STATE OF MINNESOTA | SECOND JUDICIAL DISTRICT

COUNTY OF RAMSEY | CRIMINAL DIVISION

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State of Minnesota,

Plaintiff,

vs.

Monica Rachel Bicking,
Robert Joseph Czernik,
Garrett Scott Fitzgerald,
Luce Guillen-Givins,
Erik Charles Oseland,
Nathanael David Secor,
Max Jacob Specktor, and
Erin Trimmer,

Defendants.

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MEMORANDUM IN SUPPORT OF JOINDER

No. 62-CR-08-10515
No. 62-CR-08-10338
No. 62-CR-08-10335
No. 62-CR-08-10342
No. 62-CR-08-10345
No. 62-CR-08-10365
No. 62-CR-08-10336
No. 62-CR-08-10370

## FACTS

The State of Minnesota has charged Max Jacob Specktor, Monica Rachel Bicking, Erik Charles Oseland, Robert Joseph Czernick, Garrett Scott Fitzgerald, Nathanael David Secor, Luce Guillen-Givens, and Erin Trimmer with Conspiracy to Commit Criminal Damage to Property in the First Degree, in violation of Sections 609.595.1(1), 609.595.1(3), and 609.175.2(3) of Minnesota Statutes, and Conspiracy to Commit Riot in the Second Degree, in violation of Sections 609.71.2 and 609.175.2(3) of Minnesota Statutes. Each Defendant is charged separately by a virtually identical Amended Complaint.

The State alleges Defendants conspired with each other to engage in a riot, while either armed with a dangerous weapon or knowing others would be so armed, and to cause property damage either in excess of $1,000.00 or which would pose a foreseeable risk of bodily harm, during the Republican National Convention during September of 2008. The State specifically alleges that

Defendants are members of a "self-described anarchist anti-authoritarian group . . . entitled . . . the RNC Welcoming Committee (RNCWC)," which conspired to carry out the alleged criminal acts as demonstrated by statements at meetings and press conferences of the RNCWC and documents, pamphlets, leaflets and videos allegedly authored by the RNCWC.

As set forth in the Amended Complaint, the State alleges that the Defendants committed acts in furtherance of the conspiracy, to include: facilitating two major gatherings of anarchists to discuss means to disrupt the RNC; posting a video on the RNCWC website; participating in an action camp; providing instructional material on violent and non-violent means of resistance; reaching out and visiting other affinity groups in other cities and states to gather support for demonstrating against the RNC; organizing housing for visiting demonstrators during the RNC; storing materials that were to be used during attempts to shut down the RNC (i.e. pamphlets, buckets of paint, boxes of screws, a black anarchist flag, and maps of downtown St. Paul); and picking up demonstrators from the Greyhound bus station and giving them a ride. A number of these factual allegations are made in each Amended Complaint against all defendants and each allegation made against any individual Defendant is set forth in the Amended Complaint filed against every other Defendant. Further, in opposing Motions to Dismiss filed by individual defendants, the State of Minnesota has repeatedly cited the acts of other Defendants as evidence of the criminal liability and participation in the conspiracy by each individual Defendant. See, State's Opposition to Defendant's Motion to Dismiss for Lack of Probable Cause, State v. Bicking, 62-CR-08-10515 (12/16/2008).

Pre-trial proceedings, as well as extra-judicial statements about this case made by law enforcement officers, have already received extensive media coverage. Defendants believe that further pre-trial proceedings, as well as any trial itself, will also receive extensive media coverage and be closely followed by members of the public at large. See, Exhibit A, attached. There is a

substantial basis to believe that any trials involving these matters, either for individual Defendants, groups of Defendants, or a joint trial of all eight Defendants, will last several weeks if not months. See, Exhibit B, attached.

Given the nature of the charges and the bulk of evidence involved, it would serve the interests and justice and protect the rights of the Defendants to consolidate the trial rather than try each of the eight Defendants separately.

## ARGUMENT

The State of Minnesota has repeatedly, on the record, before this Court, stated its intent to oppose any joint trial of the Defendants in this proceeding. Defendants, however, simply can not comprehend how the State on one hand can allege that the Defendants are guilty of engaging in joint, concerted action, and on the other hand take the position that separate trials are required. The Defendants are each charged with conspiring and acting together to commit felonies with one another and others, and to have undertaken various steps in furtherance of the conspiracy. Given the nature of the charges chosen by the State of Minnesota, and the bulk of evidence involved, it would be illogical, an inefficient waste of judicial resources, and an infringement on the rights of the Defendants to proceed with separate trials, rather than with a single consolidated trial involving all of the eight Defendants.

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

> On motion of the defendant, the court may order two or more indictments, complaints, tab charges, or any combination thereof to be tried together even if the offenses and the defendants, if there be more than one, could not have been joined in a single indictment, complaint or tab charge.

(emphasis added). The determination as to whether joinder is appropriate is ultimately left to the discretion of the district court and in the absence of any substantial prejudice to a defendant 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 it. State v. Duncan, 312 Minn. 17, 30-31, 250 N.W.2d 189, 198 (1977); State v. Ulferts, 288 Minn. 551, 555, 181 N.W.2d 104, 106 (1970).

Guidance as to what factors the Court should consider when determining whether to grant such a motion is found at Subdivision 2 of Rule 17.03 of the Minnesota Rules of Criminal Procedure, which provides that:

> In making its determination on whether to order joinder or separate trials, the court shall consider the nature of the offense charged, the impact on the victim, the potential prejudice to the defendant, and the interests of justice.

Consideration of each of these factors establishes that joinder is appropriate in these cases.

**Nature of the Offense**

Joinder is appropriate when the nature of the alleged offense is such that the state claims codefendants have acted in close concert with each another. DeVerney, 592 N.W.2d at 842. Conspiracy cases are particularly suited to joinder because the codefendants are charged with the same crime and "the great majority of the evidence presented . . . [is] . . . admissible against" all. State v. Blanche, 696 N.W.2d 351, 371 (Minn. 2005). This is so because conspiracy necessarily entails persons with a common purpose acting jointly and in concert. State v. Stewart, 643 N.W.2d 281, 297 (Minn.2002).1 There is simply no type of case more typically suited for joinder than a conspiracy prosecution.[2]

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1 A criminal conspiracy is an agreement between two or more people to commit a crime and where at least one participant commits an overt act in furtherance of the conspiracy. Id.

[2] The Federal law is instructive. "Persons charged with involvement in a single conspiracy should ordinarily be tried together." United States v. Rochon, 575 F.2d 191, 197 (8th Cir. 1978); see also, United States v. O'Connell, 841 F.2d 1408 (8th Cir. 1988).

Even if the State had not charged these Defendants with conspiracy, however, joinder would be appropriate due to the nature of the factual allegations. The Amended Complaints allege that all eight defendants participated in meetings in furtherance of the alleged agreement to cause damage to property and to commit riot with a dangerous weapon. Each Defendant is alleged to have committed acts in furtherance of the alleged agreement. In fact, because each Defendant was arrested prior to actually committing any of the acts the State alleges as the objects of the conspiracy, the State's case in this matter is even more focused on common planning and a shared joint purpose than a conspiracy prosecution involving a completed crime. See, "Statement of Ramsey County Attorney Susan Gaertner Concerning the Prosecution of Eight Individuals on Riot and Criminal Damage to Property Charges in Connection with the Republican National Convention, (12/17/2008) ("The evidence shows that these defendants… planned to deprive others both inside and outside the convention hall of their free speech rights through acts of violence (emphasis added)."

In these cases the evidence, including witness testimony and documents, against each Defendant is likely to be nearly identical. The State has made discovery disclosures to each defendant consisting of virtually identical documents, computer discs, CDs and DVDs. The nature of the offense favors joinder when "the great majority of the evidence presented" is admissible against joined defendants. Blanche, 696 N.W.2d at 371; see also, State v. Greenleaf, 591 NW.2d 488, 499 (Minn. 1999) (same).

Since all these Defendants are charged with the same conspiracy, they are alleged to have acted jointly and in concert, and the bulk of the evidence against each is virtually identical joinder for trial is appropriate based upon the nature of the offense.

**Impact on the Victim**

The Complaints against these Defendants do not identify any particular victim. The State does not even suggest that the alleged actions of the Defendants altered in anyway the program of the Republican National Convention. Thus, it is unclear whether the prosecution will call upon any alleged victim to provide trial testimony or whether any proposed testimony would be relevant. If the state contemplates producing alleged victims of the alleged conspiracy for testimony, requiring them to testify multiple times would be a hardship. The same is true for law enforcement witnesses. They simply should not be required to testify numerous times about the same events.

In addition, discovery has produced mountains of statements and documents from confidential "reliable" informants and undercover investigators. They should also not be required to testify numerous times. These Defendants will likely call many witnesses to refute the claims of these informants and undercover investigators and to demonstrate inconsistencies in their stories.

It is irrefutable that giving testimony at numerous separate trials instead of a single time at one trial is a negative consequence of the failure to join cases like these. See 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)

Because the impact of eight separate trial would be negative and unduly burden both state and defense witnesses, and any potential victims, the facts of the instant cases support joinder.

**Potential Antagonistic or Inconsistent Defenses**

The existence of antagonistic or inconsistent defenses, while a factor that weighs toward separate trials, is not present here. Antagonistic or inconsistent defenses exist when defendants seek to blame each other. Santiago v. State, 644 NW.2d 425, 444 (Minn. 2002). Substantial prejudice can occur in a joint trial when the defenses of codefendants are inconsistent or when they seek, through

their chosen defenses, to shift blame to one another. DeVerney, 592 N.W.2d at 842. An antagonistic or inconsistent defense can also arise when jurors are forced to believe either the testimony of one defendant or the testimony of another defendant. Powers, 654 N.W.2d at 675.

There is essentially no chance of antagonistic or inconsistent defenses arising in these cases. These Defendants have consistently taken the position that no illegal conspiracy existed. 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 has sought to join the 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.

**Interests of Justice**

In these cases the interests of justice overwhelming direct support a joint trial.

There is no presumption that a joint trial will result in an unfair trial. Powers, 654 N.W.2d at 676. “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” Id.

State v. Higgins, 376 NW.2d 747 (Minn. Ct. App. 1985), is instructive on the issue presented here. In that case 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 joinder which was granted by the District Court. The State appealed, asserting joinder was

improper on the basis that the individual defendant's subjective intent and motivation were particularly at issue and the cumulative presentation of such testimony in a consolidated trial would be highly prejudicial to the State.

The Minnesota Court of Appeals affirmed the joinder reasoning that it was not clear that a joint trial involving individual testimony would defy the interests of justice. Id. at 748-49. The Court noted that Rule 17.03 is "unquestionably designed to help guarantee criminal defendants a fair trial…" Id. at 748.[3] As in Higgins, the Court should reject the State's objections, if any, to the Defendant's motion for joinder.

There are a number of reasons why joinder of these cases serves the interests of justice. One is that separate trials would draw the process out to such an extent as to be oppressive. See, State v. Powers, 654 N.W.2d 667, 675 (Minn. 2003)(reasoning that joinder was proper because trials would drag out for a long time and prejudice potential jurors). For example, the defendant, who has his or her case tried last, or near the end of the series, would almost certainly have his or her right to a speedy trial violated, should such defendant withdraw his or her waiver of a speedy trial, because there is a substantial probability that any trial proceedings in this matter will last for a significant period of time such that the final defendants in a series of trials may finally obtain a trial date only in the distant future.

In addition, the length of time required to try multiple defendants could prejudice potential jurors through the cumulative effect of publicity related to each trial, requiring a potential change of venue, particularly for defendants tried later in the process. See, 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). The selection of an

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3 Rule 17.03 has since been modified but the Higgins analysis remains instructive and compelling.

unbiased jury in a highly publicized case is always difficult at best. The selection of eight different juries involving the same high profile circumstances would approach being an impossible task.

In the event of separate trials, it is virtually certain that information will be revealed at each that is not in the discovery but will be relevant in later trials. It therefore would be necessary for each defendant to have an attorney at each trial prior to his or her own. The economic circumstances of each of the eight defendants, however, makes this impossible. At any rate a Defendant scheduled for a later trial would need to have a transcript of prior trials available for trial preparation and the eighth defendant to stand trial would have to secure a complete transcript of seven prior trials, each potentially several weeks or months in length. This is an economic burden almost none of the Defendants can bear.

The State has asserted that a joint trial of these cases is impossible because of so-called "Bruton" issues. Under Bruton v. United States, 391 U.S. 123 (1968), the right to confrontation is violated when a non-testifying codefendant's confession that implicates the defendant is admitted into evidence. Id. at 135-36. The reasoning is that the defendant against whom the confession is admitted is denied an opportunity to cross-examine the codefendant because he or she has not taken the stand. The State's reliance Bruton as authority for separate trials here is misplaced. Not a single one of these Defendants has made a confession so no Bruton issue can arise.

Also, a joint trial would actually minimize any potential hearsay and confrontation issues because every defendant would be able to challenge all evidence and cross-examine every witness. This is especially true because should a defendant desire to testify on his or her own behalf counsel for each of the codefendants will be present to test that testimony through cross-examination. If that defendant's testimony proves to be beneficial to another defendant that second defendant will receive a much fairer trial because defendants are generally and understandably reluctant to testify

prior to their own trial and in the absence of a joint trial that beneficial testimony would simply be unavailable.

Separate trials of what is essentially a single charge of conspiracy, based on common facts, would further stretch the limited resources of individual defendants and deny them an opportunity to effectively present a defense in the face of the virtually unlimited resources available to the State. Defendants anticipate calling a expert witnesses to testify on their behalf. Defendants expect to call expert witnesses in the areas of freedom of speech, political dissent, police practices, as well as theatrical and satirical expression.

Defendants have not identified all the experts they will utilize. It is ,however, impractical to expect that expert witnesses would be available to testify eight times. That would mean that the defendants who do not have the opportunity to present such an expert would be potentially damaged. In a joint trial those experts would be required only to testify a single time. In addition, in a joint trial Defendants could pool their resources and divide the costs for these experts. Limited resources makes it impossible for every defendant to have equal access to expert testimony if this Court denies joinder for trial. Further, even if funds could be found by each defendant to engage a series of experts, it is unlikely that a particular proposed expert witness would have the time available to testify eight times, particularly if he or she were located outside of the Twin City area.

It is not just the availability of expert witnesses that will become an issue if the Court orders separate trials of these cases. Even the availability of fact witnesses will be limited should more than one trial be scheduled. Journalists and other observers can not be expected to make themselves available repeatedly for similar testimony. See, Powers 654 N.W.2d at 675 (repeated travel by witnesses is a factor supporting joinder of trials). The State's allegations in this case range over a period in excess of a year, involving acts and meetings occurring across the United States. The State

also appears to seek to hold these eight defendants responsible for each act of disorder or unlawful act that may have occurred on September 1, 2008, an admittedly chaotic day potentially involving hundreds of civilians and law enforcement officers as fact witnesses. See, Second Amended Criminal Complaint, page 10 of 15, listing series of acts that occurred on September 1-2, 2008. Requiring these witnesses to testify in separate trials would be unduly burdensome and deny Defendants the ability to effectively present a defense.

The Court has assigned these cases to a single judge. Thus, trial of eight, or even four, five, or six separate trials would impose a significant burden as to the time expended by the Court. The repetition at each trial can be expected to be extensive. There is simply no reasons for the Court to expend the resources multiple trials will require.

Each of the defendants are young and all lack resources anywhere near approaching those available to the State of Minnesota. In joint and vicarious liability cases, there is a concept favoring "Parity of Arms", meaning that each party should have equal resources to defendant against a claim. See, 43 TILJ 482, Winter 1988, Michael Steenson: *Recent Legislative Responses to the Rule of Joint and Several Liability*. The Court should consider the lack of parity in resources here and the negative effect that will have on the fairness of the process to individual defendants in the absence of a joint trial. In a joint trial Defendants can at least envision approaching parity with the immense resources of the State of Minnesota, which has been assisted in the investigation and prosecution of this matter by numerous local, state, and federal law enforcement agencies. Alone, they are doomed to be overwhelmed.

## CONCLUSION

For all the foregoing reasons these cases should be joined for trial.

Dated: Respectfully submitted,

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