

STATE OF MINNESOTA
 COUNTY OF HENNEPIN

DISTRICT COURT
 FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

**PROPOSED ORDER
 AND FINDINGS OF
 FACTS**

PLAINTIFF,

V.

TOU THAO,

DEFENDANT.

COURT FILE NO. 27-CR-20-12949

The matter of *State v. Thao*, court file number 27-CR-20-12949, was submitted for advisement to this Court on January 31, 2023, on a stipulated evidence trial. Mr. Tou Thao waived his right to a jury trial and agreed to be tried by a stipulated evidence trial on October 24, 2022. Both parties – the State of Minnesota and Mr. Thao – submitted written closing arguments and proposed findings of facts based on the following stipulated evidence:

1. *State v. Chauvin* (court file no. 27-CR-20—12646) trial transcript;
2. All *State v. Chauvin* trial exhibits;
3. *U.S. v. Thao* (court file number 0:21-cr-00108 (PAM/TNL)) trial transcript;
4. All *U.S. v. Thao* trial exhibits (including exhibits admitted by co-defendants Kueng and Lane);
5. 24 Supplemental exhibits labeled State’s Supplemental Exhibits:
 - State's Supplemental Ex. 1
 - Still Image from Alisha Oyler video 5 @ 55 Seconds – Kueng/Thao with hands in pockets facing bystanders
 - State's Supplemental Ex. 2
 - Still image of individuals on sidewalk – Thao BWC @ 20.27.27

- State's Supplemental Ex. 3
 - Still image of Milestone/D.F. video (08:22:01)
- State's Supplemental Ex. 4
 - Clip from Thao's BWC (Axon_Body_3_Video_2020-05-25_2017) from 20:22:17-20:22:52
- State's Supplemental Ex. 5
 - Still image of Thao BWC (20:22:48) (#10)
- State's Supplemental Ex. 6
 - Still image of individuals on sidewalk – Thao BWC @ 20.28.16
- State's Supplemental Ex. 7
 - Billy Jones Video
- State's Supplemental Ex. 8
 - Still Image of McMillian Van Pulling onto 38th (from Ex. 55: Dragon Wok Video at 20:34:38)
- State's Supplemental Ex. 9
 - Still image of all 4 Officers – Billy Jones Video @ 00:42
- State's Supplemental Ex. 10
 - Still image of all 4 Officers – Billy Jones Video @ 00:50
- State's Supplemental Ex. 11
 - Still image of all 4 Officers – Billy Jones Video @ 00:42
- State's Supplemental Ex. 12
 - BWC from Officer Chauvin (2034) from 20:35:13 to 20:36:42
- State's Supplemental Ex. 13
 - BWC from Officer Thomas Lane #3951 from 20:07:57 to 20:29:41
- State's Supplemental Ex. 14
 - Thao BWC Clip: 20:36:12 to 20:36:35 (Axon_Body_3_Video_2020-05-25_2017)
- State's Supplemental Ex. 15
 - Still image of Stabilization Room Video_Trauma Bay at 20:54:18/ 1:49 (#15 Report 120 HCMC Stab Room video)(top-left quadrant)
- State's Supplemental Ex. 16
 - Still image of Lane's BWC at 20:37:26 (Axon_Body_3_Video_2020-05-25_2008)
- State's Supplemental Ex. 17
 - Thao BWC Clip: 20:32:46 to 20:33:19 (Axon_Body_3_Video_2020-05-25_2017)
- State's Supplemental Ex. 18
 - Stabilization Room Video_Trauma Bay Clip: 20:54:00/1:31 to 20:55:16/2:48)

- State's Supplemental Ex. 19
 - Stabilization Room Video_Trauma Bay Clip, 21:24:53/32:25 to 21:25:28/32:59
- State's Supplemental Ex. 20
 - Minneapolis Police Field Training Officer Manual (#9830-9868)
- State's Supplemental Ex. 21
 - Expert Report of Seth W. Stoughton and Jeffrey J. Noble (#41891-42199)
- State's Supplemental Ex. 22
 - Expert Report of Sergeant Jody Stiger (#42245-42705)
- State's Supplemental Ex. 23
 - Transcript of Video Interview with Tou Thao (#27480-27525)
[ILLUSTRATIVE EXHIBIT]
- State's Supplemental Ex. 24
 - Video of BCA Interview with Tou Thao (#8128)

The Court has reviewed the stipulated evidence and makes the following order and findings of fact.

ORDER

1. The Court as to Count 1: Aiding and Abetting Second Degree Murder – Unintentional – While Committing a Felony, find the Defendant Tou Thao:

NOT GUILTY

GUILTY

2. The Court as to Count 2: Aiding and Abetting Second Degree Manslaughter – Culpable Negligence Creating Unreasonable Risk, find the Defendant Tou Thao:

NOT GUILTY

GUILTY

The attached Memorandum Opinion is incorporated herein.

BY THE COURT:

Peter A. Cahill
Judge of District Court

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PROCEDURAL POSTURE

On June 6, 2020, Mr. Thao was charged by complaint with Count 1: Aiding and Abetting Second Degree Murder – Unintentional – While Committing a Felony in violation of Minnesota Statutes § 609.19 subd. 2 (1) and § 609.05 subd. 1; Count 2: Aiding and Abetting Second Degree Manslaughter – Culpable Negligence Creating Unreasonable Risk in violation of Minnesota Statutes § 609.205 subd. 1 and § 609.05 subd.

On October 24, 2022, Mr. Thao waived his right to a trial by jury. *See* Index 633. Mr. Thao agreed that “a determination of my guilt may be submitted to and tried by the court based entirely on stipulated evidence.”. *Id.* A hearing was held on October 24, 2022, and the State withdrew their notice of pursuing an aggravated sentence on the record.

On January 31, 2023, the parties submitted their written closing arguments and proposed findings of facts. This Order follows.

FINDINGS OF FACT

I. THE MPD KNOWINGLY AND INTENTIONALLY TRAINED ITS OFFICERS – INCLUDING THAO – TO PLACE THEIR KNEES ON THE BACK OF A PERSON’S NECK IN THE PRONE POSITION WHILE HANDCUFFED TO CONTROL THEM.

Thao was first hired as a community service officer by the Minneapolis Department (“MPD” herein) while he attended college at North Hennepin – pursuing his degree in law enforcement. Federal Tr. 14 at 3053-3054. After serving the MPD in this position for a year in a half, he graduated from college, obtained his POST license, and was hired by MPD as a recruit. Federal Tr. 14 at 3056.

Thao then attended the MPD academy located at the Special Operations Center in North Minneapolis. Federal Tr.14 at 3057. The MPD academy taught recruits MPD policies, applicable law, defensive tactics – which included handcuffing, takedowns, use of force techniques, Tasers, and batons. Federal Tr. 14 at 3058-3059; Federal Thao Ex. T-27(A-T). The MPD trained the academy recruits to restrain arrestees in the prone position

using their body weight, specifically including the use of putting a knee on the neck and/or upper back of the arrestee. Federal Thao Ex. T-27(A-T); Federal Thao Ex. T-12; Federal Thao Ex. T-20; Federal Thao Ex. T-21; and Federal Thao Ex. T-22. Thao himself was trained to restrain a person using his body weight, including the use of a knee on a person's neck and/or upper back. *See* Federal Tr. 14; Federal Thao Ex. T-12; Federal Thao Ex. T-27D; Federal Thao Ex. T-27E.

The MPD intentionally, knowingly, and repeatedly taught their recruits to use a knee on the back of the neck.¹

The MPD trained Thao and his fellow academy recruits to use their body weight and knees on a person's neck to control them.² Thao testified that instructors never corrected the recruits that this was an improper technique. Federal Tr. 14 at 3084. Quite the opposite: instructors showed Thao and other recruits how to use their legs around the neck of a person to restrain them, but recruits were never allowed to practice the moves themselves. *Id.* at 3085.

¹ Federal Thao Ex. T-27C (showing a use of force instructor watching and smiling at a recruit putting his knee on the back of a neck of a person handcuffed in the prone position) (showing the volunteer fake arrestees wearing protective headgear, including padding on the back of the neck); Federal Thao Ex. T-12 (the excited delirium PowerPoint given to academy recruits which contains multiple videos and photographs of officers using knees on the back of the necks of people suspected of experiencing excited delirium); Federal Thao Ex. T-27S (showing a MPD use of force instructor displaying at least one photograph of one of Thao's fellow recruits training to use a knee on the back of the neck on the bulletin board in the MPD academy office); Federal Thao Ex. T-20, T-21, and T-22 (2017 academy videos showing use of force trainers observing and giving positive feedback on recruits who are practicing restraining people in the prone position with their knees on the back of the necks) (showing the volunteer fake arrestees wearing protective headgear, including padding on the back of the neck); and Federal Tr. 14 at 3066.

² Federal Tr. 14 at 3078-3079; *see also* Federal Thao Ex. T-27 (A-T) (which shows use of force instructors observing and smiling at Thao's academy recruits using their knees on the back of the necks of fake-arrestees).

II. THE MPD TRAINED ITS OFFICERS THE POTENTIAL SIGNS OF EXCITED DELIRIUM & THAT THE PROPER RESPONSE WAS TO RESTRAIN AND HOLD THAT PERSON UNTIL EMS ARRIVED TO PROVIDE SEDATION.

The MPD recognized excited delirium as a real phenomenon that people may experience and that can lead to death unless a police officer restrains the person until EMS arrives to sedate them.³ The MPD regularly trained its officers to be aware of excited delirium how to recognize excited delirium, and how to respond to it as an officer. Federal Tr. 6 at 1217.

The MPD trained its recruits in academy and trained its officers during in-service training on excited delirium. Federal Thao Ex. T-12; Federal Tr. 6 at 1224 and 1216; and Federal Tr. 14 at 3099 and 3100. The MPD regularly trained its officers to be aware of excited delirium, how to recognize excited delirium, and how to respond to it as an officer. Federal Tr. 6 at 1217.

MPD trained its officers that excited delirium is “a condition that manifests as a combination of delirium, psychomotor agitation, anxiety, hallucinations, speech disturbances, disorientation, violent and bizarre behavior, insensitivity to pain, elevated body temperature and super-human strength.” Federal Tr. 6 at 1234. MPD recruits and officers – including Thao – were trained to use the mnemonic NOTACRIME to recognize the signs of excited delirium. The mnemonic stands for:

³ See Federal Thao Ex. T-12 (*see specifically* Slide 6 where excited delirium is defined as “A condition that manifests as a combination of delirium, psychomotor agitation, anxiety, hallucinations, speech disturbances, disorientation, violent and bizarre behavior, insensitivity to pain, elevated body temperature and superhuman strength”; and instructor comments read “How many calls do we go on every year with someone exhibiting at least on of these signs and symptoms.”).

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

Thao went through an in-service training on excited delirium in 2019. *See* Federal Tr. 6 at 1227-1228. This excited delirium training included the PowerPoint labeled as Federal Thao Ex. T-12. *See* Blackwell testimony at Federal Tr. 6 at 1228-1229.⁴ MPD Inspector Blackwell personally approved the excited delirium PowerPoint (Federal Thao Ex. T-12). Federal Tr. 6 at 1273. MPD’s chief at the time – Medaria Arradondo – previewed and made sure the PowerPoint included “his vision” in the training. Federal Tr. 6 at 1273. This PowerPoint contained repeated photographs and videos of officers using knees on the necks to restrain persons who meet the signs of excited delirium. Federal Thao Ex. T-12.

⁴ Note: the PowerPoint was often mistakenly referred to as Exhibit T-13 by parties throughout the Federal Transcript.

The MPD knowingly and intentionally trained its officers to respond with use of force when attempting to restrain a person suspected of experiencing excited delirium. MPD presented – via the excited delirium PowerPoint – that people experiencing excited delirium may physically resist and officers should respond with force:

This is where you have a subject fight off batons, mace, tasers, and anything else you throw at them.

Attempts to subdue these patients often results in an escalation of their violent behavior, which necessitates the use of stronger physical restraints. This increased metabolic activity worsens their hyperthermia, which has been recorded in some cases to exceed 105° F.

The patient with excited delirium continued to fight the restraints until cardiac arrest occurs.

Federal Thao Ex. T-12 at Slide 22; *see also* Federal Thao Ex. T-12 at Slide 27 (where the presenter notes are a reminder to touch on the “MPD blue hog pile” needed to restrain a person experiencing excited delirium).

Through the academy and in-service training, MPD taught its officers – including Thao – that “the police restraint is actually a means of protecting [excited delirium] people from exhausting themselves and dying”. Federal Tr. 6 at 1265. MPD trained its officers that “Law enforcement control measures should be combined with immediate sedative medical intervention to attempt to reduce the risk of death.” Federal Thao Ex. T-12 at Slide 34. MPD trained its officers that “One main theme that is consistently stated throughout the paper is that the patient has almost a 10% chance of death due to metabolic acidosis is they are not properly sedated following the typical violent combative behavior.” Federal Thao Ex. T-12 at Slide 34 (presenter’s comments).

MPD trained its officers to restrain people thought to be experiencing excited delirium until they can be sedated by EMS. Federal Tr. 6 at 1266. MPD trained its officers that if they are restraining a person experiencing excited delirium, “they will actually reduce the risk of death to the person”. Federal Tr. 6 at 1266.

III. THAO HAD EXPERIENCE DEALING WITH PERSONS HE SUSPECTED TO BE EXPERIENCING EXCITED DELIRIUM.

Thao testified that while working as a hospital security guard he personally dealt with five people he believed were experiencing excited delirium. Federal Tr. 14 at 3139. Thao worked at Fairview Riverside Hospital as a security guard. Federal Tr. 14 at 3091. When a patient came into the ER and was out of control and medical staff could not de-escalate, Thao and other security officers were instructed to restrain the patient. Federal Tr. 14 at 3096. Thao restrained people he believed to have been experiencing excited delirium at Fairview Riverside Hospital. Federal Tr. 14 at 3102. When these patients were restrained, they were oftentimes sedated by medical professionals. Federal Tr. 14 at 3103. If a person was fully restrained in handcuffs and continued to not calm down, “doctors would decide for them to be held down further and sedated to prevent them from essentially working themselves to death”. Federal Tr. 14 at 3103. Thao observed medical records at Fairview Riverside hospital that included notations on excited delirium. Federal Tr. 14 at 3099.

During his time as a MPD officer, Thao interacted with people he believed were experiencing excited delirium. Federal Tr. 14 at 3139. He estimated that conservatively he encountered 30 people who met the criteria MPD set forth for excited delirium. Federal Tr.

14 at 3139. During these encounters, the people believed to be experiencing excited delirium were restrained by MPD officers and held in a restraint until paramedics arrived to sedate them. Federal Tr. 14 at 3139-3140.

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

IV. MPD OFFICERS WERE TAUGHT THAT IF THEY DO NOT DETECT A PULSE ON A PERSON, THEY MUST ADMINISTER CPR.

MPD taught its officers CPR and basic first aid. Thao was trained in basic first aid, including CPR. Federal Tr. 14 at 3145; 3163. The MPD trained officers to immediately start CPR if a person has no pulse. Federal Tr. 14. at 3149. Thao was trained that if someone has no pulse, he had to start CPR immediately after it is safe enough to do so. Federal Tr. 14 at 3168.

V. MAY 25, 2020.

On May 25, 2020, Thao and Chauvin were partnered together and assigned to Squad 330 at the Third Precinct for the middle watch shift. Federal Tr. 14 at 3109; 3112. At the

time of the call to Cup Foods, they were getting ready to eat dinner at the Third Precinct. Federal Tr. 14 at 3110. Thao and Chauvin were dispatched to an “out of sector” counterfeit bill call at Cup Foods. Federal Tr. 14 at 3110. “Out of sector” calls are calls that occur outside of a police officer’s assigned geographic sub-section within their precinct. *See generally* Federal Tr. 14 at 3110. Thao and Chauvin were specifically called because they were the only squad car available at the time of the call. Federal Tr. 14 at 3110-11. The call was a “priority 1” call which means “get there fast. Suspect may still be on scene. The crime is still in progress.” Federal Tr. 14 at 3111. Dispatch provided information that the suspect was still on scene in a parked car and possibly under the influence. Federal Tr. 14 at 3111.

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

Kueng and Lane approached the suspect – later identified by Kueng as Floyd – in a vehicle across the street from the store that was occupied by Floyd and two other persons. After observing furtive movements from Floyd and Floyd refusing to show both his hands, Lane drew his service gun on Floyd in an effort to get Floyd to comply with his directives. *See* Chauvin Ex. 47 starting at 20:09:25. Lane removed Floyd from the vehicle and handcuffed him with the needed assistance of Kueng. Chauvin Ex. 47 at 20:10:30-20:11:40. When he first spoke with Floyd, the officers asked Floyd if he “was on something” because he “was acting real erratic”. Chauvin Ex. 43 at 20:14:05-20:14:22. The

officers told Floyd he has foam around his mouth, which Floyd responds to with “yes, I was hoopin’⁵ earlier”. *Id.*

Lane and Kueng led Floyd in handcuffs to their squad car across the street. Chauvin Ex. 47 at 20:14:11. Floyd repeatedly dropped his weight while walking across the street. *See* Federal Tr. 15 at 3465. Floyd became uncooperative and resisted being placed into the squad car and then attempted to kick his way out of the back of the squad car while Lane and Kueng attempted to calm him down.

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

Chauvin and Thao left in their squad to respond to the call. Halfway through the drive to Cup Foods, “320 had called a Code 4, so we slowed down.” Federal Tr.14 at 3113. Rather than turning around to go back to the station and resume their dinner, Chauvin and Thao continued to the call because “from [Thao’s] experience, Cup Foods is hostile to police.” Federal Tr. 14 at 3114. While driving to the incident location, Thao can be heard telling Chauvin that “we’re going over there at least. It’s kind of uh Blood’s territory” Federal. Gov’t Ex. 9 at 20:12:24-20:12:36. Thao testified that “It’s a well-known Bloods gang hangout spot. And [Lane and Kueng] being new, I don’t think they would have known

⁵ Medical testimony revealed that “hoopin” refers to someone administering drugs via their rectum. Federal Tr. 10 at 2213.

that.” Federal Tr. 14 at 3114. Thao elaborated: “I wanted to at least provide 320 with security just in case things got out of hand, because it sounded like they were in a struggle near there, so I didn’t know what potential environment they could be having there”. Federal Tr. 14 at 3114-15. The Bloods street gang can be identified because they normally wear red. Federal Tr. 14. at 3115.

Shortly thereafter, Thao and co-defendant and then officer Derek Chauvin arrived on scene to assist in the arrest. Upon arriving on scene, Thao and Chauvin pull up to the left side of 38th street because Officer Chang “[w]as outnumbered two to one and one of them was wearing red” and “[h]e was by himself. So officer safety-wise it made sense to go to him” Federal Tr. 14. at 3118 and 3119 respectively. Thao noted the entirely red outfit of a person as significant because it meant that “There may be gang members in the area.” Federal Tr. 14 at 3119. Officer Chang waived off Thao and Chauvin, so they proceeded to the north side of 38th street and parked near squad 320 where the struggle was ongoing. *See* Federal Tr. 14 at 3119.

At 20:17:33, Thao and Chauvin arrived on the scene where Lane, Kueng, and Floyd struggled by squad 320. Federal. Gov’t Ex. 9. At that time, Floyd was inside the squad car, physically resisting, and attempting to get out. Federal. Gov’t Ex. 9. Thao observed Kueng and Lane struggling with Floyd to get him into their squad car. Federal Tr. 14 at 3121; Federal Thao Ex. T-29. Thao observed Floyd physically resisting getting inside the squad vehicle. Thao testified that “there seems to be a lot of physical force to kind of try to get him inside” and Floyd was stiffening up his leg. Federal Tr. 14 at 3121. In his years of

experience as an MPD officer, Thao had experience with getting resisting persons into a squad vehicle, but had “never seen this much of a struggle.” Federal Tr. 14 at 3121.

While Floyd was inside of the squad car, he stated that he could not breathe. When Floyd said this, Thao did not observe anything that would have inhibited Floyd’s ability to breathe. Federal Tr. 14 at 3122. Thao was familiar with arrestee’s claiming they cannot breathe. Federal Tr. 14 at 3122. He testified that “[p]retty much after the New York incident, it was pretty regular that when you arrest people, they kept saying they can’t breathe, they can’t breathe, so it became a pretty regular occurrence.” Federal Tr. 14 at 3122; Federal Tr. 14 (where New York incident is later explained as the 2014 arrest of Eric Garner who said ‘I can’t breathe’).

Thao continued to observe Kueng, Lane, and Chauvin’s attempts to get Floyd into the car, while Floyd physically resisted. Federal Gov’t Ex. 9 at 20:18:06-20:19:04. At one point, Thao observed Floyd use his leg to “kind of launch himself out the other side of the door ... where Lane was.” Federal Tr. 14 at 3123. Floyd again said he cannot breathe. Federal Gov’t Ex. 9 at 20:18:35-42. Thao’s BWC shows that Chauvin had his arm around Floyd’s chest and his hands at the back of Floyd’s neck while Floyd was still partially in the squad vehicle. *Id.* at 20:18:41.

Thao testified that at the time he was thinking “It was obvious that he was under the influence of some sort of drugs.” Federal Tr. 14 at 3125. Thao testified that he thought that because “[w]hen I first arrived, I saw kind of beads of sweat on him on his head, and he was kind of – very sweaty.” Federal Tr. 14 at 3125. This observation was significant

because “[i]t’s a sign of potential drug use and a sign of excited delirium.” Federal Tr. 14 at 3125. Thao also observed other signs that Floyd was under the influence:

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

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

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

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

Thao immediately went to the back of the squad car and began to search for a hobble. Federal Gov't Ex. 9; Federal Tr. 14 at 3130. At 20:19:46 Lane radioed in Code 2 request for medical attention. Thao asked if EMS had been called, and Lane and Kueng confirm this. Federal Gov't Ex. 9 at 20:20:25. Thao found and retrieved the hobble in Lane's duty bag and handed it to Chauvin. Federal Tr. 14 at 3130; Federal Gov't Ex. 9 at 20:19:15-20:20:22. The decision was made not to use the hobble. *See also* Federal Tr. 14 at 3242 (testimony from Thao that it was a group decision to not use the hobble). Thao testified that at this point in time he was aware EMS was coming, and it would have impaired their work if Floyd was hobbled upon their arrival: "Essentially when they would arrive, we would have to undo the thing, which would delay medical attention." Federal Tr. 14 at 3133. Additionally, when a hobble is used, it is policy for a sergeant to be notified; a sergeant must arrive on scene and take photographs of the arrestee in the hobble to insure that the hobble was used correctly before the arrestee can be transported. Federal Tr. 14 at 3134. Thao testified that this would have further delayed medical attention: "[W]e would have to essentially tell the paramedics; Hold on. He's tied up. We have to wait for our sergeant to come to review the hobble before we can release him, which logically makes no sense because we're trying to get him medical attention, not tie him up." Federal Tr. 14 at 3134. Thao relayed this reasoning to the other officers. Federal Gov't Ex. 9 at 20:20:29; 20:20:38.

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

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

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

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

At 20:21:48 Thao’s BWC records Lane stating “He’s gotta be on something”. Federal Gov’t Ex. 9 at 20:21:48. Shortly after, Thao asked Floyd “What are you on?”, but is given no response. Federal Gov’t Ex. 9 at 20:21:54. Lane told the other officers “We found a weed pipe on him. Might be something else with it, might be like PCP or

something. Is that the the shaking of the eyes right – PCP?” Federal Gov’t Ex. 9 at 20:21:54. starting at 20:22:10; Federal Thao Ex. T-29.

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

While waiting for the ambulance to arrive, Chauvin held Floyd down in the prone position by using his body weight and knee to keep him pinned to the street’s asphalt. Kueng was positioned around Floyd’s buttock area and Lane around Floyd’s calves and feet.

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

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

After waiting several minutes with no ambulance arriving, Thao stepped up the request and placed a Code 3 (lights and sirens, arrive as fast as possible). More than five minutes passed before sirens from the incoming ambulance were heard. During that waiting period, Thao repeatedly inquired about Floyd’s consumption of drugs. Chauvin continued to pin Floyd down on the ground until paramedics Smith and Bravinder arrived in the ambulance.

The ambulance eventually departed and took Floyd to Hennepin Healthcare where he was ultimately pronounced dead. Thao testified that he was unaware of Floyd's medical status, and it wasn't until after the ambulance left, and the firefighters arrived that he first realized that something more serious may have happened. Federal Tr. 14 at 3154-55. "When the fire department arrived, and I was kind of confused why the fire department was coming and the paramedics were already gone probably three, four minutes ago. So I heard dispatcher said that they needed fire to go to 36th and Park to help with CPR." Federal Tr. 14 at 3155. "I kind of connected the dots. It's like, oh, okay, so I guess this guy was in critical condition when they left." Federal Tr. 14 at 3155.

An autopsy was performed and declared the cause of death as "Cardiopulmonary arrest complicating law enforcement subdual, restraint, and neck compression". Chauvin Ex. 193; Federal Gov't Ex. 107.

ELEMENTS OF THE CHARGED OFFENSES

III. ELEMENTS OF COUNT 1: AIDING AND ABETTING SECOND DEGREE MURDER – UNINTENTIONAL – WHILE COMMITTING A FELONY

The Court previously outlined the elements of second-degree murder and aiding and abetting this crime in its Order and Memorandum Opinion of Defense Motions to Dismiss for Lack of Probable Cause (Index 183, filed on October 21, 2020, in the above-captioned case). Much of the discussion of elements is incorporated into this order.

a. Elements of aiding and abetting

Thao has been charged with aiding and abetting the second-degree unintentional murder of Floyd. Under Minnesota law, "[a] person is criminally liable for a crime

committed by another if the person **intentionally** aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.” Minn. Stat. § 609.05 subd. 1 (emphasis added).

Under Minnesota law, the requisite *mens rea* for Aiding and Abetting under Minn. Stat. § 609.19 is intentional. *State v. Huber*, 877 N.W. 2d 519 (Minn. 2016); *State v. Milton*, 821 N.W.2s 789 (Minn. 2012). The phrase “intentionally aids” in Minn. Stat. § 609.05 subd. 1 encompasses two “important and necessary” *mens rea* elements. *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012).

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

Definition of each offense, if accurate: “The defendant is charged with committing this crime or intentionally aiding the commission of this crime.” Also, the Committee recommends modifying the jury charge after the elements of the charged offense to provide: “If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty, unless you find the state has proven beyond a reasonable doubt that the defendant is liable for this crime committed by another person according to the instruction below,” followed by an additional header, “Liability for the Crime of Another Person” before the following text.

The defendant is guilty of the crime of committed by another person if the defendant played an intentional role in aiding the commission of that crime and made no reasonable effort to prevent the crime before it was committed. “Intentional role” includes

intentionally aiding, advising, hiring, counseling, conspiring with, or procuring another person to commit the crime.

The defendant's presence or actions constitute intentionally aiding only if:

First, the defendant knew that (another person) (others) (was) (were) going to commit or (was) (were) committing a crime; and

Second, the defendant intended that (his) (her) presence or actions aid the commission of that crime.

[If the defendant intentionally aided another person in committing a crime, or intentionally advised, hired, counseled, conspired with, or otherwise procured the other person to commit it, the defendant is also guilty of any other crime the other person commits while trying to commit the intended crime, if that other crime was reasonably foreseeable to the defendant as a probable consequence of trying to commit the intended crime.]

The defendant is guilty of the crime of , however, only if the other person commits that crime. The defendant is not guilty for intentionally aiding the commission of the crime of unless that crime is actually committed.

The state has the burden of proving beyond a reasonable doubt that the defendant intentionally aided another person in committing the crime of.

CRIMJIG 4.01 Liability for the Crime of Another Person, 10 Minn. Prac., Jury Instr. Guides--Criminal CRIMJIG 4.01 (6th ed.).

To find Thao guilty of aiding and abetting Chauvin, the State must prove:

- (i) Thao knew that Chauvin was going to commit or was committing a crime; and

- (ii) Thao intended that his presence or actions aid the commission of that crime.

b. Elements of crime another committed – second-degree unintentional murder.

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

To prove that Chauvin is guilty of unintentional second degree murder, the State must prove each of the following beyond all reasonable doubt:

- (i) Floyd’s death;
- (ii) That Chauvin caused Floyd’s death where “caused” means that Chauvin’s conduct was a “substantial causal factor in causing [Floyd’s] death”⁶; and
- (iii) That Chauvin, at the time of causing Floyd’s death, “was committing or attempting to commit” another felony offense.

With respect to the third element, the underlying felony offense the charge relies upon in this case is third-degree assault. Chauvin is guilty of third-degree assault if he “assaults another and inflicts substantial bodily harm.” Minn. Stat. § 609.223 subd. 1. To prove

⁶ Chauvin is “criminally liable for all the consequences of his actions that occur in the ordinary and natural course of events, including those consequences brought about by one or more intervening causes, if such intervening causes were the natural result of [Chauvin’s] acts. The fact that other causes contribute to the death does not relieve [Chauvin] of criminal liability. However, [Chauvin] is not criminally liable if a “superseding cause” caused the death. A “superseding cause” is a cause that comes after [Chauvin’s] acts, alters the natural sequence of events, and produces a result that would not otherwise have occurred.”

CRIMJIG 11.29 Murder in the Second Degree—While Committing a Felony—Elements, 10 Minn. Prac., Jury Instr. Guides--Criminal CRIMJIG 11.29 (6th ed.)

Chauvin is guilty of third-degree assault, the State must prove beyond all reasonable doubt the following:

- (i) Chauvin assaulted Floyd, defined either as “intentional infliction of or the attempt to inflict bodily harm” upon Floyd or “an act done with intent to cause [Floyd] to fear immediate bodily harm or death”; and
- (ii) Chauvin inflicted “substantial bodily harm” on Floyd, where “substantial bodily harm” is defined as “bodily harm that involves a temporary but substantial disfigurement, causes a temporary but substantial loss of impairment of the function of any bodily member or organ, or causes a fracture of any bodily member.”

See CRIMJIGS 13.01, 13.902, 13.16, Minn. Stat. § 609.02 subd. 7(a); Minn. Stat. §609.02 subd. 10, Minn. Stat. § 609.223 subd. 1.

Thus, in this case, the State will need to prove beyond all reasonable doubt the following to prove Chauvin committed unintentional second-degree murder:

- (i) Floyd’s death;
- (ii) Chauvin’s conduct was a substantial causal factor in Floyd’s death;
- (iii) Chauvin intentionally inflicted or attempted to inflict bodily harm on Floyd or intended to cause Floyd to fear immediate bodily harm or death; and
- (iv) Chauvin did inflict substantial bodily harm on Floyd.

c. What elements the State must prove for Thao to be found guilty of Count 1: Aiding and Abetting Second Degree Murder – Unintentional – While Committing a Felony.

Applying Minnesota law and the model jury instructions to this case’s fact pattern, to prove Thao guilty of aiding and abetting second-degree unintentional murder by Chauvin, the State must prove each of the following beyond all reasonable doubt:

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

IV. ELEMENTS OF COUNT 2: AIDING AND ABETTING SECOND DEGREE MANSLAUGHTER – CULPABLE NEGLIGENCE CREATING UNREASONABLE RISK.

The Court previously outlined the elements of second-degree manslaughter and aiding and abetting this crime in its Order and Memorandum Opinion of Defense Motions to Dismiss for Lack of Probable Cause (Index 183, filed on October 21, 2020, in the above-captioned case). Much of the discussion of elements is incorporated into this order.

a. Elements of aiding and abetting.

The same aiding and abetting elements discussed *supra* for Count 1 also apply to Count 2. To find Thao guilty of aiding and abetting Chauvin, the State must prove:

- (i) Thao knew that Chauvin was going to commit or was committing a crime; and
- (ii) Thao intended that his presence or actions aid the commission of that crime.

b. Elements of crime another committed – second-degree manslaughter.

Under Minnesota law, a person is guilty of second-degree manslaughter if “by the person’s culpable negligence whereby the person creates an unreasonable risk, and

consciously takes chances of causing death or great bodily harm to another” he “causes the death of another.”⁷

To find a person guilty of second-degree manslaughter, the prosecution must show:

- (i) “objective gross negligence on the part of the actor”; and
- (ii) “subjective ‘recklessness in the form of an actual conscious disregard of the risk created by the conduct.’”

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

⁷ Minnesota jury instruction guide defines “culpable negligence” and “great bodily harm” as follows:

“Culpable negligence” is intentional conduct that the defendant may not have intended to be harmful, but that an ordinary and reasonably prudent person would recognize as involving a strong probability of injury to others. “Great bodily harm” means bodily injury that creates a high probability of death, or causes serious permanent disfigurement, or causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm.

CRIMJIG 11.56 Manslaughter in the Second Degree—Elements, 10 Minn. Prac., Jury Instr. Guides--Criminal CRIMJIG 11.56 (6th ed.)

the defendant's act was the proximate cause of injury as well as the actual cause of death.
Id. at 507-508.

To find Chauvin guilty of second-degree manslaughter, the State must prove beyond all reasonable doubt:

- (i) Floyd' death;
- (ii) That Chauvin caused Floyd's death by culpable negligence, whereby Chauvin created an unreasonable risk and consciously took a chance of causing death or great bodily harm.

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

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

The fact that other causes contribute to Floyd's death does not relieve Chauvin of criminal liability. However, Chauvin is not criminally liable if a "superseding cause" caused Floyd's death. A "superseding cause" is a cause that comes after Chauvin's acts, alters the natural sequence of events, and produces a result that would not otherwise have occurred.

"Culpable negligence" is intentional conduct that Chauvin may not have intended to be harmful, but that an ordinary and reasonably prudent person would recognize as involving a strong probability of injury to others.

"Great bodily harm" means bodily injury that creates a high probability of death, or causes great serious permanent disfigurement, or causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm.

CRIMJIG 11.56.

c. What elements the State must prove for Thao to be found guilty of Count 2: Aiding and Abetting Second Degree Manslaughter – Culpable Negligence Creating Unreasonable Risk.

Applying Minnesota law and the model jury instructions to this case’s fact pattern, to prove Thao guilty of aiding and abetting second-degree manslaughter, the State must prove each of the following beyond all reasonable doubt:

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

REASONABLE DOUBT EXISTS AS TO THE ELEMENTS OF COUNT 1: AIDING AND ABETTING SECOND DEGREE MURDER – UNINTENTIONAL – WHILE COMMITTING A FELONY

I. THE STATE PROVED ELEMENT (i)(a) BEYOND ALL REASONABLE DOUBT.

The State proved beyond all reasonable doubt that Floyd died. *See* Chauvin.

Ex. 193.

II. THE STATE HAS NOT PROVED ELEMENT (i)(b) BEYOND ALL REASONABLE DOUBT.

The State did not prove beyond all reasonable doubt that Chauvin’s conduct was a substantial causal factor in Floyd’s death. In the stipulated evidence there is evidence supporting both ideas that: Floyd died as a result of Chauvin pinning Floyd down in a prone

position for over 9 minutes and Floyd's consumption of fentanyl was a substantial cause of his death.

III. THE STATE HAS NOT PROVED ELEMENT (i)(c) BEYOND ALL REASONABLE DOUBT.

The State did not prove beyond all reasonable doubt that Chauvin intentionally inflicted or attempted to inflict bodily harm on Floyd or intended to cause Floyd to fear immediate bodily harm or death. There is evidence disputing that Chauvin intentionally inflicted (or attempted to inflict) bodily harm on Floyd or intended to cause Floyd to fear immediate bodily harm or death.

IV. THE STATE HAS PROVED ELEMENT (i)(d) BEYOND ALL REASONABLE DOUBT.

The State proved Chauvin did inflict substantial bodily harm on Floyd. Floyd lost consciousness during Chauvin's restraint.

V. THE STATE HAS NOT PROVEN ELEMENT (ii) BEYOND ALL REASONABLE DOUBT.

The State did not prove beyond all reasonable doubt that Thao knew Chauvin was intentionally committing an assault that inflicted substantial bodily harm. The evidence supports the alternative and reasonable theory that Thao believed Chauvin's actions were within authorized use of force under Minn. Stat. § 609.06 because they were in accordance with the excited delirium training and MPD trained its officers – including Thao – that they are to restrain a person suspected of having excited delirium in the prone position until EMS arrived. Thao observed Chauvin restrain Floyd – who was suspected of having excited delirium – in the prone position until EMS arrived.

- a. **Thao followed the MPD training on excited delirium, he believed Chauvin was following the same – he believed Chauvin was restraining Floyd until medical professionals could arrive to treat him.**

Thao followed the last letter of the mnemonic – “E: EMS should be requested **early**”.

Federal Thao Ex. T-12 at Slide 30.

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

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

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

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

After over five minutes had passed since Thao originally called in Code 3, EMS had not yet arrived on scene. Federal Gov’t Ex. 9. Thao radioed dispatch again, and asked again for EMS to their location. Federal Gov’t Ex. 9 at 20:26:42. Dispatch told Thao they

EMS was en route and within a minute, EMS arrived. Federal Gov't Ex. 9 at 20:26:42-20:27:26.

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

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

MPD repeatedly trained Thao that excited delirium patients can work themselves to death if they are not sedated and restrained. Officers are taught that it is important to restrain the person and to continue to restraint them until EMS arrives to sedate them. Officers are trained to continue the restraint in the prone position because at any second the person may exhibit irrational and incredible superhuman strength which could put the officer’s lives, civilian lives, and medical professional lives in danger. Not only did Thao received this training by MPD, but Thao was also trained at Fairview to restrain the person until a medical professional could sedate them. Thao has been repeatedly trained, by both

MPD and Fairview Hospital, to restrain, hold in restraint, and wait for sedation when he encounters a person who he suspects is experiencing excited delirium. Whether or not this medical phenomenon is real, Thao was repeatedly trained that people in these highly agitated states are extremely dangerous to themselves and others, unless they are restrained until they are sedated.

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

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

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

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

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

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

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

Thao testified that Chauvin’s use of a knee restraint was not unusual to him because it was not uncommon to observe MPD officers use knee restraints and that they were trained to do so. *See* Federal Tr. 14 at 3141. Thao specifically testified that he personally had seen previous instances of MPD officers restraining people by putting their knees on the person’s neck. Federal Tr. 14 at 3141. Thao saw Chauvin do what MPD had trained its officers to do – restrain a person experiencing excited delirium in the prone position in an effort to hold them until medical professionals arrive.

VI. THE STATE HAS NOT PROVEN ELEMENT (iii) BEYOND ALL REASONABLE DOUBT.

The State has not proven beyond all reasonable doubt that Thao intended his presence or actions aided Chauvin's assault on Floyd. Instead, the evidence supports an alternative and reasonable theory that (1) Thao believed Floyd was experiencing excited delirium and it was reasonable to believe this; (2) Thao observed what he thought to be Chauvin following MPD excited delirium training; (3) Thao intended to help Floyd quickly get medical attention.

a. Thao believed he was observing Floyd experience excited delirium. It was reasonable for Thao to suspect that Floyd was experiencing excited delirium.

Thao testified that while on scene, he believed that Floyd may have been experiencing excited delirium. Federal Tr. 14 at 3138. Thao believed this based on his training and experience, explaining: “[Floyd] was acting erratic. He was very sweaty, unable to respond to us, violent. He was able to fight off three officers trying to get him in the squad car.” Federal Tr. 14 at 3138. Thao hoped that the officers would be able to restrain Floyd until EMS arrived, then the paramedics would do a medical evaluation and figure out the proper response. Federal Tr. 14 at 3140. Based upon his knowledge of Minneapolis and the traffic, Thao expected that the ambulance would arrive within “probably five minutes” after being dispatched from Hennepin Healthcare (also referred to as “HCMC” at times) to the scene of 38th and Chicago. Federal Tr. 14 at 3140.

i. Thao followed the MPD's NOTACRIME mnemonic and came to the reasonable belief that Floyd was experiencing excited delirium.

It was reasonable that Thao determined that Floyd may be experiencing excited delirium based on his training and experience. Thao observed many of the symptoms MPD trained for when attempting to discern whether a person may be experiencing excited delirium.

Thao saw that Floyd was sweaty. Federal Tr. 14 at 3125; *see* Federal Thao Ex. T-12 at Slide 18 (MPD trained Thao to look out the sign that a person is naked or sweaty). Thao also observed Floyd being tough, unstoppable, and physically resistant, signs he was trained to observe as potential symptoms of excited delirium cases. Federal Thao Ex. T-12 at Slide 22 (“Patient is **tough** and unstoppable.”); Federal Thao Ex. T-12 at Slide 27 (“Patient is **resistant**.”). Thao also observed Floyd’s speech pattern when he spoke to him, Floyd seemed confused and incoherent at times. Federal Thao Ex. T-12 at Slide 25 (“Patient is **confused**.”) and Slide 28 (“Patient’s speech is **incoherent**.”).

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

We did receive the initial information from the caller that he appeared to be under the influence. He was kind of incoherent,

not listening to direction, not able – we weren't able to reason with him or even get him calmed down. He's fighting off three officers consistent with super-human strength or more strength than all three officers could handle.

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

Based on his training and experience, Thao believed Floyd was experiencing excited delirium. This conclusion was obviously reasonable as three other trained professionals on scene. Officer Lane, Officer Kueng, and Paramedic Derek Smith all testified they suspected Floyd may be experiencing excited delirium based on their individual training and observations. *See* Federal Tr. 15 at 3465, 3494 (where Kueng testified that Floyd could be suffering from excited delirium based on his observations on scene); Chauvin Ex. 47 at 20:23:53 (where Lane is captured on body worn camera saying “I just worry about the excited delirium.”); Federal Tr. 3 at 633-634 (where Smith testified that going into the call be thought excited delirium was a possibility due to the Code 3 call and the patient being in police custody).

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

ii. It was reasonable for Thao to come to the conclusion that Floyd may be experiencing excited delirium because other people who personally encountered Floyd on May 25, 2020, believed based on their training and experience that Floyd was experiencing excited delirium.

Smith testified that going into the call he was thinking about it potentially involving excited delirium, due to the Code 3 call and the patient being in police custody. Federal Tr. 3 at 633.

Kueng testified that Floyd could be suffering from excited delirium based on his observations on scene. Federal Tr. 15 3465, 3494. Kueng testified that from his point of view, Floyd's behavior took a 180 degree turn once Floyd was placed into the squad car. Federal Tr. 15 at 3464 ("his behavior just went to extreme measures.") Specifically, Kueng testified that "[Floyd] started shaking very violently. He ended up smashing his face against the plexiglass that separates the front and back seat of the squad car and was flailing his legs very aggressively." Federal Tr. 15 at 3464. Floyd exhibited violence against objects and had an acute onset, signs MPD officers were trained to look out for. Federal Thao Ex. T-12 at Slide 20 ("Patient exhibits violence against **objects.**") and Slide 23 ("Onset is **acute.**").

Lane said extemporaneously on scene that he was worried about excited delirium. Chauvin Ex. 47 at 20:23:53 (where Lane is captured on body worn camera saying "I just worry about the excited delirium.").

b. Thao observed Chauvin restraining Floyd in the manner MPD taught its officers to do should they suspect a person is experiencing excited delirium.

A comparison of the still images of the restraint of Floyd with still images and photographs on MPD restraint training shows that Chauvin was doing exactly what MPD trained its officers to do.

Thao was repeatedly trained by MPD that it was approved, appropriate, and recommended for officers to use their body weight to restrain an arrestee – specifically MPD trained its officers to use knees on the back of necks/upper back area. What Thao observed Chauvin do – whether it was or was not an authorized use of force under Minnesota law – was what MPD repeatedly trained him to do.

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

i. Thao’s intent was to follow the MPD excited delirium training.

1. Thao followed his excited delirium training.

Thao explained his reasoning for stepping up EMS from the Code 2 Lane called in to a Code 3:

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

Federal Tr. 14 at 3137-38. “Because he’s going through excited delirium. We’re running out of time and we need him potentially sedated to save his life”. Federal Tr. 14 3140-3141.

Thao testified that he assumed the other officers were restraining Floyd “[b]ecause they were waiting for an ambulance to arrive.” Federal Tr. 14 at 3145.

2. Thao believed the other officers were following the excited delirium training and medical training.

Thao was trained in basic first aid. Federal Tr. 14 at 3145. Thao testified that the restraining officers would be expected to monitor Floyd’s medical condition. Federal Tr. 14 at 3145. Thao testified that he assumed this is what the three restraining officers were doing – monitoring Floyd’s medical condition. Federal Tr. 14 at 3145.

At no point did Thao observe the three officers roll Floyd over and do CPR on him. Federal Tr. 14 at 3149. Thao testified that this was significant to him for the following reasons:

- The MPD trains officers to start CPR if a person has no pulse. Federal Tr. 14 at 3149.
- If the other officers are not doing CPR, Thao assumed that Floyd is still breathing and doing fine. Federal Tr. 14 at 3149.
- By not seeing CPR performed at any time, it indicated to Thao that Floyd had a pulse. Federal Tr. 14 at 3149.

ii. Thao wanted to keep the scene safe so Floyd could receive medical care.

Thao did not participate in the restraint of Floyd. Instead, Thao took the role of crowd control “to allow [Chauvin, Kueng, and Lane] to attend to Mr. Floyd.” Federal Tr. 14 at 3146. This was in line with general police practices – Thao testified that a second squad arriving on scene is to act as a support unit. *Id.* at 3160. This is because the first officers who arrive on a scene are going to have the most information. Federal Tr. 14 at 3146.

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

For the majority of the time Floyd was in the prone position on the ground, Thao was charged with crowd control. He positioned himself in the road as a sort of human traffic cone. Federal Tr. 14 at 3135. Thao testified on his reasoning for traffic control: “Most people when they’re driving, they’re focused on what’s ahead of them, not really necessarily on the ground. So I put myself out in the traffic to – so they can see me and give distance to the officers.” Federal Tr. 14 at 3135.

When a crowd began to gather, Thao took over crowd control because some bystanders started getting off the sidewalk towards the officers and Floyd and Thao “wanted to give the officers the spacing to do what they needed to do”. Federal Tr. 14 at 3145.

At some point a bystander – later identified as Genevieve Hanson – identified herself as a firefighter. Federal Gov’t Ex. 9 at 20:25:28. When she entered the scene, she did so by walking into Thao’s blind spot, from behind. 20:25:28-20:25:34. Thao testified that she did not show him any identification to confirm this, and he did not believe she was a fire fighter because “Generally speaking, most first responders don’t just jump onto a scene and especially behind a police officer, come right behind a police officer. That’s -- they should know that as first responders not to sneak up on another first responder like that.” Federal Tr. 14 at 3146-3147. Hanson’s behavior was inconsistent with the ways in which first responders are trained to safely interact with a scene, and thus Thao reasonably did not believe she was actually a firefighter at the time of the incident.

As time went on with the crowd, he heard them request the officers to perform medical checks on Floyd. Federal Tr. 14 at 3148. He did not perform the checks himself because he was dealing with crowd control. Federal Tr. 14 at 3148. Thao rightfully assumed that the other officers were monitoring Floyd as this was their role per training and policy. Thao told the crowd that EMS was coming as a way “[t]o reassure that we are taking care of him. We have medical professionals coming” and “Just to let them know that we’re not trying to hurt him. We have medical coming. The professionals are coming to handle him.” *Id.* at 3148-3149; and 3153 respectively.

At several times, bystanders attempted to step off of the sidewalk and into the scene. Federal Tr. 14 at 3152. Thao testified that he wanted people to stay on the sidewalk “to give paramedics and officers space to operate.” Federal Tr. 14 at 3152. Keeping bystanders off of the street and on the sidewalk would prevent bystanders from “potentially attacking

the officers or disrupting the medical attention that they were doing.” Federal Tr. 14 at 3153.

The role of crowd control limited Thao’s focus to what was going on in front of him, rather than the restraint and what was occurring behind him. For instance, he was unaware of when the ambulance left until Chauvin tapped him on his shoulder. Federal Tr. 14 at 3154. When asked by a bystander if Floyd had a pulse, Thao responded with “I’m busy trying to deal with you guys right now.” Federal Gov’t Ex. 9 around 20:27:05; Federal Tr. 14 at 3329. Thao explained through testimony that he did not take steps to inquire whether Floyd had a pulse because he was preoccupied with his duty of crowd control. Federal Tr. 14 at 3330. Thao depended on his fellow officers involved in the physical restraint to monitor Floyd’s health status, including checking his pulse and breathing. It was reasonable for Thao to do so.

iii. It was reasonable for Thao to want to keep the crowd away from the scene with the intent of getting medical help.

Smith testified that the scene was not safe to give medical attention to Floyd. Smith testified that he told the FBI “I’m going to go home at the end of the night, the way they teach it is scene safe, and that scene was not safe.” Federal Tr. 3. at 627 (emphasis added). Smith testified that “I felt it was a hostile crowd.” Federal Tr. 3 at 627. Smith testified that the crowd was in the double digits, maybe even twenty people. Federal Tr. 3 at 617. Smith testified that the crowd appeared to be very agitated and that he wanted to leave the scene due to the environment. Federal Tr. 3 at 626-627.

He also testified that he previously told the FBI “And we had recent events of individuals trying to get into the back of our squad and ultimately losing his life”, further elaborating that “Yeah, it’s -- with the Jamar Clark incident, he, you know, unfortunately got shot trying to get in the back of one of our rigs. The community remembers that and then now I’ve got this and obviously burned half the city to the ground, so.” Federal Tr. 3 at 627 and 628 respectively. Smith testified that at the scene on May 25, 2020, he did not feel safe. Federal Tr. 3 at 628.

Smith had to move away from the scene to another location so that he could perform medical services on Floyd with limited distractions. *See* Federal Tr. 3 at 619.

c. Thao intended to help Floyd get medical attention quickly.

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

- Thao turned on squad 320’s emergency lights to signify where paramedics should go. Federal Tr. 14 at 3135.
- Thao asked the other officers if they had called EMS yet right after Floyd was placed on the ground. Federal Gov’t Ex. 9 at 20:21:14
- When Lane informed Thao that EMS had been called, but only as a Code 2, Thao immediately called dispatch to escalate the call to a Code 3 to get EMS on scene as fast as possible. Federal Gov’t Ex 9 starting at 20:21:16. Federal Tr. 14 at 3137-3138.
 - Thao testified that he wanted EMS on scene as fast as possible to “potentially sedate to save [Floyd’s] life.” Federal Tr. 14 at 3140-41.

- When the ambulance had not arrived on scene within 5 minutes – the time Thao estimated it would take them to get there from HCMC – he took it upon himself radio dispatch again to get an update. Federal Gov't 9 at 20:26:42.
- Thao determined that the use of a hobble would delay Floyd's medical care. Federal Tr. 14 at 3133; 3134.

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

At no point did Thao observe the three officers roll Floyd over and perform CPR on him. Federal Tr. 14. at 3149. Thao testified that this was significant to him for the following reasons:

- The MPD trains officers to start CPR if a person has no pulse. Federal Tr. 14 at 3149.
- If the other officers are not doing CPR, Thao reasonably assumed that Floyd was still breathing and doing fine. Federal Tr. 14 at 3149.
- By not seeing CPR performed at any time, it indicated to Thao that Floyd had a pulse. Federal Tr. 14 at 3149.

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

In sum Thao acted on his training and reasonably assumed the other officers were following training as well and were not acting with a bad purpose. Thao did not have the requisite criminal intent. His intentions were to assist and following his training. There is a reasonable alternative theory to why Thao acted the way he did. The state has not met its burden of proving beyond all reasonable doubt that Thao intended his actions to assist Chauvin to commit a crime.

REASONABLE DOUBT EXISTS AS TO THE ELEMENTS OF COUNT 2: AIDING AND ABETTING SECOND DEGREE MANSLAUGHTER – CULPABLE NEGLIGENCE CREATING UNREASONABLE RISK

I. THE STATE PROVED ELEMENT (i)(a) BEYOND ALL REASONABLE DOUBT.

The State proved beyond all reasonable doubt that Floyd died. *See* Chauvin. Ex. 193.

II. THE STATE HAS NOT PROVED ELEMENT (i)(b) BEYOND ALL REASONABLE DOUBT.

The State has not proved beyond all reasonable double that Chauvin caused Floyd's death by culpable negligence, whereby Chauvin created an unreasonable risk and consciously took a chance of causing death or great bodily harm. There is evidence that disputes the element.

III. THE STATE HAS NOT PROVEN ELEMENT (ii) BEYOND ALL REASONABLE DOUBT.

The State has not proven that Thao knew Chauvin, by his culpable negligence created an unreasonably risk, and Thao knew Chauvin consciously took a chance of causing death or great bodily harm. There is evidence that disputes the element. *See*

discussion of Count 1, § V: THE STATE HAS NOT PROVEN ELEMENT (ii) BEYOND ALL REASONABLE DOUBT.

IV. THE STATE HAS NOT PROVEN ELEMENT (iii) BEYOND ALL REASONABLE DOUBT.

The State has not proved beyond all reasonable doubt that his presence or actions aided in Chauvin's commission of that crime.

Thao did not intend his actions to aid in the commission of a crime. Instead, Thao's intended to follow MPD training; intended to keep the scene clear so that medical professionals could render medical aid safely, and intended to get Floyd medical attention fast. *See* discussion of Count 1, § VI: THE STATE HAS NOT PROVEN ELEMENT (iii) BEYOND ALL REASONABLE DOUBT.

Based on the discussion *supra*, reasonable doubt exists as to some elements. The State has not met its burden of proving each element beyond all reasonable doubt.