

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

VS.

Kandace Montgomery,	27-CR-15-1304
Nekima Levy-Pounds,	27-CR-15-1307
Michael McDowell,	27-CR-15-1320
Catherine Salonek,	27-CR-15-1326
Todd Dahlstrom,	27-CR-15-1331
Adja Gildersleve,	27-CR-15-1335
Amity Foster,	27-CR-15-1346
Jie Wronski-Riley,	27-CR-15-1349
Shannon Bade,	27-CR-15-1350
Mica Grimm,	27-CR-15-1829
Pamela Twiss,	27-CR-15-2766

Defendants.

**DEFENDANTS' JOINT MEMORANDUM IN SUPPORT OF MOTION FOR JOINDER
AND CONSOLIDATION**

I. STATEMENT OF FACTS

The State of Minnesota has charged the above-named Defendants Nekima Levy Pounds, Kandace Montgomery, Shannon Bade, Todd Dahlstrom, Amity Foster, Adja Gildersleve, Michael Mcdowell, Catherine Salonek, Pamela Twiss, Jie Wronski Riley, and Mica Grimm with multiple offenses associated with the December 20, 2014 "Black Lives Matter" demonstration at Mall of America. These include Trespass, Aiding and Abetting Trespass, Unlawful Assembly, Aiding and Abetting Unlawful Assembly, Disorderly Conduct, and Aiding and Abetting Disorderly Conduct,

in violation of Sections 609.605.1, 609.705, and 609.72.1 of Minnesota Statutes. Several Defendants are also charged with two additional counts being Interfering with Obstruction, or Rendering Dangerous for Passage a Public Highway or Right of Way in violation of Minn.Stat. 609.74(2) along with Aiding and Abetting this activity. Mica Grimm is charged with Aiding and Abetting Trespass, Aiding and abetting Unlawful Assembly and Aiding and Abetting Disorderly Conduct.

Each of the Defendants is named within substantially similar complaints, each alleging nearly identical charges stemming from one single string of events that largely occurred on December 20, 2014 associated with a group demonstration, including each of the above-named Defendants, at Mall of America.

The charges and complaints for all Defendants are virtually identical, except that the names and addresses have been changed for each Defendant. Attached to each individual Complaint is a Statement of Probable Cause which is essentially identical as to each of the Defendants with a statement that probable cause exists as to an individual named defendant inserted at the end. It is within this attachment that a description of what the Defendants are alleged to have done with reference to alleged factual circumstances is presented.

A number of individuals, in addition to the Defendants, received citations for simple trespass. These individuals are not part of the Motion to Consolidate.

The State alleges Defendants worked together to plan and execute a protest which was deemed unlawful. The State's Complaint alleges a group of people working together to achieve a common goal of disrupting business at the Mall of America in Bloomington by gathering in such a way as to make traversing the mall more difficult for mall patrons, and failing to disperse when advised that this conduct was not permitted on their property.

The attachment to the Complaint describes a “planning session” allegedly attended by all of the Defendants. It describes named individuals speaking before the group and a plan being developed as to how the group would react if, as expected, they were asked to leave.

In so doing, the State alleges, Defendants’ actions constituted an unlawful assembly, disorderly conduct, and trespass. Further, the state alleges, that the Defendants all aided and abetted one another in commission of each of these misdemeanors and additionally aided and abetted the alleged trespasses being committed by other activists in the “Black Lives Matter” demonstration. This narrative presents a singular sequence of actions and an alleged common goal pursued by all of the above-named Defendants. Each of the Defendants has entered a plea of Not Guilty and demanded a jury trial.

The Court on May 1, 2015 issued its Scheduling Order providing for trials of the above Defendants as well as other Defendants who were charged only with simple trespass. The Court during the session of that date, noted that it was impractical to have separate individual trials and thereupon set groupings of Defendants for a series of consolidated trials. The above-named Defendants now each move the Court for joinder and a single consolidated trial.

II. ARGUMENT

Joinder of Defendants is a discretionary determination by the District Court. Rule 17.03 of the Minnesota Rules of Criminal Procedure provides as follows:

Subd. 2. Joinder of Defendants.

When two or more Defendants are charged with the same offense, they may be tried separately or jointly at the court's discretion. To determine whether to order joinder or separate trials, the court must consider:

- (1) the nature of the offense charged;

- (2) the impact on the victim;
- (3) the potential prejudice to the Defendant; and
- (4) the interests of justice.

Subdivision 4 for Rule 17.03 of the Minnesota Rules of Criminal Procedure provides that:

(b) On a Defendant's motion, the court may order two or more indictments, complaints, tab charges, or any combination of them to be tried together even if the offenses and the Defendants could not have been joined in a single indictment, complaint, or tab charge.

The determination as to whether joinder is appropriate is ultimately left to the discretion of the Court. In the absence of any substantial prejudice, such an order will not be reversed.

State v. DeVerney, 592 N.W.2d 837, 842 (Minn. 1999).

It is virtually never error to order joinder when a Defendant has raised no objection to it or consents to joinder. State v. Duncan, 312 Minn. 17, 3031, 250 N.W.2d 189, 198 (1977); State v. Ulferts, 288 Minn. 551, 555, 181 N.W.2d 104,106 (1970).

It is notable that the Defendants are charged not only for their own substantive alleged actions, but aiding and abetting each other and additional alleged trespassers. Minn.Stat. 609.05 provides for liability for crimes of another and provides at Subd. 1 that “A person is criminally liable for a crime committed by another if the person intentionally aides, advises, hires, counsels, or conspires with, or otherwise procures the other to commit the crime.” Thus, since each Defendant is essentially charged with facilitating the offenses of the others, it is practical that they all be tried together in order that the jury might get a complete view. The alternative, essentially, is to summons the same witnesses a multiple number of times and for the Parties to submit essentially the same evidence at each trial.

All of the Defendants are accused of aiding and abetting one another as to their

participation within an allegedly unlawful assembly. The very nature of an “unlawful assembly” speaks to a gathering of multiple people, some of whom are named Defendants in this case.

In State of Minnesota v. Bicking, et al. 62-CR-08-10515; 62-CR-08-10338; 62-CR-08-10335; 62-CR-08-10342; 62-CR-08-10345; 62-CR-08-10365; 62-CR-08-10336; 62-CR-08-62-10370, (December 4, 2009), the Ramsey County District Court, per the Honorable Teresa R. Warner, addressed a Motion by eight Defendants for a consolidated trial as to charges they faced associated with demonstrations associated with the Republican National Convention in 2008. The Court’s reasoning within its’ Order for Consolidation is fully applicable to the matter before this Court at the present time.

Any decision this Court makes on trials, whether joint or separate, carries with it many logistical issues. But given that Defendants face identical charges, are charged in nearly identical complaints, the discovery disclosed to date has been identical for each Defendant, the evidence appears to be admissible against each Defendant, the alleged defenses are not antagonistic or inconsistent, it is the Defendants who seek joinder, and in consideration of the factors set forth in Minn.R.Crim.P. 17.03, subd. 2, the request for joinder of trial in these cases is granted.

(p. 8). (A copy of the above Ramsey County District Court Determination is attached as Exhibit A to the Affidavit of Larry Leventhal.)

Application of the facts herein and the factors of Minn.R.Crim.P. 17.03, subd. 2, requires a similar result in the instant case.

A decision to grant, or deny, a motion to join Defendants is based on four factors found at Subdivision 2 of Rule 17.03 of the Minnesota Rules of Criminal Procedure. Therein, it is provided that in making its determination on whether to order joinder, or separate trials, the Court is to consider the nature of the offense charged, the impact on the victim, the potential prejudice to the Defendant, and the interests of justice.

1. Nature of the offense

Joinder is appropriate when an offense charged asserts that codefendants acted in concert

with each other and Defendants request consolidation. The State alleges that the Defendants all acted in cooperation with one another. Thus it charges each offense not only as a substantive offense, but with an accompanying offense of aiding and abetting.

All of the alleged offenses are based around the same protest in support of “Black Lives Matter,” which allegedly had been planned and executed by the entire group of Defendants, along with others, for a common purpose. Joinder is appropriate when the Defendants are playing a role in the same alleged scheme; when they are each involved with planning of the scheme; each has a role in the scheme; and all work together to accomplish the objective. (Bicking, id. p.5).

The respective Complaints, through the identically worded probable cause statement incorporated into each, describe alleged advance planning for the demonstration and Defendant presence and participation. Defendants are described as “leaders of the planned demonstration and primary speakers at the planning meeting...” The meeting is alleged to have been a meeting for leaders of the protest. Evidence as to the nature and course of the meeting and of Bloomington’s undercover operation will likely be required as to each Defendant. If the trials are divided in the manner initially suggested by the Court, there would be four separate duplicative presentations. This would burden all the witnesses. Testimony as to the nature of the offense would be common and repetitive as to each Defendant.

The near-identical Complaint narratives allege that the Defendants gathered for an “unlawful purpose.” Proof of this unlawful purpose will be common as to each of the Defendants.

The Complaints allege that the protest was a protest for “Black Lives Matter” (BLM). The Defendants assert as a defense that they were lawfully exercising their constitutional right of free speech under the First Amendment to the U.S. Constitution to protest certain police practices

which in other states have led to the death of unarmed black individuals by police officers. Their free speech defense will require testimony as to events and circumstances which would be common as to each of the Defendants.

Perhaps the most compelling demonstration that the State would be presenting, substantially the same evidence as to each of the Defendants, is shown by the fact that the State does not present separate statements of probable cause as to each of the Defendants, but attaches the same document without any apparent revision, except as to the name of a Defendant to each Complaint.

Because these charges all stem from the exact same events in the same places and at the same times; and it is alleged that each of the Defendants acted in furtherance of a planned event with a specific shared goal, well understood, with common intent, joining these Defendants is proper.

2. Impact on the victim

In this case, no individual victim has been identified. If the victim is seen as shopkeepers who allegedly lost business because of the demonstration, these victims would encounter even more disruption by having to testify, and waiting around to testify, at multiple trials. The testimony would be substantially identical.

The Complaint describes families with “children who appeared visibly frightened and upset by the protestors.” The same line of thinking that is used by Courts to address victims applies to these children and their parents. *State v. Blanche*, 696 N.W.2d 351 (Minn.2005).

It was observed in Bicking, supra that although “eyewitness convenience” should not necessarily be the sole consideration when analyzing this factor, Courts “cannot overlook the inconvenience, stress and strain on witnesses required to testify [multiple] times about the same

thing.” In Bicking, supra, p.6, this factor was found to weigh in favor of joinder.

In addition, discovery has produced statements and documents from confidential "reliable" informants and undercover investigators. Their testimony would best be presented one time rather than multiple times. These Defendants intend to call witnesses to refute the anticipated claims of these informants and undercover investigators, and to demonstrate inconsistencies in their stories. Such individuals would be inconvenienced should they have to testify three or four times rather than once.

The impact of separate trials on witnesses is recognized as a factor when considering joinder of trials. *See Powers* at 675. Clearly, the impact of giving testimony at multiple separate trials instead of testifying once at one trial is a negative impact. State v. Blanche, 696 N.W.2d at 371 (separate trials would negatively impact the victim and eyewitnesses if forced to testify at multiple trials). See also *State v. Warren*, 1997 WL 360591 (Minn.App. 1997) (unpublished opinion)(separate trials would negatively impact the victim if forced to testify at each trial.) (Decision attached as Exhibit B to Affidavit of Larry Leventhal.) In the Court’s determination on the Motion to Consolidate in Bicking, supra at p. 6, the Court found that the circumstances there, presented essentially no risk of antagonistic defenses. The Court observed at p. 6, that because the impact of multiple trials would be negative and unduly burden the witnesses and any potential victims, the facts presented support joinder.

Because separate trials would be unduly burdensome, the facts of the case at bar support a joinder as to the factor.

3. Potential prejudice to Defendant

Given that the Defendants are moving for this joinder of trial, the only consideration as to potential prejudice to Defendants is whether there are antagonistic or inconsistent defenses being

prepared by the separate Defendants. If the Defendants seek to blame each other, an antagonistic or inconsistent defense question may arise. *Santiago v. State*, 644 N.W.2d 425, 444. In such a situation, a Defendant may encounter prejudice in a joint trial if another Defendant seeks to shift blame upon one another as their primary means of legal defense. *DeVerney*, at 842. This is not a factor here.

As in *Bicking*, *id.* at p. 6, none of the Defendants have asserted any different defenses or trial strategies. In fact, each of the Defendants has presented motions commonly and has worked in concert in their defense. This factor weighs in favor of joinder. The Court in *Bicking*, *supra* at p.6 advises:

There is essentially no chance of antagonistic or inconsistent defenses arising in these cases. These Defendants have consistently taken the position that no illegalities on their part occurred. There is absolutely no indication of the possibility of any materially inconsistent testimony between these Defendants. None of these Defendants have asserted different defenses or trial strategies. Rather, each of these Defendants have joined in motions of the other codefendants and have clearly worked in concert to defend these cases. If codefendants regularly adopt the motions and the objections of the other and do not present antagonistic defenses, joinder is proper. *Santiago* at 444. Defendants collectively are moving for a joint trial, each seeks to adopt the motions of co-Defendants, and none has presented an antagonistic defense. This factor therefore also requires joinder.

The Defendants and their attorneys are only able to effectively address this litigation by dividing up responsibility. In contrast the State has overwhelming resources. If there are a series of trials, such division of responsibility may well become quite limited and Defendants may be deprived off fully effective representation and fair trials.

Each Defendant will each be submitting, prior to the hearing on their Motion for Joinder and Consolidation, a personal Affidavit advising that he or she personally desires a joint trial and has discussed potential advantages and disadvantages of a joint trial with counsel. Affidavits by each of the above Defendants will further provide waiver as to any prejudice arising from the

requested consolidation.

4. **Interests of justice**

The interests of justice overwhelming support a joint trial.

Under Minnesota law there is no presumption that a joint trial will result in an unfair trial. *Powers* at 676. The Minnesota Supreme Court has observed that the assertion that a joint trial itself is against the interest of justice is flawed. *Id.* "A [party opposing joinder] should demonstrate how the interests of justice are affected in a joint trial such that joinder would result in the denial of a fair trial" *Powers* at 676. If such prejudice is to be found, it must be demonstrated to the sound discretion of the Court. *Id.* *Powers* places on a party opposing joinder the burden of demonstrating how joinder would adversely affect the interests of justice such that a fair trial would be denied. *Id.* at 676.

In *State v. Higgins*, 76 NW.2d 747 (Minn. Ct. App. 1985), four Defendants were charged with trespass at the plant of the Sperry Corporation in Eagan, MN, for protesting Sperry's role in weapons development and manufacture and showing slides of the Hiroshima bombing. Over the objection of the State of Minnesota, all four Defendants moved for consolidation which was granted by the District Court. The State appealed, asserting joinder was improper on the basis that the individual respondents' subjective intent and motivation was particularly at issue and the cumulative presentation of such testimony in a consolidated trial would be highly prejudicial to the State.

In denying the State's appeal, Chief Judge Popovich of the Minnesota Court of Appeals affirmed the joinder stating that it was not clear that a joint trial involving individual testimony would defy the interests of justice. *Higgins* at 748-49. Citing to *State v. Strimling*, 265 N.W.2d 423, 432 (Minn. 1978), the Court of Appeals notes that Rule 17.03 is "unquestionably designed to help guarantee criminal Defendants a fair trial..." *Higgins* at 748. The Court further references the

Commentary to Minn. R. Crim. P. 17.03 as advising "it shall be considered an abuse of discretion for a trial judge to refuse to grant a joinder when the interest of justice so require." As in Higgins, the Court should reject the State's objections to the Defendant's motion for joinder in the instant case as the interest of justice favors a joint trial.

Selection of an unbiased jury in a highly publicized case is always difficult. The selection of multiple juries, over the course of months, involving the same high profile circumstances would increase in difficulty.

It can be anticipated that new relevant information will be developed at each trial of any Defendant or group of Defendants. This may provide evidence that the State would seek to introduce at further trials, along with evidence that it would be prudent for remaining Defendants to introduce at further trials. It, thus, would be advisable for each Defendant to have an attorney at each trial prior to his or her own. However, the economic circumstances of each of the Defendants make this impossible. Further, the attorneys for the Defendants are all working pro bono or at reduced rates and cannot be expected to have the time to perform additional services at multiple trials.

Given that the series of trials would primarily involve the same witnesses, and describe the same or similar events, the Defendants, and their counsel, in the latter trials would need to review transcripts of the earlier trials. The final Defendant or group of Defendants to stand trial would potentially need to secure a complete transcript of each prior trial, each potentially of several weeks or more. This would place an undue burden on these Defendants as the cost of transcripts would be significant. The State would have a budget to obtain such transcripts. The Defendants do not.

A series of individual trials would inevitably put Defendants through a very long process. Defendants, who have their case tried last, or near the end of the series, may well have his or her

right to a speedy trial compromised should such Defendant withdraw his or her waiver of a speedy trial. (United States Constitution Amendment 6; Minnesota Constitution. Art. I., Sec. 6.)

The length of time required for multiple Defendants to each be afforded a fair trial could lead to prejudice through the cumulative effect of publicity related to each trial, requiring a potential change of venue, particularly for Defendants tried later in the process. State v. Blom, 682 N.W.2d 578, 607 (Minn. 2004)[district court should grant a motion for change of venue when the dissemination of potentially prejudicial material creates a reasonable likelihood of an unfair trial]; Powers at 675 (recognizing joinder of Defendants at trial is supported due to potential prejudice to jurors through publicity related to series of related trials of individual Defendants). *State v. Blom*, 682 N.W.2d 578, 607 (Minn. 2004).

The Ramsey County District Court in *Bicking, supra* in examining considerations, such as the above, concluded that the interests of justice would be served by a joint trial. It commented, supra, p.7.

If separate trials were held, there would be a stark difference between the trial of the first Defendant and the trial of the last Defendant. Not only would there be a significant amount of time between the two, there is a threat of the cumulative effect of publicity related to each trial. Similarly, each witness would be required to testify multiple times about the same thing. Transcripts would pile up from previous testimony, and all would potentially be admissible at subsequent trials. Multiple trials would be less efficient and a more significant strain on resources for all involved.

The circumstances herein are similar, and the interests of justice certainly support that the joint consolidated trial requested by each of the above Defendants be granted.

III. CONCLUSION

For the foregoing reasons, each Defendant respectfully requests the Court to grant Defendants', jointly submitted Motion for Joinder and Consolidation. It is clear that consideration of the applicable factors, nature of offense, impact on victim, potential prejudice Defendant, and interest of justice, demonstrate that each factor individually, and certainly

collectively, speaks for the desirability, and practicality, of a single joint trial. The Court should grant Defendants' Motion for Joinder and Consolidation.

Dated: June 30, 2015

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