Floyd and then pinned him to the street.

In sum, Chauvin's arguments misapprehend the law and are predicated on viewing the facts in the light most favorable to Chauvin, not to the State. They provide no basis for dismissing the unintentional second-degree murder charge for lack of probable cause. At most,

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these arguments raise fact questions for the jury at trial. Accordingly, Chauvin's motion to dismiss this charge for lack of probable cause is denied.

III. PROBABLE CAUSE DOES NOT EXIST FOR THE THIRD-DEGREE MURDER CHARGE AGAINST CHAUVIN.

Under Minnesota law, a person is guilty of third-degree murder if "without intent to effect the death of any person, [the defendant] causes the death of another by perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human life." Minn. Stat. § 609.195(a). To prove that Chauvin is guilty of third-degree murder, the State must prove at trial the following elements:

(i) Floyd's death;

(ii) that Chauvin caused Floyd's death;[29] and

(iii) that Chauvin's intentional conduct that caused Floyd's death was "eminently dangerous to other persons and was performed without regard for human life. Such an act may not have been specifically intended to cause death, and may not have been specifically directed at the particular person whose death occurred, but it must have been committed in a reckless or wanton manner with the knowledge that someone may be killed and with a heedless disregard of that happening."

CRIMJIG 11.38.[30]

[29] The drafters of the jury instruction guides here recommend that the jury be further instructed that "'to cause' means to be a substantial causal factor in causing the death," that Chauvin "is criminally liable for all the consequences of his actions that occur in the ordinary and natural course of events," and that "[t]he fact that other causes contribute to the death does not relieve [Chauvin] of criminal liability."

[30] The drafters of the jury instruction guides determined not to recommend inclusion of the words "depraved mind" found in Minn. Stat. § 609.195(a) in the elements for third-degree murder believing that the terminology used in the third element as set forth above adequately captured the statutory concept of "depraved mind" and that including the words "depraved mind" would be "unnecessary and possibly prejudicial." CRIMJIG 11.38 n.2.

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The focus here for purposes of Chauvin's probable cause challenge is the third element.[31] To find probable cause to allow the State to proceed to trial against Chauvin on the third-degree murder charge, the State must point to evidence not only that Chauvin's intentional actions were eminently dangerous to other persons[32] but also that such actions "may not have been specifically directed at the particular person whose death occurred."

The issue here, given all the statutory language, the manner in which Minnesota's appellate courts have construed that language, and Minnesota's third-degree murder jurisprudence, is not so much whether Chauvin's conduct toward Floyd during the critical nine minutes and twenty seconds was "eminently dangerous" or "performed without regard to human life" or done in "reckless or wanton manner with the knowledge that someone may be killed and with a heedless disregard of that happening." Those are also elements and, viewing the evidence in the light most favorable to the State and drawing all reasonable inferences in the State's favor, the State might well be entitled to proceed to trial on this charge if this were all that is required. But, it is not.

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[31] There is no dispute regarding Floyd's death, the first element. As to the second element, the discussion from Part II regarding Chauvin's conduct as a substantial causal factor in Floyd's death would also apply here, as that element is the same for both the unintentional second-degree and the third-degree murder charges.

[32] The State contends that it need not prove that Chauvin's conduct was eminently dangerous to others and was directed at more than one person for a third-degree murder charge. According to the State, it suffices if Chauvin's conduct was eminently dangerous to Floyd himself, which it says Floyd's death establishes. The State's contention is belied by the plain language of Minn. Stat. § 609.195(a) because that statute uses the plural "others." The construction urged by the State would only be reasonable had the Minnesota legislature used the singular form "other" or perhaps by some other analogous device, such as by repeating the word "another" which appears eight words earlier in the statute.

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The language of the third-degree murder statute explicitly requires the act causing the "death of another" must be eminently dangerous "to others." In defining this crime, the legislature of course could have continued in the singular, or could have included both an actual single victim as well as others. An example of the first approach would be the following: "Whoever, without intent to effect the death of any person, causes the death of another by perpetrating an act eminently dangerous to ["such person" or "that other"] and evincing a depraved mind . . . ." An example of the latter approach would be the following: "Whoever, without intent to effect the death of any person, causes the death of another by perpetrating an act eminently dangerous to that person or to other persons and evincing a depraved mind . . . ." The legislature did not take those approaches, though, but instead required that the defendant's action(s) was/were "eminently dangerous to others," and this Court must give effect to the plain meaning of the language of the statute.

Chauvin argues, relying upon *State v. Barnes*, 713 N.W.2d 325, 331 (Minn. 2006), that Minnesota law does not permit a conviction for third-degree murder "where the defendant's actions were focused on a specific person." According to Chauvin, because his "actions were directed toward no one but Mr. Floyd and could not have resulted in harm to any person other than George Floyd," probable cause does not exist for the third-degree murder charge. This Court agrees.

State v. Zumberge, 888 N.W.2d 688, 698 (Minn. 2017), is instructive. *Zumberge* arose from a fraught, deteriorating relationship between defendant and the victims, his neighbors, over a couple years: the defendant did not like deer in the neighborhood whereas the victims enjoyed feeding deer in their backyard and had done so for more than a decade. A couple

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years before the shooting incident, the defendant had written to neighbors expressing frustration about the deer. Not long after that letter, the victims found mutilated animals in their yard, and suspected the defendant was responsible. When the girlfriend confronted the defendant about the mutilated animals, the defendant allegedly threatened to kill her, leading her to obtain a restraining order against the defendant. As tensions between them continued to rise, the girlfriend accused the defendant of blowing an air horn to scare the deer when he saw them feeding in the victims' back yard. Another neighbor recounted at trial a conversation in which the defendant said "it would all soon be over." The girlfriend later called the police to report that the defendant's son had threatened to kill her, and the police told her to call them if she saw him again and they would arrest him. After that incident, the defendant kept a loaded shotgun under his living room sofa.

On the day in question, the police had arrested the defendant's son when she saw him at a local bar. Defendant and his wife learned of their son's arrest. When the girlfriend returned home, defendant's wife provoked a confrontation, standing at the end of their driveway, yelling at the girlfriend who was standing outside the front door of the victims' house across the street from the defendant's home. As that shouting match continued, the other victim came out of their house to stand alongside his girlfriend. Seeing this, the defendant, who had been watching the confrontation between his wife and the girlfriend victim retrieved the loaded shotgun, went to his basement, climbed out an egress window, and fired four shots, three of which stuck the male victim, and the fourth of which struck the girlfriend as she tried to run back into her home. The male victim died, and the girlfriend was hospitalized, but recovered. The defendant was convicted after trial on counts of first-degree murder and

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attempted first-degree murder and second-degree murder and attempted second-degree murder. The defense had requested an instruction on third-degree murder as a lesser-included defense, which the trial court denied. Defendant testified at trial that he had fired his shotgun to scare off the victims but that he had not intended to hit either of them with his shots.

The Minnesota Supreme Court held the trial court had not erred in refusing to instruct the jury on third-degree murder as a lesser-included offense. The Court noted that "[t]hird-degree murder 'cannot occur where the defendant's actions were focused on a specific person.'" 888 N.W.2d at 698 (quoting *State v. Barnes*, 713 N.W.2d 325, 331 (Minn. 2006)). As Chauvin notes, the Minnesota Supreme Court has explained that, for a jury to be instructed on third-degree murder in certain cases, "the act must be committed without a special design upon the particular person or persons with whose murder the accused is charged." *Id*. (quoting *State v. Wahlberg*, 296 N.W.2d 408, 417 (1980)). Although the defendant in *Zumberge* had testified that he did not intend to harm the victims, the Court concluded, in light of his testimony that he had fired his gun intending to stop the male victim, that the shooting was done with "'special regard to [its] effect on [a] particular person," *id*. (quoting *Wahlberg*, 296 N.W.2d at 417), and that such a targeted purpose demonstrating "a special design upon the particular person" precluded a conviction for third-degree murder. *Id*.

The same principle was determinative In *State v. Stiles*, 664 N.W.2d 315, 321 (Minn. 2003). In *Stiles*, the defendant and several friends arranged to meet the victim from whom they had previously bought drugs in a park under the pretext of buying drugs but actually intending to rob him of the drugs. When the victim presented the drugs to one of the defendant's companions who had come over to the victim's car, the defendant and another of

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his companions jumped out of their van, pointed shotguns at the victim, and demanded that he give them the drugs. Rather than complying, the victim tossed the drugs back into his car and reached toward his waist where he had a gun stashed. Defendant and one of his accomplices, who were within a few feet of the victim, fired their shotguns at the victim, striking him several times, and the victim died from multiple gunshot wounds. Defendant was tried and convicted on counts of first-degree felony murder and intentional second-degree murder.

In rejecting defendant's argument that the trial court had erred in refusing to instruct the jury on a lesser-included charge of third-degree murder, the Supreme Court reasoned that the third-degree murder statute "excludes a situation where the animus of defendant is directed toward one person only." 664 N.W.2d at 321. In *Stiles*, the victim was the defendant's intended victim and the evidence would not have supported a finding that the defendant's actions were eminently dangerous to more than one person, which the Court construed the third-degree murder statute as requiring. Because there was no evidence that the defendant had shot at anyone or anything other than the victim, and no circumstantial evidence that defendant's actions had endangered anyone other than the victim, the Court concluded the trial court properly declined to instruct the jury on third-degree murder which the Court noted "is generally used when no specific individual is singled out." *Id*. at 321-22.

To the same effect is *Barnes*, in which the Supreme Court, holding that third-degree murder "cannot occur where the defendant's actions were focused on a specific person," reasoned that the third-degree murder statute:

> was intended to cover cases where the [defendant's] reckless or wanton acts [] were *committed without special regard to their effect on any particular person or persons*; the act must be committed without a special design upon the particular person or persons with whose murder the accused is charged.

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713 N.W. 2d at 331 (emphasis in original). *See also State v. Harris*, 713 N.W.2d 844, 849-50 (Minn. 2006)(affirming trial court refusal to instruct on third-degree murder as a lesser-included offense to first-degree felony murder and attempted first-degree felony murder in the wake of a drug deal gone bad where defendant had intentionally fired a shot at close range at the murder victim during when physical violence had broken out among the participants at an apartment); *State v. Stewart*, 276 N.W.2d 51 (Minn. 1979) (not error to refuse to instruct jury on third-degree murder where evidence showed defendant had shot his gun twice at victim without shooting anyone else or otherwise acting in a manner that endangered anyone else's safety, Court reasoning that third-degree murder statute requires evidence that defendant's actions were eminently dangerous to more than one person); *State v. Carlson*, 328 N.W.2d 690, 694 (Minn.1982) (not error to refuse to instruct jury on third-degree murder where evidence was that defendant's shooting attacks were specifically directed against particular victims -- defendant intentionally shot and killed his wife and step-son, and then shot and injured a third person whom he heard on the phone telling someone to call ambulances -- but did not harm any of the other persons in the home where shootings took place, reasoning third-degree murder applies only where defendant's reckless and wanton acts were committed without special design on or special regard to their effect on any particular person or persons); *State v. Stewart*, 276 N.W.2d 51, 54 (Minn. 1979)(not error for trial court to refuse to instruct jury on third-degree murder as lesser-included offense of first-degree murder where evidence showed that defendant fired two shots at victim, then stopped shooting, no additional shots were fired at anyone or anything else, and the only other person in the vicinity testified to not having any concerns for her safety at time of shootings because evidence failed to establish that

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defendant's actions were eminently dangerous to more than one person as required for third-degree murder); *State v. Hanson*, 176 N.W.2d 607, 614-15 (Minn. 1970) (not error for trial court to refuse to instruct jury on third-degree murder as lesser-included offense of first-degree murder where evidence showed that defendant shot and killed his wife, from whom he was estranged, firing only a single shot from his .22 rifle which struck her in the back of the head after she had turned around from a confrontation with him to reenter the home, Court concluding Minnesota third-degree murder jurisprudence precludes submission to jury under third-degree murder charge fact patterns in which "the animus of defendant is directed toward one person only").

In contrast to these cases, *State v. Weltz*, 193 N.W. 143 (Minn. 1923), provides an archetypal example of the kind of situation the third-degree murder statute was intended to cover. The defendant there, while out driving around with a woman companion, had stopped at an acquaintance's, leaving his companion in the car while he went in for drinks. Emerging half an hour to 45 minutes later, stumbling, with glassy eyes, apparently intoxicated, and carrying a couple glasses of an undetermined liquid, upon returning to his car he found his waiting woman companion in a fit of pique. After she poured out the contents of the two glasses he was carrying, an argument between them ensured, after which she exited the car, refusing to ride with the defendant. The defendant, then in a highly excitable state and seething with anger after that argument, drove off in his car, speeding down the streets of St. Paul at what some witnesses estimated may have been 50 m.p.h. A woman in a group happened to be crossing the street as defendant came barreling down the street. Defendant's car struck the woman, knocking her down, upon which his car ran over her, producing injuries

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from which she died the following day. Defendant was still not done. He continued on, driving recklessly and scattering pedestrians who had gathered at the site where he had knocked down and driven over the woman crossing the street. As police on motorcycles began pursuing him -- and shooting at his tires in an effort to bring him to a stop -- rather than stopping he began swerving his car from side to side in the street in an attempt to run over the officers' motorcycles or force them off the street. The Supreme Court affirmed defendant's conviction for third-degree murder. After surveying the historical development of murder and manslaughter charges for homicides, the Court described the nature of cases contemplated for third-degree murder variously as:

(1) "cases of depraved and reckless conduct, aimed at no one in particular, but endangering indiscriminately the lives of many and resulting in the death of one or more";

(2) "acts perpetrated with a full consciousness that they were calculated to put the lives of others in jeopardy"; and

(3) "cases where reckless, mischievous, or wanton acts were committed without special regard to their effect on a particular person, but with a reckless disregard of whether they injured one person or another."

193 N.W. at 42-43.

Indeed, reckless driving of a vehicle resulting in the death of others in fact is the general fact pattern in which most of the reported Minnesota cases affirming third-degree murder convictions arise. For example, *State v. Coleman*, 944 N.W.2d 469 (Minn. App. 2020), *review granted* (Minn. June 30, 2020), the defendant, while intoxicated,[33] was driving a snowmobile at 58 m.p.h. at night on a lake with numerous ice fishing houses, snowmobiles and other vehicles,

[33] Defendant tested with a blood alcohol concentration of 0.165 three hours after the incident.

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and many people on the lake fishing. The defendant's snowmobile struck the pickup truck of another family out ice fishing that night, then ran into an eight-year old boy, before careening into an ice house where the boy's father was. Defendant was thrown from his snowmobile, the father was injured, but the boy died a few days later from his injuries. The Court of Appeals affirmed his third-degree murder conviction, concluding the defendant's conduct under these circumstances created the substantial and unjustifiable risk to human life and his conscious disregard of that risk as required by statute for third-degree murder, although he had not of course, been specifically focused on or targeting the pickup truck, the boy, or the ice house he wound up driving into. 944 N.W.2d at 484-85.

State v. Montermini, 819 N.W.2d 447 (Minn. App. 2012) (affirming third-degree murder conviction), another drunk driving case resulting in a fatality is also representative. In *Montermini*, the intoxicated defendant engaged in numerous reckless behaviors while driving: he was talking on his cell phone while driving; at times he had swerved in and out of traffic, switching back and forth between lanes; he had driven the wrong way down a one-lane street; had driven at speeds up to 115 m.p.h. and 90 m.p.h.; finally, he was driving about 60 m.p.h. on a street with a 30 m.p.h. speed limit when he rounded a curve and lost control of his car, upon which his car skidded sideways into the oncoming lane and on on-coming car in that lane struck the passenger side of defendant's vehicle, knocking it off the road. All three passengers in defendant's vehicle were rendered unconscious by the crash; one of the passengers later died, another suffered a broken femur, and the third received cuts and bruises. Four occupants in the oncoming vehicle that crashed into defendant's vehicle were also injured. Defendant did not lose consciousness. After getting out of his vehicle to urinate, he got back into the car,

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drove back up over the curb to get back on the road, nearly striking other bystanders, and drove away from the accident scene. After running a red light and driving down a street at almost 80 m.p.h., defendant stopped in a church parking lot, dragged the unconscious bodies of all three passengers from his car, leaving them on the pavement (this incident occurred in the dead of winter, on Jan. 13), and drove away. He was later stopped by a state trooper who noticed him weaving on the road, in his by then badly-damaged vehicle. Testing revealed his blood alcohol level at the time, about three hours after the accident, to be 0.15.

Finally, in *State v. Patrick*, 358 N.W.2d 426 (Minn. App. 1984) (affirming third-degree murder conviction), *rev. denied* (Minn. Feb. 27, 1985), the defendant once again had been drinking. While intoxicated, he then drove recklessly: driving more than 60 m.p.h. on residential streets; nearly colliding head-on with one car; forcing two pedestrians off the road before turning around and chasing them off the road for a second time; fleeing police who had begun pursuing him, during which he drove at speeds up to 80 m.p.h. on residential streets seeking to evade the pursuing police, running through a police roadblock, running several stop signs, before eventually striking a car, killing the driver.

The Court's research has not disclosed any published Minnesota Supreme Court or Court of Appeals opinions affirming third-degree murder convictions in cases presenting analogous fact patterns to that presented here, in which the defendant's allegedly criminal conduct was directed at and specifically focused on a single victim and where that defendant's conduct did not present a risk of harm to others. The State cites *State v. Padden*, 2000 WL 54240, at *2 (Minn. App. Jan. 25, 2000) (affirming third-degree murder conviction for defendant who hung his victim when no one other than defendant and his victim were

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present), for the proposition that the third-degree murder statute does not require that defendant's conduct must threaten more than one person, only that the conduct be committed "without special regard to its effect on any particular person or persons," and "without the intent to effect death." But, *Padden* is unpublished and thus not precedential and is contrary to the cases discussed above in that regard.[34]

The State also points to a statement in *State v. Wahlberg*, 296 N.W.2d 408, 417 (Minn. 1980), characterizing *State v. Mytych*, 194 N.W.2d 276 (Minn. 1972), as standing for the proposition that a conviction of third-degree murder could be sustained "where the defendant's shots were aimed at the decedent alone." However, as indicated above, although

[34] In this Court's view, the Court of Appeals in *Padden* may also have misread *State v. Mytych*, 194 N.W.2d 276 (1972), a third-degree murder conviction stemming from a shooting. The defendant in *Mytych* had fired a gun in an apartment three times, with one of the bullets striking the intended target, the defendant's former lover, wounding him (although he survived), and with the two other bullets striking her lover's current wife, killing her. However, the Supreme Court's opinion in *Mytych* does not expressly indicate that the evidence presented to the trial court demonstrated that the defendant had fired one shot intentionally at her former lover and then continued on searching in the apartment to locate the wife, intentionally firing the two shots at her that proved fatal. That seems unlikely, because third-degree murder is an unintentional crime, and the trial court in *Mytych* had conducted a bench trial upon which he found the defendant not guilty of first-degree murder, which had been charged, instead finding her guilty on the lesser-included offense of third-degree murder for the death of the wife and aggravated assault for the shooting of the defendant's former lover. The evidence presented to the trial court may possibly have shown that the defendant, who apparently suffered from "mental disturbances," had fired erratically, with one of the bullets striking her former lover, the intended target, and the other two bullets inadvertently striking his wife. The risk that shots fired in places where multiple people are present, particularly in chaotic situations, is one reason that crimes involving guns may present an eminent risk of harm to others who can wind up being hit by gunfire even if they are not the intended targets. In any event, both *Padden* and *Mytych* present unusual, atypical fact patterns, as the trial court had noted in *Padden*, *see* 2000 WL 54240, at *3, and it appears both trial courts had concluded that the defendants were guilty of something more serious than culpable negligence, which apparently led to the willingness to convict the defendants of third-degree murder rather than a manslaughter charge and which consideration actually weighed into the appellate court's decisions to affirm the third-degree murder convictions in both cases. *See id.*

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the *Mytych* opinion discloses that the defendant there had intentionally fired at her former lover, he was not the decedent. Rather, the decedent – the victim for purposes of the third-degree murder conviction -- was the former lover's wife, who was also in the apartment, and who was struck by two other bullets the defendant had fired while in the apartment. Nothing in the review of the underlying facts in the *Mytych* opinion demonstrates that the defendant had purposefully sought out the wife after shooting her former lover and intentionally fired the two bullets that wound up killing her specifically at her. In any event, the Supreme Court in *Wahlberg* held that the trial court there had not erred in refusing to instruct the jury on third-degree murder as lesser-included offense to the first-degree murder charge because the evidence in that case showed that "all the blows were directed toward the victim." 296 N.W.2d 408, 417 (Minn. 1980).

The State also relies on the Mohamed Noor case, another homicide prosecution of a Minneapolis police officer. *State v. Noor*, No. 27-CR-18-6859 (Henn. Cty. Dist. Ct.), *appeal pending*. In *Noor*, Noor, while seated in the passenger seat of his squad car, had fired his revolver toward the driver's side window across his partner's body (his partner was driving their squad, although they were parked at the time at the end of an alley, preparing to turn onto the street) toward a woman standing outside the driver's side window who had banged on the rear of the squad before approaching the driver's window. The bullet struck the woman, killing her. Noor faced the same three charges Chauvin faces here. By Order filed September 27, 2018, Judge Quaintance denied Noor's motion to dismiss for lack of probable cause. *Id*., Dk # 31. At trial, the jury acquitted Noor on the unintentional second-degree

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murder charge but found him guilty on the third-degree murder and manslaughter charges, and he was convicted and sentenced on the third-degree murder charge.

Noor does not support a finding of probable cause for the third-degree murder charge against Chauvin here, however. First, there is no precedential appellate court opinion in *Noor*, and that case is presently on appeal to the Court of Appeals. Second, *Noor* is factually distinguishable. In *Noor*, the evidence indicated that a bicyclist was riding by on the street just in front of Noor and Harrity's squad at the time of the shooting. Noor and Harrity were patrolling at the time in a residential area of South Minneapolis. For purposes of eminently dangerous conduct performed recklessly and with heedless disregard for whether others might be killed, Noor's actions are a better fit for the third-degree murder charge than are Chauvin's actions toward Floyd. In firing his gun, Noor was potentially putting at risk his own partner's life (Noor fired the shot across Harrity's body on the bullet's path to the driver's side window) as well as that of the bicyclist who, as a matter of happenstance, was pedaling by at precisely that moment. In addition, their squad was parked at the end of an alley in a residential neighborhood. Firing his gun as he did might possibly have led to the bullet striking any pedestrians who happened to be walking by in the bullet's path. Or, the bullet could possibly have struck a person in a car passing by on the street at that moment. Or, the bullet could potentially even have passed through the walls of a nearby home, striking someone in the house. Here, in contrast, nothing about the manner in which Chauvin pressed his knee down on Floyd's neck for nine-plus minutes while Kueng and Lane were also kneeling on Floyd's back and legs was eminently dangerous to anyone other than Floyd. And, nothing about that conduct can be said to have been done in heedless disregard for whether anyone other than

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Floyd, the person who was the specifically the target and focus of Chauvin's actions, might be killed as a result.

Because a third-degree murder charge can be sustained only in situations in which the defendant's actions were "eminently dangerous to other persons" ***and*** were not specifically directed at the particular person whose death occurred, this is not an appropriate case for a third-degree murder charge. The evidence presented by the State does not indicate that Chauvin's actions were eminently dangerous to anyone other than Floyd. More importantly, Chauvin's actions were of course specifically directed at the particular person whose death occurred, George Floyd, upon whom Chauvin kneeled for more than nine minutes, pressing Floyd's upper chest area, neck and throat, and face into the concrete of Chicago Avenue.

IV. PROBABLE CAUSE EXISTS TO BELIEVE THAT CHAUVIN COMMITTED SECOND-DEGREE MANSLAUGHTER.

A. Elements of Second-Degree Manslaughter

Under Minnesota law, a person is guilty of second-degree manslaughter if "by the person's culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another" he "causes the death of another."[35] Minn. Stat. § 609.205(1); see CRIMJIG 11.56 (providing elements of second-degree manslaughter, tracking directly the statutory language). Second-degree manslaughter requires proof of:

[35] "Great bodily harm" means "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm." Minn. Stat. § 609.02 subd. 8. "'Culpable negligence' is intentional conduct that the defendant may not have intended to be harmful, but that an ordinary and reasonably prudent person would recognize as involving a strong probability of injury to others. CRIMJIG 11.56.

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(i) "objective gross negligence on the part of the actor"; and

(ii) "subjective 'recklessness in the form of an actual conscious disregard of the risk created by the conduct.'"

State v. McCormick, 835 N.W.2d 498, 507 (Minn. App. 2013) (quoting *State v. Frost*, 342 N.W.2d 317, 320 (Minn. 1983)), *rev. denied* (Minn. Oct. 15, 2013). The objective gross negligence component "is satisfied by demonstrating that the act was 'a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.'" *Id*. (quoting *Frost*, 342 N.W.2d at 319). The subjective recklessness component requires proof of the actor's state of mind, which generally is proven circumstantially "by inference from words or acts of the actor both before and after the incident." *Id*. (quoting *State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000)). In conducting this inquiry, the fact-finder may infer that a person intends the natural and probable consequences of their actions. *Id.* at 507; *Johnson*, 616 N.W.2d at 726. The causation requirement requires proof both that the defendant's act was the proximate cause of injury as well as the actual cause of the death. *Id*. at 507-08.

To prove that Chauvin is guilty of second-degree manslaughter, the State must prove at trial the following elements:

(1) Floyd's death;

(2) that 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.

"To cause" means to be a substantial causal factor in causing Floyd's death.

Chauvin is criminally liable for all the consequences of his actions that occur in the ordinary and natural course of events, including those consequences brought about by one or more intervening causes, if such intervening causes were the natural result of Chauvin's acts.

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> The fact that other causes contribute to Floyd's death does not relieve Chauvin of criminal liability. However, Chauvin is not criminally liable if a "superseding cause" caused Floyd's death. A "superseding cause" is a cause that comes after the Chauvin's acts, alters the natural sequence of events, and produces a result that would not otherwise have occurred.
>
> "Culpable negligence" is intentional conduct that Chauvin may not have intended to be harmful, but that an ordinary and reasonably prudent person would recognize as involving a strong probability of injury to others.
>
> "Great bodily harm" means bodily injury that creates a high probability of death, or causes serious permanent disfigurement, or causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm.

CRIMJIG 11.56.

As with the unintentional second-degree murder charge, there is no dispute regarding Floyd's death, the first element. As to causation, the discussion from Part II regarding Chauvin's conduct as a substantial causal factor in Floyd's death applies here as well, as that element is the same here as for both the unintentional second-degree and the third-degree murder charges.

B. Probable Cause Exists that Chauvin Acted with Culpable Negligence in Causing Floyd's Death.

The only issue to be addressed on Chauvin's probable cause challenge to this charge is whether probable cause exists to believe Chauvin's actions constituted culpable negligence, whereby Chauvin created an unreasonable risk and consciously took a chance of causing death or great bodily harm. This Court concludes probable cause exists.

First, Chauvin's conduct "gross[ly] deviat[ed] from the standard of care that a reasonable person" would observe in the situation. The State contends that the training given to all Minneapolis police officers, including Chauvin, required him not only to "[p]lace the

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subject in the recovery position to alleviate positional asphyxia" but to do so "[a]s soon as possible"; to stop using a "neck restraint" when the subject is not resisting or only passively resisting; and to "start CPR" if the subject stops breathing. MPDPPM §§ 5-311(II)(C), 5-316(IV)(B)(1); 2019 MPD Use of Force Manual, at 2, 4. Chauvin did none of those things. Instead, as bystanders repeatedly pointed out to all Defendants that Floyd was not resisting, was not moving, and was not breathing, Chauvin continued to press his knee into Floyd's neck. That is evidence of culpable negligence, creating an unreasonable risk of causing great bodily harm of death.

Second, Chauvin's conduct reflected his actual conscious disregard of the risk created by his conduct. Chauvin could hear bystanders yelling that Floyd was "not fucking moving." (Kueng & Thao BWC Videos at 8:27:11-:17.) Chauvin could hear bystanders shouting that he was "stopping [Floyd's] breathing" and repeatedly pleading with the Defendants to take Floyd's pulse (Kueng & Thao BWC Videos at 8:25:09-:11, 8:25:41-8:27:07). Chauvin heard Kueng twice confirm that he could not detect Floyd's pulse. Chauvin could hear Lane tell emergency personnel who arrived on the scene that Floyd was "not responsive." Despite all this, Chauvin continued to press his knee into Floyd's neck for a full four minutes and forty seconds after Floyd stopped talking and moving. That evidence is more than sufficient to establish that Chauvin consciously disregarded the risk to Floyd that his conduct created.

Viewed in the light most favorable to the State, the evidence the State points to is more than "sufficient to present a fact question for the jury's determination" on the elements of second-degree manslaughter. *Slaughter*, 691 N.W.2d at 75.

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Chauvin's primary argument on the second-degree manslaughter charge is that he was "acting within his duties to execute a legitimate legal process" and that "Floyd was obstructing the legal process of his arrest through active resistance." Chauvin contends that because Floyd had been resisting Lane and Kueng before he and Thao arrived at the scene shortly after 8:17 and because Floyd continued resisting being placed in Lane and Kueng's squad during Chauvin's engagement with Floyd, Kueng, and Lane from about 8:18:00 to 8:19:00, Chauvin's decision to kneel on Floyd's neck pressing his face into the concrete of Chicago Avenue for nine minutes and forty seconds after Chauvin, Kueng, and Lane had subdued Floyd in a prone position on the street at 8:19:18 was reasonable. In particular, Chauvin relies on Minn. Stat. § 609.06 subd. 1(1)(a), which authorizes the use of reasonable force by police officers in effecting a lawful arrest. That argument fails for two reasons.

First, it ignores critical questions for the jury: Whether Chauvin's act of pressing his knee into Floyd's neck constituted an impermissible "choke hold" within the meaning of Minn. State § 609.06 subd. 3 and, even if that was not an impermissible "choke hold," whether his actions in continuing to apply force against Floyd by kneeling on his neck for more than nine minutes and twenty seconds, including for four minutes and forty seconds after Floyd had stopped talking and moving, for almost three and a half minutes after which it appears Floyd had stopped breathing, and for about two and a half minutes after Kueng informed Chauvin he was unable to detect a pulse on Floyd were reasonably justified. *See* Minn. Stat. § 609.06 subd. 1 (authorizing only the use of "reasonable force"); *Graham v. Connor*, 490 U.S. 386, 396 (1989) (listing factors relevant to whether force is reasonable); MPDPPM § 5-303 (same).

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Even assuming *arguendo* that Chauvin was reasonably justified in restraining Floyd when he, Kueng, and Lane subdued Floyd and pinned him prone on Chicago Avenue at 8:19:18, Chauvin cannot escape criminal liability if kneeling on Floyd's neck and pinning him face-down became unjustified at some point during the ensuing nine minutes and twenty seconds and thus ceased to be the authorized use of reasonable force. The State contends that is the case here. Whatever the levels of Floyd's continuing resistance in the early moments after Chauvin, Kueng, and Lane had subdued him and were all kneeling on him, pinning him prone to the street, Floyd was continually crying out that he could not breathe. The Lane, Kueng, and Thao BWC Videos as well as the Darnella Frazier cell-phone video show that Floyd's movements became less vigorous, and the frequency and volume of his speaking began noticeably to decline after about three and a half minutes. By 8:24:00 (four minutes and forty seconds after Chauvin first pressed his knee onto the back of Floyd's neck), Floyd had fallen silent and become motionless. Nonetheless, Chauvin continued to press his knee into Floyd's neck, with Kueng and Lane restraining his back and legs, until 8:28:42, more than four minutes and forty seconds later. Floyd clearly was offering no resistance whatsoever over that time, and any plausible justification for continuing to restrain Floyd in that manner had evaporated. Yet Chauvin continued to kneel on Floyd's neck and refused to roll Floyd onto his side into the recovery position, even after Kueng told him—twice—that Floyd no longer had a pulse.

Second, the jury could find that Chauvin and the other Defendants' actions in restraining Floyd prone on the street with Chauvin, Kueng, and Lane kneeling on his neck, midsection, and legs were not reasonably justified under the circumstances. For one thing, the charge for which Floyd was arrested -- passing a counterfeit $20 bill -- is a gross misdemeanor offense.

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See Minn. Stat. §§ 609.632 subd. 4(b)(4), 609.02 subd. 4. The jury might find that the "severity of the crime at issue," a nonviolent property crime, thus did not support the level of force Chauvin and the others employed against Floyd. MPDPPM § 5-303; *see also id.* at § 9-103 ("[a]dult misdemeanor violators" generally "shall be issued citations in lieu of arrest").

The jury could also find that the nature of Floyd's "resistance" to the Defendants' commands did not support the application of a neck restraint. The Defendants were required by their training to consider whether Floyd's alleged "lack of compliance" was a "deliberate attempt to resist" or just "an inability to comply" based on Floyd's self-identified claustrophobia and anxiety, his assertions that he had been shot before and was "scared" and that he was recovering from COVID, and the "influence of drug or alcohol use," among other things. *See* MPDPPM § 5-304(B)(1)(b). Floyd in fact had already earlier once ceased his resistance when Kueng had him sit down on the sidewalk by the Dragon Wok restaurant. (Kueng BWC Video at 8:11:45-8:14:00.) Based on those factors, a jury could conclude that Chauvin should have known that Floyd was, at most, engaged in "passive resistance," and that a reasonable officer therefore would have known not to use a neck restraint on Floyd. *See* Exhibit 1, MPDPPM § 5-302 (defining "passive resistance" as "behavior initiated by a subject when the subject does not comply with verbal or physical control efforts, yet the subject does not attempt to defeat an officer's control efforts"); *id.* § 5-311(II)(C) (forbidding use of "neck restraint against subjects who are passively resisting"). Ultimately, these questions are questions for the jury at trial, not for this Court in the context of a motion to dismiss for lack of probable cause. *See Trei*, 624 N.W.2d at 598 ("[T]he trial court is not to invade the province of the jury.").

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Chauvin's other arguments fare no better. Although Chauvin claims that he "acted according to MPD policy" and "his training," the State disputes that contention, maintaining Chauvin and the other Defendants failed to follow MPD's use-of-force policy, did not use proper MRT techniques, failed to consider whether to implement de-escalation tactics, failed to attempt CPR, and failed to inform emergency medical personnel that they had used a neck restraint on Floyd, all of which the State contends their training as Minneapolis police officers required. The evidence to which Chauvin points is not to the contrary.

The "Responsive Training Guide" chart Chauvin cites says that an officer must "de-escalate force" when he or she "can clearly defend or control with less force." As noted, the State maintains that Chauvin made no attempt to "de-escalate force" even after Floyd stopped moving, responding, or breathing.

Chauvin also relies on a photograph of three officers pinning a subject down in the prone position. Chauvin Exh. 8, p. 5. That photograph demonstrates a particular procedure for getting an uncooperative subject handcuffed when the subject is resisting handcuffing. Here, however, Floyd, had been in handcuffs for more than seven and a half minutes by the time Chauvin and the other Defendants made the decision shortly after 8:19:00 to subdue Floyd in a prone position on the street. Lane and Kueng had Floyd handcuffed by 8:11:35, almost six minutes before Chauvin first made his way to Lane and Kueng's squad were Lane and Kueng were struggling with Floyd. In addition, the State observes that the photograph on which Chauvin relies also shows that Chauvin's technique while kneeling on Floyd's neck was wrong: Chauvin placed all of his weight in his left knee that was pressing was Floyd's neck, rather than distributing his weight as the officer in this photograph did. That photo, moreover, is

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accompanied in the training materials by the following warning: "[P]lace the subject in the recovery position to alleviate positional asphyxia." *Id.* at 5; *see also* Chauvin Exh. 8, p. 7 (image demonstrating how to protect the airway when the subject is placed in the "recovery position"). Chauvin not only omits that warning from his brief, but also failed to follow that safety procedure on May 25, 2020 when he pinned Floyd face-down with his knee applying significant downward pressure on Floyd's neck for more than nine minutes and twenty seconds. In short, the State notes that Chauvin's own evidence shows that he did not act "according to MPD policy" and "his training."

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

Because when viewed in the light most favorable to the State, the facts "would lead a person of ordinary care and prudence to hold an honest and strong suspicion" that Chauvin is guilty of second-degree manslaughter, *Ortiz*, 626 N.W.2d at 449, probable cause exists for this charge.

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V. PROBABLE CAUSE EXISTS TO BELIEVE THAT LANE, KUENG, AND THAO ARE GUILTY OF AIDIND AND ABETTING UNINTENTIONAL SECOND-DEGREE MURDER.

A. Standards Governing Aiding and Abetting Second-Degree Murder and Elements of the Crime

Thao, Lane, and Kueng are all charged with aiding and abetting Chauvin's crime of unintentional second-degree murder. The statutory language of unintentional second-degree murder and that of the underlying predicate felony of third-degree assault as well as the required elements are set out in Part II of this Memorandum Opinion. The statute governing aiding-and-abetting liability provides: "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. The phrase "intentionally aids" encompasses two "important and necessary" *mens rea* elements. *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012).

First, the defendant must know that his "alleged accomplices were going to commit or were committing a crime." *State v. Smith*, 901 N.W.2d 657, 661 (Minn. App. 2017). Critically, the defendant need not have "knowledge of an accomplice's criminal intent before the crime commences." *Id.* at 662. Because the statute only "requires knowledge of the crime at the time of the acts or presence amounting to aid," "[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. *Id.*[36]

[36] To have "knowledge of the crime," the defendant must know that his accomplice satisfies the elements of the crime. The defendant need not know, however, that his accomplice's conduct was criminal at the time it was committed. *See* Minn. Stat. § 609.02 subd. 9(5) (noting that the law "does not require proof of knowledge of the existence or constitutionality of the

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Second, the defendant must "intend[] his presence or actions to further the commission of that crime." *Milton*, 821 N.W.2d at 808. In other words, the defendant must "make[] the choice to aid in its commission either through [his] presence or [his] actions." *Smith*, 901 N.W.2d at 662. Although "[i]t is rare for the State to establish a defendant's state of mind through direct evidence," the jury may properly "infer the requisite state of mind for accomplice liability through circumstantial evidence," including, for example, "the defendant's presence at the scene of the crime" or "a close association with the principal offender before and after the crime." *State v. McAllister*, 862 N.W.2d 49, 53 (Minn. 2015).

Recently revised CRIMJIG 4.01, the model jury instruction for aiding and abetting liability, provides as follows:

Definition

Under Minnesota law, [here, read definitions of unintentional second-degree murder and underlying predicate felony third-degree assault of which Chauvin is charged].

[Thao][Lane][Kueng] is charged with committing this crime or intentionally aiding the commission of this crime.

statute under which the actor is prosecuted or the scope or meaning of the terms used in that statute"); *see also* 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.6 (3d ed. 2019 update).

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Elements

[First, read combined elements of unintentional second-degree murder and predicate felony of third-degree assault from jury instructions for Chauvin on the unintentional second-degree murder charge.[37]]

Liability for Crimes of Another

[Thao][Lane][Kueng] is guilty of the crime of unintentional second-degree murder committed by Chauvin only if [Thao][Lane][Kueng] has played an intentional role in aiding the commission of the underlying predicate felony crime of third-degree assault and made no reasonable effort to prevent the crime before it was committed. "Intentional role" includes intentionally aiding, advising, hiring, counseling, conspiring with, or procuring another to commit the crime.

[Thao's][Lane's][Kueng's] presence or actions constitute intentionally aiding only if:

First, [Thao][Lane][Kueng] knew Chauvin was going to commit or was committing the crime of third-degree assault; and

Second, [Thao][Lane][Kueng] intended that his presence or actions aid the commission of the crime of third-degree assault.

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[37] After the substantive elements, the closing paragraph is also modified in the case of aiding and abetting as follows (language added for purposes of aiding and abetting charge is italicized):

> If you find that each of these elements has been proven beyond a reasonable doubt, the Defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the Defendant is not guilty*, unless you find the State has proven beyond a reasonable doubt that the Defendant is liable for this crime committed by another person according to the instruction below*.

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> [Thao][Lane][Kueng] is guilty of the crime of aiding and abetting unintentional second-degree murder, however, only if Chauvin commits that crime. [Thao][Lane][Kueng] is not guilty for aiding, advising, hiring, counseling, conspiring, or otherwise procuring the commission of the crime of unintentional second-degree murder, unless that crime is actually committed.
>
> The State has the burden of proving beyond a reasonable doubt that [Thao] [Lane] [Kueng] intentionally aided Chauvin in committing the crime of unintentional second-degree murder.

Under Minnesota law then, given the nature of the charges and the fact pattern here, to prove Thao, Lane, and Kueng guilty of aiding and abetting second-degree unintentional murder by Chauvin, the State will have to show that:

(1) Chauvin committed second-degree unintentional murder;

(2) [Thao] [Lane] [Kueng] knew Chauvin was intentionally committing an assault that inflicted substantial bodily harm on Floyd; and

(3) [Thao] [Lane] [Kueng] intended that his presence or actions aided Chauvin's assault of Floyd.[38]

Viewed in the light most favorable to the State, the evidence the State relies upon is sufficient for probable cause purposes for the State's charges that Thao, Lane, and Kueng each independently aided and abetted Floyd's second-degree unintentional murder by Chauvin. *Ortiz*, 626 N.W.2d at 449. As to the first element, the Court laid out in Part II the analysis upon which the Court has concluded that probable cause exists for the second-degree murder charge against Chauvin, which is a necessary predicate for holding each of these other three

[38] Lane does not dispute that he is liable for aiding and abetting second-degree murder so long as he is liable for aiding and abetting third-degree assault. For good reason: it is black-letter law that "one who intentionally aids or encourages the actor in the underlying crime may likewise be convicted of felony-murder . . . notwithstanding his lack of intent that death result." 2 LaFave § 13.2(c). Courts in Minnesota, moreover, have concluded that third-degree assault is a felony offense that necessarily involves "a special danger to human life." *See, e.g.*, *State v. Trevino*, No. A14-0252, 2015 WL 1401464, at *8 (Minn. App. Mar. 30, 2015) ("The level of violence present in a third-degree assault -- resulting in substantial bodily harm -- easily meets the danger-to-human-life threshold.").

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Defendants criminally liable for aiding and abetting that crime. That analysis will not be repeated but is fully incorporated as it relates to the probable cause determinations of the State's aiding and abetting unintentional second-degree murder against Thao, Lane, and Kueng.

Each of the next three sections addresses the evidence upon which this Court is making that probable cause determination as to each of these Defendants on the other two elements.

B. The Aiding and Abetting Second-Degree Unintentional Murder Charge Against Lane Is Supported By Probable Cause.

What remains for discussion here is whether the evidence establishes probable cause on the two remaining elements against Lane:

(1) Did Lane know Chauvin was intentionally committing an assault that inflicted substantial bodily harm on Floyd?

(2) Did Lane intended that his presence or actions aided Chauvin's assault of Floyd?

There is sufficient evidence upon which a jury could conclude that Lane knew Chauvin was intentionally committing an assault that inflicted substantial bodily harm on Floyd. Between 8:19:18, when Chauvin, Kueng, and Lane first subdued Floyd prone on Chicago Avenue, each of them kneeling on Floyd as has been described earlier in this Memorandum Opinion, and 8:24:00, Lane heard Floyd complaining that he couldn't breathe a couple dozen times, and heard him say nearly a dozen times that he feared he would die. As he was less than few feet from Chauvin, could look to his left and see Chauvin perched atop Floyd, and could hear Floyd and well as the bystanders, Lane knew that Chauvin's knee was pressed into Floyd's neck. Moreover, for probable cause purposes, the State is entitled to the inference that Lane actually heard Floyd tell Chauvin: "I can't breathe. Please, your knee in my neck." which is

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recorded on the audio of Lane's BWC Video. (Lane BWC Video at 8:21:53-:57.) Likewise, the State is entitled to the inference that Lane also heard Chauvin's dismissive remarks to Floyd and Thao's dismissive remarks to the bystanders responding to Floyd's repeated cries and claims he couldn't breathe along the lines of: "It takes a heck of a lot of oxygen to say things." "You're talking fine." "He's talking, so he's breathing." *See* Factual Background, *supra*. Those facts alone are sufficient to raise a fact question for the jury as to whether Lane had the requisite knowledge that by kneeling on Floyd's neck in the manner in which he was, Chauvin was assaulting Floyd.

There is also sufficient evidence from which a jury could find that Lane knew Chauvin was inflicting substantial bodily harm on Floyd as the minutes and seconds passed by. By 8:24:00, Lane had been in engaged directly with Floyd for fourteen and a half minutes.[39] He knew how vocal and physically active Floyd had been over that period. But, then, by 8:24:00, Floyd had fallen silent and had stopped moving. As time continued ticking by, Lane heard Kueng tell Chauvin that he could not detect a pulse and could hear the increasingly insistent comments coming from the bystanders that Floyd had become non-responsive, was not moving, was not breathing, and repeatedly demanding that the Defendants check his pulse. The woman representing herself as a Minneapolis firefighter even yelled that they should begin CPR if they could not detect a pulse. This is evidence from which a jury could find that Lane knew Chauvin's kneeling on Floyd's neck was inflicting substantial bodily harm. *See Smith*, 901

[39] Recall that Lane had first tapped his flashlight on Floyd's car window at 8:09:28, and had been continually engaged with him since that time except for the approximate two minutes and twenty seconds from 8:11:45 to 8:14:05 when Lane was talking to Floyd's passengers, Shawanda Hill and Morries Hall, while Kueng was talking to Floyd seated on the sidewalk by the Dragon Wok restaurant.

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N.W.2d at 661 (concluding that a defendant may "acquire[] the requisite knowledge while the accomplice is in the process of committing the offense").

Lane's own comments at that time confirmed that he was aware that Chauvin was intentionally and unjustifiably causing substantial bodily harm to Floyd. For instance, as Floyd started to show signs of losing consciousness, Lane asked Chauvin whether they should "roll [Floyd] on his side" because he was "worr[ied] about the excited delirium or whatever." (Lane BWC Video at 8:23:48-8:24:02.) Less than a minute later, Lane remarked that Floyd was "passing out." (*Id*. at 8:24:45-50.) Another minute later, Lane asked again whether the officers should "roll [Floyd] on his side," as bystanders were yelling that Floyd was not resisting or moving. (*Id*. at 8:25:39-:41.) Lane asked Kueng if he was able to detect a pulse; Kueng checked twice, responding in the negative both times. (Kueng BWC Video at 8:25:50-8:26:12.) Even though Lane knew from his training that Floyd was in an inherently dangerous position, that he had ceased talking, had become nonresponsive, that he no longer had a detectable pulse, and that some of the gathering crowd of bystanders were shouting that Floyd was not breathing any longer, Lane persisted with Chauvin and Kueng in keeping Floyd pinning him to the pavement face-down. When emergency personnel arrived to provide medical aid, Lane acknowledged to them that he knew Floyd was "not responsive." (Lane BWC Video at 8:27:36-38.) As Lane later told investigators, by the time the EMTs had arrived he was "concerned" that Floyd was "maybe dead." Lane Exh. 1, at p. 47.

Lane's comments show that he knew Floyd had not been resisting for some minutes, and did not appear to have a pulse. His questions about changing Floyd's body position by rolling him over on his side demonstrate his knowledge from his recent training about the

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inherent dangers of neck restraints used on detainees in a prone position. Lane had solid contemporaneous, real-time evidence that Chauvin's actions in continuing to press his knee into the back of Floyd's neck in fact were harming Floyd. (Lane BWC Video at 8:24:30-8:28:46.) These facts together establish probable cause to believe that Lane knew Chauvin was intentionally inflicting substantially bodily harm on Floyd.

Finally, Lane's training reinforces that he knew Chauvin was applying unlawful force. Lane was a new officer, so his training was recent. Minneapolis police officers are trained to "[p]lace the subject in the recovery position to alleviate positional asphyxia." (Lane Exh. 7, at 21.) They are told that a "neck restraint" is not permissible on a subject who is "passively resisting" or who is not resisting at all. (MPDPPM § 5-311(II)(3).) They are told to check the subject's "airway [and] breathing," and to cease a neck restraint and "start CPR" if the subject stops breathing. (Lane Exh. 7, at 12.) Chauvin and Lane, however, ultimately disregarded all of that training. *See also* Lane Exh. 1, at 37-38 (Lane noting that kneeling on the neck was not a technique he had "seen before" or "been trained in"). The question Lane repeated twice to Chauvin and Kueng – should we roll Floyd onto his side -- shows that Lane remembered his training, from which a jury would be justified in finding he knew Chauvin's actions were unjustified.

Second, the evidence is more than sufficient for a jury to conclude that Lane intended to aid Chauvin in the assault on Floyd. A jury may properly "infer the requisite state of mind for accomplice liability through circumstantial evidence." *McAllister*, 862 N.W.2d at 53. Such circumstantial evidence may include "the defendant's presence at the scene of the crime" or "a

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close association with the principal offender before and after the crime." *Id*. Here, the circumstantial evidence is even stronger.

The Lane, Kueng, Thao BWC Videos and the Darnella Frazier cell-phone video demonstrate that Lane was using his knees and hands to pin down Floyd's legs for the entire nine minutes and twenty seconds that Chauvin had his knee pressing into Floyd's neck. Lane continued to restrain Floyd in conjunction with Chauvin for almost four minutes after he told the other officers that Floyd was "passing out" (Lane BWC Video at 8:24:40-:45), and for two and a half minutes after Kueng told Chauvin and Lane for the second time that he had been unable to detect a pulse. (Id. at 8:26:12.) Indeed, Lane continued to maintain his position even as onlookers pointed out that Floyd was not resisting, moving, or breathing; even as onlookers yelled that Chauvin was responsible for "stopping [Floyd's] breathing" and was going to "kill that man in front of you" (Thao BWC Video at 8:25:08-:10, 8:28:05-13); and even as an ambulance arrived on the scene to provide medical aid to Floyd.[40] (Lane BWC Video at 8:24:24-8:27:32; Lane Exh. 1, at 52 (Lane admitting to investigators he was "[h]olding [Floyd's legs down" the "entire time").) Lane also waved off an off-duty emergency firefighter who sought to provide medical assistance to Floyd, telling her to go "[u]p on the sidewalk." (Lane BWC Video at 8:25:28-:30.) In taking these actions, Lane made "the choice to aid in [the offense's] commission." *Smith*, 901 N.W.2d at 662. At a minimum, his actions enabled Chauvin to

[40] The evidence demonstrates that Lane was paying attention to the bystanders' comments, and that he was taking cues from their reactions. For instance, Lane remarked that Floyd was "passing out" in response to a similar observation from one bystander, and he asked Kueng to check Floyd's pulse based on a request from another bystander. That evidence underscores that Lane heard and credited the bystanders' comments, and that their reactions are relevant in establishing Lane's knowledge and intent during the incident.

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maintain control over Floyd and to continue kneeling on Floyd's neck. A jury could therefore conclude that Lane "intended his presence or actions to further" Chauvin's assault on Floyd. *Milton*, 821 N.W.2d at 808.[41]

That conclusion also follows from Lane's questions to the other officers -- and his subsequent actions -- as Floyd was losing consciousness. As previously noted, Lane twice asked Chauvin and Kueng if they should roll Floyd over onto his side. (Lane BWC Video at 8:23:48-8:24:02, 8:25:39-:41.) Lane not only asked Kueng to check Floyd's pulse (Kueng BWC Video at 8:25:50-8:26:00) but told investigators he "might've" checked for a pulse himself "on [Floyd's] leg." (Lane Exh. 1, at 53.) Those questions demonstrate that Lane knew not only the proper protocol but also the consequences of keeping Floyd pinned face-down to the ground. Nevertheless, Lane ignored all of that, electing every time to stay the course, reapplying pressure to Floyd's legs after hearing his fellow officers/co-Defendants responses. Lane also never began to perform CPR once Floyd stopped moving or breathing before the ambulance arrived with the EMTs. Lane never attempted to move Floyd into a different position on the ground. Equally important is another thing Lane never did:[42] At no time after the ambulance

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[41] Citing *State v. Ulvinen*, 313 N.W.2d 425 (Minn. 1981), Lane asserts that aiding and abetting requires a "high level of activity" by the accomplice. That supposed requirement is not supported by recent case law. *See State v. Bahtuoh*, 840 N.W.2d 804, 812-813 (Minn. 2013) ("presence" in some circumstances may establish aiding-and-abetting liability). In any event, Lane does not argue that *his* level of activity failed to meet that alleged requirement. That is not hardly surprising as pinning a victim down while the principal commits an assault is textbook aiding-and-abetting activity. *See* 2 LaFave § 13.2(a).

[42] Calling to mind the curious incident in the Sherlock Holmes story about the dog that failed to bark when the prize race horse was taken from the stable and led out onto the moor in the middle of the night, thus betraying that it was the dog's master the horse trainer, and not a thief, who had taken the horse out of the stable. *See* Arthur Donan Doyle, **THE COMPLETE**

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arrived and the EMTs set up the stretcher next to Floyd did Lane try to extract himself from the situation or assertively remonstrate with Chauvin to stop pressing his knee on Floyd's neck. Viewing all Lane's actions in the light most favorable to the State, a jury could readily conclude that Lane intended to aid Chauvin in assaulting Floyd.

In summary, on each of the elements of aiding and abetting second-degree murder, the evidence is more than "sufficient to present a fact question for the jury's determination, after viewing the evidence and all resulting inferences in favor of the state." *Slaughter*, 691 N.W.2d at 75. There is therefore probable cause to believe that Lane committed that offense.

Lane's principal argument in his motion to dismiss is that he "did not have knowledge" that Chauvin was committing third-degree assault because "[t]he decision to restrain Floyd was reasonably justified." According to Lane, Floyd was "uncooperative" and "was actively resisting and acting erratic for over 10 minutes." That, Lane contends, gave Chauvin and Lane license to pin Floyd to the ground face-down, even for minutes after Floyd was no longer moving, had stopped breathing, and did not have a pulse. Lane's argument fails for two reasons.

First, it ignores the critical question for the jury: whether the actions of Lane and his co-defendants were reasonably justified for the *entirety* of their interaction with Floyd. *See* Minn. Stat. § 609.06 subd. 1 (authorizing only use of "reasonable force"); *Graham v. Connor*, 490 U.S. 386, 396 (1989) (listing factors relevant to whether force is reasonable); MPDPPM § 5-303 (same). Even were the State to concede that the Defendants were reasonably justified in restraining Floyd in the manner they did when they first pinned him to the ground at 8:19:18,

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SHERLOCK HOLMES, "*Silver Blaze*," at 347, from the *Memoirs of Sherlock Holmes* (Dorset Press 1988).

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that does not grant the Defendants under the law carte blanche to continue the same manner of restraint for more than nine minutes without regard to changing circumstances and conditions as time passed. After all, Lane is guilty of aiding and abetting the third-degree assault – the predicate felony here for the unintentional second-degree murder charge -- so long as he "acquire[d] the requisite knowledge" while Chauvin was "in the process of committing the offense." *Smith*, 901 N.W.2d at 662. Stated otherwise, if three officers continued to restrain Floyd prone on the street, with one of the officers forcibly pressing his knee into Floyd's neck to the ground, adversely impacting the capacities of Floyd's respiratory system in his throat, face, and upper chest after a point at which it became unjustified, and Lane knew as much, he cannot escape criminal liability on this aiding and abetting charge.[43]

The Court has already detailed the evidence upon which the State relies for its contention that the Defendants had no reasonable justification for continuing to apply the same levels of force and the same means of restraint for minutes after Floyd had stopped even passively resisting, stopped talking, stopped moving, and – as it turns out – had stopped breathing and slipped into unconsciousness.[44] The State maintains there was no plausible

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[43] Here, again, it must be stressed that this Court is not making any findings, weighing the evidence, or making credibility determinations. Rather, this Court is applying the probable cause standards that require this Court on the pending motions to dismiss for lack of probable cause to view the facts and evidence in the light most favorable to the State, including drawing all reasonable inferences in the State's favor.

[44] The record before the Court does not establish the time when Floyd actually expired. He was pronounced dead at HCMC at 9:25 p.m. on May 25, 2020, less than an hour after he was loaded into the ambulance outside Cup Foods. Lane's BWC Video records Lane traveling in the ambulance with the EMTs and Floyd for more than ten minutes, during which CPR and other efforts to try to resuscitate Floyd were undertaken. There is no indication those efforts succeeded in restarting Floyd's heart. Lane himself noted that Floyd appeared to be passed out at 8:24:45; some of the bystanders were telling the Defendants between 8:24:00 and 8:25:00

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justification for the Defendants to have continued restraining Floyd after he'd gone silent and motionless (8:24:00), yet Lane, Chauvin, and Kueng continued to do so for another four minutes and forty seconds. Viewing the evidence in the light most favorable to the State, probable cause exists for this aiding-and-abetting charge even if the Defendants' initial decision five minutes earlier to restrain Floyd in the manner they chose was justified as reasonable force to effect an arrest.

Second, and in any event, the jury could find that the officers' actions were not reasonably justified even at the initial moment they restrained Floyd face-down on the ground. The State's rationale and evidence for this was discussed in Part IV.B, *supra*, at pp. 72-73.

Lane's other arguments for dismissing the second-degree murder charge fare no better. Lane contends that he relied on the experience of Chauvin, a 20-year MPD veteran, who told Lane, on only his fourth day on the job on May 25, to "hold Floyd where he was." But, there is no free pass under state law for rookies who choose to disregard their training at the suggestion of a senior officer. MPD policy itself compelled Lane to do what was right: "It shall be the duty of every sworn employee present at any scene where physical force is being applied to either stop or attempt to stop another sworn employee when force is being inappropriately applied or is no longer required." MPDPPM § 5-303.01(B). As for Lane, even if May 25 was only his fourth day on the regular force after completion of his field training, he had extensive training prior to Floyd's death: he had been hired 15 months earlier and had

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that Floyd appeared non-responsive and may not have been breathing; and Kueng had been unable to detect any pulse as early as 8:25:55. Lane ventured an uncertain personal opinion that he didn't think Floyd was already dead at the time by the time the EMTs arrived on the scene and one tried to check Floyd for a pulse. (Lane Exh. 1, at p. 43)

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spent about five months receiving skills training at a technical college, four months in the Minneapolis Police Academy, and four and a half months in field training with other officers. (*See* Lane Exh. 1, at pp. 5-6.) Lane's questions to Chauvin signaled that he knew Chauvin had disregarded the training officers received on the proper use of force; it wasn't that he didn't know, it is that he failed to act appropriately on what he in fact knew from his training. In light of Lane's training and Chauvin's manifest disregard for Floyd's condition, viewed in the light most favorable to the State, this evidence establishes probable cause, reserving for the jury at trial the ultimate determination whether it was "reasonable for Lane to believe Chauvin and follow his direction," rather than acting in accordance with his own training and knowledge. *Slaughter*, 691 N.W.2d at 75.

Although Lane also speculates that "[i]t would have been total chaos" if he had decided not to follow Chauvin's instructions, he points to nothing in the record supporting that bare assertion. Lane could have disagreed with Chauvin's instructions -- either at the time they were given, or after Lane learned that Kueng was unable to find a pulse -- and demanded that the officers turn Floyd on his side or use a Hobble restraint. He could have tried to perform CPR once he realized that Floyd was nonresponsive. There is no reason to believe such responses would have created any more "chaos" than the Defendants' actions did.

In any event, under Minnesota law, this consideration is largely irrelevant in determining if Lane is criminally liable as an accomplice. By statute, Lane can escape aiding-and-abetting liability only if he "abandon[ed]" the crime "and ma[de] a reasonable effort to prevent the commission of the crime prior to its commission." Minn. Stat. § 609.05 subd. 3. Lane does not contend here that he "abandon[ed]" the crime or made a "reasonable effort" to

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prevent it before it happened, and the evidence from the BWC videos makes clear he did not. Indeed, rather than "abandon[ing]" the crime or "prevent[ing] . . . its commission," Lane furthered it by continuing to hold down Floyd's legs while Chauvin continued pressing his knee into Floyd's neck.

Finally, Lane contends that "the force used by Chauvin by kneeling was not substantial" because "there were no physical findings of asphyxia." That contention misses the mark in that Minnesota law regarding third-degree assault does not require "the force used" to be "substantial"; it requires the "bodily harm" to be "substantial." Minn. Stat. § 609.223 subd. 1; CRIMJIG 13.16. No one is contesting that Floyd suffered "substantial bodily harm." *See Larkin*, 620 N.W.2d at 337 (even temporary loss of consciousness is "substantial"). Lane's contention also misconstrues the record before this Court. It appears two autopsy reports commissioned by the Floyd family concluded that the cause of Floyd's death was asphyxia due to the neck compression applied by Chauvin (Chauvin Exh. 6, p.3); the HCME autopsy report concluded that Floyd's death was caused by "law enforcement subdual, restraint, and neck compression"; and the independent consult by the Armed Forces Medical Examiner resulted in a report in which that office endorsed the autopsy findings and death certification by the HCME and also noted that the "subdual and restraint had elements of positional and mechanical asphyxiation." That is strong evidence of "substantial bodily harm." Chauvin may, of course, contest those findings and, if he chooses, present his own expert testimony at trial. However, for present purposes, the task of weighing this evidence in light of the testing by the adversarial process and the parties' arguments regarding the weight to be given to any evidence is for the jury at trial, not this Court on the pending probable cause motions. *See Barker*, 888 N.W.2d at 353.

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At best, then, viewed in their totality, Lane's arguments and the other evidence he points to raise fact questions for the jury. Because it does not warrant dismissal under the probable cause standards, Lane's motion to dismiss this charge is denied.

C. The Aiding and Abetting Second-Degree Unintentional Murder Charge Against Kueng Is Supported By Probable Cause.

What remains for discussion here is whether the evidence establishes probable cause for on the two remaining elements against Kueng:

(1) Did Kueng know Chauvin was intentionally committing an assault that inflicted substantial bodily harm on Floyd?

(2) Did Kueng intended that his presence or actions aided Chauvin's assault of Floyd?

Kueng was kneeling on Floyd's back, a couple feet away from Lane, who was to his right, holding down Floyd's legs, and a couple feet away from Chauvin, who was to his left, kneeling on Floyd's neck. Viewing the evidence in the light most favorable to the State, and drawing all reasonable inferences from that evidence in favor of the State, all the evidence presented as to Chauvin's actions earlier in this Opinion as well as the evidence laid out In Part V.B as to Lane suffice to establish probable cause that Kueng knew Chauvin was intentionally inflicting substantial bodily harm on Floyd. Kueng, for example, heard Lane asking Chauvin twice if they should roll Floyd over; he not only heard Chauvin's negative responses to Lane but joined in. (Kueng BWC Video at 8:23:47.) Kueng heard Lane's comment that Floyd was passing out, as the comments came from the bystanders that Floyd was no longer responsive and was not moving. As the bystanders' complaints increased in their urgency and volume, including observations that Floyd was no longer breathing, Lane asked Kueng to check Floyd for a pulse. Kueng checked twice in the space of half a minute, but was unable to detect a pulse. (Kueng

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BWC Video, 8:25:45-8:26:12.) Even knowing that the manner of their restraint and, in particular, Chauvin's kneeling on Floyd's neck, placed Floyd in an inherently dangerous position, and even after not being able to detect a pulse, Kueng continued as he had been doing, rather than demanding Chauvin stop kneeling on Floyd's neck, taking any action to roll Floyd over onto his side into the recovery position, or to start performing CPR.

Like Lane, Kueng had also just recently completed his training at the Minneapolis Police Academy and his Field Officer Training. As detailed in Part V.B with respect to Lane, Kueng's MPD training also supports the conclusion that he knew Chauvin was applying unlawful and unjustifiable force to Floyd.

All the evidence presented as to Chauvin's actions earlier in this Opinion as well as the evidence laid out In Part V.B as to Lane also suffice to establish probable cause that Kueng intended his presence and actions to aid Chauvin in his assault on Floyd. For almost four minutes after Lane commented that he thought Floyd had passed out and for about two and a half minutes after Kueng himself had been unable to detect a pulse on Floyd, Kueng continued to maintain his position, holding down Floyd's back and midsection. Those actions demonstrate the choice Kueng made "to aid in [the offense's] commission." *Smith*, 901 N.W.2d at 662. And, Kueng's maintaining his position rather than assertively persuading Chauvin and Lane to stop what they had been doing in the wake of Floyd's non-responsiveness and total lack of any resistance whatsoever and seek to revive him certainly assisted Chauvin in his unswerving commitment to keep kneeling on Floyd's throat until the ambulance arrived. Like Lane, Kueng could have elected to walk away if more aggressive actions to dissuade Chauvin from continuing to restrain Floyd as they had been doing proved unavailing, but he chose not

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to do so. That evidence is a sufficient basis to proceed to trial, as a jury could reasonable conclude that such actions by Kueng met the statutory aiding and abetting criteria of intentionally aiding, advising, counseling or conspiring with Chauvin in the assault of Floyd. Minn. Stat. §609.05 subd. 1; *State v. Ostrem*, 535 N.W.2d 916, 935 (Minn. 1995).

Kueng's response, like Lane's, that he cannot be charged with aiding Chauvin's assault of Floyd because Chauvin had been justified in using force against Floyd given Floyd's earlier acts of resistance fails for the same reasons. *See* Part V.B. The State does not have to show that Kueng knew in advance that Chauvin intended to assault Floyd; it is sufficient if at some point at the scene, he became aware that the actions constituted an ongoing assault because, even if initially justified by Floyd's resistance, they had ceased being justified as the minutes keep ticking by and Chauvin continued as he had long after Floyd had stopped resisting, talking, moving, and it Kueng surely must have realized, stopped breathing. It also is no answer for Kueng to point to Chauvin's responses to Lane's questions about whether they should roll Floy onto his side as indicating that Chauvin did not consider his use of force [to be] unreasonable." Kueng knew or should have known from his training that a jury could readily infer that Chauvin knew he was deviating from the conduct demanded of reasonable officers. And, whatever Chauvin's subjective belief, the question whether the force being used is reasonable is an objective, not subjective, test, assessed by reference to "a reasonable peace officer in the same situation." CRIMJIG 7.12; *Graham v. Connor*, 490 U.S. 386, 397 (1989). What matters is whether his actions were objectively unreasonable, and that will ultimately be a question for the jury.

Kueng's reliance on *Lombardo v. City of St. Louis*, 956 F.3d 1009 (8th Cir. 2020), is

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misplaced due to the factual differences between *Lombardo* and here. The Eighth Circuit in *Lombardo* deemed it critical that the "Officers held [the arrestee] in the prone position only until he stopped actively fighting against his restraints and the Officers. Once he stopped resisting, the Officers rolled [him] out of the prone position." 956 F.3d at 1014. The Eighth Circuit determined that the officers did not apply constitutionally excessive force because they "could have reasonably interpreted [the arrestee's] conduct as ongoing resistance" for the duration of the time they restrained him in the prone position. *Id.* Here, by contrast, Chauvin, Kueng, and Lane did the opposite, continuing to restrain Floyd for four minutes and forty seconds after Floyd fell silent and stopped moving and had long since stopped offering any meaningful resistance.

Kueng's remaining challenge is based on his contention – like Chauvin's – that Floyd did not die of asphyxiation.[45] While Kueng like Chauvin is able to present expert testimony on that issue at trial and to challenge the State's experts, the germane point here is that the issue of causation is an issue for trial, based on the evidence the State has come forward with.

D. The Aiding and Abetting Second-Degree Unintentional Murder Charge Against Thao Is Supported By Probable Cause.

What remains for discussion here is whether the evidence establishes probable cause on the two remaining elements against Thao:

(1) Did Thao know Chauvin was intentionally committing an assault that inflicted substantial bodily harm on Floyd?

[45] As pointed out earlier, the State need only establish at this stage of the proceedings probable cause to believe that the bodily harm to Floyd was substantial and was a substantial causal factor in Floyd's death. Minn. Stat. § 609.223 subd. 1; CRIMJIG 11.29, 13.16; *Larkin*, 620 N.W.2d at 337 (even temporary loss of consciousness is "substantial").

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(2) Did Thao intended that his presence or actions aided Chauvin's assault of Floyd?

The Court incorporates here all the evidence previously discussed in Part IIs, V.B, and V.C regarding the evidence as to Chauvin, Lane, and Kueng. Thao is in a somewhat different position than Lane and Kueng because at no point was he involved in the efforts physically to restrain Floyd. Rather, his role was primarily to maintain watch over the growing crowd of bystanders, to act – to use Thao's own phrasing – as a human body cone, interposing himself between Chauvin, Lane , and Kueng in their positions kneeling on top of Floyd while he was in a prone position on Chicago Avenue and the growingly restive and increasingly assertive crowd of bystanders during the nine minutes and forty seconds the other three Defendants were restraining Floyd as it became increasingly obvious that he had long ceased offering any resistance but also had become so unresponsive that the crowd kept shouting at the other Defendants that Floyd appeared no longer to be breathing and that they were killing him.

For almost six minutes after Chauvin, Kueng, and Lane had subdued Floyd, and restrained him prone on the street, Thao was standing far enough back in the street that he could see everything that Chauvin (as well as Lane and Kueng) were doing in restraining Floyd. Although Thao did move forward toward the curb at Chicago to position his body between his fellow officers kneeling on Floyd and the crowd of bystanders at about 8:25:15 (just prior to the arrival of the off-duty Minneapolis firefighter), he remained only two of three feet from where Chauvin was kneeling and can be seen occasionally turning his head from the crowd assembled

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on Chicago Avenue to look at Floyd, Chauvin, and the others. (Darnella Frazier cell-phone video at 7:10-:12;[46] Thao BWC Video at 2:26:40.)

In reality, Thao hardly needed to turn around and "watch for himself": he was getting a second-by-second "play-by-play" from the assembled bystanders, and was close enough to Floyd and the others that he could hear everything that was being said. For example, the bystanders demanded that Thao look at Chauvin and Floyd at 8:24:18 (Thao BWC Video), yelled that Chauvin was "stopping [Floyd's] breathing," and that Floyd was about to "pass out" (*id*. at 8:24:40-8:25:10), and, after Floyd had stopped talking and moving, they pointed out that "he's [Floyd] not saying shit now," "he's not resisting arrest or nothing," and "[Chauvin is] stopping [Floyd's] breathing right now." (*Id*. at 28:24:19-20:24:46.) One of the bystanders pleaded with Thao directly, asking if he was "just gonna let [Chauvin] choke [Floyd] like that," if he was "gonna let [Chauvin] sit there with" his knee on Floyd's neck, and whether he was "gonna let [Chauvin] kill that man in front of you." They screamed at Thao that Floyd was dying and urged Thao what appears to be dozens of times – the State contends no fewer than thirty times, although the Court has not counted them for purposes of this Memorandum Opinion -- to check Floyd's pulse. (*See, e.g.*, id. at 8:25:17, 8:25:51, 8:25:55, 8:26:03, 8:27:11-:36, 8:28:05-:30.) A jury could conclude, on the basis of this evidence, that Thao knew that Chauvin was

[46] Unlike the Lane, Kueng, and Thao BWC Videos which record actual time, albeit in "military" time, the Frazier cell-phone video does not reflect "clock" time but simply the length of the recording. It would be possible to ascribe the precise time at which the events recorded on the Frazier cell-phone are occurring by reference to the officers' BWC videos, but the parties have not done so for purposes of the present record. Thus, the times noted form the Frazier cell-phone video reflect running time since she started the recording.

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intentionally inflicting substantial bodily harm on Floyd by continuing to kneel on his neck even after Floyd had lapsed into silence for minutes and had long since ceased moving.

As with the other officers, Thao also knew from his training – or, at a minimum, a jury could reasonably conclude that he should reasonably have known – that Chauvin's continuing to kneel on Floyd's neck for minutes after he had ceased talking, moving, or breathing and knowing that Kueng had not been able to detect a pulse was contrary to MPD policy and could not be considered the justifiable use of reasonable force. Although Thao had been on the force for years, he acknowledged in his BCA interview that he had repeatedly been trained how to use neck restraints (Thao BCA Interview at 7:10-:20) and his comment when the four officers were considering whether to use a Hobble restraint on Floyd that if they applied a Hobble "a Sergeant's going to have to come over" (Thao BWC at 8:20:32-:39) demonstrates his level of knowledge and familiarity with the MPD rules governing the use of force. Thao was fully aware from his own direct personal observations, as well as what he could hear from Floyd, Chauvin, Lane, and Kueng and the gathering crowd of bystanders, that Chauvin had continued kneeling on Floyd's neck for a substantial period of time after Floyd had ceased resisting, stopped talking, stopped moving, and had even stopped breathing. That suffices to present a fact issue for the jury at trial whether Thao knew that Chauvin was intentionally inflicting substantial bodily harm on Floyd.

The State's evidence also suffices to present an issue for the jury's determination regarding Thao's intent by his presence or actions to aid Chauvin's assault of Floyd. A jury is permitted to infer state of mind or intent through circumstantial evidence for purposes of accomplice liability. *McAllister*, 862 N.W.2d at 53. Thao had early on suggested that Floyd be

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"hogtied." (Thao BWC Video at 8:18:48-:53.) Thao had also located Lane's Hobble device in the first minute after the other three had pinned Floyd to the street (id. at 8:20:25) and engaged in discussion with the other three whether to Hobble Floyd before deciding to wait for the EMS to arrive since, in Thao's words, if "we Hobble, a Sergeant's going to have to come over." (*Id*. at 8:20:30-:40.) A jury might reasonably conclude from this that Thao was more concerned about avoiding paperwork and administrative work than he was about Floyd's safety by virtue of the dangers Floyd faced from the manner in which Chauvin knelt on his neck. The jury could view such evidence as Thao providing aid, advice and counsel to Chauvin as well as conspiring with him in the assault on Floyd. Thao's actions as a "human body cone" preventing any of the bystanders from coming into the street and forcing them back onto the sidewalk as soon as any of them stepped into the street closer certainly enabled Chauvin, Kueng, and Lane to maintain their positions atop and restraint of Floyd. Thao also took the lead role in rebuffing the off-duty Minneapolis firefighter who arrived on the scene at 8:25:28, and asked to be allowed to provide medical assistance to Floyd, telling her to "back off" and to get off the street and onto the sidewalk. (*Id*. at 8:25:36.) Thao's actions in keeping the bystanders on the sidewalk and preventing any of them from intervening to come to Floyd's aid further aided Chauvin in continuing the assault on Floyd.

It does not matter that, unlike the other three Defendants, Thao himself never physically touched Floyd. Active participation in the overt act that constitutes the substantive offense – here, the assault – is not a requirement for aiding and abetting liability. *Ostrem*, 535 N.W.2d at 924. Indeed, the law is that "the 'lookout'" -- someone who stands watch nearby and does not make direct contact with the victim, but who seeks to prevent others from

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interfering with the crime -- "is a classic example" of an "aider and abettor." *State v. Parker*, 164 N.W.2d 633, 641 (Minn. 1969). Because Thao's actions enabled Chauvin, Kueng, and Lane to maintain their restraint of Floyd prone on the street, with Chauvin's knee continually pressed firmly into Floyd's neck, a jury could reasonably conclude that Thao intended his presence and his actions to aid and assist Chauvin in his assault on Floyd. That suffices for probable cause purposes.

Thao's primary counter arguments mirror those of the other officers regarding the justifiable use of reasonable force in effecting a lawful arrest of a resisting suspect. The discussion of this from earlier portions of this Memorandum Opinion dealing with probable cause for the unintentional second-degree murder charge against Chauvin and the aiding and abetting unintentional second-degree murder charges against Lane and Kueng are incorporated by reference here as they apply equally to Thao.

VI. PROBABLE CAUSE EXISTS TO BELIEVE THAT LANE, KUENG, AND THAO ARE GUILTY OF AIDING AND ABETTING SECOND-DEGREE MANSLAUGHTER.

A. Standards Governing Aiding and Abetting Second-Degree Manslaughter and Elements of the Crime

Lane, Thao, and Kueng are all also charged with the crime of aiding and abetting Chauvin's crime of second-degree manslaughter. *See In re Welfare of S.W.T.*, 277 N.W.2d 507, 514 (Minn. 1979) ("[A] person may be criminally liable for aiding . . . manslaughter.").

The statutory language of second-degree manslaughter as well as the required elements of that crime are set out in Part IV of this Memorandum Opinion. The statute governing aiding-and-abetting liability and the elements of aiding and abetting are set out in Part V.A of this Memorandum Opinion.

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Under Minnesota law, to prove Lane, Thao, and Kueng guilty of aiding and abetting second-degree manslaughter by Chauvin, the State must prove at trial the following elements:

> (1) that Chauvin caused Floyd's death by culpable negligence, whereby he created an unreasonable risk and consciously took a chance of causing death or great bodily harm;
>
> (2) [Thao] [Lane] [Kueng] knew Chauvin by his culpable negligence, created an unreasonable risk and consciously took a chance of causing death or great bodily harm; and
>
> (3) [Thao] [Lane] [Kueng] intended that his presence or actions aided Chauvin's commission of that crime.

CRIMJIGs 4.01, 11.56.

The basis for finding probable cause regarding Chauvin's conduct as a substantial causal factor in Floyd's death from Part II applies here as well, as that element is the same here as for the unintentional second-degree murder charge.

As for Chauvin's caused Floyd's death, the discussion from the second element, in Part IV the Court laid out the analysis upon which the Court has concluded that probable cause exists for the second-degree manslaughter charge against Chauvin, which is a necessary predicate for holding each of these other three Defendants criminally liable for aiding and abetting that crime. That analysis will not be repeated but is fully incorporated as it relates to the probable cause determinations of the State's aiding and abetting unintentional second-degree manslaughter against Thao, Lane, and Kueng.

Each of the next three sections addresses the evidence upon which this Court is making the probable cause determination as to each of these Defendants on the two remaining elements.

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B. The Aiding-and-Abetting Second-Degree Manslaughter Charge Against Lane Is Supported By Probable Cause.

The evidence, viewed in the light most favorable to the State, with all reasonable inferences also drawn in favor of the State, suffices to establish probable cause that Lane aided and abetted second-degree manslaughter and warrants submission of this charge to the jury at trial.

Lane knew that Chauvin's conduct was a "gross deviation from the standard of care that a reasonable" officer would observe in that situation. *McCormick*, 835 N.W.2d at 507. Lane's comments to Chauvin and the other officers as well as all the things he could see and hear, as shown by his, Kueng's, and Thao's BWC videos, demonstrate Lane's knowledge that Floyd had ceased any meaningful resistance soon after he'd been restrained on the street; his knowledge that Floyd's speech and minor bodily movements were diminishing in the first few minutes of that restraint; his knowledge that Floyd had altogether ceased talking and moving after a couple more minutes; his own recognition that Floyd appeared to have passed out shortly after he'd stopped talking and moving; the knowledge that Kueng had twice checked Floyd for a pulse but had been unable to detect one. Yet, none of that growing recognition that there was no justification for continuing the restraints and, in particular, for Chauvin to continue pressing his knee into the back of Floyd's neck caused any meaningful substantive changes in Lane's actions; instead, Lane continued doing what he had been doing, and acquiescing in Chauvin's continuing forcefully to assert pressure against the back of Floyd's neck for several minutes, knowing that Chauvin's actions violated the use-of-force protocol Lane had learned during his MPD police training.

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Lane knew that Chauvin was consciously disregarding the risk of death created by his conduct. Lane could hear and well knew that Chauvin, only four or five feet away from Lane and even closer to the bystanders gathering on Chicago next to the back of their squad, could hear the plaintive pleas of bystanders to the four Defendants that Floyd was not moving, had become totally nonresponsive, and even appeared to have stopped breathing. Lane knew Chauvin could hear Lane's statement that Floyd was "passing out," Kueng's statements that he could not find Floyd's pulse, and Lane's statement that Floyd was "not responsive right now." (Lane & Kueng BWC Videos at 8:24:45-:48, 8:25:49-8:26:12, 8:27:34-:38.)

So, for the same reasons Lane intentionally aided in the commission of second-degree unintentional murder by Chauvin, Lane also intentionally aided in the commission of second-degree manslaughter by Chauvin.

Lane contends that the "circumstantial evidence proves Lane's innocence, his lack of knowledge, and no criminal intent." Most of the "facts" Lane points to:

- that he received training by the MPD
- that he had been on the job for only four days as of May 25[47]
- that he had offered to roll down the windows in the squad or turn on the A/C in their squad car to meet Floyd's resistance to getting into the back seat of the squad
- that Floyd requested to be moved to the ground
- that Lane's statement to the Sergeant at the scene was generally consistent with what can be observed on the BWC videos

[47] While Lane may only have been in his fourth day after his completion of field officer training, that is misleading, because it ignores the facts that he had been hired more than a year earlier, had been in the police academy for four months, and had been working on the streets of Minneapolis with another officer in "field training" for over four months.

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- that Lane voluntarily agreed to sit for an interview by the BCA

have little or nothing to do with whether Lane's actions violated the law. And a jury could reasonably infer from several of the other listed facts Lane lists – most notably the that "Lane questioned Chauvin twice about rolling Floyd on to his side" but also that "Lane went in the ambulance and started CPR on Floyd"— that Lane was acutely aware that Chauvin's actions had created an unreasonable risk of death. In any event, Lane's cherry-picked "facts" ignore the force of the other evidence the State has pointed to in the record presently before this Court, much of which has been detailed earlier in this Memorandum Opinion and upon which this Court has concluded that probable cause exists for the aiding and abetting second-degree manslaughter charge.

The answer to Lane's pointing out that he "did not know what Chauvin was thinking while restraining Floyd" is that such knowledge has never been a prerequisite to aiding-and-abetting liability because any person's actual state of mind is rarely determined based on direct statements by the subject but has to be assessed from circumstantial evidence and common sense evaluations the totality of circumstances in any given situation. Here, the State's obligation is to show that Lane knew Chauvin grossly deviated from the standard of care a reasonable person in Chauvin's situation would have observed, and that Lane knew Chauvin consciously disregarded the risk of death created by his conduct. Lane did not need to "know what Chauvin was thinking" to know that Chauvin was consciously disregarding the risk of death. That conscious disregard was evident from Chauvin's "words" and "acts" during the incident. *McCormick*, 835 N.W.2d at 507. Lane knew that Chauvin ignored the repeated cries of bystanders, as well as his own comments that Floyd appeared to have passed out, and

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suggestions about rolling Floyd over onto his side, as well as Kueng's reporting to both Chauvin and Lane that he had been unable to detect a pulse from Floyd. Lane heard Chauvin's dismissive comments, responding to Floyd's repeated complaints that he couldn't breathe, to the effect that "you're doing a lot of talking," "you're talking fine," and "[i]t takes a heck of a lot of oxygen to talk" (e.g., Lane BWC Video at 8:20:21, 8:21:35, 8:22:41-:49) but knew that Chauvin never reacted by taking his knee off Floyd's neck or starting CPR after Floyd had stopped talking, which a jury might reasonably find was a telling clue that Floyd had not been making things up but actually was experiencing difficulty breathing, but instead continued on as if nothing had changed from 8:19:20 when Chauvin, Kueng, and Lane had first restrained Floyd prone on the street.

For the same reasons detailed in Part V.B with respect to aiding and abetting the unintentional second-degree murder charge, Lane's conduct a jury could find that Lane intended his actions and presence to aid Chauvin in the commission of this crime.

C. The Aiding-and-Abetting Second-Degree Manslaughter Charge Against Kueng Is Supported By Probable Cause.

Because Kueng was kneeling of Floyd's back only a couple feet away from Lane kneeling on and holding Floyd's legs, a jury could reasonably conclude that Kueng knew all the same things Lane knew, as summarized in Part VI.A. The evidence, viewed in the light most favorable to the State, with all reasonable inferences also drawn in favor of the State, suffices to establish probable cause that Kueng aided and abetted second-degree manslaughter and warrants submission of this charge to the jury at trial.

Kueng contends that Chauvin's conduct was not objectively negligent or subjectively reckless because "Chauvin was faced with a scene where he had a suspect [who] had not

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complied" and who "continued to not comply after being handcuffed." Although Floyd had offered resistance initially when Lane had asked Floyd to step out of his vehicle and Lane and Kueng were handcuffing Floyd, Kueng knew that Floyd had calmed down and become compliant when Kueng had deescalated and had Floyd sit on the sidewalk next to the Dragon Wok restaurant for a couple minutes. Again, while it is true that Floyd resisted Lane and Kueng's efforts to force him into the back seat of their squad, which was further exacerbated after Chauvin joined those efforts for about a minute between 8:18:00 and 8:19:00, it is highly misleading to insinuate that the situation as it existed at 8:19:15 remained the same more than nine minutes later at 8:28:42, when Chauvin finally stood up, taking his knee off the back of Floyd's neck.

Even assuming for present purposes that Chauvin, Kueng, and Lane were justified in acting to restrain as they did at 8:19:18 based on Floyd's then extant actions and resistance[48] that would not justify Chauvin's actions – or Kueng's and Lane's -- for the entirety of the following nine minutes and twenty seconds. As has been noted, many things changed between 8:19:18 and 8:28:42:

- Floyd's complaints and the vigor of his efforts to lift his right shoulder off the street, and to try to lift his head or change the position of his face, which Chauvin's knee had pressed firmly against the concrete street, diminished over the course of the next few minutes. That ought to have been a clue that Floyd might have been accurately reporting his difficulties breathing.
- Between 8:23:00 and 8:24:00, the frequency of Floyd's words and the volume of his voice was diminishing.

[48] As discussed earlier in this Memorandum Opinion, the State may in fact offer evidence at trial that the manner in which Chauvin, Kueng, and Lane sought to restrain Floyd, with Chauvin's knee pressed firmly into the back of his neck, was not warranted and did not constitute reasonable force even from the very onset.

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- At 8:23:49, Lane asked Chauvin and Kueng if they should roll Floyd on his side
- After 8:24:00, Floyd spoke no more. And his movements ceased.
- At about 8:24:45, Lane announced that he thought Floyd was passed out.
- After about 8:25:15, it appears from the BWC videos that Floyd may no longer have been breathing.
- At about 8:25:38, Lane again inquires if they should roll Floyd on his side.
- Between roughly 8:25:45 and 8:26:12, Kueng twice attempted to check Floyd for a pulse, reporting to Chauvin and Lane that he had been unable to detect one.

Despite these rapidly evolving and changing circumstances in Floyd, Chauvin, Kueng, and Lane did not react by doing anything differently. Chauvin kept pressing his knee forcefully into the back of Floyd's neck, and the jury might reasonably assess from the BWC videos that he kept applying roughly the same amount of pressure throughout, until he finally stood up and got off Floyd's neck at 8:28:42 when the EMTs had the stretcher set up and ready to receive Floyd. Although Kueng and Lane may have relaxed the pressure of their holds over this period – after all, Floyd had ceased to move halfway through, and it no longer required any effort to keep his midsection and legs stationary – they also remained in their same positions, and took no affirmative, assertive actions to persuade Chauvin to terminate the neck restraint, to roll Floyd onto his side in what they knew from their training was the recovery position, to begin administering CPR to Floyd or at the very minimum to walk away and stop associating themselves with Chauvin's conduct.

The State has, in this Court's view, presented evidence upon which a jury might reasonably find that Chauvin grossly deviated from the standard of care a reasonable officer would observe, and consciously disregarded the risk of death to Floyd. Because a jury might also reasonably conclude that Kueng knew or, in any event, should have known from an

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objective standpoint, that and that his presence at the scene and his own actions allowed Chauvin to continue, there is probable cause to believe that Kueng aided and abetted second-degree manslaughter.

D. The Aiding-and-Abetting Second-Degree Manslaughter Charge Against Thao Is Supported By Probable Cause.

Finally, the evidence, viewed in the light most favorable to the State, with all reasonable inferences also drawn in favor of the State, also suffices to establish probable cause to believe that Thao aided and abetted second-degree manslaughter and warrants submission of this charge to the jury at trial. The Court incorporates here by reference all the evidence summarized in Parts V.D, VI.A, and VI.B which also support the probable cause determination for this aiding and abetting charge against Thao.

PAC