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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Case Type: Criminal

State of Minnesota,

Plaintiff,

STATE'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR JOINDER

vs.

State v. Derek Michael Chauvin,	Court File No. 27-CR-20-12646
State v. J Alexander Kueng,	Court File No. 27-CR-20-12953
State v. Thomas Kiernan Lane,	Court File No. 27-CR-20-12951
State of Minnesota v. Tou Thao,	Court File No. 27-CR-20-12949

Defendants.

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

INTRODUCTION

The State moves to join the cases against Defendants Derek Chauvin, J. Alexander Kueng, Thomas Lane, and Tou Thao, who have all been charged in connection with the death of George Floyd on May 25, 2020 in Minneapolis. Defendant Chauvin is charged with: (i) second-degree murder, in violation of Minn. Stat. § 609.19, subd. 2(1); (ii) third-degree murder, in violation of Minn. Stat. § 609.195(a); and (iii) second-degree manslaughter, in violation of Minn. Stat. § 609.205(1). Defendants Kueng, Lane, and Thao are each charged with: (i) aiding and abetting second-degree murder, in violation of Minn. Stat. § 609.19, subd. 2(1) and § 609.05,

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subd. 1; and (ii) aiding and abetting second-degree manslaughter, in violation of Minn. Stat. § 609.205(1) and § 609.05, subd. 1.

All four Defendants should be joined for trial. In evaluating a motion for joinder, courts must consider four factors: (i) "the nature of the offense charged"; (ii) "the impact on the victim" and other witnesses; (iii) "the potential prejudice to the defendant"; and (iv) "the interests of justice." Minn. R. Crim. P. 17.03, subd. 2. All four factors strongly support joinder here:

- The charges and evidence against all four Defendants are similar.
- Eyewitnesses and family members are likely to be traumatized by multiple trials.
- Defendants will not be prejudiced by joinder because their defenses are not antagonistic.
- The interests of justice favor joinder because separate trials would cause delay and burden the State, the Court, and witnesses, and publicity related to the jury's verdict may run the risk of prejudicing the jury pool in subsequent trials.

This Court should grant the motion and jointly try Defendants Chauvin, Kueng, Lane and Thao.

STATEMENT OF FACTS

A. At approximately 8:08 p.m. on May 25, 2020, Defendants J. Alexander Kueng and Thomas Lane—both police officers at the time—responded to a report that an individual had used a counterfeit bill at Cup Foods on the corner of 38th Street and Chicago Avenue in Minneapolis. When Kueng and Lane entered the store, the manager of Cup Foods showed them a $20 bill that he believed was counterfeit. He stated that the man who had passed the $20 bill was sitting in a blue vehicle across the street. (Kueng & Lane, Body Worn Camera ("BWC") at

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20:08:47-20:09:06.) Kueng and Lane did not inspect the bill. *See* Exhibit 4, at 41:15.[1] Instead, they immediately approached the vehicle. (Kueng & Lane, BWC at 20:09:06-28.)

George Floyd was sitting in the vehicle's driver's seat. When Lane approached the driver's side of the car, Floyd was speaking to the two other passengers in the car. Floyd was startled when Lane tapped on the window. (Lane, BWC at 20:09:28-32.) He cracked the door open and apologized. Lane instructed Floyd to show his hands. (Lane, BWC at 20:09:32-40.) Seconds later, Lane pulled his firearm on Floyd, pointed it at Floyd, and yelled at him to "put your fucking hands up right now." (Lane, BWC at 20:09:41-44.) Visibly shaken, Floyd asked Lane what he had done wrong, put his hands up, and placed them on the wheel, complying with Lane's instructions. Instead of answering Floyd's question, Lane continued to curse at Floyd, telling him to "keep your fucking hands on the wheel." (Lane, BWC at 20:09:45-58.) Floyd immediately complied. Lane instructed Floyd to put his hands on his head, and Floyd again complied. Lane then lowered his gun. (Lane, BWC at 20:10:17-22.)

Floyd, clearly upset, repeated at least five times that he was "sorry." (Lane, BWC at 20:09:36-20:10:04.) He also repeated at least five times that he had been shot before, and even told Lane that he had been shot "the same way." (Lane, BWC at 20:09:50-20:10:09.) Sobbing, he pleaded: "Mr. Officer, please don't shoot me." (Lane, BWC at 20:10:35-37.) Over the next 30 seconds, he begged Lane not to shoot him four more times, and he repeated the word "please" nearly a dozen times. As he pleaded for his life, he also explained to Lane that "I just lost my mom." (Lane, BWC at 20:10:35-20:11:02.)

[1] The exhibits supporting this memorandum are attached to the Affidavit of Matthew Frank, submitted herewith. The BWC videos will be referenced by name, the others by exhibit number.

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Lane told Floyd to step out of the car, while Kueng told the other two passengers in the vehicle to do the same. Kueng then came around to the driver's side, and Kueng and Lane handcuffed Floyd. (Kueng, BWC at 20:11:10-49.) Kueng walked Floyd to the sidewalk and told him to sit down on the ground. Floyd did so, immediately becoming calmer and saying "thank you" to Kueng three times. (Kueng, BWC at 20:11:49-20:12:15.) While Floyd was seated on the sidewalk, Lane interviewed the other two passengers. (Lane, BWC at 20:12:14-20:14:02; Kueng, BWC at 20:12:14-20:13:54.) One of the passengers explained to Lane that Floyd was scared of police officers, and was likely scared when Lane pointed his weapon at Floyd because he had been shot before. (Lane, BWC at 20:12:52-20:13:07.)

Meanwhile, Floyd pleaded with Kueng and Lane to talk to him. While sitting on the sidewalk, Floyd responded to Kueng's questions. He provided Kueng with his name and date of birth, and reiterated that he was scared because he had been shot before. (Kueng, BWC at 20:12:24-20:13:01.) Kueng then told Floyd that he was accused of giving "a fake bill" to the employees at Cup Foods—the first mention of the counterfeit bill in the three minutes and 45 seconds since Lane had first approached Floyd—and that they had pulled him from the car because he was "not listening to anything we told you." (Kueng, BWC at 20:13:13-23.) Floyd responded that he "didn't know what was going on" when Lane approached Floyd's vehicle and drew his weapon. (Kueng, BWC at 20:13:23-25.)

B. Although Floyd remained compliant and conversant while seated on the sidewalk, Kueng and Lane decided to detain Floyd in their squad car. (Kueng, BWC at 20:13:35-36.) When Floyd stood up to walk to the squad car, he said that he was in pain and that his wrists hurt from the handcuffs. (Kueng, BWC at 20:13:57-20:14:11.) Lane asked whether Floyd was "on something right now," and Kueng said Floyd was "acting real erratic" while walking in

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handcuffs to the squad car. (Lane, BWC at 20:14:10-13.) Floyd responded that he was "scared." (Lane, BWC at 20:14:13-15.)

When they reached the squad car, Floyd stated: "I just want to talk to you, man." (Lane, BWC at 20:14:56-58.) 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 at 20:14:57-20:15:01.) Floyd told Lane and Kueng several times that he was scared to get into the squad car, and he stated five times that he was "claustrophobic." (Lane, BWC at 20:14:47-20:15:06.) But Kueng and Lane insisted they would have a conversation with Floyd only after he got into the squad car. They pinned Floyd against the squad car and patted him down. While being patted down, Floyd stated: "I'm not resisting, man. I'm not." (Kueng, BWC at 20:15:11-15.) Kueng found a small pipe in Floyd's pocket, but found no weapons on his person. (Kueng, BWC at 20:15:15-54.)

As Floyd stood outside the squad car, he 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." (Kueng, BWC at 20:15:34-44.) In response, Lane told Floyd: "Well, you're still going in the car." (Lane, BWC at 20:15:39-41.)

Kueng and Lane then began forcing Floyd inside the open rear driver side door of the squad car. (Lane, BWC at 20:16:20.) Floyd exclaimed: "I'ma die in here, I'ma die man." (Lane, BWC at 20:16:40-43.) Floyd also noted that he "just had COVID," and that he didn't "want to go back to that." (Lane, BWC at 20:16:44-46.) A bystander yelled to Floyd that he should get in the car because "you can't win." (Lane, BWC at 20:17:01-02.) Floyd responded he did not want to "win" or hurt the officers; he was simply "claustrophobic" and had "anxiety." (Lane, BWC at 20:17:02-10.) 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. (Lane, BWC at

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20:17:12-20.) And he 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." (Lane, BWC at 20:17:20-26.) He pleaded for Kueng and Lane to allow him to get on the ground or do "anything" other than get in the car. (Lane, BWC at 20:17:26-29.)

By this point, Defendants Derek Chauvin and Tou Thao had arrived on scene. (Thao, BWC at 20:17:25.) Although the dispatcher informed Chauvin and Thao before they arrived at the scene that the request for backup had been canceled, they had still proceeded to the scene. Exhibit 5.

Kueng and Lane continued trying to force Floyd into the car. Lane went to the passenger side of the squad car and began to pull Floyd into the vehicle through the rear passenger side door. Kueng, meanwhile, pushed Floyd through the rear driver-side door. As the Defendants forced Floyd into the squad car, Floyd hit his head on the glass that divided the front and back seats of the squad car. (Kueng, BWC at 20:17:54-57; Exhibit 4 at 1:02:10.) Floyd fell partway through the rear passenger side door, and he asked to be laid on the ground. (Lane, BWC at 20:18:15-20.) Lane and Chauvin, however, pinned Floyd against the back seat. During this time, Floyd continued to yell "please," and repeatedly said he couldn't breathe. (Kueng, Thao, & Lane, BWC at 20:17:59-20:19:01.)

After Kueng circled to the passenger side of the squad car to assist Lane and Chauvin, Kueng and Chauvin attempted to lift Floyd into the back of the squad car. When that did not work, Lane said: "Let's take him out and just MRT"—referring to the Maximal Restraint Technique, which utilizes a "Hobble" device to "secure a subject's feet to their waist in order to

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prevent the movement of legs."[2] (Lane, BWC at 20:19:02-04; Exhibit 6, Minneapolis Police Department (MPD) Policy & Procedure Manual 5-316(III).) The others agreed.

C. At 8:19 p.m., Chauvin, Kueng, and Lane pinned Floyd to the pavement, face-down. Chauvin pressed his knee into the back of Floyd's neck. 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, BWC at 20:19:14-45.) Shortly after they pinned Floyd to the ground, 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.[3] (Lane, BWC at 20:19:48-52.)

Thao then located a Hobble in the back of the squad car, and asked the other Defendants whether they "want[ed] to hobble him at this point." (Thao, BWC at 20:20:28-31.) When the others did not answer immediately, Thao suggested "why don't we just hold him until EMS" arrives, and added that "if we hobble a Sergeant's going to have to come over."[4] (Thao, BWC at 20:20:32-39.) The Defendants decided against using the Hobble. Chauvin, Kueng, and Lane therefore continued to maintain their positions directly on top of Floyd. Thao stood watch and guarded against any interference with the other Defendants' actions by, among other things,

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[2] A Hobble "limits the motion of a person by tethering both legs together." Exhibit 6, Minneapolis Police Department (MPD) Policy & Procedure Manual 5-316(III). The Maximal Restraint Technique is accomplished using two Hobbles connected together. *See id.* at 5-316(IV)(A)(2).

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

[4] Under MPD policy, whenever a Hobble is used in connection with the Maximal Restraint Technique (MRT), "[a] supervisor shall be called to the scene where a subject has been restrained," and the supervisor is required to "complete a Supervisor's Force Review." Exhibit 6, MPD Policy & Procedure Manual 5-316(IV).

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

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

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

(Lane, BWC at 20:21:53-57.) Floyd screamed that he was in significant pain:

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

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

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

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

The Defendants, however, ignored Floyd's desperate 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." (Kueng, BWC at 20:22:39-50.) Kueng reacted to Chauvin's comment with a smirk. (Thao, BWC at 20:22:48-49.) Meanwhile, as the gathered crowd of bystanders began echoing Floyd's pleas for help, 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 at 20:23:00-26.) And when a bystander expressed concern that

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Chauvin was "trapping" and "stopping" Floyd's breathing, Thao responded: "He's talking. . . . It's hard to talk if you're not breathing." (Thao, BWC at 20:23:40-20:24:04.)

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

But even after Floyd went limp, the 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, continued to stand between the other Defendants and the bystanders gathered on the sidewalk, pushing back anyone who stepped off the sidewalk and moved toward Floyd and the other Defendants. Each time he turned back to check on Chauvin, Kueng, and Lane, they were in the same positions: Chauvin on Floyd's neck, Kueng on his back, and Lane on his legs. (Thao, BWC at 20:24:00-20:26:43.) As Floyd lost consciousness, Lane asked the other Defendants: "Should we roll him on his side?" Lane cited his "worry about the excited delirium or whatever." Chauvin rejected Lane's suggestion, stating that the ambulance was en route. (Lane, BWC at 20:23:48-20:24:02.) 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 at 20:24:00-20:24:30.)

By this point, the half-dozen or so bystanders gathered on the sidewalk had begun yelling at the Defendants, expressing concern that Floyd was struggling to breathe. One bystander yelled that Floyd was "not even resisting arrest right now." (Thao, BWC at 20:24:40-44.) He also yelled that Chauvin was responsible for "stopping [Floyd's] breathing." (Thao, BWC at 20:25:08-10.) When a bystander screamed that Floyd was about to "pass out," Lane remarked—in apparent agreement with the bystander—that Floyd was indeed "passing out." (Lane &

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Kueng, BWC at 20:24:43-48.) Even so, Lane continued to hold down Floyd's right leg with his arm, noting nonchalantly to the other Defendants that his own "knee might be a little scratched, but I'll survive." (Lane, BWC at 20:25:00-04.) Meanwhile, when a bystander said that Floyd was not "breathing right now," Lane and Kueng both responded "he's breathing." (Lane & Kueng, BWC at 20:25:10-15.) But the body camera videos appear to show that Floyd's shallow breaths stopped about 10 seconds later. (Kueng, BWC at 20:25:20-31.)

At 8:25 p.m., 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, BWC at 20:25:28-30.) Chauvin and Thao likewise refused to allow her to tend to Floyd, with Thao shouting "back off!" (Thao & Kueng, BWC at 20:25:26-20:26:47.) Given the witnesses' concerns about Floyd's lack of responsiveness, Lane asked again whether the officers should "roll him on his side." (Lane, BWC at 20:25:39-41.) This time, no one responded. Once again, Lane did not press the matter, and continued to hold down Floyd's legs with his right arm. Chauvin, Kueng, and Thao likewise continued to maintain their positions. (Lane, BWC at 20:25:40-20:26:00.)

As the bystanders grew increasingly vocal about Floyd's lack of responsiveness, the off-duty firefighter urged the Defendants to take Floyd's pulse. Another bystander repeatedly pleaded for Thao to check Floyd's pulse. (Thao, BWC 20:25:53-20:26:03.) After hearing the bystanders' pleas to check Floyd for a pulse, Lane asked Kueng whether he could find a pulse.[5] Kueng checked and said "I can't find one." (Kueng & Lane, BWC at 20:25:45-20:26:00.)

[5] 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.'" Exhibit 4 at 1:24:54. 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 at 20:26:53-57.)

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Chauvin responded: "Huh?" Kueng clarified for Chauvin that he was "check[ing] [Floyd] for a pulse." (Kueng & Lane, BWC at 20:26:00-05.) Kueng continued to check Floyd for a pulse. About ten seconds later, Kueng sighed, leaned back slightly, and repeated: "I can't find one." (Kueng & Lane, BWC at 20:26:07-12.) After learning that Kueng could not find a pulse, Chauvin squeezed Floyd's fingers. Floyd did not respond. (Lane, BWC at 20:26:12-18.)

Even as Floyd remained unresponsive, the Defendants did not move from their positions. They continued to restrain Floyd—with Chauvin on his neck, Kueng on his back, and Lane holding his legs—while Thao pushed bystanders back onto the sidewalk. They also ignored the off-duty firefighter's plea for them to begin chest compressions. (Thao, BWC at 20:28:39-48.) 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 stopped breathing, and about a minute and a half after Kueng first stated that he could not find Floyd's pulse. But Chauvin, Kueng, Lane, and Thao did not move from their positions. (Lane, BWC at 20:27:00-24.) Indeed, even as Lane explained to emergency personnel that Floyd was "not responsive right now," Chauvin kept his knee on Floyd's neck. (Lane, BWC at 20:27:36-38.) The crowd, which had grown to nearly a dozen horrified onlookers, continued to plead with the officers, asking Thao whether he was "gonna let [Chauvin] kill that man in front of you." (Thao, BWC at 20:28:05-13.) Yet the Defendants continued to maintain their positions: For over a full minute after emergency personnel arrived, Chauvin and Kueng continued to press Floyd face-down into the pavement, Lane knelt over Floyd's legs, and Thao continued to push back the crowd. (Lane, Kueng & Thao, BWC at 20:27:25-20:28:45.)

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

In total, Floyd was pinned to the ground—with Chauvin's knee pressing into his neck, and Kueng and Lane restraining his back and legs—for approximately nine minutes. For over four and a half of those minutes, Floyd did not speak. For at least three of those minutes, Floyd appeared not to be breathing. And for at least two and a half minutes, the Defendants were unable to locate Floyd's pulse. Yet over that entire time period, they remained in the same position: Chauvin continued to kneel on Floyd's neck, Kueng and Lane remained atop Floyd's back and legs, and Thao continued to prevent the crowd of concerned citizens from interceding.

D. Floyd was pronounced dead at the Hennepin County Medical Center. According to the Hennepin County Medical Examiner, Floyd's death resulted from "cardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression," Exhibit 7, at 1, and the "manner of death" was "homicide," Exhibit 8. A separate autopsy review by the federal Armed Forces Medical Examiner System concluded that Floyd's "death was caused by the police subdual and restraint," and that the "subdual and restraint had elements of positional and mechanical asphyxiation." Exhibit 9.

ARGUMENT

Minnesota Rule of Criminal Procedure 17.03 provides that two or more defendants "may be tried separately or jointly at the court's discretion." Minn. R. Crim. P. 17.03, subd. 2. In deciding "whether to order joinder," a court "must consider" four factors: (i) "the nature of the offense charged"; (ii) "the impact on the victim"; (iii) "the potential prejudice to the defendant";

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and (iv) "the interests of justice." *Id*. These four factors must be considered as a whole, and the rule "neither favors nor disfavors joinder." *State v. Jackson*, 773 N.W.2d 111, 118 (Minn. 2009).

All four factors favor joinder here. *First*, the nature of the offenses supports joinder because of the similarity of the charges and evidence against all four Defendants. *Second*, the victim-impact factor favors joinder because this factor has been interpreted broadly to include the impact on eyewitnesses and family members who would likely be traumatized by multiple trials. *Third*, Defendants are unlikely to be prejudiced by joinder because their defenses are not antagonistic. *Finally*, the interests of justice favor joinder because, among other things, separate trials would cause delay and impose burdens on the State, the Court, and witnesses, and trial-related publicity may compound the difficulty in selecting a jury in subsequent trials. This Court should therefore grant the motion and order the joinder of all four Defendants' trials.

I. THE NATURE OF THE OFFENSES CHARGED FAVORS JOINDER.

The first factor—the nature of the offenses charged—strongly supports joinder. This factor turns largely on the "similarity of the charges and evidence" against the defendants. *Jackson*, 773 N.W.2d at 118. The charges or evidence against all defendants, however, need not be identical. Rather, this factor favors joinder so long as at least one of the following is true: (i) the defendants are charged with the "same" or "similar[]" offenses, *id*.; (ii) the defendants worked "in close concert with one another," *id.* (quoting *State v. Blanche*, 696 N.W.2d 351, 371 (Minn. 2005)), or "all worked together" during the offense, *State v. Powers*, 654 N.W.2d 667, 675 (Minn. 2003); or (iii) a "great majority of the evidence" to be presented is admissible against all of the defendants, *Blanche*, 696 N.W.2d at 371. Any one of these is sufficient to tilt this factor in favor of joinder. *See Powers*, 654 N.W.2d at 674-675. And here, all three are present.

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First, all four Defendants are charged with the "same" or "similar[]" offenses. *Jackson*, 773 N.W.2d at 118. Chauvin is charged with second-degree murder, third-degree murder and second-degree manslaughter. Kueng, Lane, and Thao, meanwhile, are charged with aiding and abetting second-degree murder and second-degree manslaughter. "[A]iding and abetting is not a separate substantive offense" under Minnesota law. *State v. DeVerney*, 592 N.W.2d 837, 846 (Minn. 1999). The substantive charges against Kueng, Lane, and Thao are therefore equivalent to Chauvin's second-degree murder and second-degree manslaughter charges. In other words, all four Defendants are charged with variants of the same offenses, and all of the charges against the Defendants stem from the same incident. That strongly favors joinder.

Second, there is "substantial evidence" that all four Defendants worked "in close concert with one another" during the offense. *Jackson*, 773 N.W.2d at 119 (quoting *Blanche*, 696 N.W.2d at 371). The Minnesota Supreme Court has explained that defendants work "in close concert" when "each [defendant] had a role in the scheme," or when "all worked together," *Powers*, 654 N.W.2d at 674-675, or "had very similar involvement" in the criminal act, *DeVerney*, 592 N.W.2d at 842. Indeed, the legislature has already provided by statute that defendants may be tried jointly so long as they "are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense." Minn. Stat. § 631.035, subd. 1. That is true even if one or more of the defendants denies involvement in the crime, or denies that he was working in close concert with the other defendants. *See State v. Johnson*, 811 N.W.2d 136, 142 (Minn. Ct. App. 2012); *Yusuf v. State*, No. A17-0022, 2017 WL 3013420, at *2 (Minn. App. Sept. 19, 2017). And it is true regardless of whether the defendants planned the criminal act beforehand. *See Johnson*, 811 N.W.2d at 142.

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Here, the evidence establishes that all four Defendants were present at the scene of Floyd's murder and worked together to commit the crime. Chauvin pressed his knee into Floyd's neck for about nine minutes. During that same time, Kueng knelt on Floyd's back and held Floyd's handcuffed wrists in place. Lane restrained Floyd's legs by kneeling on them and pressing them down with his hands. And Thao placed himself between his codefendants and the gathering crowd, pushing the onlookers back to the sidewalk, preventing them from intervening to assist Floyd, and thereby enabling the other Defendants to maintain their positions. The Defendants also communicated with one another and coordinated their actions throughout the incident, discussing whether to use a Hobble restraint, whether to keep Floyd pinned face-down to the ground, whether Floyd had lost consciousness, and whether Floyd had a pulse. *See supra* pp. 7-11. These actions show that "each [Defendant] had a role in the scheme," and that they "all worked together" during Floyd's murder. *Powers*, 654 N.W.2d at 674-675. In short, the evidence shows that all four Defendants worked "in close concert" during the offense. *Jackson*, 773 N.W.2d at 119 (quoting *Blanche*, 696 N.W.2d at 371). That, too, strongly supports joinder.

Third, the "great majority of the evidence presented" is likely to be admissible against all four Defendants. *Blanche*, 696 N.W.2d at 371. The critical evidence in this case—videos of the murder, witness testimony, and autopsy reports—will be the same for all four Defendants, and will likely be admissible to prove the charges against all four. Indeed, the fact that the criminal complaint against each Defendant is nearly "identical" confirms that the evidence at trial will be largely the same for all four. *Johnson*, 811 N.W.2d at 142; *see* Complaint in *State v. Chauvin*, No. 27-CR-20-12646; Complaint in *State v. Kueng*, No. 27-CR-20-12953; Complaint in *State v. Lane*, No. 27-CR-20-12951; Complaint in *State v. Thao*, No. 27-CR-20-12949. There may, of course, be slight differences in the evidence—for example, personnel records—presented against

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the Defendants. But the evidence need not be identical to support joinder. Here, because the "great majority of the evidence" against the four Defendants will be the same, this consideration strongly supports joinder. *Blanche*, 696 N.W.2d at 371.

In short, the relevant charges and evidence point to the same conclusion: The nature of the offenses charged supports the joinder of the four Defendants for trial.

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

The second factor—the impact on the victim and eyewitnesses—also strongly supports joinder. In the absence of joinder, eyewitnesses and Floyd's family members would be required to relive Floyd's murder at multiple trials. Requiring victims and witnesses to relive traumatic experiences across seriatim trials is disfavored under the victim-impact factor in Rule 17.03. That is a compelling reason to join the four Defendants for trial.

Although Rule 17.03 refers only to the impact on the "victim," the Minnesota Supreme Court has explained that "analysis of this factor" may consider "the trauma to the eyewitnesses who would be compelled to testify at multiple trials." *Blanche*, 696 N.W.2d at 371. Courts may also consider whether the victim's "family members" may be "traumatized by multiple trials." *Jackson*, 773 N.W.2d at 119. This factor cuts most strongly in favor of joinder where young children or other persons who are considered "vulnerable" would be forced to testify at multiple trials, *Blanche*, 696 N.W.2d at 371, or where "the violent nature of the crime charged" and the "number of people involved" are likely to exacerbate the trauma suffered by witnesses, *Powers*, 654 N.W.2d at 675. That said, "no showing of particular vulnerability or unusual violence need be made in order for this factor to weigh in favor [of] joinder." *State v. Meeks*, No. 27-CR-09-8498, 2009 WL 8603557 (Minn. Dist. Ct. Apr. 29, 2009). Indeed, "the language of Rule 17.03 includes the word 'impact,' not the narrower word 'trauma,'" and that impact "may include

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things other than emotional trauma." *State v. Carlson*, No. 27-CR-11-29606, 2013 WL 9792447, at *3 (Minn. Dist. Ct. Aug. 1, 2013); *see State v. Bellfield*, No. 27-CR-07-127152, 2008 WL 7650412 (Minn. Dist. Ct. July 2, 2008) (considering the impact of "travel costs and lost wages or other earned income" on witnesses, as well as delays to victims seeking closure).

Here, the trauma suffered by eyewitnesses supports joinder. *See Jackson*, 773 N.W.2d at 119. Eyewitnesses who take the stand will be asked to recount the harrowing details of Floyd's death. They will be asked to explain what they saw during the nine minutes that Chauvin knelt on Floyd's neck, Kueng and Lane pinned down Floyd's back and legs, and Thao prevented bystanders from intervening to save Floyd's life. And they will be asked to recount what they heard when Floyd told the Defendants he could not breathe, pleaded for his mother, told the Defendants he was dying, and then grew silent as he lost consciousness. *See Powers*, 654 N.W.2d at 675 (noting that the "nature of the crime charged" likely exacerbates the trauma suffered by witnesses); *supra* pp. 8-10. The trauma eyewitnesses may suffer when testifying about Floyd's death, moreover, is likely to be even more substantial if defense counsel cross-examines them about, for instance, why they did not try harder to intervene to stop the murder. *See* Aila Slisco, *Attorney for Officer Charged in George Floyd Death Questions Why Public Didn't Intercede to Prevent Floyd's Death*, Newsweek (June 9, 2020), https://www.newsweek.com/attorney-officer-charged-george-floyd-death-questions-why-public-didnt-intercede-prevent-1509533. In addition to the emotional burden of testifying, witnesses will also face other logistical and financial burdens—for example, the "travel costs and lost wages" associated with testifying at four separate trials. *Bellfield*, 2008 WL 7650412. And they will face the added risk of testifying at multiple trials *in person* during an ongoing global

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pandemic. In short, forcing the eyewitnesses to relive Floyd's death in as many as four separate trials is likely to be extremely burdensome and weighs in favor of joinder.

The impact on eyewitnesses is also a particularly heavy thumb on the scale in favor of joinder here because several of the key eyewitnesses are minors and are therefore considered particularly "vulnerable." *See Blanche*, 696 N.W.2d at 371. One of the bystanders who filmed Floyd's murder, Darnella Frazier, was seventeen years old. Ms. Frazier's nine-year-old cousin also witnessed Floyd's murder. Ms. Frazier has been publicly shamed for not somehow stopping Defendants and saving Floyd. She has been the subject of considerable media scrutiny. And she has begun therapy to cope with the trauma of witnessing Floyd's murder. *See* Joshua Nevett, *George Floyd: The Personal Cost of Filming Police Brutality*, BBC News (June 11, 2020), https://perma.cc/U7H4-MT9M. Testifying at multiple trials is likely to be highly traumatic for all of the eyewitnesses. And that is especially true for Ms. Frazier and any other minors who witnessed Floyd's murder and may be called to testify.

Floyd's family members are also likely to be similarly affected by multiple trials. *See Jackson*, 773 NW.2d at 119 (affirming joinder of defendants where family members would be traumatized by multiple trials). Requiring Floyd's family members to sit through multiple, separate trials—each time reliving Floyd's murder—will cause them to suffer additional trauma. That trauma is an especially significant factor if any family members are called to testify at trial. Floyd's family members would also need to travel long distances for each trial, imposing substantial financial and logistical burdens on them and making it harder for them to be present to witness justice for their deceased family member. *See Bellfield*, 2008 WL 7650412. Those burdens are heightened during the current COVID-19 pandemic, during which Floyd's family members would face added risks in traveling to Minnesota for multiple trials.

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Thus, in light of the impact of separate trials on eyewitnesses and Floyd's family, the second joinder factor cuts strongly in favor of joining all four Defendants for trial.

III. BECAUSE THEIR DEFENSES ARE NOT ANTAGONISTIC, DEFENDANTS WILL NOT BE PREJUDICED BY JOINDER.

The third factor—the potential prejudice to the defendants—weighs against joinder only if Defendants show that they will present "antagonistic defenses" at trial." *Jackson*, 773 N.W.2d at 119; *State v. Santiago*, 644 N.W.2d 425, 440 (Minn. 2002). The four Defendants in this case cannot make such a showing. Thus, this factor also favors joinder.

The Minnesota Supreme Court has defined the concept of "antagonistic defenses" narrowly: Defendants have "antagonistic defenses" only "when they seek to put the blame on each other and the jury is forced to choose between the defense theories advocated by the defendants." *Santiago*, 644 N.W.2d at 446. Under this standard, "mere differences in trial strategy" between the defendants "do not constitute substantial prejudice." *Id.* at 444.

The Minnesota Supreme Court has identified two narrow categories of cases in which antagonistic defenses are likely to be present. *First*, antagonistic defenses may be present where "the state introduce[s] evidence that show[s] only one of the defendants killed the victim, thus forcing each defendant to 'point the finger' at the other." *Id.* (quoting *State v. Hathaway*, 379 N.W.2d 498, 503 (Minn. 1985)). *Second*, antagonistic defenses may be present when the jury is "forced to believe either the testimony of one defendant or the testimony of the other" in order to reach a verdict. *Id.* (quoting *Hathaway*, 379 N.W.2d at 503). In both types of cases, one codefendant's defenses "depend[] on proof" of the other codefendant's guilt, and the jury "could not accept" both defenses in rendering a verdict. *Id.* at 449.

By contrast, defenses are not likely to be considered "antagonistic" when the jury is "not forced to choose between [the codefendants'] defenses." *Jackson*, 773 N.W.2d at 119.

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Consistent with that standard, arguments about disparate levels of responsibility among the defendants are not enough to render defenses antagonistic. For example, in *Powers*, attorneys for two of the three codefendants "ask[ed] questions highlighting [the third codefendant's] role in the aggravated robbery and murder." 654 N.W.2d at 677. Nonetheless, the Court concluded that "these questions did not present prejudicial antagonistic defense issues," as "the questioning in issue was not exculpatory as to any of the defendants but merely clarified the roles played by each of the participants in this joint crime." *Id.* Likewise, in *Yusuf*, one of the codefendants claimed that "her defense implicated [her] codefendant's guilt because she admitted they both knew [the victim] and rented a room to her, while her codefendant initially denied ever knowing [the victim]." 2017 WL 3013420, at *3. But because the two codefendants "did not present alternative defenses" and "neither tried to shift the blame to the other to exculpate him or herself," the "choice for the jury was between the state's theory and each defendant's theory of the case, not between antagonistic defenses." *Id.*

Critically, the burden to establish the existence of antagonistic defenses rests with the defendants. *See Powers*, 654 N.W.2d at 675 (relying on defendant's "failure to show the existence of antagonistic defenses" as a basis for rejecting challenge to joinder). "General concern on the behalf of defense counsel . . . is not adequate to demonstrate the existence of inconsistent or antagonistic defenses." *Id.* That is especially true early in the case: Because the district court has the "ability to address any potential prejudice that may arise at the trial with the power to sever pursuant to Minn. R. Crim. P. 17.03, subd. 3(3)," pretrial joinder may be denied based on prejudice only when the defendants can prove that the defenses they will raise at trial are in fact antagonistic. *Id.* Thus, it is incumbent on defendants to "commit to [a] particular

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defense theory," and to show that the jury would be "*forced to choose*" between their defenses to render a verdict. *Santiago*, 644 N.W.2d at 446-447 & n.6 (emphasis added).

Here, Defendants cannot meet their burden to show that their defenses are antagonistic. Indeed, the State's case against the four Defendants does not fall into either of the narrow categories the Minnesota Supreme Court has recognized as involving antagonistic defenses.

First, Defendants cannot demonstrate that this is a case in which the State will introduce "evidence that show[s] only one of the defendants killed the victim, thus forcing each defendant to 'point the finger' at the other." *Santiago*, 644 N.W.2d at 446 (quoting *Hathaway*, 379 N.W.2d at 503). Unlike in *Santiago*, where only one of the defendants could have pulled the trigger, all of the Defendants here are accused of having played a role in Floyd's death. For approximately nine minutes, Chauvin pressed his knee into Floyd's neck; Kueng and Lane pinned down Floyd's back and legs; and Thao—after suggesting to the other Defendants that they should continue pinning Floyd face-down—stood watch and prevented the crowd of bystanders from intervening to save Floyd. If the jury concludes that one of the Defendants is guilty, that would not exculpate any of the other Defendants. And if the jury were somehow to conclude that any one of the Defendants is not criminally liable, that would not prove the guilt of the other Defendants. The State's case therefore does not "forc[e] each defendant to 'point the finger' at the other." *Id.* (quoting *Hathaway*, 379 N.W.2d at 503).

Second, Defendants cannot show that this is a case in which the jury will be "forced to believe either the testimony of one defendant or the testimony of the other" in order to reach a verdict. *Id.* (quoting *Hathaway*, 379 N.W.2d at 503). Even if the Defendants choose to testify, this case would not turn on whether the jury believes one Defendant's version of the events or another's. The events leading to Floyd's death are well-documented in police body camera

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videos, bystander videos, and local surveillance videos. And no Defendant has signaled that he intends to present a version of the facts that does not align with the evidence that is already known and publicly available, or that does not align with the version the other Defendants will offer. *See, e.g.*, Lane Mot. to Dismiss 1-9 (relying on body-camera footage and officer interviews); Thao Mot. to Dismiss 1-2 (similar).

Accordingly, Defendants cannot demonstrate that the jury would be "forced to choose between [their] defenses." *Jackson*, 773 N.W.2d at 119. Far from "shift[ing] blame to one another," the four Defendants are likely to raise common defenses. *DeVerney*, 592 N.W.2d at 842. These include, for example, that the use of force was reasonable or necessary, or that the Defendants' actions did not cause Floyd's death. Indeed, the Defendants' filings to date suggest remarkable similarity, not antagonism, in their defenses. The motions to dismiss for lack of probable cause filed by Lane and Thao—the only two Defendants who have thus far disclosed their defenses to this Court—indicate that their primary defense is that the "decision to restrain Floyd was reasonably justified," and that they therefore lacked the requisite knowledge and intent to be criminally liable for aiding and abetting. Lane Mot. to Dismiss 14; *see* Thao Mot. to Dismiss 6, 10-12. That defense is consistent with, not antagonistic to, the defenses of Chauvin and Kueng, who are also likely to raise the same defense.[6]

In short, Defendants cannot show that the jury would be "forced to choose between [their] defense theories." *Santiago*, 644 N.W.2d at 446. Because the Court can "address any

[6] To the extent Lane might argue that he relied on the greater experience of Chauvin, *see* Lane Mot. to Dismiss 15-16, that argument is not "antagonistic" in any way to the defenses Chauvin is likely to raise at trial. After all, a jury would not be "forced to choose" between that argument and Chauvin's defenses. *Jackson*, 773 N.W.2d at 119. A jury could theoretically accept that argument and still accept Chauvin's likely defense that his actions were justified. Or it could reject both arguments. In no sense, then, does Lane's argument "depend[] on proof" of Chauvin's guilt. *Santiago*, 644 N.W.2d at 449.

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potential prejudice that may arise at the trial with the power to sever," Defendants bear a heavy burden to establish prejudice at this early stage of this case. *Powers*, 654 N.W.2d at 675. They cannot meet that burden. The third factor—like the first two—strongly favors joinder.

IV. THE INTERESTS OF JUSTICE ARE SERVED BY JOINDER.

The final factor—the interests of justice—also supports joinder. Courts have identified a range of considerations relevant to the interests of justice. At least five favor joinder here.

First, joinder is appropriate because of the "length of separate trials." *Jackson*, 773 N.W.2d at 119. Conducting four separate trials will potentially take several years, delaying justice. Indeed, Floyd's family members and the community would "likely have to wait longer for the resolution of many separate trials than they would for one joined trial." *Bellfield*, 2008 WL 7650412. Conducting a joint trial, by contrast, "would save time" and the Court's resources. *Johnson*, 811 N.W.2d at 143. This factor takes on added importance here because—in light of the number of bystanders who witnessed Floyd's death, the complex issues in the case, and the high-profile nature of the case—both parties are likely to call more witnesses than in a typical trial. *See Yusuf*, 2017 WL 3013420, at *3 (favoring joinder based on number of witnesses).

Second, because the evidence offered against the four Defendants is likely to substantially overlap, separate trials would place "an undue burden on the State and Court system." *Carlson*, 2013 WL 9792447. There is a strong thumb on the scale against conducting separate trials where, as here, the evidence presented in each of the four trials is likely to be very similar. *See supra* pp. 15-16. And this factor tilts especially strongly in favor of joinder here because of the costs to the State and the court system that are likely to attend each trial, including added courthouse security, the administrative burdens in overseeing a trial that will attract global

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attention, the costs of separate appeals, and the potential diminution in the resources available to conduct trials for other criminal defendants in the same courthouse.

Third, the availability and convenience of the witnesses favors joinder. In addition to the potential trauma of having to testify multiple times, *see supra* pp. 17-18, eyewitnesses will have to travel and may suffer "lost wages or other earned income" in order to testify at multiple trials, *Bellfield*, 2008 WL 7650412. Moreover, the risk of witnesses becoming "unavailable or unwilling to testify" at trial—whether because of the trauma of testifying, threats against the witnesses by those opposed to this prosecution, the travel burdens imposed by testifying, or the ongoing COVID-19 pandemic—increases when there are multiple trials. *Jackson*, 773 N.W.2d at 119. This harms both the prosecution and the defense.

Fourth, separate trials run the risk of "prejudic[ing] potential jurors through the publicity related to each trial." *Powers*, 654 N.W.2d at 675. The media coverage of this case has been extensive. The existing level of media attention suggests that there may be a swell of media coverage surrounding the proceedings and verdict in the first trial, whether that trial is conducted with one or multiple defendants. If there were subsequent trials of other defendants, impaneling a jury in those trials may become more difficult after the first trial concludes. In this respect, joinder is a critical safeguard to help protect the fairness of a jury trial. This consideration strongly supports a single trial, rather than four separate trials with four separate juries.

Finally, joinder is in the "collective interest of the people" because it would allow the community and the nation to absorb the verdicts for the four Defendants at once, as opposed to absorbing them in piecemeal fashion. *State v. Higgins*, 376 N.W.2d 747, 748 (Minn. App. 1985) (quoting *State v. Strimling*, 265 N.W.2d 423, 432 (Minn. 1978)). "[E]motions in the affected community" and throughout the State and Nation "will inevitably be heated and volatile"

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following the verdict at the first trial, whether that trial is conducted with one or multiple defendants. *Georgia v. McCollum*, 505 U.S. 42, 49 (1992). Forcing the community to endure four separate trials, with four separate verdicts rendered at four different times, is likely to compound and prolong the trauma to the community. This, too, strongly favors joinder.

In sum, joinder would safeguard the Defendants' right to a fair trial from an impartial jury, and would mitigate the burdens on the State, the courts, and witnesses. Trying these cases jointly would ensure that the jury understands—with adversarial testing by the four Defendants—all of the evidence and the complete picture of George Floyd's death. And it would allow the community and the nation to absorb the verdicts for the four Defendants at once. Like the other three factors, the interests of justice strongly favor joinder of all four Defendants.

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CONCLUSION

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

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