

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

State of Minnesota,

Case Type: Criminal  
Court File No. 27-CR-20-12949

Plaintiff,

vs.

Tou Thao,

Defendant.

**STATE'S RESPONSE OPPOSING  
DEFENDANT'S MOTION TO DISMISS  
FOR LACK OF PROBABLE CAUSE**

To: Judge Peter A. Cahill, Judge of District Court, the above-named defendant and defendant's attorney, Robert Paule, 920 Second Avenue South, Ste. 975, Minneapolis, MN 55402.

**INTRODUCTION**

Defendant Tou Thao is charged by complaint with aiding and abetting second-degree murder, in violation of Minn. Stat. § 609.19, subd. 2(1) and § 609.05, subd. 1, and aiding and abetting second-degree manslaughter, in violation of Minn. Stat. § 609.205(1) and § 609.05, subd. 1. Thao and three codefendants, Derek Chauvin, J. Alexander Kueng, and Thomas Lane, are former police officers charged in connection with the death of George Floyd. Thao has filed a motion to dismiss the complaint for lack of probable cause. His motion should be denied.

There is probable cause for both charged offenses in the complaint. On May 25, 2020, Chauvin, Kueng, and Lane pinned Floyd to the ground, face down, after he was suspected of using a counterfeit \$20 bill to purchase a pack of cigarettes. Chauvin pressed his knee into Floyd's neck. Kueng knelt on Floyd's back and held Floyd's handcuffed arms in place. Lane restrained Floyd's legs with his hands and knees. And Thao—who saw what the other officers

were doing and heard Floyd's cries for help—encouraged the others to continue pinning Floyd down, pushed back a group of concerned bystanders, and prevented them from intervening.

In the first five minutes Floyd was on the ground, he told the officers at least twenty times that he could not breathe. He told them nearly ten times that he was dying. And then he fell silent. As Floyd lost consciousness, a crowd of bystanders pleaded with Thao. They told him that the officers were killing Floyd. They screamed that Floyd had stopped moving. They alerted Thao that Floyd had stopped breathing. And they begged Thao almost *thirty* times to take Floyd's pulse. But instead of intervening on Floyd's behalf, Thao continued to push the crowd of bystanders back to the sidewalk, allowing the other officers to continue to pin Floyd to the ground—with Chauvin on Floyd's neck, Kueng on Floyd's back, and Lane on Floyd's legs.

All told, the officers held Floyd in that position for approximately nine minutes—about five times longer than the national anthem, and four times longer than President Lincoln's Gettysburg Address. During that time, Thao encouraged the other officers to continue holding Floyd in that position; blocked bystanders, including a trained firefighter, from intervening to help Floyd; ignored desperate cries—from Floyd, and from concerned onlookers—that his partners were killing Floyd; and refused to intervene or provide Floyd with medical assistance.

Probable cause is manifest. The facts here “would lead a person of ordinary care and prudence to hold an honest and strong suspicion” that Thao aided and abetted second-degree murder and second-degree manslaughter. *State v. Ortiz*, 626 N.W.2d 445, 449 (Minn. App. 2001). The evidence is more than sufficient to establish probable cause for both offenses.

This Court should therefore deny Thao's motion to dismiss.

## STATEMENT OF FACTS

The following statement of facts is drawn from the complaint filed on June 3, 2020, and has been supplemented with other available record evidence. The State incorporates here the statement of probable cause and finding of probable cause contained in the complaint.

### A. The Events of May 25, 2020

1. At approximately 8 p.m. on May 25, 2020, Tou Thao and Derek Chauvin—both police officers at the time—were dispatched to Cup Foods at the corner of 38th Street and Chicago Avenue in Minneapolis on a report that an individual was suspected of using a counterfeit bill. (Thao, Bureau of Criminal Apprehension (“BCA”) Interview at 25:38-26:05.)<sup>1</sup> Before they could make their way to the scene, however, dispatch informed them that J. Alexander Kueng and Thomas Lane would handle the call instead. (Thao, BCA Interview at 25:40-57.)

At approximately 8:08 p.m., Kueng and Lane arrived at Cup Foods. When they entered the store, the manager 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 20:08:47-20:09:06.) Kueng and Lane did not inspect the bill. (Lane, BCA Interview at 42:49-52.) 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. Lane approached and tapped on the window, startling Floyd. (Lane, BWC at 20:09:28-32.) Floyd cracked the door open and apologized. Lane instructed Floyd to show his hands. (Lane, BWC at 20:09:32-40.) Seconds

---

<sup>1</sup> The body worn camera videos, the Bureau of Criminal Apprehension interviews of Thao and Lane, and the autopsy reports referenced herein were submitted to the Court in support of the State’s motion for joinder. The remaining exhibits cited herein are submitted with the Affidavit of Matthew Frank, filed with this Memorandum.

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 20:10:20-22.)

Floyd, clearly upset, continued to apologize to Lane, and explained repeatedly that he had been shot before. (Lane, BWC at 20:09:36-20:10:09.) Sobbing, he pleaded: “Mr. Officer, please don’t shoot me.” (Lane, BWC at 20:10:35-37.) As he pleaded for his life, he also told Lane that “I just lost my mom.” (Lane, BWC at 20:10:35-20:11:02.)

Lane told Floyd to step out of the car, while Kueng told the other two passengers to do the same. At this point, Lane asked dispatch for backup. (Lane, BWC at 20:10:45; Lane, BCA Interview at 58:00-15; Thao, BCA Interview at 27:30-35.) In response, Thao and Chauvin drove to Cup Foods with their squad car lights and sirens activated. (Thao, BCA Interview at 27:40-51; Thao, BWC at 20:11:30-20:12:14.)

After Floyd stepped out of the car, Kueng came around to the driver’s side, and he and Lane handcuffed Floyd’s arms behind his back. (Kueng, BWC at 20:11:10-49.) From this moment on, and for all of the remaining minutes of his life, Floyd’s hands remained cuffed.

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 20:11:43-20:14:02; Kueng, BWC at 20:12:14-20:13:54.) One of the

passengers explained that Floyd was scared of the police, and was likely scared when Lane pulled out his weapon because Floyd had been shot before. (Lane, BWC at 20:12:52-20:13:07.)

While speaking with the passengers, Lane reported a “Code 4” to dispatch, which meant that the “[s]ituation [was] under control” and that “[r]esponding squads that have not arrived may clear.” Exhibit 1, Minneapolis Police Department Policy and Procedure Manual, § 7-103, at 31. (Lane, BWC at 20:12:14-16.) Dispatch therefore told Thao and Chauvin that the request for backup had been canceled. Thao and Chauvin, however, continued to the scene anyway. (Thao, BCA Interview at 27:54-28:40; Thao, BWC at 20:12:14-27.)

2. 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 20:13:32-36.) As they walked over to the squad car, Lane asked whether Floyd was “on something right now,” and Kueng said Floyd was “acting real erratic” while walking in handcuffs. (Lane, BWC at 20:14:10-13.) Floyd responded that he was “scared.” (Kueng, BWC at 20:14:13.)

When they reached the squad car, Floyd pleaded to talk with the officers, but Kueng refused, telling him “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 20:14:14-20:15:01.) Floyd told Kueng and Lane 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 that he not be left 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 20:15:34-40.) 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’s side door of the squad car. (Lane, BWC at 20:16:20.) Floyd exclaimed: “I’m a die in here, I’m a 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.) And he asked Kueng and Lane to allow him to count to three before getting into the back of the squad car, insisting that he was not trying to “win.” (Lane, BWC at 20:17:20-26.)

3. At 8:17 p.m., Thao and Chauvin arrived on the scene. (Thao, BWC at 20:17:07.) As they approached, they saw Kueng and Lane trying to force Floyd into the back of the squad car, and heard a bystander yelling to Floyd that he should get in the car because “you can’t win.” (Thao, BWC at 20:17:19-48.) Floyd responded he was not trying to “trying to win.” He told the officers four times that he was claustrophobic, and said he wanted to speak to the officers outside the squad car. (Thao, BWC at 20:17:22-47.) Floyd also pleaded for the officers to allow him to get on the ground or do “anything” other than get in the car. (Thao, BWC at 20:17:26-29.)

The officers, however, ignored Floyd’s pleas. Thao watched as Kueng pushed Floyd into the back seat from the driver’s side and Lane pulled Floyd from the passenger’s side. (Thao, BWC at 20:17:37-56.) During this time, Floyd continued to plead with the officers, repeating “please, Mr. Officer, please” and “I’m not a bad guy.” (Thao, BWC at 20:17:49-20:18:00.) Floyd also exclaimed: “I can’t breathe, Mr. Officer. Please.” (Thao, BWC, at

20:18:05-08.) Thao responded dismissively: “You’re talking. Sit down.” (Thao, BWC at 20:18:07-09.)

Floyd fell partway through the rear passenger’s side door, and he asked to be laid on the ground. (Thao, BWC at 20:18:15-20.) Chauvin and Lane, however, pinned Floyd against the passenger’s side back seat, while Thao watched from the driver’s side. (Thao, BWC at 20:18:30-48; Thao, BCA Interview at 32:34-40.) During this time, Floyd continued to yell “please,” and repeatedly said he couldn’t breathe, explaining that he “just had COVID” and telling the officers “I’m not going to run.” (Kueng, Thao, & Lane, BWC at 20:17:59-20:19:01.) But the officers continued to dismiss his complaints, with Chauvin telling him: “You’re talking. . . . It takes a lot of oxygen to . . . say ‘I can’t breathe.’ ” (Thao, BWC at 20:18:40-46.)

When the other officers were unable to lift Floyd into the squad car, Thao said: “We’re just going to have to hogtie him.” (Thao, BWC at 20:18:48-50.) He then circled to the passenger’s side and repeated: “We’re just gonna have to tie him.” (Thao, BWC at 20:18:52-53.) Lane agreed, telling Chauvin and Kueng, “Let’s take him out and just MRT”—referring to the Maximal Restraint Technique, which utilizes the Hobble device to “secure a subject’s feet to their waist in order to prevent the movement of legs.”<sup>2</sup> Exhibit 1, MPD Policy & Procedure Manual 5-316 § III, at 24; Thao Mot. to Dismiss Ex. 3, at 13. (Lane, BWC at 20:19:02-04.) The

---

<sup>2</sup> A Hobble “limits the motion of a person by tethering both legs together.” Exhibit 1, MPD Policy & Procedure Manual 5-316 § III, at 24; Thao Mot. to Dismiss Ex. 3, at 13. The Maximal Restraint Technique is accomplished using two Hobbles connected together. *Id.* IV.A.2, at 24; Thao Mot. to Dismiss Ex. 3, at 13. MPD policy, however, also specifically provides: “**Do not** tie the feet of the subject directly to their hands behind their back. This is also known as a hogtie.” *Id.* 5-316 § IV.A.2.d, at 24 (emphasis in original); Thao Mot. to Dismiss Ex. 3, at 13.

others agreed, and Thao told Chauvin and Kueng to lay Floyd on the ground. (Thao, BWC at 20:19:06.)

4. At 8:19 p.m., Chauvin, Kueng, and Lane pinned Floyd to the pavement face-down. Thao watched as the other officers took their positions: 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; and Lane restrained Floyd's legs, kneeling on them and pressing them down with his hands. (Thao, BWC at 20:19:15-25.) Shortly after they pinned Floyd to the ground, Lane called in an EMS "Code 2," signaling that emergency medical services were needed but that emergency personnel were not required to use their sirens to reach the scene. (Lane, BWC at 20:19:48-52.)

While the other officers pinned Floyd to the ground, Thao searched for a Hobble in the back of the squad car. (Thao, BWC at 20:19:17-23.) During the time it took him to locate one, Floyd told the officers "I can't breathe" another six times, called for his recently deceased mother nine times, and asked the officers to tell his kids he loved them. (Thao, BWC at 20:19:24-20:20:24.) He also cried "I'm dead," and told the officers that what they were doing to him was "cold blooded." (Thao, BWC at 20:19:20-20:20:18.) Chauvin responded: "Yeah, you're doing a lot of talking though." (Thao, BWC 20:20:18-19.)

After finding a Hobble in the back of the squad car, Thao asked whether the other officers still "want to Hobble at this point then." (Thao, BWC at 20:20:25-31.) When the other officers 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."<sup>3</sup> (Thao, BWC

---

<sup>3</sup> 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 1, MPD Policy & Procedure Manual 5-316(IV), at 24.

at 20:20:32-39.) The officers decided against using the Hobble. Chauvin, Kueng, and Lane therefore continued to maintain their positions on top of Floyd.

As Thao watched the other officers press Floyd into the ground, he asked whether EMS was coming under “Code 3,” which requires emergency services to use red lights and sirens to reach the scene. Lane relayed that he had called for only a “Code 2,” but Thao “should probably step it up.” (Thao, BWC at 20:21:12-17.) Thao stepped a few feet away to update EMS. Seconds later, he came back and watched as Chauvin, Kueng, and Lane continued to maintain their positions atop Floyd’s neck, back, and legs. (Thao, BWC at 20:21:20-30.)

In response to Floyd’s repeated pleas that he could not breathe, Thao told Floyd to “relax.” (Thao, BWC at 20:21:30.) Floyd cried back “I can’t breathe” four more times. (Thao, BWC at 20:21:30-37.) Thao dismissed Floyd’s plea: “He’s talking, so he’s breathing.” (Thao, BWC at 20:21:37-40.) Floyd responded: “I’ll probably just die this way.” (Thao, BWC at 20:21:44-46.) Once again, Thao told Floyd to “relax.” He then asked Floyd: “What are you on?” (Thao, BWC at 20:21:47-53.) Floyd responded:

I can’t breathe! Please, your knee in my neck. I can’t breathe, shit.

(Thao, BWC, at 20:21:53-58.) Thao stood by and watched as Floyd continued to cry out for his mother and screamed that he was in significant pain:

My body, my knee, my neck . . . I’m claustrophobic. My stomach hurt. My neck hurt. Everything hurt.

(Thao, BWC at 20:22:13-29.) And he stood by and watched as Floyd told the officers repeatedly that he feared he would die while lying on the ground. Floyd exclaimed:

I’m through, I’m through. . . . They’re gonna kill me. They gonna kill me, man.

(Thao, BWC at 20:22:19-22, 20:22:42-45.)

The officers, 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." (Lane, BWC at 20:22:39-50.) Kueng reacted to Chauvin's comment with a smirk. (Thao, BWC at 20:22:48-51.) Throughout this exchange, Thao continued to watch as Chauvin, Kueng, and Lane maintained their positions atop Floyd. (Thao, BWC at 20:22:03-51.)

At 8:22 p.m., Thao positioned himself between the officers restraining Floyd and the crowd of bystanders that had begun to form along the sidewalk. (Thao, BWC at 20:22:50-20:23:01.) As Floyd yelled that he could not breathe, the bystanders shouted for Chauvin to take his knee off Floyd's neck. One bystander yelled: "You can get off his neck, man. That's wrong right there." (Thao, BWC at 20:22:49-20:23:00.) Another bystander observed that Floyd was "not even resisting arrest." (Thao, BWC at 20:23:05-09.) Thao responded: "This is why you don't do drugs, kids." Thao also said: "He's talking, so he's fine." (Thao, BWC at 20:23:00-41.) Thao maintained his position between the crowd and the other officers, occasionally turning back to check on them. (Thao, BWC at 20:23:09-20:24:18.) Each time, they were in the same position: Chauvin on Floyd's neck, Kueng on Floyd's back, and Lane on Floyd's legs.

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

But even after Floyd fell silent, Chauvin, Kueng, and Lane continued to restrain him, and Thao continued to block the crowd and dismiss their concerns. Thao told the crowd that "it's hard to talk if you're . . . not breathing." (Thao, BWC at 20:24:02-04.) One bystander countered: "He's not saying shit now. Is he talking now? Look at him." (Thao, BWC 20:24:18-25.) She also shouted: "Look at him. . . . Look, he's about to knock out." (Thao,

BWC at 20:24:25-34.) Thao, however, did not move from his position. From that position, he saw Chauvin continuing to press his knee into Floyd's neck. (Thao, BWC at 20:24:00-20:25:15; Exhibit 2, Darnella Frazier Facebook Video at 3:25-3:27, 4:11-4:13.)

When the bystanders realized that Floyd had become unresponsive, their pleas grew more urgent. They yelled to Thao that Floyd was “not even resisting arrest right now,” that Chauvin was responsible for “stopping [Floyd's] breathing,” and that Floyd was about to “pass out.” (Thao, BWC at 20:24:40-20:25:10.) One bystander pleaded with Thao, asking whether he was “just gonna let [Chauvin] choke [Floyd] like that?” (Thao, BWC at 20:25:17-19.) But Thao, who saw what Chauvin was doing, continued to stand guard, pushing back the bystanders and telling them to “just get back on the sidewalk” whenever they stepped toward the officers and Floyd. (Thao, BWC at 20:24:40-20:25:24.)

At 8:25 p.m., an out-of-uniform, off-duty Minneapolis firefighter arrived on the scene. After identifying herself as a firefighter, she asked to provide Floyd with medical assistance, and asked whether Floyd had a pulse. Thao, however, moved to shield the officers who were restraining Floyd, shouting “back off!” and “get off the street,” and directing the off-duty firefighter away from Floyd and toward the sidewalk. (Thao, BWC at 20:25:29-41.)

Thao continued to block the off-duty firefighter and other bystanders from intervening to help Floyd—even as the bystanders pleaded nearly *thirty times* for the officers to check Floyd's pulse, and even as they screamed that Floyd was not responsive and no longer breathing. (Thao, BWC at 20:25:32-20:27:07.) One bystander asked Thao: “You're just gonna let him sit there with that on his neck? Is he breathing right now?” Thao responded by asking the bystander: “How long are we gonna have this conversation?” (Thao, BWC at 20:25:49-56.) The bystander repeatedly pleaded with Thao by name: “Check his pulse. Check his

pulse. Check his pulse, Thao. Thao, check his pulse.” (Thao, BWC, at 20:25:55-20:26:03.) In an apparent attempt to placate the bystanders, Thao said “okay,” “alright,” “yeah, okay.” (Thao, BWC at 20:25:56-59.) But he never checked for a pulse or asked the other officers to look for one. Not even once. Instead, he merely repeated what he had told the crowd of concerned citizens almost three minutes earlier: “Don’t do drugs, guys.” (Thao, BWC at 20:25:54-20:26:05.)

When the off-duty firefighter stepped off the sidewalk and demanded that the officers “show me [Floyd’s] pulse,” Thao once again acted. He stepped toward her and demanded that she stay on the sidewalk. (Thao, BWC at 20:26:19-26.) When the bystanders screamed that Floyd “has not moved, not one time,” “in over a minute,” Thao merely glanced back at the other officers. (Thao, BWC at 20:26:40-42.) And when the off-duty firefighter again asked whether Floyd had a pulse, Thao said he was “busy trying to deal with you guys,” but offered no response to her question. (Thao, BWC at 20:27:06-10.) In fact, Kueng—who could hear the screams of the crowd of concerned citizens gathered on the sidewalk—had checked for Floyd’s pulse twice and could not find one. (Kueng & Lane, BWC at 20:25:50-20:26:12.) And Floyd appeared to stop breathing almost two minutes earlier. (Kueng, BWC at 20:25:20-31.)

By that point, the crowd had grown to nearly a dozen concerned bystanders. Their cries grew more frantic: “He’s not fucking moving.” (Thao, BWC at 20:27:11-17.) “What are you doing? He’s dying.” (Thao, BWC at 20:27:35-36.) “Why is he still on him? Y’all see that he’s not . . . what is wrong with you?” (Thao, BWC at 20:27:36-40.) “Get off of his fucking neck, bro.” (Thao, BWC at 20:27:41-42.) “You’re still on him . . . why?” (Thao, BWC at 20:27:44-46.) Through it all, Thao did nothing to help Floyd. Instead, he continued to act as a barrier between the concerned crowd and three officers pinning Floyd down, telling bystanders to “get

back” on the sidewalk and pushing them away from Floyd and the other officers whenever they stepped forward in an attempt to help. (Thao, BWC at 20:27:45-52.)

5. At 8:27 p.m., an ambulance arrived on the scene. Chauvin, Kueng, and Lane maintained their positions atop Floyd, and Thao continued to block bystanders from intervening. (Lane, BWC at 20:27:00-24; Thao, BWC at 20:27:00-24.) Even as Lane explained to emergency personnel that Floyd was “not responsive right now,” the officers maintained their positions. (Lane, BWC at 20:27:36-38.) While emergency personnel prepared the stretcher, Thao turned and looked in the direction of the ambulance and Chauvin, who continued to press his knee into Floyd’s neck. (Exhibit 2, Darnella Frazier Facebook Video 7:10-12; Thao, BWC at 20:28:00.)

After the ambulance arrived, a bystander made a final direct appeal to Thao: “Thao, you gonna let him keep that like that? You gonna let him kill that man in front of you, bro?” Thao responded: “Hey, if that makes you feel better about yourself, go ahead.” (Thao, BWC at 20:28:05-30.)

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. (Lane, BWC at 20:28:45-59.) But even as bystanders yelled that Floyd was “dead,” and even as Floyd was being loaded into the ambulance, Thao pushed back a bystander who was attempting to film emergency personnel as they loaded Floyd into the ambulance.

All told, Floyd was pinned to the ground—with Chauvin’s knee pressing into his neck, Kueng and Lane atop his back and legs, and Thao standing watch nearby—for approximately nine minutes. For over four and a half of those minutes, Floyd was silent. For at least three of

those minutes, Floyd appeared not to be breathing. And for at least two and a half minutes, the officers were unable to locate Floyd's pulse. After Floyd fell silent, the crowd alerted Thao ten times that Floyd was no longer moving, warned him nine times that Floyd was unresponsive, and pleaded with him nearly thirty times to check Floyd's pulse. But Thao did nothing to help Floyd. In fact, for the entire time the officers pinned Floyd to the ground, Thao prevented the crowd of onlookers—including a trained emergency responder—from interceding to save Floyd.

6. Floyd was pronounced dead at the hospital later that evening. According to the Hennepin County Medical Examiner, Floyd's death resulted from "cardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression," Hennepin County Medical Examiner's Office, Autopsy Report for George Floyd, at 1 (June 1, 2020) ("Hennepin County Autopsy Report"), and the "manner of death" was "homicide," Hennepin County Medical Examiner, Press Release Report (June 1, 2020). 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." Armed Forces Medical Examiner System, Autopsy Report for George Floyd, at 2 (June 10, 2020) ("Armed Forces Medical Examiner Autopsy Report").

### **B. Minneapolis Police Department Policies and Training**

As officers in the Minneapolis Police Department (MPD), Chauvin, Kueng, Lane, and Thao held a position of public trust and were trained not to "willfully mistreat or give inhumane treatment to any person held in custody." Exhibit 1, MPD Policy & Procedure Manual 5-107.3, at 9. All officers agree to abide by a code of ethics that binds them to "enforce the law courteously and appropriately" and to "never employ[] unnecessary force or violence." *Id.* at 5-102.01, at 2.

“Sanctity of life and the protection of the public” are “the cornerstones of the MPD’s use of force policy.” *Id.* at 5-301.A, at 10; Thao Mot. to Dismiss Ex. 3, at 1. 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.* at 5-303.01(B), at 12; Thao Mot. to Dismiss Ex. 3, at 2.<sup>4</sup> Officers are also permitted to 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.* at 5.301.01, at 10; Thao Mot. to Dismiss Ex. 3, at 1. Before using force, officers are required to consider using various de-escalation tactics short of force. *Id.* at 5-304(B), at 12; Thao Mot. to Dismiss Ex. 3, at 3. And in 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; (ii) mental impairment; (iii) developmental disability; (iv) physical limitation; (v) language barrier; (vi) influence of drug or alcohol use; or (vii) behavioral crisis. *Id.* at 5-304(B)(1)(b), at 12; Thao Mot. to Dismiss Ex. 3, at 3.

Under MPD policies in effect at the time of Floyd’s death, the most extreme uses of force—Maximal Restraint Technique (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), at 24; Thao Mot. to Dismiss Ex. 3, at 13. “As soon as reasonably possible, any person restrained using the

---

<sup>4</sup> This policy, which was in effect when Floyd died, was subsequently updated on June 15, 2020.

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.* at 5-316(IV)(B)(1), at 24; Thao Mot. to Dismiss Ex. 3, at 13. 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.” Exhibit 3, 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.” Exhibit 1, 5-311(I), (II)(C), at 18; Thao Mot. to Dismiss Ex. 3, at 8. 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.* at 5-302, at 11; Thao Mot. to Dismiss Ex. 3, at 1. “An officer 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.* at 5-311(II)(D)(2), at 18; Thao Mot. to Dismiss Ex. 3, at 8. And if unconsciousness occurs, officers are to “request EMS immediately by radio.” Exhibit 3, 2019 MPD Use of Force Manual, at 2.

In applying a Neck Restraint, MRT, or any other use of force, officers are required to render medical aid when their use of force necessitates it. 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.” Exhibit 1, MPD Policy & Procedure Manual 5-306, at 14; Thao Mot. to Dismiss

Ex. 3, at 4.<sup>5</sup> And they are trained to check the subject’s “airway [and] breathing,” and “start CPR if needed.” Exhibit 3, 2019 MPD Use of Force Manual, at 2, 4.

### ARGUMENT

The facts overwhelmingly demonstrate that probable cause exists to believe that Thao aided and abetted second-degree murder and second-degree manslaughter.

Probable cause exists if “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.” *Ortiz*, 626 N.W.2d at 449. So long as the evidence “brings the charge against the prisoner within reasonable probability,” the motion to dismiss for lack of probable cause must be denied. *State v. Florence*, 239 N.W.2d 892, 896 (Minn. 1976) (quoting *State ex rel. Hastings v. Bailey*, 116 N.W.2d 548, 551 (Minn. 1962)). Thus, to defeat a motion to dismiss for lack of probable cause, “[i]t is not necessary for the state to prove the defendant’s guilt beyond a reasonable doubt.” *Id.* at 896 (quoting *Bailey*, 116 N.W.2d at 551). This rule reflects the strong public interest in having adjudications of guilt and innocence take place before a jury, drawn from the community, after the extensive adversarial testing of a criminal trial. See *State v. Trei*, 624 N.W.2d 595, 598 (Minn. App. 2001) (noting that a probable cause challenge should be rejected so long as it is “fair and reasonable to require the defendant to stand trial”).

In evaluating a motion to dismiss for lack of probable cause, the court must examine the “entire record, including reliable hearsay.” Minn. R. Crim. P. 11.04, subd. 1(c). That includes, among other things, “the complaint, the police reports, the statements of witnesses and the representations of the prosecutor, who is an officer of the court.” *State v. Dunagan*, 521 N.W.2d 355, 356 (Minn. 1994) (quoting *State v. Rud*, 359 N.W.2d 573, 579 (Minn. 1984)).

---

<sup>5</sup> This policy, which was in effect when Floyd died, was subsequently updated on July 17, 2020.

Critically, the court must “view the evidence and all resulting inferences in favor of the State.” *State v. Peck*, 773 N.W.2d 768, 782 n.1 (Minn. 2009). In deciding the motion, “the trial court is not to invade the province of the jury,” *Trei*, 624 N.W.2d at 598, and may not assess “the relative credibility or weight of . . . conflicting evidence,” *State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016) (quoting *State v. Hegstrom*, 543 N.W.2d 698, 702 (Minn. App. 1996)). So long as “the prosecutor possesses substantial evidence that will be admissible at trial and that would justify denial of a motion for a directed verdict of acquittal,” “the court should deny the motion to dismiss without requiring the prosecutor to call any witnesses.” *Dunagan*, 521 N.W.2d at 356 (quoting *Rud*, 359 N.W.2d at 579). In other words, the “test” for probable cause, as with a directed verdict of acquittal, is “whether the evidence is sufficient to present a fact question for the jury’s determination, after viewing the evidence and all resulting inferences in favor of the state.” *State v. Slaughter*, 691 N.W.2d 70, 74-75 (Minn. 2005). If the answer is yes, the “production of exonerating evidence by a defendant at the probable cause hearing does not justify the dismissal of the charges.” *Rud*, 359 N.W.2d at 579.

Here, viewing the record in the light most favorable to the State, the evidence is more than “sufficient to present a fact question for the jury’s determination.” *Slaughter*, 691 N.W.2d at 75. The Court therefore should deny Thao’s motion to dismiss for lack of probable cause.

**I. THERE IS PROBABLE CAUSE TO BELIEVE THAT THAO AIDED AND ABETTED SECOND-DEGREE UNINTENTIONAL MURDER.**

Thao is guilty of aiding and abetting second-degree unintentional murder so long as the State can show that (i) Chauvin committed second-degree unintentional murder; and (ii) Thao aided third-degree assault. The State can make both of these showings. The available evidence brings this charge “within reasonable probability,” *Florence*, 239 N.W.2d at 896, and is

sufficient “to present a fact question for the jury’s determination,” *Slaughter*, 691 N.W.2d at 75. Thao’s motion to dismiss for lack of probable cause should be denied.<sup>6</sup>

### **A. Standards Governing Aiding and Abetting Second-Degree Murder**

1. Minnesota law provides that 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). As relevant here, the elements of that offense are: (i) the victim’s death; (ii) the person’s conduct was a “substantial causal factor” in the death; and (iii) the person, at the time of causing the death, “was committing or attempting to commit” a felony. 10 Minn. Dist. Judges Ass’n, *Minnesota Practice Jury Instruction Guides, Criminal 11.29* (6th ed.) (“CRIMJIG”).<sup>7</sup>

With respect to the third element, the felony offense that gives rise to the second-degree murder charge in this case is third-degree assault. A person is guilty of third-degree assault if he “assaults another and inflicts substantial bodily harm.” Minn. Stat. § 609.223, subd. 1. As relevant here, the elements of third-degree assault are: (i) an assault, defined as “the intentional

---

<sup>6</sup> Thao asserts in passing that the “charging instrument”—here, the criminal complaint—lacks sufficient detail about his role in Floyd’s death to establish probable cause. Thao Mot. to Dismiss at 4. Not so. The complaint sets forth all essential facts and elements to establish probable cause with respect to the charged offenses. Moreover, this Court must evaluate Thao’s motion to dismiss in light of the “entire record,” which includes but is not limited to the complaint. Minn. R. Crim. P. 11.04.1(c). The complaint and the evidence cited here amply demonstrate that there is probable cause for the charged crimes. *See Dunagan*, 521 N.W.2d at 356 (providing that courts shall review information including, but not limited to, “the complaint, the police reports, the statements of witnesses and the representations of the prosecutor”).

<sup>7</sup> For each of the relevant offenses in this case, the model jury instructions also list an additional element: that “the defendant’s act took place on (*or about*) \_\_\_ in \_\_\_ County.” E.g., CRIMJIG 11.29. There is no dispute, however, as to the time or place of the defendants’ acts.

infliction of or attempt to inflict bodily harm” upon the victim; and (ii) the infliction of “substantial bodily harm” upon the victim, defined as “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member.” CRIMJIG 13.16; Minn. Stat. §§ 609.02, subd. 7a, 609.02, subd. 10(2).

Thus, putting these pieces together, the relevant elements of the second-degree unintentional murder charge in this case are: (i) the victim’s death; (ii) the accused’s conduct was a “substantial causal factor” in the death; (iii) the intentional infliction of bodily harm upon the victim; and (iv) “substantial bodily harm” to the victim.

2. The State has charged Thao with aiding and abetting second-degree murder. 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) (internal quotation mark omitted). Critically, the defendant does not need to 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.*<sup>8</sup>

*Second*, the defendant must “intend[] his presence or actions to further the commission of that crime.” *Milton*, 821 N.W.2d at 808 (internal quotation mark omitted). 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. “[A]ctive participation in the overt act which constitutes the substantive offense,” however, “is not required.” *State v. Ostrem*, 535 N.W.2d 916, 924 (Minn. 1995). In evaluating the defendant’s intent, 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).

3. Based on the elements of aiding-and-abetting liability, Thao may be held criminally liable for aiding and abetting second-degree unintentional murder so long as the State can prove that Chauvin committed second-degree unintentional murder and that Thao aided and abetted third-degree assault.<sup>9</sup> In other words, to prove that Thao is guilty of aiding and abetting second-

---

<sup>8</sup> 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 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).

<sup>9</sup> Thao 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. That is with 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 (Footnote Continued on Next Page)

degree murder, the State must establish that Chauvin is guilty of second-degree murder, and must then prove that (i) Thao knew that Chauvin was intentionally committing an assault that inflicted substantial bodily harm on Floyd; and (ii) Thao intentionally aided the assault on Floyd. Thao appears to agree that the State must prove these elements, and does not identify any other disputed elements the State must prove to establish that he is criminally liable on this charge.

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

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 Thao aided and abetted second-degree unintentional murder. *Ortiz*, 626 N.W.2d at 449.

1. As noted, the underlying second-degree murder charge against Chauvin is a necessary predicate for holding Thao criminally liable for aiding and abetting that crime.<sup>10</sup> The relevant elements of unintentional second-degree murder are: (i) Floyd’s death; (ii) Chauvin’s conduct was a “substantial causal factor” in the death; (iii) Chauvin intentionally inflicted bodily harm on Floyd; and (iv) Chauvin’s actions inflicted “substantial bodily harm” on Floyd. *See supra* p. 20. Thao does not meaningfully dispute probable cause as to any of these elements.

Nor could he. Floyd died. The Hennepin County Medical Examiner concluded that Floyd’s cause of death was “cardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression,” and another autopsy report identified “asphyxiation” as a cause

---

(Footnote Continued from Previous Page)

level of violence present in a third-degree assault—resulting in substantial bodily harm—easily meets the danger-to-human-life threshold.”).

<sup>10</sup> This interrelationship between the charges against Thao and Chauvin is one of many reasons why the State has moved for joinder. *See State’s Mot. for Joinder* (filed Aug. 12, 2020)

of death. Hennepin County Autopsy Report, at 1; Armed Forces Medical Examiner Autopsy Report, at 2. And Chauvin's actions—pressing his knee into Floyd's neck for approximately nine minutes—intentionally inflicted substantial bodily harm on Floyd. *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). Indeed, for more than three minutes after Floyd became nonresponsive, and for more than two minutes after Kueng indicated that he could not find Floyd's pulse, Chauvin continued to kneel on Floyd's neck. He did so even as concerned citizens pointed out that Floyd was not resisting or moving, and even as they pointed out that Floyd was no longer breathing. And he did so for a full minute after an ambulance arrived on the scene, and even while one of the emergency medical technicians tried to check Floyd's pulse. At a minimum, these facts prove that the second-degree murder charge against Chauvin is “within reasonable probability.” *Florence*, 239 N.W.2d at 896.

As for Thao's actions: The record evidence readily shows that probable cause exists to believe that (i) Thao knew Chauvin was intentionally committing an assault on Floyd; and (ii) Thao intentionally aided in the assault. *See supra* p. 22.

*First*, the evidence is more than sufficient for a jury to conclude that Thao knew Chauvin was intentionally inflicting substantial bodily harm on Floyd. During the first five minutes Floyd was pinned to the ground, Thao heard Floyd yell “I can't breathe” at least twenty times, and heard him tell the officers nearly ten times that he feared he would die. He watched as Chauvin pressed his knee into Floyd's neck, even while Floyd pleaded: “I can't breathe. Please, your knee in my neck.” (Thao, BWC at 20:21:53-57.) And he heard Chauvin's dismissive response to Floyd's cries for help: “It takes a heck of a lot of oxygen to say things.” (Thao & Kueng, BWC at 20:22:46-50.) Those facts by themselves are sufficient to raise a fact question for the

jury as to whether Thao had the requisite knowledge for aiding and abetting liability—that is, whether Thao knew Chauvin’s conduct satisfied the elements of assault.

Moreover, regardless of whether Thao possessed the requisite knowledge in the first moments after Floyd was pinned to the ground, he certainly possessed that knowledge once Floyd lost consciousness a few minutes later. *See Smith*, 901 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”). Thao saw Chauvin continue to press his knee into Floyd’s neck minutes after Floyd stopped talking and breathing.<sup>11</sup> The bystanders also informed Thao that Chauvin continued to intentionally and unjustifiably cause bodily harm to Floyd even after Floyd was no longer responsive. As Floyd started to show signs of losing consciousness, bystanders urged Thao to “Look at him! . . . Look he’s about to knock out.” (Thao, BWC at 20:24:18-34.) They yelled that Chauvin was “stopping [Floyd’s] breathing,” and that Floyd was about to “pass out.” (Thao, BWC at 20:24:40-20:25:10.) And after Floyd fell silent, bystanders pointed out that “he’s not saying shit now,” “he’s not resisting arrest or nothing,” and “[Chauvin is] stopping [Floyd’s] breathing right now.” (Thao, BWC at 20:24:19-20:24:46.) They pleaded with Thao directly, asking whether he was “just gonna let [Chauvin] choke [Floyd] like that,” whether 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 told Thao that Floyd was “not

---

<sup>11</sup> Thao claims that when he last “turned around to see what was happening, Mr. Floyd was alive and breathing.” Thao Mot. to Dismiss 9. But video evidence shows that Thao turned back to check on the other officers throughout the incident, including at least once well after Floyd stopped breathing. (Exhibit 2, Darnella Frazier Facebook Video 7:10-12; Thao, BWC at 20:23:09-20:25:15, 20:26:40-42, 20:28:00.) In any event, it does not matter whether Thao “turned around.” The crowd told Thao exactly what was happening behind him. *See supra* pp. 10-14.

fucking moving” and that he was “dying.” And they urged Thao and the other officers to check Floyd’s pulse no fewer than thirty times. (Thao, BWC at 20:25:17, 20:25:51-56, 20:25:55-20:26:03, 20:27:11-36, 20:28:05-30.) These comments are more than sufficient to establish Thao’s knowledge that Chauvin was intentionally inflicting harm on Floyd by continuing to kneel on Floyd’s neck, even though he was not resisting, was not responsive, and was not conscious.

Thao’s training also reinforces that he knew Chauvin was applying unlawful force contrary to “Minneapolis Police Department policy.” Thao Mot. to Dismiss 6. Officers “shall only use 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.” Exhibit 1, MPD Policy & Procedure Manual 5-301.01, at 10; Thao Mot. to Dismiss Ex. 3, at 1; see Minn. Stat. § 609.06, subd. 1 (authorizing only the use 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.” Exhibit 3, 2019 MPD Use of Force Manual, at 2. They are told that a “neck restraint” is not permissible on a subject who is “passively resisting,” or who is not resisting at all. Exhibit 1, MPD Policy & Procedure Manual 5-311(II)(C), at 18; Thao Mot. to Dismiss Ex. 3, at 8. And 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. Exhibit 3, 2019 MPD Use of Force Manual, at 2, 4. Chauvin and Thao were trained in these policies, and Thao had attended the Police Academy for several months before the incident. *See* Thao Mot. to Dismiss 6 (“Officer Thao and the other three officers had been repeatedly trained to use neck restraints.”); Thao, BCA Interview at 7:10-7:20. Indeed, Thao’s statement to the other officers that “if we Hobble a Sergeant’s going to have to come over” reflects Thao’s intimate familiarity with the rules

governing the use of force. (Thao, BWC at 20:20:32-39.) But Chauvin and Thao disregarded all of these policies. Thao knew—based on both his own view of the scene and the observations of the gathered crowd of concerned citizens—that Chauvin maintained his knee on Floyd’s neck even after Floyd stopped talking, became unresponsive, and stopped breathing, and that none of the officers had placed Floyd into the recovery position, checked his airway, or started CPR.

Thus, viewed in the light most favorable to the State, the evidence is more than sufficient “to present a fact question for the jury’s determination” as to whether Thao knew that Chauvin was intentionally inflicting substantial bodily harm. *Slaughter*, 691 N.W.2d at 75.

*Second*, the evidence is more than sufficient for a jury to conclude that Thao 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. In other cases, courts have inferred intent from “the defendant’s presence at the scene of the crime” or “a close association with the principal offender before and after the crime.” *Id.*; see Thao Mot. to Dismiss 8 (agreeing that “active participation in the overt act” is not required, as “presence, companionship, and conduct before and after an offense” can suffice to infer intent (quoting *Ostrem*, 535 N.W.2d at 924)). Here, the evidence is even stronger.

For one thing, it was Thao who suggested to the other officers that they should continue to pin Floyd face-down to the ground. About a minute after Chauvin began pressing his knee into Floyd’s neck, Thao located a Hobble device and asked whether the officers still “want to Hobble at this point then.” (Thao, BWC at 20:20:25-20:20:31.)<sup>12</sup> When the other officers did

---

<sup>12</sup> Thao first suggested that the officers should “hogtie” Floyd, and repeated that the officers were “gonna have to tie him.” (Thao, BWC at 20:18:48-53.) MPD policy, however, expressly forbids the use of a “hogtie.” Exhibit 1, 5-316 § IV.A.2.d, at 24; see *supra* p. 7 n.2.

not answer immediately, Thao suggested that they “just hold him until EMS” arrives. Thao then explained why. He told the other officers that using the Hobble would mean more paperwork for the officers: “If we hobble a Sergeant’s going to have to come over.” (Thao, BWC at 20:20:32-39; *see supra* p. 8 & n.3.) Thao, in other words, encouraged the officers to continue pinning Floyd in a dangerous position for the administrative convenience of the officers. The other officers agreed with Thao. From that evidence alone, a jury could reasonably conclude that Thao intentionally aided Chauvin in his assault on Floyd by “advising” and “encourag[ing] [him] to act.” Minn. Stat. § 609.05, subd. 1; *Ostrem*, 535 N.W.2d at 935.

After encouraging the other officers to maintain their positions, Thao then placed himself between the officers and the gathering crowd, preventing bystanders from intervening to assist Floyd and thereby enabling Chauvin, Kueng, and Lane to maintain their positions. Indeed, Thao himself admits that he was “focused on keeping the civilian bystanders out of the scene to allow the other three officers” to continue to restrain Floyd. Thao Mot. to Dismiss 9. As Chauvin, Kueng, and Lane continued to press Floyd face-down into the pavement, Thao blocked the bystanders from coming onto the street, telling them to “just get back on the sidewalk” and pushing them back when they did not comply. (Thao, BWC at 20:23:09-20:24:18, 20:27:45-52.) Thao also rebuffed an off-duty Minneapolis firefighter who asked to provide Floyd with medical assistance, yelling at her to “back off!” and “get off the street,” and directing her away from Floyd and toward the sidewalk. (Thao, BWC at 20:25:36-41.) Thao took these actions even as the bystanders urged him to check Floyd’s pulse, to provide medical assistance, and to stop Chauvin from kneeling on Floyd’s neck. *See supra* pp. 11-14. Instead of intervening to help Floyd, as he was trained to do, Thao pushed the distraught bystanders back to the sidewalk

and preventing them from intervening, thereby aiding and abetting his co-defendants in continuing the course of action Thao himself had suggested. (Thao, BCA Interview at 9:30.)

Thao nonetheless contends that he could not have intentionally aided the assault because he “did not physically place his hands on Mr. Floyd.” Thao Mot. to Dismiss 8. But that has never been a requirement for aiding-and-abetting liability. As Thao acknowledges, “active participation in the overt act which constitutes the substantive offense is not required.” *Id.* at 7-8 (quoting *Ostrem*, 535 N.W.2d at 924). For that reason, the Minnesota Supreme Court has long recognized that “the ‘lookout’ ”—someone who stands watch nearby and does not make direct contact with the victim, but who seeks to prevent others from interfering with the crime—“is a classic example” of an “aider and abettor.” *State v. Parker*, 164 N.W.2d 633, 641 (Minn. 1969). Here, Thao fulfilled that role and more. He encouraged the other officers to continue pinning Floyd to the ground face-down. And he stood watch and prevented concerned bystanders from intervening to save Floyd, including by using his hands to push the bystanders back to the sidewalk. (Thao, BWC at 20:27:48-51, 20:28:00-01.) All the while, “[h]e did nothing to prevent the offense[.]” and “made no effort to stop it.” *Parker*, 164 N.W.2d at 641. That evidence is more than sufficient for a jury to conclude that Thao intentionally aided in the assault.

Thao also claims that “[h]is actions in no way furthered the commission of the alleged crime” because he allegedly “suggested alternative means to using a neck restraint on Mr. Floyd when he offered the hobble restraint.” Thao Mot. to Dismiss at 8. That, too, is wrong. After all, it was Thao who suggested that the officers *should not* use a Hobble because of the administrative headaches it would create. *See supra* p. 8. Moreover, even if Thao had acted properly at the outset of the incident, that cannot absolve him of criminal liability for his actions

over the ensuing minutes, during which he ignored Floyd's cries for help, actively restrained bystanders, turned away an off-duty firefighter who sought to provide Floyd with medical aid, and failed himself to provide Floyd with medical aid. *See Smith*, 901 N.W.2d at 662.

Thao therefore "made the choice to aid in [the offense's] commission." *Smith*, 901 N.W.2d at 662. His actions enabled Chauvin and the other officers to maintain control over Floyd and to continue pinning him to the ground. Viewing Thao's actions in the light most favorable to the State, a jury could readily conclude that Thao "intended his presence or actions to further" Chauvin's assault on Floyd. *Milton*, 821 N.W.2d at 808; *see Ostrem*, 535 N.W.2d at 925 (finding sufficient evidence for aiding-and-abetting liability where the defendant was present "while the crime was being committed" and "did nothing to 'thwart its completion'").

In short, on all 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 Thao committed that offense.

2. Thao's primary response is that Chauvin used "reasonable force in effecting a lawful arrest," and that Chauvin's actions therefore cannot serve as the basis for Thao's liability. Thao Mot. to Dismiss 9-11; Minn. Stat. § 609.06, subd. 1. Thao's argument fails for two reasons.

*First*, it ignores the critical question for the jury: Whether Chauvin's actions were reasonably justified for the entirety of the officers' interaction with Floyd. *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); MPD Policy & Procedure Manual 5-303, Thao Mot. to Dismiss Ex. 3, at 2 (same). It does not matter whether the officers were reasonably justified in restraining Floyd when they first pinned him to the

ground. After all, Thao is guilty of aiding and abetting second-degree unintentional murder so long as he “acquire[d] the requisite knowledge” while the officers were “in the process of committing the offense.” *Smith*, 901 N.W.2d at 662. In other words, as long as pinning Floyd to the ground face-down with a knee pressed into his neck became unjustified at some point during the incident, and as long as Thao knew as much, he cannot escape criminal liability.

That is the case here. For the first five minutes after Chauvin began kneeling on Floyd’s neck, Floyd cried for help, declaring over twenty times that he could not breathe. *See supra* pp. 8-11. Floyd then went silent. Nonetheless, Chauvin continued to press his knee into Floyd’s neck for four more minutes, with Kueng and Lane restraining his back and legs, and Thao preventing the crowd of bystanders from interceding. During the last three of these minutes, Floyd lay completely motionless, offering no resistance at all. *See supra* pp. 13-14. By that point, any plausible justification for pinning Floyd in that manner had evaporated. And Thao knew as much. He heard the bystanders’ repeated statements that Floyd was not resisting, was not moving, was unresponsive, and had stopped breathing. *See supra* pp. 23-25. He saw Chauvin continue to press his knee into Floyd’s neck. *See supra* p. 24 & n.11. And he acknowledged and responded to those comments. *See supra* pp. 10-14 (Thao responded by saying “okay,” “alright,” “yeah, okay,” and “Hey, if that makes you feel better about yourself, go ahead”).

Indeed, the defendants’ actions here are legally and factually distinguishable from *Lombardo v. City of St. Louis*, 956 F.3d 1009 (8th Cir. 2020), a federal civil rights case on which Thao relies. *See* Thao Mot. to Dismiss 11-12. The Eighth Circuit in that case evaluated whether police officers were subject to civil liability for violating the Fourth Amendment, whereas the question here is whether the officers committed a crime under Minnesota law. In any event, the

factual differences between this case and *Lombardo* reinforce the existence of probable cause. The Eighth Circuit found it critical that the “[t]he undisputed facts . . . show[ed] 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.” *Lombardo*, 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, the defendants took the opposite approach: They continued to restrain Floyd for more than four minutes after Floyd fell silent and bystanders pointed out that Floyd was not resisting. Throughout that time, Thao continued to aid the other defendants. The evidence therefore supports the existence of probable cause for the aiding and abetting charge regardless of whether the initial decision to restrain Floyd was reasonable.

*Second*, the jury could find that the defendants’ actions were not reasonably justified at the initial moment they restrained Floyd face-down on the ground. For one thing, the charge for which Floyd was arrested—passing a counterfeit \$20 bill—was a gross misdemeanor offense. *See* Minn. Stat. §§ 609.632, subd. 4(b)(4), 609.02, subd. 4. The “severity of the crime at issue”—a nonviolent property crime—thus did not support the level of force used against Floyd. MPD Policy & Procedure Manual 5-303, Thao Mot. to Dismiss Ex. 3, at 2; *see 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 alleged “resistance” to the defendants’ commands did not support the application of a neck restraint. Thao Mot. to Dismiss 11. The officers 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, his assertion that he was recovering from COVID, and the “influence of drug or alcohol use,” among other things. *See* Exhibit 1, MPD Policy & Procedure 5-304(B)(1)(b), at 12; Thao Mot. to Dismiss Ex. 3, at 3; Thao, BCA Interview 33:39-55 (Thao suggesting that Floyd was “obviously” high); *see supra* p. 15. Based on those factors, a jury officers 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, MPD Policy & Procedure 5-302, at 10; Thao Mot. to Dismiss Ex. 3, at 1 (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.* at 5-311(II)(C), at 18; Thao Mot. to Dismiss Ex. 3, at 8 (forbidding the use of a “neck restraint against subjects who are passively resisting”). Moreover, to the extent Thao asserts that the evidence shows that Floyd’s resistance justified the initial neck restraint, the court should not weigh that evidence itself. Rather, it should deny the motion and reserve that question for the jury. *See Trei*, 624 N.W.2d at 598 (“[T]he trial court is not to invade the province of the jury.”).

At best, then, Thao’s arguments raise fact questions for the jury. But under the probable cause standard, that is nowhere close to enough to warrant dismissal. Because the evidence brings the charge of aiding and abetting second-degree murder “within reasonable probability,” Thao’s motion to dismiss should be denied. *Florence*, 239 N.W.2d at 896.

## **II. THERE IS PROBABLE CAUSE TO BELIEVE THAT THAO AIDED AND ABETTED SECOND-DEGREE MANSLAUGHTER.**

To establish aiding-and-abetting liability on second-degree manslaughter, the State must show that Chauvin committed second-degree manslaughter, that Thao had knowledge of the crime, and that Thao intentionally aided in the crime. The evidence plainly demonstrates that there is probable cause to believe that each of these elements has been satisfied.

### A. Standards Governing Aiding and Abetting Second-Degree Manslaughter

1. The statute governing second-degree manslaughter provides: “A person who causes the death of another . . . 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” is “guilty of manslaughter in the second degree.” Minn. Stat. § 609.205(1). The statute defines “great bodily harm” as “bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss of impairment of the function of any bodily member or organ.” *Id.* § 609.02, subd. 8.

Second-degree manslaughter requires proof of (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)). 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.” *Id.* That is usually established through circumstantial evidence, “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 (quoting *Johnson*, 616 N.W.2d at 726).

2. Thao is charged with aiding and abetting 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.”). As noted, to establish aiding and abetting liability, the State must

prove that Chauvin committed the underlying offense, that Thao had knowledge of the crime, and that Thao intentionally aided in the crime. *See supra* pp. 20-22. In other words, the State must prove that Chauvin committed second-degree manslaughter and must then establish the following elements: (i) Thao knew Chauvin grossly deviated from the standard of care a reasonable person would have observed; (ii) Thao knew Chauvin consciously disregarded the risk of death created by his conduct; and (iii) Thao intentionally aided in the crime.

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

For the same reasons there is probable cause to believe that Thao aided and abetted second-degree unintentional murder, there is also probable cause to believe that he aided and abetted second-degree manslaughter.

To begin, the evidence strongly supports the conclusion that Chauvin committed second-degree manslaughter, which is a predicate for holding Thao liable for aiding and abetting that crime. In kneeling on Floyd's neck for approximately nine minutes, and for more than three minutes after Floyd became unresponsive, Chauvin "cause[d] the death" of Floyd. *See* Minn. Stat. § 609.205(1); *supra* p. 33. Chauvin's conduct also "gross[ly] deviat[ed] from the standard of care that a reasonable person" would observe in the situation. *McCormick*, 835 N.W.2d at 507. Indeed, the training given to all police officers, including Chauvin, required him to "[p]lace the subject in the recovery position to alleviate positional asphyxia," and 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. Exhibit 1, MPD Policy & Procedure Manual 5-311(II)(c), 5-316(IV)(B)(1), at 18, 24; Thao Mot. to Dismiss Ex. 3, at 8, 13-14; Exhibit 3, 2019 MPD Use of Force Manual, at 78, 84. Chauvin did none of those things. Chauvin's conduct, moreover, reflected his "actual conscious disregard of the risk

created by his conduct.” *McCormick*, 835 N.W.2d at 507. Even as bystanders were screaming that Floyd was not responsive and was not breathing, and even as Kueng confirmed twice that he could not find Floyd’s pulse, Chauvin continued to press his knee into Floyd’s neck—for a matter of minutes, not seconds. *See supra* pp. 11-14. That evidence readily establishes that Chauvin committed second-degree manslaughter.

With respect to Thao’s conduct, the evidence—viewed in the light most favorable to the State—is also more than “sufficient to present a fact question for the jury’s determination” on the elements of aiding and abetting second-degree manslaughter. *Slaughter*, 691 N.W.2d at 75.<sup>13</sup>

*First*, Thao 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 (quoting *Frost*, 342 N.W.2d at 319). The chorus of pleas from the crowd of bystanders—as well as the body camera footage—demonstrate Thao’s knowledge that Floyd was not resisting and did not appear to have a pulse; his knowledge that Chauvin continued to press his knee into Floyd’s neck after Floyd became unresponsive; and his knowledge that none of the officers had placed Floyd into the recovery position, checked his airway, or started CPR. *See supra* pp. 23-26. Thao was familiar with the use-of-force protocols mandated by the MPD’s officer training, but he knew that Chauvin was disregarding those protocols. *See supra* pp. 25-26.

*Second*, Thao knew that Chauvin was consciously disregarding the risk of death created by his conduct. He knew that Chauvin could hear the screams of bystanders who cried out that Floyd was “not fucking moving,” because Thao could hear them clearly too. (Thao, BWC at

---

<sup>13</sup> As with the first charge against Thao, the interrelationship between Thao’s conduct and Chauvin’s with respect to the second-degree manslaughter charge is one reason why the State has moved for joinder. *See supra* p. 21 n.10.

20:27:11-17; *see supra* pp. 12-13.) He knew that Chauvin could hear the crowd yelling that he was “stopping [Floyd’s] breathing,” and begging the officers to take Floyd’s pulse more than thirty times. (Thao, BWC at 20:24:40, 20:25:41-20:27:07.) He knew that Chauvin continued to keep his knee on Floyd’s neck for several minutes after Floyd stopped talking, responding, or moving. *See supra* p. 13 (bystander asking: “Thao, you gonna let him keep that like that? You gonna let him kill that man in front of you, bro?”). And he knew that Chauvin was not following the use-of-force protocols mandated by the MPD’s officer training. *See supra* pp. 25-26.

*Finally*, for the same reasons Thao intentionally aided in the commission of second-degree unintentional murder, Thao intentionally aided in the commission of second-degree manslaughter. *See supra* pp. 26-29. He encouraged the other officers to keep Floyd pinned to the ground face-down, rather than using a Hobble device to restrain him. And he stood guard as Chauvin knelt on Floyd’s neck. Indeed, even after Floyd became unresponsive, Thao continued to push concerned citizens back onto the sidewalk, preventing them from intervening to help Floyd and allowing Chauvin, Kueng, and Lane to maintain their positions on top of him.

Thus, at a minimum, the facts “would lead a person of ordinary care and prudence to hold an honest and strong suspicion” that Thao is guilty of aiding and abetting second-degree manslaughter. *Ortiz*, 626 N.W.2d at 449. Probable cause exists for this charge.

**CONCLUSION**

For the foregoing reasons, Defendant Tou Thao's motion to dismiss should be denied.

Dated: August 24, 2020

Respectfully submitted,

KEITH ELLISON  
Attorney General  
State of Minnesota

/s/ Matthew Frank  
MATTHEW FRANK  
Assistant Attorney General  
Atty. Reg. No. 021940X

445 Minnesota Street, Suite 1400  
St. Paul, Minnesota 55101-2131  
(651) 757-1448 (Voice)  
(651) 297-4348 (Fax)  
matthew.frank@ag.state.mn.us

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

ATTORNEYS FOR PLAINTIFF