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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

J. Alexander Kueng,

Tou Thao,

Defendants.

STATE'S MEMORANDUM IN SUPPORT OF MOTIONS *IN LIMINE*

Court File No.: 27-CR-20-12953

Court File No.: 27-CR-20-12949

TO: The Honorable Peter A. Cahill, Judge of District Court; counsel for Defendants, Thomas Plunkett, U.S. Bank Center, 101 East Fifth Street, Suite 1500, St. Paul, MN 55101; Robert Paule, 920 Second Avenue South, Suite 975, Minneapolis, MN 55402.

The State submits the following memorandum in support of its motions *in limine* numbered one through sixteen. In addition, the State submits a memorandum in support of its supplemental motion *in limine* (motion number 29).[1]

ARGUMENT

1. DEFENDANTS SHOULD BE FORECLOSED FROM ARGUING INCORRECT LEGAL STANDARDS, OR FROM PRESENTING EVIDENCE SPECIFICALLY ADDRESSING THESE INCORRECT STANDARDS.

The State moves the Court to prevent Defendants from arguing that: (i) the State must show that Derek Chauvin and/or Defendants intended to kill George Floyd or intended to cause him bodily harm; (ii) that the State must show "but for" causation in order to establish the causation element of the charged offenses; (iii) that the State must prove that Defendants' aid to Chauvin

[1] Defendant Lane pleaded guilty on May 18, 2022. Out of an abundance of caution, and because Defendants have previously adopted each other's disclosures, the State maintains its motions *in limine* pertaining to the experts that Defendant Lane disclosed, and matters which Defendant Lane's counsel suggested he intended to raise.

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was effective; or (iv) that the State must prove that Defendants violated a duty to intervene. The State also respectfully requests that the Court prohibit Defendants from presenting evidence that specifically addresses whether these incorrect legal standards have been satisfied.

A. The State Need Not Prove That Derek Chauvin Or Defendants Intended To Cause Floyd Bodily Harm Or Kill Him.

Defendants are charged with aiding and abetting second-degree unintentional murder and second-degree manslaughter. To prove that Defendants aided and abetted Chauvin, the State will need to prove that Chauvin committed each of the underlying offenses; that Defendants knew Chauvin was "going to commit or" was "committing a crime;" and that Defendants "intended" their "presence or actions" to aid the commission of that crime. Minn. CRIMJIG 4.01. Neither of these charges require the State to prove that Chauvin (as the principal) nor the Defendants (as accomplices) intended to cause Floyd bodily harm or kill him.

1. For both charges, the State does not need to prove that the principal—Chauvin—intended to cause George Floyd bodily harm or kill him.

To prove Chauvin committed the predicate crime of second-degree unintentional murder, the State must prove: (i) George Floyd's death; (ii) that Chauvin's conduct was "a substantial causal factor in causing" Floyd's death; and (iii) that "at the time of causing the death of" George Floyd, Chauvin "was committing or attempting to commit" an underlying felony. Minn. CRIMJIG 11.29. "It is not necessary for the State to prove" Chauvin "had an intent" "to kill" Floyd. *Id*.

Here, Chauvin's underlying felony is third-degree assault, which in turn requires proof that Chauvin (i) assaulted Floyd, meaning he intentionally inflicted or attempted to inflict "bodily harm" on Floyd, and (ii) "inflict[ed] substantial bodily harm" on George Floyd. Minn. CRIMJIG 13.02, 13.15. Bodily harm is defined as "physical pain or injury, illness, or any

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impairment of a person's physical condition." Minn. CRIMJIG 13.02. " 'Substantial bodily harm' means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member." Minn. Stat. § 609.02, subd. 7a.

Critically, assault-harm does not "require proof of intent to inflict a certain degree of bodily harm." *State v. Gorman*, 532 N.W.2d 229, 233 (Minn. Ct. App. 1995), *aff'd*, 546 N.W.2d 5 (Minn. 1996) (en banc); *accord State v. Dorn*, 887 N.W.2d 826, 830-831 (Minn. 2016). Instead, as the Minnesota Supreme Court has explained, for assault-harm "the forbidden conduct is a physical act, which results in bodily harm upon another." *Dorn*, 887 N.W.2d at 830 (cleaned up). Therefore, "assault-harm . . . requires only the general intent to do the act that results in bodily harm," meaning the "intent to do the prohibited physical act of committing a battery." *Id.* at 830-831 (cleaned up). As a result, the State need only "prove that 'the blows to the complainant were not accidental but were intentionally inflicted' " to satisfy the *mens rea* element of assault-harm. *Id.* at 830 (quoting *State v. Fleck*, 810 N.W.2d 303, 310 (Minn. 2012)).

The same is true with respect to second-degree manslaughter. To show that Chauvin committed second-degree manslaughter, the State need only prove: (i) George Floyd's death; and (ii) that Chauvin caused George Floyd's death by "culpable negligence," meaning Chauvin's conduct was a "substantial causal factor" in Floyd's death, and that Chauvin "created an unreasonable risk and consciously took a chance of causing death or great bodily harm." Minn. CRIMJIG 11.56. The State need not prove that Chauvin "specifically intended to cause" George Floyd's "death." *Daniels v. State*, No. A17-0623, 2018 WL 817286, at *9 (Minn. Ct. App. Feb. 12, 2018).

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2. Just as it need not prove that Chauvin—as principal—intended to cause death or bodily harm, the State likewise need not prove that Defendants—as accomplices—intended to cause death or bodily harm.

To prove aiding and abetting liability, the State must show that Defendants: (1) "knew" Chauvin was "going to commit or" "was" "committing a crime; and" (2) that Defendants "intended" that their "presence or actions aid the commission of that crime." Minn. CRIMJIG 4.01; *see* Minn. Stat. § 609.05, subd. 1. Additionally, a person liable for aiding and abetting a felony "is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by the person as a probable consequence of committing or attempting to commit the crime intended." *Id.* subd. 2.

Thus, to be liable for felony murder, an accomplice need only aid and abet the underlying felony—here, third-degree assault—and need not know or intend that a death would occur. *See, e.g.*, *State v. Foresta*, No. A14-2146, 2016 WL 207698, at *5 (Minn. Ct. App. Jan. 19, 2016) (affirming conviction for aiding and abetting felony murder where the accomplice did "not deny that he aided [the principal] in the attempted aggravated robbery"); *see generally* 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.2(c) (2d ed. 2021) ("[O]ne who intentionally aids or encourages the actor in the underlying crime may likewise be convicted of felony-murder . . . notwithstanding his lack of intent that death result.").

The State similarly need not prove that Defendants knew or intended that Chauvin would inflict "a certain degree of bodily harm." *Gorman*, 532 N.W.2d at 233. Accomplice liability's dual knowledge and intent requirements ensure that those who lack moral culpability are not held liable for another's misconduct. *See State v. Huber*, 877 N.W.2d 519, 525 (Minn. 2016). Thus, for "example, if a person plans to rob a bank and asks a friend for a ride to the bank, if the friend

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provides the ride she has aided a crime." *State v. Smith*, 901 N.W.2d 657, 663 (Minn. Ct. App. 2017). "But if the friend did not know of the intent to commit a crime, she" did nothing morally wrong, the friend did "not form the necessary intent to aid the crime," and therefore does not face legal liability for an innocent act. *Id*. As a result, the State must only prove that Defendants knew about and intentionally aided Chauvin's "physical act"—an intentionally inflicted blow to George Floyd—that constitutes the "forbidden conduct" under the assault-harm statute. *Fleck*, 810 N.W.2d at 309. Chauvin's physical "act" is "that [which] the law makes punishable" and therefore is the "crime" for purposes of the aiding and abetting statute, Minn. Stat. § 609.05, subd. 1; *Crime*, *Black's Law Dictionary* (11th ed. 2019) ("An act that the law makes punishable; the breach of a legal duty treated as the subject-matter of a criminal proceeding."). And just as the State need only prove that Chauvin possessed the general intent to commit that forbidden act, the State also need not prove any higher degree of culpability for his accomplices.

Finally, to prove Defendants aided and abetted second-degree manslaughter, the State need not prove that Defendants knew about or intended George Floyd's death. Instead, here too the State need only prove that Defendants knew about and assisted Chauvin's forbidden act, namely the "culpable negligence whereby" Chauvin "create[d] an unreasonable risk, and consciously [took] chances of causing death or great bodily harm to another." Minn. Stat. § 609.205(1); *Matter of S. W. T.'s Welfare*, 277 N.W.2d 507, 514 (Minn. 1979) (upholding conviction for "aiding criminally negligent manslaughter" because defendants "acted together with conscious disregard of a risk").

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B. The State Need Not Prove "But For" Causation Or The Efficacy Of Defendants' Actions In Aiding Chauvin.

To prove that Chauvin committed the offenses which Defendants aided, the State need not prove that Chauvin's actions were the "but for" cause of Floyd death. Instead, the State must prove only that his actions were a "substantial causal factor" in Floyd's death.

As the Minnesota Court of Appeals has explained, the "substantial causal factor" test "is more accurately worded, not in terms of but-for cause, but rather: Was [a person's] conduct a substantial factor in bringing about the forbidden result?" *State v. Dorn*, 875 N.W.2d 357, 362 (Minn. Ct. App. 2016) (quoting 1 Wayne R. LaFave, *Substantive Criminal Law* § 6.4(b), at 468-469 (2d ed. 2003)), *aff'd*, 887 N.W.2d 826 (Minn. 2016). "The State must prove that [Chauvin's] acts contributed to the death." *State v. Torkelson*, 404 N.W.2d 352, 357 (Minn. Ct. App. 1987). The State "need not prove the specific mechanism of death," *id*., or that Chauvin's acts were "the sole cause of death," *State v. Gatson*, 801 N.W.2d 134, 148 (Minn. 2011). Instead, Chauvin's acts need only be a "proximate cause of injury," meaning Chauvin's acts "cause[d] injury directly or through [a] natural sequence of events." *State v. Hofer*, 614 N.W.2d 734, 737 (Minn. Ct. App. 2000) (citing *Lennon v. Pieper*, 411 N.W.2d 225, 228 (Minn. Ct. App. 1987)). As a result, even if the principal's actions would not have independently caused the victim's death, a principal may still be held liable if multiple factors combined to produce that result. *Id*. ("There can be more than one cause of harm."). This means that the State does not need to show that George Floyd would have survived *but for* Chauvin's actions.

Finally, the State need not prove that Defendants as accomplices were "effective in aiding the primary actor," Derek Chauvin. *State v. Taylor*, 869 N.W.2d 1, 16 (Minn. 2015). To be sure, the State must prove that Defendants intentionally aided Chauvin, and the efficacy of an accomplice's efforts can be "probative for the jury to consider in deciding whether a defendant

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'intentionally aids' another." *Id*. But the State need not affirmatively prove that Defendants *effectively* aided Chauvin in injuring George Floyd or contributed to his death.

C. Although The Duty To Intervene Is Relevant, The State Does Not Need To Prove Beyond A Reasonable Doubt That Defendants Violated A Duty To Intervene.

The Court should permit the parties to present evidence regarding Minneapolis Police Department's (MPD) duty to intervene and Defendants' (non)compliance with that policy. The Court should, however, prevent Defendants from arguing that this case boils down to whether Defendants violated a duty to intervene, or that the State must prove that particular fact beyond a reasonable doubt.

Both parties should be allowed to present evidence regarding MPD's policy imposing a duty to intervene. Defendants' failure to comply with the policy on which they were trained is relevant evidence in this case under Rule 402. In particular, Defendants' failure to intervene is highly probative of their intent to aid Chauvin: by not intervening, and violating MPD policy in the process, Defendants revealed their intent to aid Chauvin's unlawful acts. Likewise, the fact that Defendants were trained on MPD's duty to intervene is part of the totality of circumstances the jury may consider when determining the reasonableness of Defendants' force.

But the State need not prove beyond a reasonable doubt that Defendants violated a duty to intervene. Under Minnesota law, Defendants are criminally liable because they affirmatively aided and abetted Chauvin's third-degree assault and culpable negligence. *See supra* pp. 4-5. The State need not prove that Defendants are liable as bystanders who failed to act; instead, the State must prove that Defendants were knowing and intentional accomplices to Chauvin's crimes.

These charges contrast with Defendants' recent federal trial, in which Defendants' failure to intervene *was* an express element of the charged conduct which the jury needed to find beyond a reasonable doubt. Defendants lost that case; they cannot get a "do-over" here by transforming

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the State's case into a referendum on their (non)intervention. The Court should therefore prevent Defendants from confusing the issues in this case by arguing that the State must prove beyond a reasonable doubt that Defendants' violated a duty to intervene. That erroneous legal standard misstates the ultimate question and would confuse the jury.[2] *See* Minn. R. Evid. 403.

2. DEFENDANTS SHOULD BE FORECLOSED FROM ARGUING INCORRECT LEGAL STANDARDS REGARDING THE USE OF FORCE DEFENSE, OR FROM PRESENTING EVIDENCE SPECIFICALLY ADDRESSED TO THOSE INCORRECT STANDARDS.

The State moves the Court to prevent Defendants from arguing that a Defendant's use of force was lawful because—when viewed in isolation—that Defendant's force would have been reasonable on its own. The State also respectfully requests that the Court prohibit Defendants from presenting evidence that specifically addresses whether that incorrect legal standard has been satisfied.

Minnesota law authorizes a public officer to use "reasonable force" when certain "circumstances exist" or the officer "reasonably believes them to exist." Minn. Stat. § 609.06, subd. 1. Under this standard, the objective reasonableness of a Defendant's use of force depends on the totality of "the facts and circumstances" that officer faces, such as "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). A particularly important factor in this holistic inquiry is the nature and extent of force that another officer may be simultaneously employing against a suspect.

In this case, whether a given Defendant's use of force was reasonable therefore depends not only on the particular force that particular Defendant applied, but also on the force that Chauvin

[2] Because the duty to intervene is not an element of the charged offense, it is also unclear what *mens rea* would apply to that non-element. By contrast, in the federal trial, the charged element required the United States to prove Defendants willfully failed to intervene.

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and the remaining co-Defendants were simultaneously applying. To avoid confusing the jury, the Court should therefore prevent Defendant Kueng from arguing that his actions were lawful because—on its own—his restraint of George Floyd was reasonable. Likewise, the Court should prevent Defendant Thao from arguing that his actions were lawful because—on their own—his actions restraining the crowd and offering advice to his co-defendants were reasonable.

3. THE COURT SHOULD EXCLUDE DEFENSE EXPERT STEVE IJAMES FROM TESTIFYING TO IMPROPER AND IRRELEVANT OPINIONS.

A. The Court Should Exclude Ijames From Offering Medical Testimony Or Testimony Lacking Foundation.

In his expert report, Ijames opines that George Floyd's behavior was "generally consistent with a person affected by mental illness, in medical distress (to include excited delirium), under the influence of mind-altering substance(s), or a combination of these factors." Ijames Report at 3 (citation omitted). The Court should exclude Ijames from offering a medical diagnosis far outside of his expertise. The Court should also exclude Ijames from testifying about how a reasonable officer in Defendants' position might have perceived Floyd's behavior, because Ijames' opinion would lack the necessary foundation.

Steve Ijames is not a medical expert and should not be allowed to offer expert testimony on medical matters. To offer expert testimony, the witness must be "qualified as an expert by knowledge, skill, experience, training, or education." Minn. R. Evid. 702. A witness may possess expertise with respect to certain matters but not others. *See, e.g.*, *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 727 (Minn. 2005). While Ijames may be qualified to provide expert testimony regarding policing, he lacks expertise that would allow him to diagnose George Floyd's medical symptoms. At a minimum, the Court should exclude any testimony from Ijames that provides an objective medical evaluation.

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The Court should also not permit Ijames to present medical testimony through the guise of how a reasonable officer in Defendants' position might have perceived Floyd's behavior. An expert's opinion must "have foundational reliability." Minn. R. Evid. 702. The Rules of Evidence do not "describe what that foundation must look like for all types of expert testimony," but the "trial judge should require that all expert testimony under rule 702 be based on a reliable foundation." Minn. R. Evid. 702 cmt. The Minnesota Supreme Court has explained that when "determining whether expert testimony has foundational reliability, a district court must consider both 'the reliability of the underlying theory,' as well as 'the reliability of the evidence in the particular case' with a view toward the purpose for which the expert testimony is offered." *Kedrowski v. Lycoming Engines*, 933 N.W.2d 45, 56 (Minn. 2019) (citation omitted). "When determining whether expert testimony has a reliable factual foundation, the question is whether the facts upon which an expert relies for an opinion are supported by the evidence." *Id*. (cleaned up).

Ijames' "reasonable officer" opinion lacks foundation. Ijames cites no sources regarding how Defendants—or even other police officers—were trained to recognize someone experiencing "mental illness" or someone "under the influence of mind-altering substance(s)." Ijames Report at 3. Meanwhile, Ijames purports to cite a mere two webpages that discuss excited delirium, although he does not provide an accessible link for either. *Id.* at 3 n.10; *Id.* at 4 n.12. And neither of the two webpages the State believes he is citing details training officers receive regarding excited delirium, let alone these Defendants.[3] Additionally, "facts assumed by [Ijames] in

[3] The State believes that the webpages are available at the following links:

https://web.archive.org/web/20200616130952/https://www.lexipol.com/resources/blog/understanding-excited-delirium-4-takeaways-for-law-enforcement-officers/.

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rendering [his] opinion are not supported by the evidence." *Kedrowski*, 933 N.W.2d at 56 (quoting *Mattick v. Hy-Vee Foods Stores*, 898 N.W.2d 616, 621 (Minn. 2017)). In particular, Ijames states that Floyd was "seemingly tireless, and extraordinarily strong," yet Ijames includes not a single citation for that claim. Ijames Report at 3.

Finally, even putting all of those deficiencies aside, Ijames' opinion is inherently inconsistent. Ijames concludes that George Floyd's behavior was *both* consistent with someone suffering from medical distress *and* "consistent with criminal malingering"—meaning someone who is not undergoing medical distress but instead is feigning symptoms. *Id*. These two statements are at the very least in tension if not outright contradictory, making Ijames' opinion unreliable, lacking any probative value, and confusing to the jury.

B. The Court Should Exclude Ijames From Offering Testimony About George Floyd's Mental State, Including Any Assertion That Floyd Was Malingering.

For similar reasons, the Court should exclude Ijames from testifying that George Floyd's behavior was "consistent with criminal malingering." Ijames Report at 3. George Floyd's subjective mental state is irrelevant and would therefore confuse rather than help the jury. Minn. R. Evid. 402-403, 702. In particular, whether Defendants used reasonable force depends on "the perspective of a reasonable officer on the scene," not on Floyd's internal motivations. *Graham*, 490 U.S. at 396.

The Court should likewise prevent Ijames from opining that "[p]olice officers are also trained to consider the possibility that criminal malingering is involved," or that officers are taught that "a criminal suspect" may "fake[] or fabricate[] a mental/medical condition to achieve a desired outcome." Ijames Report at 4. Here again, Ijames' report lacks foundation. The lone webpage

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https://www.ems1.com/ems-products/patient-handling/articles/excited-delirium-medical-emergency-not-willful-resistance-3B8xLHBK7myikoFx/.

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cited is a journalistic think-piece on the phenomenon of malingering that cites sources as varied as the Bible and Homer's *Odyssey*.[4] *Id.* at 3 n.11. Notably, Ijames does not cite any evidence that the officers in this case were trained to identify criminal malingering.

C. The Court Should Exclude Hearsay Embedded In Ijames' Testimony.

Ijames stated that he has spoken with Defendant Kueng, including "about his observations and understanding of what was happening" and Defendant Kueng's awareness of certain MPD policies. *Id.* at 11. The Court should prevent Ijames from testifying to Defendant Kueng's account because such testimony would constitute inadmissible hearsay.

Defendant Kueng's statements to Ijames would be inadmissible hearsay because the statements were not made "while testifying at the trial," would be "offered in evidence to prove the truth of the matter asserted," and would not be "offered against" Defendant Kueng. Minn. R. Evid. 801(c)-(d). An expert may rely on inadmissible hearsay to form an opinion. Minn. R. Evid. 703(a). But "underlying expert data must be independently admissible in order to be received upon direct examination," and any "inadmissible foundation should not be admitted into evidence simply because it forms the basis for an expert opinion." Minn. R. Evid. 703(b), cmt. Defendants thus cannot "launder inadmissible hearsay evidence, turning it into admissible evidence by the simple expedient of passing it through the conduit of purportedly 'expert opinion.' " *State v. DeShay*, 669 N.W.2d 878, 886 (Minn. 2003).

[4] https://www.bbc.com/future/article/20190521-malingering-when-criminals-fake-diseases.

This journalistic article is particularly unsuitable foundation because it is inadmissible hearsay and Ijames does not explain why it is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Minn. R. Evid. 703(a).

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D. The Court Should Exclude Testimony About A Defendant's Mental State.

In his report, Ijames draws conclusions about Defendant Kueng's mental state, for instance stating that "Kueng *had confidence* in his (Chauvin's) judgment and abilities." Ijames Report at 8 (emphasis added). While Ijames can testify to a reasonable officer's confidence in another officer in these circumstances, the Court should not permit Ijames to opine about Defendant Kueng's actual mental state.

To the extent Ijames' assertions about Defendant Kueng's mental state parrot Ijames' interview with Defendant Kueng, Ijames' testimony would "launder inadmissible hearsay evidence." *DeShay*, 669 N.W.2d at 886. And whether or not Defendant Kueng chooses to testify, the jury would be just as able to evaluate Defendant Kueng's testimony and determine his mental state. Thus, Ijames' independent assessment of Defendant Kueng's mental state would not be "helpful" because Ijames' "testimony" about what Defendant Kueng had actually thought would be well "within the knowledge and experience of a lay jury." *State v. Anderson*, 789 N.W.2d 227, 235 (Minn. 2010) (internal quotation marks and citation omitted); *State v. Wembley*, 712 N.W.2d 783, 791 (Minn. Ct. App. 2006) ("The Minnesota Supreme Court has recognized that, in most criminal cases, the credibility of witnesses is peculiarly within the competence of the jury, whose common experience affords sufficient basis for assessment of credibility.") (internal quotation marks and citation omitted).

E. The Court Should Exclude Testimony That Chauvin Had Either Formal Or Informal Command Of The Scene.

The Court should prevent Ijames from testifying that, as a senior officer, Chauvin had command of the scene. Ijames' report states that "every working police officer in America knows" a senior officer will take charge when a call "goes sideways" and that "new officers are trained, expected, and directed to defer to senior officers." Ijames Report at 7. Here again, Ijames' opinion

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lacks the necessary foundation and contradicts all of the facts in the record. Ijames includes no citation to MPD's (contrary) policy, any training materials, or any academic literature on policing. *See* BATES 004804 (MPD Policy 1-407) ("In the absence of a supervisor, the senior sworn employee *of the first squad to arrive* at the incident shall be responsible for police activity until relieved by a supervisor." (emphasis added)). The report does cite a short segment of a Department of Justice interview with a Minneapolis police officer. Yet there is no way to assess whether this (brief) statement is reliable or even "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Minn. R. Evid. 703(a).

4. THE COURT SHOULD EXCLUDE DEFENSE EXPERT GREG MEYER FROM TESTIFYING TO IMPROPER AND IRRELEVANT OPINIONS.

A. Meyer Should Be Prohibited From Testifying About The Limits Or Benefits Of Video Evidence.

In his report, Meyer opines about potential limitations of videos, such as the fact that cameras "do not capture objects and movements that are blocked from the camera lens" or that a camera cannot record human emotions. Meyer Report at 3 (emphasis original). The Court should exclude this testimony because it will not "assist the trier of fact to understand the evidence." Minn. R. Evid. 702. How cameras work is a fact well "within the knowledge and experience of a lay jury" and Meyer's testimony "will not add precision or depth to the jury's ability to" evaluate the body-worn camera footage. *State v. Helterbridle*, 301 N.W.2d 545, 547 (Minn. 1980). Additionally, to the extent Meyer opines that "videos" may have a "low frame rate," "do not capture real time," and "may document very different lighting conditions than the human eye," Meyer offers no foundation for that assertion nor any reason to believe that cameras in this case possessed that attribute in a non-obvious way. Meyer Report at 3; *see State v. Hanks*, 817 N.W.2d 663, 669 (Minn. 2012) (affirming exclusion of battered woman syndrome testimony where "the

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evidence of a troubled relationship" "was insufficient to establish the type of relationship that would give rise to battered woman syndrome").

If the Court does permit Meyer to testify about how cameras work, the Court should at least exclude Meyer's testimony about specific "physiological and psychological" phenomena, such as "sound distortion, memory (formation, storage, and retrieval), and other human performance phenomena." Meyer Report at 3. Meyer is not a psychologist, and these types of psychological phenomena are well outside of his expertise. Additionally, to the extent Meyer's suggestive testimony implies that Defendants experienced "narrowly focused attention ('tunnel vision')" or any other psychological effect, Meyer's testimony would lack foundation, would be irrelevant, and would confuse the jury. *Id.*; *see* Minn. R. Evid. 402-403, 702. Meyer cites no evidence that any Defendants experienced any such phenomenon. *See Hanks*, 817 N.W.2d at 669.

The Court should likewise exclude Meyer's assertion that videos "of police use of force incidents tend to cause emotion-based (not fact-based) reactions by viewers, because police use of force is generally not pleasant to view." Meyer Report at 3. This assertion is not a proper topic of expert testimony because it is well within the lay jury's knowledge, is entirely irrelevant to the questions the jury must reach, and borders on a request for jury nullification.

B. Meyer Should Be Prohibited From Testifying That Defendant Lane Could Have Been Confused Based On MPD Policy.

The Court should prevent Meyer from suggesting that Defendant Lane might have been confused because MPD policy and training allegedly permit officers to use a leg to affect a neck restraint. *See, e.g.*, Meyer Report at 8. Meyer notes that Defendant Lane "stated that he had never seen the knee-to-neck tactic before, and it was not something he had been trained on." *Id*. (emphasis and citation omitted). But if Defendant Lane was unaware of the policy and training, it would be impossible for Defendant Lane to be confused about it. As a result, unless Defendants

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offer evidence that Defendant Lane had seen the policy before, Meyer's speculation that Defendant Lane might have been confused by MPD policy lacks foundation, is irrelevant, and should be excluded. *See Hanks*, 817 N.W.2d at 669. Additionally, because Defendant Lane is no longer a Defendant in this case, this opinion is irrelevant and would confuse the jury.

C. Meyer Should Be Prohibited From Testifying About A Defendant's Intent.

In his Report, Meyer characterizes Defendant Lane's intent, for instance stating that Defendant Lane "attempted to stop the force being used by saying out loud, 'Roll him over on his side?' " Meyer Report at 9. While Meyer can characterize a Defendant's actions from an objective standpoint, the Court should not permit Meyer to testify to any Defendant's subjective motives, which would launder inadmissible hearsay through an expert and/or invade the province of the fact finder. *See supra* pp. 12-13.

D. Meyer Should Be Prohibited From Testifying That The State Must Prove That The Use Of Force Was Clearly Or Obviously Unlawful.

The Court should prohibit Meyer from testifying that the State must prove that Chauvin's use of force or their own use of force was clearly or obviously unlawful. *See, e.g.*, Meyer Report at 9-13. Such testimony would substantially misstate the legal standard the jury must apply and would unnecessarily confuse the jury.

To overcome Defendants' use of force defenses, the State must prove beyond a reasonable doubt that Chauvin's force was not "reasonable" and that Defendants' actions aiding Chauvin were not "reasonable." Minn. Stat. § 609.06, subd. 1. The State is entitled to—but need not prove beyond a reasonable doubt—that Chauvin and Defendants' use of force was *obviously* or *clearly* unreasonable.

Yet in his report, Meyer states that "[t]he question is whether Officer Lane would have **clearly** perceived that inappropriate or unnecessary force was occurring." Meyer Report at 14

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(emphasis in original). Meyer likewise argues that MPD's duty to intervene policy was deficient because other "policies" "state that intervention should occur when the force used is **clearly** beyond what is necessary." *Id*. at 12 (emphasis in original). Meyer can opine on the effectiveness of MPD's training and policy, and on national standards for policing. But the Court should prevent Meyer from improperly suggesting the State must prove anything more than the fact that the force—in this case—was unreasonable.

E. Meyer Should Be Prohibited From Testifying About Specific Lexipol Materials, Other Departments' Policies, California Law, Or Qualified Immunity Precedent.

1. The Court should prohibit Meyer from testifying about a Lexipol model policy stating that an officer only has a duty to intervene when another officer's use of force is "**clearly** beyond that which is objectively reasonable under the circumstances," and a similar Peoria Police Department policy. *Id*. at 11 (emphasis in original); *see id*. at 10. Defendants were not trained on either standard. Quite the opposite: MPD policy requires officers to intervene whenever "force is being inappropriately applied or is no longer required." BATES 894 (MPD Policy 5-303.01). The Lexipol and Peoria policies are thus irrelevant to determining whether Defendants acted reasonably, in light of their individual training and experience. Meanwhile, even if the Lexipol and Peoria policies are marginally relevant to establishing national standards of policing, allowing Meyer to testify about the specific details of these policies at length would confuse the jury and would be substantially more prejudicial than probative. *See* Minn. R. Evid. 403.

2. The Court should prevent Meyer from testifying about Lexipol's training webinar. *See* Meyer Report at 11-12. Defendants were not trained on this webinar. Additionally, to the extent that Meyer would testify that a Lexipol "presenter" testified about his opinions regarding the necessity of changing police culture, such testimony would be inadmissible hearsay. Meyer Report at 11; *see* Minn. R. Evid. 801, 802.

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3. The Court should likewise prevent Meyer from testifying about California law, which is similarly irrelevant, prejudicial, and would confuse the jury.

4. Finally, the Court should prevent Meyer from testifying about federal qualified immunity precedent. *See* Meyer Report at 12. According to federal law, whether a particular violation of a constitutional right can give rise to civil monetary liability under 42 U.S.C. § 1983 depends on whether that right has been clearly established by judicial precedent. *See El v. City of Pittsburgh*, 975 F.3d 327, 334 (3d Cir. 2020) (quoted in Meyer Report at 12). That legalistic inquiry asks whether the facts of a given case are sufficiently similar to the precise holdings of federal appellate precedent. *See, e.g.*, *id*. Contrary to Meyer's assertion, federal qualified immunity precedent has nothing to do with whether an officer has an objective duty to intervene only when force is clearly or obviously unlawful. Indeed, the case Meyer cites notes that a "police officer has a duty to take reasonable steps to protect a victim from another officer's use of excessive force" where "there is a realistic and reasonable opportunity to intervene." *El*, 975 F.3d at 335 (internal quotation marks omitted). The qualified immunity doctrine is thus completely irrelevant to this case.

F. Meyer Should Be Prohibited From Testifying That It Would Be Unreasonable To Expect That, Had A Defendant Acted Differently, The Defendant's Actions Would Have Changed The Course Of Events.

Meyer's report opines on whether Defendant Lane could have "change[d] the course of [the] event." Meyer Report at 16. The Court should exclude this, and any similar testimony pertaining to any other Defendant, because it is outside of Meyer's area of expertise, lacks foundation, and would confuse the jury.

Whether any Defendant's hypothetical actions could have changed the course of events is, among other things, a medical determination. Meyer lacks the necessary medical expertise to opine on these medical issues, and his opinion about the consequences of actions or inaction lacks

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the necessary medical foundation. To the extent that Meyer intends to opine on the reasonableness of a Defendant intervening under the circumstances, the Court should prevent Meyer from couching that testimony in ways that imply medical causation.

G. Meyer Should Be Prohibited From Testifying To Hearsay.

Finally, Meyer should not be permitted to testify to hearsay, including Defendant Lane's voluntary interview with the Bureau of Criminal Apprehension (BCA). *See supra* p. 12.

5. THE COURT SHOULD EXCLUDE ALL EXPERT TESTIMONY FROM DR. SHAWN PRUCHNICKI.

The State moves for an order to exclude all expert testimony from Dr. Shawn Pruchnicki. Dr. Pruchnicki is unqualified to testify in the field of law enforcement. Moreover, the evidence he proposes to offer is unhelpful to the jury, irrelevant, more prejudicial than probative, and lacks foundational reliability. Minn. R. Evid. 401, 402, 403, 702. His testimony should be wholly excluded. To the extent this Court deems it necessary, however, the State requests an evidentiary hearing outside the presence of the jury to evaluate Dr. Pruchnicki's proposed testimony.

A. Dr. Pruchnicki Is Not Qualified To Offer Any Opinion As To Police Training Or Decision-Making.

The Court should prevent Dr. Pruchnicki from testifying about policing because he lacks expert qualifications necessary to opine about that topic. "The competency of an expert witness to provide [an expert] opinion depends upon both the degree of the witness's scientific knowledge and the extent of the witness's practical experience with the subject of the offered opinion." *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 761 (Minn. 1998); *see* Minn. R. Evid. 702. Dr. Pruchnicki's background is as an airline captain, pharmacist, and EMT. Dr. Pruchnicki Report at 1; *see* Pruchnicki CV. His report also states that he has "expertise in human factors, safety and crew resource management." Dr. Pruchnicki Report at 1. But neither his report nor his curriculum

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vitae mention any practical law enforcement experience, let alone experience preparing or evaluating law enforcement training programs or academic research into those topics.[5]

Minnesota courts regularly prevent experts from opining on matters on which they lack practical experience, even if they have experience in a related field or theoretical knowledge about the topic in question. For example, a psychologist who lacked "practical or occupational experience" with an antipsychotic drug was not qualified to offer expert testimony on a medical doctor's decision to prescribe that medication. *Lundgren v. Eustermann*, 370 N.W.2d 877, 879-881 (Minn. 1985). The proposed expert had "admirable qualifications as a psychologist, with extensive training and experience in the areas of psychology and pharmacology, including a doctorate in biopsychology," and "may well have had the requisite scientific knowledge to testify about" the drug at issue. *Id.* at 880. But that did not qualify him as an expert about how "physicians . . . customarily use[d]" that drug in treating patients. *Id*. at 880-81. Likewise, an expert with "30 years experience in penal administration and consulting, including jail design and the training of jail staff, in Minnesota and elsewhere" was allowed to "express his opinion of the physical facility," staffing needs, and training requirements. *Hille v. Wright Cnty*., 400 N.W.2d 744, 747, 749 (Minn. Ct. App. 1987). But the witness was not qualified to offer an expert opinion as to "whether the 'observation and monitoring' of [the inmate-plaintiff] met general professional standards . . . because [the witness] did not have personal knowledge of the actual monitoring practices of Minnesota county jails." *Id.* at 747; *see also, e.g.*, *Gross*, 578 N.W.2d at 761-762

[5] Dr. Pruchnicki served as a firefighter/paramedic from 1988-1997 and was a licensed EMT from 1990-2000. Dr. Pruchnicki CV at 4, 6. As this Court recognized in *Chauvin*, a firefighter is not qualified to testify to police officer training. *See* Order on Def.'s Mots. *In Limine* at 5, *State v. Chauvin*, No. 27-cr-20-12646 (Mar. 24, 2021). The same is true of an EMT. Dr. Pruchnicki's limited experience in these fields also does not qualify him as an expert on healthcare, rendering any opinion about training in that industry equally improper.

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(putative expert with an "extensive amount of experience with horses" not allowed to offer expert opinion on causes of equine lameness, because expert did not have experience in that field).

Because Dr. Pruchnicki does not possess "knowledge, skill, experience, training, or education" on police training or decision-making, he is not "qualified as an expert" on that subject. Minn. R. Evid. 702. This Court should exclude any testimony from Dr. Pruchnicki on those topics, including but not limited to testimony about the content of MPD's training programs or other police training programs; whether certain police training programs are or are not effective, "behind the times," or "ignorant of" certain topics; whether Defendants "followed" their training; whether "MPD policy and training left its officers completely on their own;" or whether the belief that any Defendant's training required him to "do[ ] more . . . is based on hindsight and wishful thinking." Dr. Pruchnicki Report at 4, 6-7.

B. Dr. Pruchnicki's Testimony Concerning Standards And Training In Other Industries Is Irrelevant.

The Court should likewise prevent Dr. Pruchnicki from testifying about aviation or other far-flung industries. "All evidence, including expert testimony, may be admitted only if it is relevant." *State v. MacLennan*, 702 N.W.2d 219, 235 (Minn. 2005). Dr. Pruchnicki's report speaks at length about intervention training in the aviation industry. *See* Dr. Pruchnicki Report 2, 4-6. That is not surprising; Dr. Pruchnicki has extensive expertise in that industry. But this case is about police, not pilots. Information regarding the need for, development of, requirements associated with, or implementation of intervention training in the aviation industry has no relevance to this case. Minn. R. Evid. 401, 402. And even if such evidence had some minimal probative value, it is far outweighed by the potential for prejudice and confusion. Allowing Dr. Pruchnicki to testify about aviation training standards threatens to confuse the jury

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about whether Defendants' actions should be judged against standards from an unrelated industry. Minn. R. Evid. 403.

Dr. Pruchnicki should therefore be prohibited from testifying about topics specific to the aviation industry, including but not limited to: when or why the airline industry decided to implement intervention training; which members of the industry receive intervention training; how intervention training is conducted in the aviation field; how often the aviation industry provides intervention training; whether intervention training has reduced aviation accidents; whether intervention training is standard in the aviation industry; the "Ask-Suggest-Direct-Take over" framework; airlines' uses of "codeword[s];" whether "[t]he aviation industry has broadly recognized that it is impossible to time an intervention decision exactly right during a dynamic, unfolding situation;" "why the aviation industry doesn't put its trust in generic guidance about the duty or expectation to intervene;" and whether intervention training was part of a "cultural change of the role of pilots as well as superiors." Dr. Pruchnicki Report at 2, 4-6. The same is true of any testimony related to intervention policies or training in other industries, including but not limited to "maritime and rail transportation, nuclear and chemical industries, and health care." *Id.* at 4.

C. Dr. Pruchnicki's Opinion That MPD's Policies Fall Short Of "Standards In Comparable Industries" Is Irrelevant And Prejudicial.

Even if Dr. Pruchnicki was qualified to opine about MPD's intervention policies, and even if the testimony concerning other industries were relevant to this case, Dr. Pruchnicki should not be allowed to testify that MPD's policies "fall far short of accepted/regulated standards in comparable industries." *Id.* Whether Defendants' use of force was "objectively reasonable" depends on "the perspective of a reasonable [police] officer on the scene," not on how police policies generally and MPD's policies specifically compare to those in other industries like aviation or maritime and rail transportation. *Graham*, 490 U.S. at 396-397; *see* Dr. Pruchnicki

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Report at 4; Minn. R. Evid. 401, 402. Moreover, even if relevant, such testimony is unduly prejudicial. As explained, although the parties should be permitted to present evidence about the duty to intervene, the State need not prove that Defendants violated a duty to intervene. *See supra*, pp. 7-8. Testimony that MPD's specific policies "fall far short" of those in other, unrelated industries might lead the jury to acquit because it believes MPD should be held responsible for not providing different or more training on that topic. *See* Dr. Pruchnicki Report at 4. Or the jury might think that convicting Defendants sends a strong message to MPD (or police departments more generally) about the need to adopt policies like those used in other industries. Either way, eliciting testimony comparing MPD's intervention policies to those in unrelated industries risks prompting the jury to decide this case "on an improper basis." *Bott*, 246 N.W.2d at 53 n.3.

D. Dr. Pruchnicki's Entire Testimony About Peer Pressure And Any Defendant's Ability To Intervene Is Neither Helpful Nor Relevant.

Relevant "[e]xpert testimony is helpful and admissible if it explains a behavioral phenomenon not within the understanding of an ordinary lay jury, such as battered woman syndrome or the behavior of sexually abused children." *State v. Ritt*, 599 N.W.2d 802, 811 (Minn. 1999); *see* Minn. R. Evid. 702. But "[e]xpert testimony is not helpful if the expert opinion is within the knowledge and experience of a lay jury and the testimony of the expert will not add precision or depth to the jury's ability to reach conclusions." *State v. Garland*, 942 N.W.2d 732, 746 (Minn. 2020) (quoting *State v. Obeta*, 796 N.W.2d 282, 289 (2011)). "In other words, if the jury can reach an informed conclusion just as easily as the expert, the expert's testimony is not helpful to the jury." *Id*. Dr. Pruchnicki opines that Defendant Lane in particular could not have "intervened earlier, or intervened more assertively" because he was a junior officer in the presence of superiors. Dr. Pruchnicki Report at 1. In short, the core of Dr. Pruchnicki's testimony purports to offer an expert opinion on peer pressure and deference to one's superiors. That testimony would

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be unhelpful, irrelevant, and prejudicial, and warrants excluding Dr. Pruchnicki's testimony in its entirety.

1. As a threshold matter, the topic of Dr. Prucknicki's psychological testimony is completely within the jury's everyday experience and therefore inappropriate for expert testimony. Dr. Prucknicki's opinion that "deference towards people in power can be deeply programmed as behaviour," Dr. Pruchnicki Report at 6, is effectively an opinion that individuals defer to superiors and are susceptible to peer pressure. No jury needs expert testimony to understand these concepts. Peer pressure and deference to superiors are no different than any other familiar condition for which expert testimony is unhelpful and thus inadmissible, such as mental illness and intoxication, *State v. Provost*, 490 N.W.2d 93, 103 (Minn. 1992) (en banc), duress, *State v. Greenleaf*, 591 N.W.2d 488, 504 (Minn. 1999), general trauma, *State v. Borchardt*, 478 N.W.2d 757, 761 (Minn. 1991), and gender stereotyping, *Ray v. Miller Meester Advertising, Inc.*, 664 N.W.2d 355, 365-366 (Minn. Ct. App. 2003), *aff'd*, 684 N.W.2d 404 (Minn. 2004). These issues are "so abundant in our society" as to be considered common knowledge and "within the realm of ordinary understanding and comprehension." *Ray*, 664 N.W. 3d at 366. If "virtually all adults in our society know about gender stereotypes," "the stuff of countless television situation comedies," then surely peer pressure and deferring to one's superiors is also within the public's ken. *Id.*

Indeed, the Minnesota Supreme Court has already held that "psychological expert testimony" that a defendant is "susceptible to coercion," "vulnerable to suggestion," and "has a tendency to say what authority figures want to hear" is unhelpful and inadmissible. *Bixler v. State*, 582 N.W.2d 252, 254-255 (Minn. 1998). The defendant in *Bixler* tried to offer this evidence to cast doubt on his confession. The Court held that testimony was properly excluded because it was "nothing more than a composite of personal characteristics that might render an individual more

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susceptible to wanting to please an authority figure," something that "the jury, without the testimony of the psychological expert, was fully capable of observing and understanding." *Id*. at 256. So too here. This Court should therefore exclude all of Dr. Pruchnicki's testimony as unhelpful and improper under Rule 702.

2. Dr. Pruchnicki's testimony also lacks probative value because Minnesota does not allow "expert psychiatric opinion testimony" in criminal cases to negate guilt. *Provost*, 490 N.W.2d at 101. "Minnesota law unambiguously prohibits expert psychiatric testimony" "to establish that at the time of the alleged offense, a defendant lacked the mental capacity to form specific intent" or "to show that a defendant did not in fact form the requisite mental state for the offense charged." *State v. Bird*, 734 N.W.2d 664, 672, 674 (Minn. 2007). Such testimony "impermissibly introduces diminished capacity into the jury's deliberations," which Minnesota does not recognize as a defense. *Provost*, 490 N.W.2d at 101. Expert psychiatric testimony on "whether a person capable of forming a specific intent did in fact formulate that intent" is also unhelpful. *Provost*, 490 N.W.2d at 101; *see* Minn. R. Evid. 702. "[I]t is the factfinder's job to" examine the evidence and determine whether the defendant possessed the necessary *mens rea*, "not the expert's as a thirteenth juror." *Provost*, 490 N.W.2d at 101-102. Because it is for the jury to decide whether Defendants possessed the requisite intent to aid and abet second-degree unintentional murder and second-degree manslaughter, any expert testimony on this subject is inadmissible.[6]

[6] Minnesota courts recognize two "narrow exceptions" to the general rule excluding expert psychological evidence of intent: (1) "the very rare circumstance in which a defendant's mental illness" is "per se inconsistent" with the requisite *mens rea*, and (2) "when a defendant has a past history of mental illness and that history helps explain the whole man as he was before the events of the crime." *Bird*, 734 N.W.2d at 673, 678 (internal quotation marks and citation omitted). Neither is applicable here. Both exceptions involve *factual* evidence rather than *opinion* evidence, and Dr. Pruchnicki offers nothing but opinion. Dr. Pruchnicki Report at 1 ("I have been asked to give my opinion in the case."). Nor is there any evidence suggesting that a Defendant suffered from a documented mental illness on May 25, 2020. *See State v. Persitz*, 518 N.W.2d 843, 848 (Minn. 1995); *Bird*, 734 N.W.2d at 678.

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3. Even if Dr. Pruchnicki's opinion has some minimal probative value, it is substantially prejudicial and potentially misleading. Minn. R. Evid. 403. Dr. Pruchnicki's report suggests that because Defendant Lane in particular was not adequately prepared to intervene, he was incapable of forming any intent to aid Chauvin. "But if psychiatric opinion testimony is admitted on the issue of whether the defendant *did or didn't* have the requisite guilty mind, the jury will inevitably take the testimony as an invitation to consider whether the defendant *could or couldn't* have a guilty mind." *Provost*, 490 N.W.2d at 100; *see* Minn. R. Evid. 704. That is both prejudicial and confusing, because Minnesota prohibits such diminished capacity or responsibility defenses. *State v. Fardan*, No. A08-0364, 2009 WL 1851404, at *9 (Minn. Ct. App. June 30, 2009) ("psychiatric opinion testimony" cannot be used "as a backdoor way of adopting diminished-capacity and diminished-responsibility defenses"), *aff'd as modified* 773 N.W.2d 303 (Minn. 2009). Nor can these dangers be cured by a limiting instruction. As the Minnesota Supreme Court has explained, "[t]he law cannot giveth psychiatric testimony on the one hand and taketh it away with the other." *Provost*, 490 N.W.2d at 100. The same would be true of similar testimony about any other Defendant. Dr. Pruchnicki's entire testimony should accordingly be excluded.

E. Dr. Pruchnicki's Opinion Regarding The Inability To Intervene Absent More Robust Training Lacks Foundational Reliability.

Dr. Pruchnicki's opinion should also be excluded as impermissible "syndrome" testimony. The rules regarding the admissibility of "syndrome" evidence are strict. The trial court "must analyze the proffered testimony in light of the purpose for which it is being offered" and "consider the underlying reliability, consistency, and accuracy of the subject about which the expert is testifying." *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 168 (Minn. 2012). Therefore, expert evidence on a syndrome may lack foundational reliability based on its theory, methodology, or factual support. Dr. Pruchnicki's opinion falls on all three fronts.

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1. "[A]t a minimum," foundational reliability requires "that the theory forming the basis for the expert's opinion or test is reliable." *Id.* at 166. Dr. Pruchnicki opines that there is a longstanding and well known "problem of getting junior ranking officers to intervene in the assessments and decisions of seniors." Dr. Pruchnicki Report at 2. That is akin to an opinion that junior officers attempting to intervene suffer from a "deference towards people in power" syndrome. *Id*. at 6; *see Doe*, 817 N.W.2d at 156, 168-169 (analyzing expert testimony about "the theory of repressed and recovered memory as a basis for tolling the statute of limitations" under syndrome framework (internal quotation marks and citation omitted)). But Dr. Pruchnicki does not offer any reliable scientific evidence to support the idea that "deference towards people in power" qualifies as a condition or syndrome that can explain a person's behavior.

Dr. Pruchnicki relies on studies discussing a variety of training principles from the aviation industry such as "psychological safety" and "crew resource management," Dr. Pruchnicki Report at 2-3, but these studies hardly establish "deference towards people in power" as a syndrome. They merely identify interpersonal challenges that arise when pilots disagree as to aircraft safety protocols and suggest intervention techniques to ensure that planes operate safely. Nor has he identified any evidence explaining why only certain junior officers suffer from this syndrome. *Cf. Borchardt*, 478 N.W.2d at 761 (affirming exclusion of syndrome evidence where expert "did not establish that the theory of male sexual victimization has reached the required level of scientific acceptance" and "several important components of" that syndrome had "not been explained"). Minnesota courts have excluded theories with substantially more support. *See, e.g.*, *Doe*, 817 N.W.2d at 169 (affirming exclusion of evidence concerning repressed and recovered memory syndrome, despite "hundreds of studies on the theory," because none "proved the existence of, much less the accuracy or reliability of, repressed and recovered memories"). And

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Dr. Pruchnicki's opinion stands in sharp contrast to the sorts of theories Minnesota courts consider reliable, such as "the theory underlying the battered woman syndrome," which "is beyond the experimental stage and has gained a substantial enough scientific acceptance to warrant admissibility," *State v. Hennum*, 441 N.W.2d 793, 798-799 (Minn. 1989), or the theory of abusive head trauma, which was endorsed by the American Academy of Pediatrics and supported by "[h]undreds, probably thousands" of studies, *State v. Stewart*, 923 N.W.2d 668, 676 & n.6 (Minn. Ct. App. 2019). The lack of scientific evidence on this topic is unsurprising and further supports the conclusion that this so-called syndrome is a common-sense observation on which expert testimony is unnecessary. *See supra*, pp. 24-25.

Even if Dr. Pruchnicki's sources support the idea of a "deference to people in power" syndrome in aviation, Dr. Pruchnicki offers no evidence that his proffered training programs actually address that problem. His own sources acknowledge that "[m]any of the measures employed to evaluate crew performance and attitudes are still under development and require refinement through research," including the "open question[]" of "the long-term impact of the training on crew behavior and system safety." Robert L. Helmreich & H. Clayton Foushee, *Why Crew Resource Management? Empirical and Theoretical Bases of Human Factors In Aviation* 41, in Earl L. Wiener, Barbara G. Kanki, & Robert L. Helmreich (Eds.), Cockpit Res. Mgmt. (1993);[7] *see also* Eduardo Salas et al., *Does Crew Resource Management Training Work? An Update, an Extension, and Some Critical Needs*, 48 Human Factors 392, 408, 410 (2006) ("The lack of systematic studies" means that, despite "two decades of CRM training research and practice," "the picture is not as clear as it should be," particularly given "the difficulty in establishing a credible, direct cause-and-effect relationship between CRM training and safety."). Healthcare training fares

[7] https://booksite.elsevier.com/samplechapters/9780123749468/9780123749468.pdf

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no better according to these experts, who say that "it remains to be seen," "[i]n the absence of a more coherent healthcare system," "if medical CRM training enhances safety significantly." *Id*. at 54. Dr. Pruchnicki himself admits that, even with proper training, "it is impossible to time an intervention decision exactly right during a dynamic, unfolding situation." Dr. Pruchnicki Report at 6. Because Dr. Pruchnicki's own sources undermine his theory, they do not support a supposed deference-to-people-power syndrome. *Cf*. *Doe*, 817 N.W.2d at 169 ("[T]he scientific literature relied upon by [the proponent's] experts simply did not support" any theory of repressed memory.).

Finally, even if Dr. Pruchnicki's sources supported the existence of such a syndrome in the aviation industry, or the effectiveness of aviation training programs in combatting it, Dr. Pruchnicki does not identify any source theorizing that "deference towards people in power" is a condition to which *police officers* in particular succumb—much less one that can be remedied by the sorts of aviation training programs he identifies. *Cf. supra* pp. 19-23.

2. Dr. Pruchnicki commits serious methodological flaws by relying on aviation programs and vaguely gesturing at similar practices in "comparable industries" that "help team members of differing ranks collaborate safely" in forming opinions about police officers. Dr. Pruchnicki Report at 2, 4. These fields share little—if anything—in common with law enforcement. For example, to support his claim that "[f]ields including but also beyond healthcare and aviation increasingly recognize the importance of so-called 'psychological safety' in a team setting," Dr. Pruchnicki cites a study of teamwork at an office furniture company. *Id*. at 3 (citing Amy Edmondson, *Psychological Safety and Learning Behavior In Work Teams*, 44 Admin. Sci. Q. 350, 358 (1999)). In support of his claim that "risk-secrecy cultures that lack psychological safety" have a "higher mortality of third parties in acute settings," Dr. Pruchnicki points to a study of 137 English hospital systems. *Id*. (citing Veronica Toffolutti & David Stuckler, *A Culture of Openness*

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Is Associated with Lower Mortality Rates Among 137 English National Health Service Acute Trusts, 38 Health Affs. 844 (2019)). And for his claim that intervention issues are "well-described in domains where timely intervention and problem resolution is critical for assuring safety," Dr. Pruchnicki Report at 2, Dr. Pruchnicki relies on a "cockpit resource management" book that also contains a few paragraphs on medicine and a single paragraph on firefighting, but none on law enforcement. Helmreich & Foushee, *supra*, 53-55. Other sources on which he relies, like a study about "[n]ew strategies to prevent laparoscopic bile duct injury," are even further afield. *See* Dr. Pruchnicki Report at 2 (citing Thomas B. Hugh, *New Strategies to Prevent Laparoscopic Bile Duct Injury—Surgeons Can Learn from Pilots*, 132 Surgery 826 (2002)).

Relying on these unrelated studies, Dr. Pruchnicki opines that "MPD policy and training fall far short of accepted/regulated standards in comparable industries" and "is more than fifty years behind the times as compared to other domains—particularly aviation, and, increasingly healthcare." *Id.* at 4, 7. But he fails to explain how studies concerning aviation and healthcare translate to the dynamic world of law enforcement. Nor does Dr. Pruchnicki explain how and why the training principles from these unrelated industries translate to the world of law enforcement. Although he claims that other police forces are "starting to . . . embrace[ ]" these "insights and research," he points to just two programs: Active Bystandership in Law Enforcement (ABLE) and the Baltimore Police Department's Ethics in Policing is Courageous (EPIC) Lesson Plan. Dr. Pruchnicki Report at 1, 3-4.[8] But Dr. Pruchnicki does not offer any data on how frequently these courses are offered or how many police departments have implemented such training. He also fails to mention that ABLE was not developed until 2021, a year *after* George Floyd's death.

[8] Dr. Pruchnicki's report notes that he specifically reviewed the "Baltimore Police Department EPIC (Ethical Policing is Courageous) Lesson Plan," as opposed to materials associated with the broader EPIC program. Dr. Pruchnicki Report at 1.

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Nor does Dr. Pruchnicki offer any evidence demonstrating that these trainings have proved successful at combating any supposed "deference towards people in power" syndrome.

3. Even if Dr. Pruchnicki's theory and methodology were not fatal, his opinion lacks adequate factual foundation. *See Kedrowski*, 933 N.W.2d at 56. Before it can be admitted, "the proponent of evidence about a given subject must show that it is reliable in that particular case." *Doe*, 817 N.W.2d at 168. Nothing in the record connects the supposed deference-to-authority syndrome to any Defendant. Dr. Pruchnicki's report does not explain whether any Defendant actually found it particularly difficult to challenge superiors or whether any Defendant's fear of authority specifically rendered him unable to take certain actions. *See State v. Nystrom*, 596 N.W.2d 256, 260 (Minn. 1999) (expert testimony properly excluded where the opinion relied on a generalized fear unconnected to the defendant). And Dr. Pruchnicki did not observe Defendants in the presence of superior officers. *See Fardan*, 2009 WL 1851404, at *8 (expert testimony concerning peer pressure properly excluded where the report failed to "indicate that the authoring psychologists observed [defendant] in the presence of his peers"). Nor does the record "support a factual conclusion, independent of [the supposed syndrome], that" Defendants behaved in that manner. *Id.* Because there is no evidence in the record that Defendants were afraid or other felt pressured to defer to his superiors, Dr. Pruchnicki's opinion lacks factual foundation.

F. Dr. Pruchnicki Cannot Opine As To A Defendant's Motivations.

At the very least, this Court should prevent Dr. Pruchnicki from opining that any Defendant actually suffered from a deference-to-authority syndrome. Even in the rare, factually distinct situations where courts have allowed credible syndrome evidence, "the expert is not allowed to testify whether a particular defendant or witness suffers from the syndrome." *Ritt*, 599 N.W.2d at 811 (citations omitted). Minnesota courts "do not, for example, allow expert opinion testimony on the ultimate question of whether a rape victim had rape trauma syndrome, nor on whether a

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battered woman in fact suffered from the battered woman syndrome." *Provost*, 490 N.W.2d at 101 (citations omitted). Rather, because whether a witness indeed suffered from such a syndrome is a factual question that turns on the witness's credibility, that determination is "left to the trier of fact." *MacLennan*, 702 N.W.2d at 234; *see Ritt*, 599 N.W.2d at 811; Minn. R. Evid. 403.

At minimum, Dr. Pruchnicki's opinions as to whether Defendants *themselves* suffered from any deference-to-authority syndrome are therefore inadmissible. This includes Dr. Pruchnicki's opinions that "MPD policy and training did not prepare Defendant Lane for more assertive intervention than what he did on 25 May 2020," that Lane was "not equipped to do what others, in hindsight, now claim he should have done," and that Lane "followed the spartan and basic steps and language of his training." Dr. Pruchnicki Report at 2, 3, 4.

6. THE COURT SHOULD EXCLUDE ALL EXPERT TESTIMONY FROM DR. SIDNEY DEKKER.

This Court should exclude all expert testimony from Dr. Sidney Dekker, the first named witness on Defendant Lane's list. Thomas Lane Witness List at 1 (May 12, 2022). No Defendant has provide the necessary expert disclosure for Dr. Dekker, and his opinion would fail for the same reasons as Dr. Pruchnicki.

1. On April 8, Defendant Lane disclosed Dr. Dekker's curriculum vitae and a general description of four potential areas of testimony: (1) "The social dynamic of, and impediments to speaking up," particularly in the "face of authority;" (2) the difficulty of intervening absent adequate training, based on experience in "[i]ndustries such as aviation and healthcare;" (3) "[t]he problem of suddenly revising your insight and radically modifying your actions during a situation that is gradually, unwittingly drifting toward criticality/calamity;" and (4) "[t]he impossibility of timing an intervention decision right during a dynamic, unfolding situation." The disclosure did not cite any sources; it merely noted that Dr. Dekker's 1996 PhD was on the fourth proposed topic.

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Defendant Lane explained that Dr. Dekker was "preparing a more extensive report" that would be provided "as soon as possible." No such report was ever disclosed.

In order to call Dr. Dekker, Defendants were therefore required to produce by May 1 "a written summary of the subject matter of the expert's testimony, along with any findings, opinions, or conclusions the expert will give, the basis for them, and the expert's qualifications." Minn. R. Crim. P. 9.02, subd. 1(2)(b); *see* Trial Management Order ¶ 1 (Apr. 25, 2022). The bare-bones 303-word summary Defendant Lane provided in April does not suffice; it fails to identify with adequate specificity any of Dr. Dekker's findings, opinions, or conclusions, or the supporting basis for his testimony. That is reason enough to exclude Dr. Dekker's testimony.

2. Even if this Court were to deem that disclosure adequate, however, Dr. Dekker's opinion should still be excluded. Based on the general descriptions provided, it appears the four topics on which Dr. Dekker proposes testifying are materially identical to those covered in Dr. Pruchnicki's report. Dr. Dekker's testimony would presumably suffer from the same flaws as Dr. Pruchnicki's opinion and should also be excluded on that basis. *See supra*, pp. 19-32. To the extent this Court deems it necessary, however, the State requests an evidentiary hearing outside the presence of the jury to evaluate Dr. Dekker's proposed testimony.

7. THIS COURT SHOULD LIMIT DR. DAVID FOWLER'S EXPERT MEDICAL TESTIMONY TO NON-HEARSAY INFORMATION WITHIN HIS EXPERTISE, AND SHOULD NOT PERMIT DEFENDANTS TO CALL ADDITIONAL EXPERTS TO TESTIFY TO OTHER ASPECTS OF DR. FOWLER'S REPORT.

Defendants have disclosed one expert medical report in this case: the report from The Forensic Panel.[9] The report purports to be a "multi-specialist, multi-disciplinary" collaboration between 14 doctors of varying disciplines. But Defendants have only disclosed the findings,

[9] The State incorporates by reference its prior filing on this issue. *See* State's Mem. of Law Regarding Audio Visual Coverage, Sequestration, Expert Disclosure Deadlines, and Expert Test. at 19-28 (Apr. 7, 2022).

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opinions, conclusions, and bases for the expert opinion of one of those 14 doctors: the report's so-called "primary" author, Dr. David Fowler. As this Court ruled in *Chauvin*, Dr. Fowler may only testify to opinions that he is independently qualified to offer and may not introduce the opinions of other, non-testifying experts through hearsay statements.

Because Defendants have failed to timely disclose the required information for the other 13 doctors, they should be precluded from introducing any aspects of The Forensic Panel's report that Dr. Fowler is not independently qualified to testify to. The State gave Defendants ample notice of its position that they must produce the required Rule 9.02 disclosures prior to calling any of the other members of The Forensic Panel who contributed to this report. And this Court gave Defendants multiple opportunities to do so. Yet Defendants still failed to comply with Rule 9.02, subd. 1(2)(b). Defendants should therefore be prohibited from calling other members of The Forensic Panel to introduce the aspects of Dr. Fowler's report outside of his expertise.

8. DEFENDANTS SHOULD BE PROHIBITED FROM INTRODUCING IRRELEVANT CHARACTER EVIDENCE.

The State moves for an order prohibiting Defendants from introducing irrelevant character evidence and limiting any testimony from Defendants' character witnesses accordingly.

Generally, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." Minn. R. Evid. 404(a). The Rule provides a limited exception for criminal defendants, who may introduce "evidence of a pertinent trait." *Id.* 404(a)(1). A trait is "pertinent" if it is "involved in the offense charged." *State v. Miller*, 396 N.W.2d 903, 906 (Minn. Ct. App. 1986); *accord, e.g.*, 1 Kenneth S. Broun et al., *McCormick On Evid.* § 191 (8th ed. 2020 Update). The defense bears the burden of demonstrating that character evidence relates to a pertinent trait and is admissible. *See State v. Lopez-Ramos*, 913 N.W.2d 695, 708 (Minn. Ct. App. 2018). If character evidence is admissible,

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"proof may be made by testimony as to reputation or by testimony in the form of an opinion." Minn. R. Evid. 405(a). But unless character is "an essential element of a charge, claim, or defense," the accused may not affirmatively offer evidence that he or she acted "in conformity" with a pertinent trait "on a particular occasion." *Id.* 404(a), 405(b). Character evidence relevant to a pertinent trait may also be excluded if its admission would lead to "unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403.

Defendants are charged with aiding and abetting second-degree unintentional murder and aiding and abetting second-degree manslaughter. To prove its case, the State must show that Defendants knowingly and intentionally aided Chauvin's assault and his culpably negligent act. *See supra*, pp. 4-5. Thus, the only pertinent character traits at issue in this case are law-abidingness and peacefulness. Moreover, because character is not "an essential element of a charge, claim, or defense," defendants should not be permitted to affirmatively offer any specific-instance character evidence. *See* Minn. R. Evid. 405(b); *see* 1 Barbara E. Bergman, Nancy Hollander, & Theresa M. Duncan, *Wharton's Criminal Evidence* § 4:21 (15th ed. 2021 Update) ("[I]n criminal cases, character is an essential element of a charge, claim or defense only in very limited circumstances," like "fraud or coercion").

Despite this, based on their presentations in the federal trial, the State anticipates that Defendants will attempt to offer several pieces specific-incident evidence, as well as evidence of non-pertinent traits, including their character for compassion, volunteerism, connecting with individuals with diverse backgrounds, or overcoming hardship. This includes but is not limited to (1) testimony regarding Defendant Thao's ability to deal with hardships as a child; (2) testimony regarding how much time Defendant Thao spent working while attending high school;

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(3) testimony regarding Defendant Thao's father's physical abuse, including an incident in which MPD arrested Defendant Thao's father; (4) testimony regarding Defendant Kueng's missionary work or other church-related community service; (5) testimony regarding Defendant Kueng's ability to deal with hardships as a child, including the fact that he had an absentee father; and (6) photographs of Defendant Kueng as a child, kissing a dog, with other family members, or volunteering.[10]

This evidence is inadmissible for several reasons. *First*, as a threshold matter, whether Defendants had difficult childhoods or engaged in community service does not have "any tendency to make the existence of" the fact relevant to those charges "more or less probable," or involve a "pertinent trait of character." Minn. R. Evid. 401 cmt., 404(a). *Second*, even if this anticipated evidence was relevant and related to a pertinent trait, much of it speaks to specific instances of conduct and is therefore inadmissible under Rule 405(b). *Third*, any possible probative value it carries is substantially outweighed by the danger of unfair prejudice. Minn. R. Evid. 403. "When weighing the probative value of character evidence against its prejudicial effect, 'the court must consider how crucial the [character] evidence is to the [proponent's] case.' " *State v. Alowonle*, No. A14-1308, 2015 WL 4994303, at *9 (Minn. Ct. App. Aug. 24, 2015) (quoting *Pierson v. State*, 637 N.W.2d 571, 581 (Minn. 2002)) (first alteration in original). Evidence that Defendants had difficult childhoods or are active in their communities is merely designed to "distract[] the jury from the issues in the case and induc[e] a decision on an improper basis." 28 Wright & Miller, *Federal Practice and Procedure, Evidence* § 6112 & n.15 (2d ed. 2022 Update).[11]

[10] The State assumes without conceding that any of the evidence described above can even be considered character evidence.

[11] Courts routinely exclude this type of testimony on similar grounds. *See, e.g.*, *United States v. Santana-Camacho*, 931 F.2d 966, 967-968 (1st Cir. 1991) (concluding that trial court properly excluded testimony by defendant's daughter that defendant "was a kind person or a good family

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For these reasons, the State moves for an order (1) limiting Defendants' character evidence to general reputation or opinion testimony concerning their characters for law-abidingness and peacefulness; (2) excluding the six examples of inadmissible evidence listed above; and (3) limiting the testimony of Defendants' character witnesses to one or two sentences describing how the witness knows the Defendant and the witnesses' opinion as to whether the Defendant is a law-abiding or peaceful person.

9. DEFENDANTS SHOULD NOT BE PERMITTED TO REFER TO THEIR FAMILY MEMBERS DURING TRIAL.

The State moves this Court to prohibit reference to Defendants' spouses, children, or other family members in opening statements, closing arguments, and direct or cross-examinations.

During their federal trial, Defendants repeatedly made unnecessary and irrelevant references to their spouses, children, and other family members. For example, during opening statements, counsel for Defendant Kueng noted that Defendant Kueng's mother was a teacher who "adopted four at-risk youth," and referred to Defendant Kueng's "absentee father." Tr. of Jury Trial Proceedings, Vol. III, at 257:24-25, 258:1, *United States v. Thao*, No. 21-cr-108 (D. Minn. Jan. 24, 2022). This theme continued on direct. Defendant Thao testified about his "family of origin," his parents' jobs, and his siblings' upbringing. Tr. of Jury Trial Proceedings, Vol. XVI, at 3041:20-21-42, *United States v. Thao*, No. 21-cr-108 (D. Minn. Feb. 15, 2022). Defendant Kueng testified about his adopted siblings, their ethnicities, and his families' participation in mission trips overseas. Tr. of Jury Trial Proceedings, Vol. XVII, at 3379-80, 3384, *United States*

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man" because it did not speak to a pertinent trait); *United States v. Paccione*, 949 F.2d 1183, 1201 (2d Cir. 1991) (concluding that trial court properly excluded testimony that defendant "had devoted his life to caring for" his disabled son because it did not relate to a pertinent trait and "could well cause the jury to be influenced by sympathies having no bearing on the merits of the case"); *Lohman v. Gen. Am. Life Ins. Co.*, 478 F.2d 719, 728 (8th Cir. 1973) ("[t]he admission of testimony showing family responsibilities usually has been held error") (internal quotation marks omitted).

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v. Thao, No. 21-cr-108 (D. Minn. Feb. 16, 2022). Counsel made similar comments during closing arguments, for instance referencing Defendant Kueng's "blended family" and "family of missionaries," and noting that Defendant Kueng's sisters and family members had previously had negative encounters with the police. Tr. of Jury Trial Proceedings, Vol. XX, at 4097, *United States v. Thao*, No. 21-cr-108 (D. Minn. Feb. 21, 2022).

Such testimony or commentary regarding Defendants' spouses, children, or other family members is not relevant. What Defendants' family members do for a living or whether they previously had negative interactions with the police have no bearing on whether Defendants committed the elements of the charged crimes in this case. Minn. R. Evid. 401, 402.

Even if relevant, however, such references to Defendants' families should be excluded because their "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* 403. References to Defendants' families risk confusing the jury by suggesting that Defendants' personal backgrounds are relevant here. They are not; Defendants' professional experiences and training bear on the events of May 25, 2020; their family structure or family members' jobs do not. Allowing such references to Defendants' family members would serve only to "arouse[ ] the sympathy . . . of the jury and influence[ ] the verdict." *See, e.g.*, *Lohman*, 478 F.2d at 728 ("The admission of testimony showing family responsibilities usually has been held error." (citations omitted)).

For these reasons, the State respectfully requests this Court enter an order prohibiting Defendants from making such references to their families during trial.

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10. INSPECTOR KATIE BLACKWELL CAN TESTIFY REGARDING THE NATURE AND EXTENT OF DEFENDANTS' FIELD TRAINING.

The State intends to ask Inspector Katie Blackwell to testify to the number, type, and general nature of the incidents to which Defendant Lane and Defendant Kueng responded during their field training, as detailed in their training records. To preempt potential objections and promote trial efficiency, the State moves for an order that such testimony is admissible.

Because the reasonableness of an officer's use of force is assessed based on the totality of the circumstances, the details of Defendants' prior field experience is extremely relevant. *See generally Graham*, 490 U.S. at 396; *cf., e.g.*, *State v. Lester*, 874 N.W.2d 768, 771 (Minn. 2016) (in assessing probable cause, "the totality of the circumstances includes reasonable inferences that police officers draw from facts, based on their training and experience"). Yet from the beginning of this case, Defendants have minimized their real-world experience and misleadingly argued that May 25, 2020 was "Lane's fourth day on the job" and Kueng's third day "on the job." Lane's Mem. Supporting Mot. to Dismiss at 15 (July 7, 2020). In reality, May 25, 2020 was far from either Defendant Lane's or Defendant Kueng's first time on the street. For months, as part of their field training, Defendants responded as sworn officers to dozens of calls, ranging from overdoes and burglaries to fatal car crashes. The State therefore intends for Inspector Blackwell—who oversaw MPD's training program—to testify at a high level of generality about the nature of Defendants' field training as detailed in their training records. The State will not ask Inspector Blackwell to delve into the specifics of any particular incident. Rather, the State will ask Inspector Blackwell about the number, nature, and extent of the calls to which Defendants responded to establish the nature and extent of Defendants' field experience prior to May 25, 2020.

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11. THIS COURT SHOULD LIMIT DEFENDANTS' ABILITY TO QUESTION INSPECTOR BLACKWELL ABOUT INFORMATION IN CHAUVIN'S INTERNAL AFFAIRS FILE.

The State moves this Court to prevent Defendants from questioning Inspector Blackwell about information in Chauvin's internal affairs file and from characterizing the contents of the file with facts not in evidence.

Witnesses can only testify to matters that they have personal knowledge of, meaning the witness had an opportunity to observe the fact, actually observed the fact, and presently recalls the observed fact. Minn R. Evid. 802; 1 Kenneth S. Broun, et al., *McCormick On Evidence* § 10 (8th ed. 2020 Update) (collecting cases). At Defendants' federal trial, Defendants repeatedly asked Inspector Blackwell about Chauvin's internal affairs file. Tr. of Jury Trial Proceedings, Vol. VIII, at 1313:9-13, 1314:6-11, 1316:21-22, *United States v. Thao*, No. 21-cr-108 (D. Minn. Jan. 31, 2022). But Inspector Blackwell never "actually observed" the file; rather, she reviewed only a "brief synopsis" of it. *Id.* at 1314:9-11; 1 *McCormick on Evidence* § 10. Although Defendants may ask Inspector Blackwell during this trial whether she has since reviewed Chauvin's internal affairs file, if the answer is "no," the line of questioning should stop there. If Inspector Blackwell never reviewed Chauvin's full file, she lacks personal knowledge to testify about it. Minn. R. Evid. 802; *see State v. Ferguson*, 581 N.W.2d 824, 832 (Minn. 1998).

The Court should also prohibit Defendants from asking Inspector Blackwell questions about Chauvin's internal affairs file that assume facts not in evidence. Rule 611(a) requires trial courts to "exercise reasonable control over the mode and order of interrogating witnesses" such that the examination is "effective for the ascertainment of the truth." This rule prohibits "insinuating inquiries as to relevant matters" which "assum[e] the existence of highly damaging facts." *State v. Sharich*, 209 N.W.2d 907, 912 (Minn. 1973). Otherwise, counsel might pursue these inquiries "with such persistence as to impress the jury that an inference should be drawn as

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to their truth even though . . . there is no other evidence to support it." *Id.* at 911 (citing *State v. Flowers*, 114 N.W.2d 78, 81 (1962)).

Twice during the federal trial, Defendant Lane's counsel asked Inspector Blackwell questions implying that Chauvin's internal affairs file contained information that should have disqualified him from being a field training officer. Tr. of Jury Trial Proceedings, Vol. VIII, at 1313:6-13, 1316:21-22, *United States v. Thao*, No. 21-cr-108 (D. Minn. Jan. 31, 2022). Upon the Government's objection—and having successfully introduced improper information to the jury—counsel then twice withdrew the questions. *Id.* at 1313:19, 1316:24. Once asked, however, that bell cannot be easily unrung. That is precisely why "inquiries which assume the existence of damaging facts" are "inexplicable, and inexcusable." *Sharich*, 209 N.W.2d at 911-912.

To prevent similarly "improper" inquiries here, *id.*, the Court should limit Defense counsel to asking only whether Inspector Blackwell has reviewed Chauvin's internal affairs file, without improperly characterizing the contents of that file with facts not in evidence.

12. DEFENDANTS CANNOT REASON FROM SILENCE IN A PUBLIC RECORD WITHOUT A PROPER FOUNDATION.

The State moves this Court for an order preventing Defendants from presenting any evidence that MPD's records do not show that officers have intervened in the past as proof that officers did not in fact intervene, unless Defendants lay a proper foundation that demonstrates records of intervention would have been regularly kept and a diligent search failed to uncover them. If Defendants intend to lay that foundation, the State requests the Court require Defendants to make an offer of proof outside of the presence of the jury.

Defendant Lane subpoenaed—and MPD produced—records of occasions in which police officers have intervened to prevent another officer's unlawful use of force. Defendant Lane had suggested that he intended to use these records to establish "to the jury that" an officer "intervening

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physically" to prevent a fellow officer's misconduct "has never happened." Suppl. Mem. In Supp. of Disc., Brady, Gigglio, Paradee Mot. at 1 (June 22, 2021). In essence, Defendant Lane sought to infer the absence of intervention from the (alleged) absence of records of such intervention. The remaining Defendants may attempt to make a similar argument.

The Court should preclude Defendants from presenting this evidence and making this argument, unless Defendants presents the necessary foundation. According to basic principles of relevancy, the nonexistence of a public record may only imply evidence of a nonoccurrence if the record was otherwise "regularly made and preserved" and a "diligent search failed to disclose" the record. Minn. R. Evid. 803(10); *see also id*. Minn. R. Evid. 803 cmt ("The admissibility would depend on principles of relevancy."). As a leading evidence treatise explains, Defendant must show that a regular recording would "normally be made, for the obvious reason that its absence has little or no bearing on nonfiling or nonevent otherwise." 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 8:94 (4th ed. 2021 Update); *McInnis v. Maine*, 638 F.3d 18, 23 (1st Cir. 2011) (Souter, J.) (affirming exclusion where party made no showing that type of evidence would have been regularly recorded).

In this case, that logic has particular force. Police officers may not always or regularly record when they intervene against fellow officers, even though such intervention occurs. For instance, intervention may have prevented the incident from escalating and the intervening officer may have concluded (rightly or wrongly) that it was unnecessary to make a record. Or officers may improperly forgo making a formal record to avoid causing colleagues embarrassment or potential repercussions. As a result, any alleged absence in the records Defendants seek to introduce (if such absence exists) will not make the occurrence of the lack of intervention any

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"more probable or less probable than it would be without the evidence" and would—at a minimum—substantially confuse the jury. Minn. R. Evid. 401; *see id.* 403.

13. THE COURT SHOULD EXCLUDE OR LIMIT ANY ARGUMENT, EVIDENCE, OR TESTIMONY REGARDING MPD'S DECISION-MAKING PROCESS IN TERMINATING DEFENDANTS' EMPLOYMENT AND MPD'S CIVIL LIABILITY.

The State moves this Court to exclude any argument, evidence, or testimony regarding the MPD's decision-making process in terminating Defendants' employment as MPD officers. The State also moves the Court to exclude any argument, evidence, or testimony referencing the City of Minneapolis's settlement with Floyd's family. To the extent the Court determines that evidence on these topics may be admissible for the limited purpose of attempting to show purported bias on the part of testifying witnesses, the State respectfully requests that the Court properly limit evidence on such extraneous matters.

A. Defendants Should Be Precluded From Eliciting Evidence Or Testimony Regarding MPD's Decision-Making Process In Terminating Them.

1. This Court should preclude Defendants from presenting argument, evidence, and testimony related to MPD's decision-making process in terminating their employment. Such evidence and testimony is not relevant to the charges and defenses in this case, and has the potential to unduly prejudice, confuse, or mislead the jury.

First, evidence and testimony regarding MPD's internal decision-making process in terminating Defendants' employment is not relevant to the elements of the charged offenses or Defendants' defenses. Why and how MPD decided to terminate Defendants and after the incident with Floyd, for example, does not in any way illuminate whether Defendants had the requisite *mens rea* to be convicted of these charges. *See supra* pp. 4-5. For similar reasons, MPD's decision-making process is also not relevant to whether Defendants' use of force—at the time—was objectively reasonable.

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Second, even if evidence and testimony related to MPD's decision-making process in firing Defendants were relevant, it is inadmissible because "its probative value is substantially outweighed by its potential to cause unfair prejudice, to confuse the issues, or to mislead the jury." *State v. Harris*, 521 N.W.2d 348, 351-352 (Minn. 1994); *see* Minn. R. Evid. 403. Evidence related to MPD's internal decision-making process in terminating Defendants' employment carries the "potential to cause unfair prejudice," *Harris*, 521 N.W.2d at 352, because Defendants might attempt to use this evidence to suggest that their termination was not based on evidence, but instead reflected a politically-motivated rush to judgment, *see* Mem. of Law In Supp. of Def.'s Mot. to Dismiss at 6, *State v. Chauvin*, No. 27-CR-20-12646 (Aug. 28, 2020) (suggesting Chauvin's termination was influenced by African-American faith leaders). Moreover, such arguments and evidence risk "confus[ing] the issues" and "misleading the jury," Minn. R. Evid. 403, by suggesting that the jury that it should decide this case based on whether Defendants' firing was justified, or whether their firing was an adequate punishment for their offense. Those factors have nothing to do with whether Defendants' conduct satisfies the elements of the charged offenses.

2. The Court should also limit defense counsel's elicitation of testimony regarding MPD's internal decision-making process as a way of showing purported bias on the part of testifying MPD officers. Evidence of bias is admissible only to impeach the credibility of testifying witnesses. Minn. R. Evid. 616. Bias generally refers to " 'the relationship between a party and a witness' that might cause the witness to 'slant, unconsciously or otherwise, his testimony in favor of or against a party.' " *State v. Whittle*, 685 N.W.2d 461, 464 (Minn. Ct. App. 2004) (quoting *United States v. Abel*, 469 U.S. 45, 52 (1984)). Of course, "not everything a witness testifies to will show bias, and evidence that is only marginally useful for that purpose may be excluded." *State v. Collins*, No. A19-1277, 2020 WL 5107292, at *4 (Minn. Ct. App. Aug. 31, 2020) (internal quotation marks

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and citation omitted). Moreover, in considering whether to restrict cross-examination aimed at showing bias, the court examines whether the jury has "sufficient other information to make a discriminating appraisal of the witness's [purported] bias or motive to fabricate." *State v. Lanz-Terry*, 535 N.W.2d 635, 641 (Minn. 1995) (internal quotation marks and citation omitted). If the jury does, the court can limit cross-examination on the subject. *Id.* at 639. Courts also "retain wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness safety, or interrogation that is repetitive or only marginally relevant." *State v. Brown*, 739 N.W.2d 716, 720 (Minn. 2007) (internal quotation marks and citation omitted).

The Court should not permit defense counsel to impeach witnesses by attempting to elicit testimony concerning MPD's internal decision-making process in firing Defendants. Rather, defense counsel should only be permitted to show any purported bias on the part of testifying MPD officers by pointing to the fact of Defendants' firing, and asking whether the witness played a role in that decision. That would give the jury "sufficient other information to make a 'discriminating appraisal' of the witness's [purported] bias." *Lanz-Terry*, 535 N.W.2d at 641 (quoting *United States v. Hinton*, 683 F.2d 195, 200 (7th Cir. 1982)). But the Court should not permit examination regarding the specific internal process MPD uses to make personnel decisions.[12]

[12] To the extent this Court permits defense counsel to ask questions regarding MPD's decision-making process in terminating Defendants, it should instruct the jury to use the evidence only for the limited purpose of assessing the witness's credibility. *See, e.g.*, *State v. Olivera*, No. A19-0023, 2019 WL 7049557, at *2 (Minn. Ct. App. Dec. 23, 2019).

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B. Defendants Should Be Precluded From Arguing Or Introducing Evidence Related To The Civil Settlement.

On March 12, 2021, it was announced that the City of Minneapolis and the Floyd family had entered into a civil settlement related to George Floyd's death.[13] Defendants should not be permitted to reference, introduce evidence about, or elicit testimony concerning this settlement, nor should they be allowed to suggest that MPD's decision to terminate the officers and the State's decision to prosecute this case arises from concerns about the City of Minneapolis's civil liability.

1. Evidence regarding the civil settlement is not relevant because it does not have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." Minn. R. Evid. 401. The City's civil liability has no bearing on Defendants' guilt or innocence. *See State v. Yeazizw*, No. CX-02-1486, 2003 WL 21789013, at *9 (Minn. Ct. App. Aug. 5, 2003) (evidence of a parallel civil lawsuit "was not probative of any of the facts in the criminal case"); *cf. State v. Nelson*, No. C8-98-1920, 1999 WL 993975, at *2 (Minn. Ct. App. Nov. 2, 1999) (finding evidence of separate civil suit relevant only because it could prove a charged element in the criminal proceeding). Because this evidence is not relevant, it is not admissible. *State v. Thiel*, 846 N.W.2d 605, 615 (Minn. Ct. App. 2014).

Evidence regarding the settlement is also unduly prejudicial. As the Minnesota Court of Appeals has recognized, informing the jury in a criminal trial about "the existence of a civil lawsuit" predicated on the same underlying events is unduly prejudicial, as it "invit[es] a conclusion of wrongdoing based not on evidence, but on the mere commencement of a civil action." *Yeazizw*, 2003 WL 21789013, at *9. That risk is even greater when dealing with a settlement, as it might lead the jury to believe Defendants are guilty, or to conclude that criminal

[13] Steve Karnowski & Amy Forliti, *Floyd Family Agrees to $27M Settlement Amidst Ex-Cop's Trial*, Associated Press (Mar. 12, 2021), https://apnews.com/article/minneapolis-pay-27-million-settle-floyd-family-lawsuit-52a395f7716f52cf8d1fbeb411c831c7.

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liability is not appropriate because Defendants might be subject to civil liability. Or the jury might believe that, because there is a civil settlement in place, the State has an untoward interest in seeing Defendants convicted. The risk of undue prejudice thus substantially outweighs any alleged probative value this information might have.

2. The Court should also bar defense counsel from impeaching MPD officers or other witnesses by offering evidence or eliciting testimony regarding the civil settlement. Although a prosecution witness may be cross-examined to show the pendency "of a civil action for damages by the *witness* against the accused," or to show that the witness is contemplating a lawsuit against the defendant, *State v. Whaley*, 389 N.W.2d 919, 924-925 (Minn. Ct. App. 1986) (emphasis added), as far as the State is aware, no MPD official is contemplating a civil action for damages against Defendants, and no such action is currently pending.

Moreover, because evidence regarding the civil settlement is (at best) "only marginally useful" in showing bias, this Court should exclude it. *Lanz-Terry*, 535 N.W.2d at 640. For one thing, the *City's* civil liability is largely irrelevant to *MPD*'s civil liability. *See Ketchum v. City of West Memphis*, 974 F.2d 81, 82 (8th Cir. 1992) (explaining that City police departments are not subject to suit under § 1983). The City's liability is also irrelevant to whether *individual MPD officers*—none of whom have been sued in their individual or official capacities—have an incentive to secure a conviction or a reason to be biased against Defendants.

Examination regarding the civil settlement also carries a significant risk of "prejudice" and "confusion of the issues." *Brown*, 739 N.W.2d at 720; *see supra* p. 46. The existence of the civil settlement might prompt jurors to believe that civil liability is an adequate punishment, or it might prompt them to treat the existence of the civil settlement as an additional reason to deem Defendants guilty. Either way, eliciting testimony regarding the civil suit risks prompting the jury

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to decide this case "on an improper basis." *State v. Bott*, 246 N.W.2d 48, 53 n.3 (Minn. 1976). That risk reinforces the strong need to prevent such cross-examination.

The Court should accordingly grant the motion, exclude any argument, evidence, or testimony regarding MPD's internal decision-making process in connection with Defendants' firing or the civil settlement with George Floyd's family.

14. THE COURT SHOULD EXCLUDE ANY ARGUMENT OR EVIDENCE REGARDING CHANGES TO MPD POLICIES AND TRAINING MATERIALS THAT WERE MADE AFTER MAY 25, 2020.

1. Evidence relating to MPD policy changes that post-date George Floyd's death is minimally probative, unfairly prejudicial, and should be excluded. *See* Minn. R. Evid. 403.

Evidence that MPD revised its policies after the death of George Floyd has little probative value. The only MPD policies and training materials that are relevant in determining whether Defendants committed the charged offenses are those which were *in effect at the time of Floyd's death*. For example, MPD's then-existing policies may tend to prove *mens rea*, *State v. Gruber*, 864 N.W.2d 628, 637 (Minn. Ct. App. 2015), or whether Chauvin's or Defendants' use of force was "reasonable" based on the totality of the circumstances at the time of Floyd's death, *see* Minn. Stat. § 609.06; *Graham*, 490 U.S. at 396.

But the fact that MPD later updated its policies is, at best, minimally probative. This change of policy does not speak to whether Chauvin or Defendants were in compliance with MPD policy on May 25 or whether the old policies were flawed. *Cf. Jackson v. City of Cleveland*, No. 1:15CV989, 2017 WL 3336607, at *4 (N.D. Ohio Aug. 4, 2017) ("The mere fact that police policies have changed . . . is not evidence that the old policies were unconstitutional."), *rev'd and remanded on other grounds*, 925 F.3d 793 (6th Cir. 2019). Nor does MPD's change in policy have any bearing on whether Chauvin's or Defendants' conduct, even if authorized by policy, was objectively reasonable. Indeed, the State intends to show at trial that Chauvin's and Defendants'

conduct was plainly unauthorized under then-prevailing MPD policy, and their actions were plainly unreasonable under the circumstances.

The risks associated with admitting evidence of MPD's policy changes, however, are substantial. Admitting this evidence poses an undoubted risk of unfair prejudice by prompting the jury to draw the unfairly prejudicial (and incorrect) inference that these changes are tantamount to a concession by MPD that Defendants' and Chauvin's actions were authorized under the prior policy. Or the evidence may "illegitimate[ly]" "persuade" the jury that MPD is at fault for failing to make these policy changes sooner, and that MPD—not Defendants—is responsible for George Floyd's death. *Garland*, 942 N.W.2d at 748 (internal quotation marks and citation omitted).

Evidence that MPD updated its policies after Floyd's death also risks confusing the issues and misleading the jury. *See* Minn. R. Evid. 403. The issue is not what MPD's policies say now. It is what MPD's policies said on May 25, and whether Defendants complied with the policies and their training as of that date. Admitting evidence about changes in MPD policy, however, risks having the jury focus on whether MPD's policies on May 25 were adequate, whether they should have been worded differently, and whether MPD's revisions reflect an admission that its policies were responsible for Floyd's death. The evidence may also mislead jurors into believing that MPD changed its policies *because* the prior policies authorized Defendants' conduct. For these reasons, evidence of MPD's post-May 25 changes to its policies is inadmissible under Rule 403.

2. The rationale underlying Rule 407, which prohibits the introduction of subsequent remedial measures to demonstrate liability, reinforces the reasons for excluding policy-change evidence. Rule 407 is a "concrete application[]" of Rule 403's balancing test, and reflects that

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evidence subsequent remedial measures rarely warrant admission. *See* Fed. R. Evid. 403, Advisory Committee Notes—1972 Proposed Rules.[14]

There are two basic rationales for Rule 407's exclusion of subsequent remedial measures. *First*, the Rule reflects the drafters' judgment that the probative value of such evidence is extremely slight compared to the potential for unfair prejudice. *See, e.g.*, 23 Charles Alan Wright, Arthur R. Miller & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5282 (2d ed. 2020 update). Taking precautions against the future does not amount to "an admission of responsibility for the past." *Columbia & P. S. R. Co. v. Hawthorne*, 144 U.S. 202, 207 (1892). Evidence and arguments suggesting otherwise are merely "calculated to distract the minds of the jury from the real issue, and to create a prejudice against [that party]." *Id.* *Second*, Rule 407 advances "policy considerations aimed at encouraging people" to implement remedial measures after a victim suffers harm. Minn. R. Evid. 407 cmt. Because parties may "fear the evidential use of such acts" in litigation, admitting such evidence would make it less likely that individuals or entities will take remedial action. David P. Leonard, *The New Wigmore: Selected Rules of Limited Admissibility* § 2.3.2 (3d ed. 2020).

Both of Rule 407's rationales support excluding evidence regarding changes to MPD's policies after May 25. *First*, as discussed above, the probative value of changes to MPD's policies following Floyd's death is very low. *See supra*, pp. 48-49. By contrast, admitting evidence of MPD policy chances will only "distract the minds of the jury from the real issue"—Defendants' liability—and "create a prejudice against" MPD instead. *Hawthorne*, 144 U.S. at 207. *Second*,

[14] Rule 407 applies to both civil and criminal cases. Minn. R. Evid. 1101(a) (the Rules of Evidence "apply to all actions and proceedings in the courts of this state"); *see* Minn. R. Evid. 101 ("These rules govern proceedings in the courts of this state, to the extent and with the exceptions stated in Rule 1101."). *Cf., e.g.*, Minn. R. Evid. 804(b) (specifying that certain hearsay exceptions apply only in civil or criminal proceedings).

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admitting this evidence might make police departments more reluctant to update their policies and training procedures in the future, which would harm public safety and "would be plainly against public policy." *Jackson*, 2017 WL 3336607, at *4. Conversely, excluding this evidence encourages departments to improve their policies without fear of reprisal and is therefore essential to "protect[] . . . the public." *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 98 (Minn. 1987).

Thus, whether under Rule 403, Rule 407, or both, this Court should exclude any evidence that MPD updated its training manuals or policies after May 25, 2020.

15. THIS COURT SHOULD EXCLUDE THE RESULTS OF A SURVEY RELATED TO THE FIELD TRAINING OFFICER PROGRAM.

The State moves this Court to exclude the results of an electronic survey that Inspector Blackwell conducted in 2018 regarding MPD's Field Training Officer (FTO) program. The survey asked current and former Field Training Officers 11 questions, ranging from "What is the biggest challenge(s) you have as an FTO?" to "What additional training would you like to have as an FTO?" FTO Program SurveyMonkey at 1-2 ("Survey"). At the federal trial, Defendant Kueng sought to introduce 65 anonymous survey responses into the record because "the jury needs to understand the depth of" the "problems" with the FTO program. *See* Tr. of Jury Trial Proceedings, Vol. VII, at 1166:14-15, *United States v. Thao*, No. 21-cr-108 (D. Minn. Jan. 28, 2022). This Court should prevent Defendants from doing so in this trial, both because the survey is inadmissible hearsay, and because it is more prejudicial and misleading than probative. Minn. R. Evid. 801(c), 401, 402.

1. The survey implicates two levels of hearsay: (1) the survey itself, and (2) the content of the responses. Even if the existence of the survey is not hearsay under the business records exception because Inspector Blackwell conducted the survey in the course of ordinary business,

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the hearsay statements of the 65 anonymous respondents are not *themselves* entitled to be admitted under the business records exception. *See* Minn. R. Evid. 803(6), 805.

Start with the most obvious fact: in order to qualify as a business record, the document in question must have been "made by a person with . . . a busines duty to report accurately." *In re Child of Simon*, 662 N.W.2d 155, 160 (Minn. Ct. App. 2003); *see also, e.g.*, *Walker v. Walker*, No. A20-0675, 2021 WL 955947, at *9 (Minn. Ct. App. Mar. 15, 2021). But the survey was completely anonymous. Survey respondents were under no meaningful oversight, and could choose to respond unprofessionally—or not respond at all—without repercussion. *Cf. Child of Simon*, 662 N.W.2d at 160 (business records are presumed reliable because "employees are required to be accurate and risk embarrassment or dismissal if they fail" in producing such records). Additionally, there is also no any indication that respondents possessed the requisite "knowledge" to support their sometimes sweeping statements. Minn. R. Evid. 803(6). As a result, none of the anonymous responses satisfy the foundational requirements of the business records exception.

Even if Defendants could overcome these foundational barriers and invoke the business record's exception, the survey's anonymous nature also "indicate[s] [a] lack of trustworthiness" that makes the business records exception improper. *See id.* Indeed, the responses contain unprofessional, politicized, or cavalier language that makes it clear that many respondents did not provide reliable feedback. *See, e.g.*, Survey at 5 ("I don't understand why they have to interrupt two weeks [sic] worth of scheduling to do that bullshit"); *id*. at 6 (recommending that all FTOs have "Bulletproof Mind"); *id*. at 7 ("[S]ome fto's are idiots."); *id*. at 19 (responding to "What are your biggest challenges with recruits" with the one word answer "Millennials"); *id*. at 33 (responding to a question allowing for respondents to expound further with "There's not enough

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time or space."); *id*. at 34 (stating that the FTO process "doesn't matter if the admin WANTS that recruit to pass because of race or gender"); *id*. a 73 ("I am tired of typing, I have no more input."). Other respondents skipped questions entirely. *See, e.g.*, *id*. at 23. And the majority of respondents offered only brief answers or broad generalizations. Defendants should not be permitted to introduce this untrustworthy, anonymous hearsay.

Finally, the survey also asked respondents subjective questions, like what were their personal "biggest challenges" and whether they thought recruits had "basic skills to succeed." These subjective assessments are far afield from the typical, objective business record where "the regularity of the records produces habits of precision in the record keeper," "the records are regularly checked," and "employees are motivated to make accurate records because the businesses that employ them function in reliance on these records." *In re Child of Simon*, 662 N.W.2d at 160. In short, these 65 anonymous responses are wholly unreliable and far outside the heartland of the business records exception. They should not be allowed into this case to prove the truth of the statements asserted.[15]

2. The responses to the survey are also inadmissible because they are of minimal probative value, and would be unduly prejudicial, misleading, and confusing. *See* Minn. R. Evid. 403.

The survey has limited probativeness here: Defendant Thao's Field Training Officer program experience was more distant from the events of May 25, 2020, and far less probative of his total policing experience. Meanwhile, the 2018 survey predated both Defendant Kueng's and Lane's experiences, and Inspector Blackwell's overhaul of MPD's Field Training Officer program. As a result, even if the survey offers marginal insight into the quality of the program before

[15] In the federal trial, Defendants suggested the survey results were present sense impressions. Unlike their federal counterpart, Minnesota's Rules of Evidence do not contain an analogous hearsay exception for present sense impressions (which would not apply in any event). *See* Minn. R. Evid. 803 cmt.

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Defendants Kueng and Lane went through that program, the survey offers far little insight into either of their personal experiences.

At the same time, it would be prejudicial, misleading, and confusing to permit Defendants to introduce the contents of the 65 anonymous survey responses. The jury does not know who the anonymous respondents are or their backgrounds. As a result, the jury has no way to evaluate the veracity of individual statements or the basis for their sweeping conclusions, and might (incorrectly) take them at face value. Meanwhile, to the extent different responses contradict one another, the jury would need to evaluate all 138 pages of responses to have the full picture of this already marginally relevant information. That time-consuming process would add little—if any—value and would threaten to further confuse the jury as to the ultimate question. The contents of the anonymous responses should be excluded.

16. THIS COURT SHOULD EXCLUDE THE APRIL 27, 2022 PROBABLE-CAUSE REPORT ENTITLED "INVESTIGATION INTO THE CITY OF MINNEAPOLIS AND THE MINNEAPOLIS POLICE DEPARTMENT."

On April 27, 2022, the Minnesota Department of Human Rights released a report finding "probable cause that the City and MPD engage in a pattern or practice of race discrimination." *See Investigation into the City of Minneapolis and the Minneapolis Police Department*, Minneapolis Dep't of Human Rights 5 (Apr. 27, 2022) ("*Probable Cause Report*").[16] The State anticipates that Defendants may seek to introduce the entire report or sections of the document criticizing MPD's program to train new officers.[17] *See id*. at 39-41 (describing training new officers); *id*. at 43-44 (describing field training). The State moves this Court to exclude this entire document because it

[16] https://mn.gov/mdhr/assets/Investigation%20into%20the%20City%20of%20Minneapolis%20and%20the%20Minneapolis%20Police%20Department_tcm1061-526417.pdf.

[17] Defendant Kueng has listed Commissioner Rebecca Lucero as a potential witness. *See* Defendant Kueng Witness List Amended, 3 (May 18, 2022).

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is inadmissible hearsay, is largely irrelevant, is of extremely limited probative value with respect to the charged offenses, and would substantially mislead and confuse the jury. To be clear: the State does not take issue with the Department's investigation, or the purpose for which the probable cause report was drafted. But the Department's preliminary report should not be presented to the jury in this case.

1. The Department's probable-cause findings, the report's supporting data and analysis, and anecdotes in the report are all plainly hearsay. *See* Minn. R. Evid. 801(a), (c). The report is also not admissible under Rule 803(8)'s hearsay exception for public reports.

Rule 803(8) permits the introduction of "factual findings resulting from an investigation made pursuant to authority granted by law" "against the State in criminal cases." Minn. R. Evid. 803(8). However, that exception does not apply where "the sources of information or other circumstances indicate lack of trustworthiness." *Id*. In assessing trustworthiness, "the court should consider the qualifications, bias, and motivation of the authors, the timeliness and methods of investigation or hearing procedures, and the reliability of the foundation upon which any factual finding, opinion, or conclusion is based." *Id*. cmt.

Here, the probable-cause report is not admissible under Rule 803(8) because its "findings" "were made pursuant to an ex parte investigation." *Denny v. Hutchinson Sales Corp.*, 649 F.2d 816, 821 (10th Cir. 1981) ("The lack of formal procedures and an opportunity to cross-examine witnesses are proper factors in determining the trustworthiness of the finding."). The Department interviewed numerous individuals. *See Probable Cause Report* at 7. Yet those efforts were one-sided. As a result, without disapproving of the Department's efforts, it is fair to say that not every aspect of the report has been fully-vetted through an adversarial process. *See City of New York v.*

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Pullman Inc., 662 F.2d 910, 915 (2d Cir. 1981) (finding that "lack of formal verification or procedure" was "sufficient to justify the exclusion of the report as untrustworthy").

Additionally, the specific parts of the report detailing MPD's academy and field training are far less thoroughly sourced and are therefore particularly less "trustworthy" for purposes of Rule 803(8). Many of the report's findings of likely discriminatory practices in policing are buttressed by extensive and objective data. For instance, the report concludes that "MPD officers recorded using chemical irritants in 25.1% of use of force incidents involving Black individuals," but only recorded using chemical irritants in 18.2% of use of force incidents involving white individuals in similar circumstances." *Probable Cause Report* at 14; *see also, e.g.*, *id.* at 10-11, 13-14, 16-20, 23-29, 31-32, 53-54, 56-57 (providing other statistics). The report's conclusions regarding academy training and the FTO process, however, are thinly sourced. The report concludes that "MPD currently uses a 'paramilitary' approach to train its officers." *Id.* at 40. This conclusion is primarily supported by a one-word quote from an anonymous "high-level MPD leader" and a single account "on the very first day of Academy training in 2021." *Id.* The report states that the Department reviewed "MPD's Academy training and MPD's written training materials," but the report offers no relevant excerpts. *Id.* The report's analysis of the field training program is even less detailed: it concludes that "field trainers continue to emphasize that rookie officers should demonstrate unquestionable compliance with their field trainer's orders and directions," without supporting data. *Id.* at 43. The State does not question the Department's good faith. But at this stage in the Department's investigation, it is difficult to evaluate these particular aspects of the report, and they are therefore not admissible under Rule 803(8)(C).

The nature of the report also cuts against its admission. The report is designed to determine probable cause, which is a low legal threshold. In some respects, the report is a persuasive

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document akin to a civil complaint, and it would not be unfair to conclude that the Department intends the report to influence MPD to voluntarily engage in reforms. The Court may consider the low threshold and the potential "motivations" of both the Department—as well as the anonymous individuals interviewed—in determining the report's admissibility. *See* Minn. R. Evid. 803 cmt.; *see also McKinnon v. Skil*, 638 F.2d 270, 278 (1st Cir. 1981) (district court did not abuse its discretion by excluding record as hearsay where underlying data were provided by declarants who could not "be regarded as disinterested observers").

Finally, to the extent that the report contains anonymous "statements" other than the Department's own analysis and conclusions, those statements "constitute inadmissible hearsay evidence," which the Court should exclude. *John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d 632, 636 (3d Cir. 1977) (per curiam); *see* Minn. R. Evid. 803 cmt. ("The rationale for this exception rests in a belief in the trustworthiness *of the work product* of government agents operating *pursuant to official duty*." (emphasis added)); *see also, e.g.*, *Martinez v. Takuanyi*, No. A09-155, 2009 WL 4251094, at *2 (Minn. Ct. App. Dec. 1, 2009) (affirming exclusion of report that "constitutes hearsay within hearsay, requiring an additional exception").

2. Even if the probable cause report is admissible under Rule 803(8)'s hearsay exception, the Court should exclude it under Rules 402 and 403.

The vast majority of the report is wholly irrelevant and therefore inadmissible. *See* Minn. Rule Evid. 401, 402. The report chiefly focuses on whether and how MPD officers subjected Black, Indigenous, and white individuals to different police practices. *See generally Probable Cause Report* at 10-39, 64-69. MPD's alleged disparate policing practices, however, are not relevant to the elements of the crimes charged here and certainly do not excuse Defendants' guilt. The State will not argue Defendants targeted Floyd on account of his race, nor must the State prove

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racial discrimination of any kind. Minnesota law prohibits raising issues of race where it is otherwise irrelevant. *See generally State v. Varner*, 643 N.W.2d 298, 304 (Minn. 2002). To be sure, the State condemns racially discriminatory policing practices in the strongest possible terms. But the question of whether MPD has systemically engaged in discriminatory policing is a question for a different fact finder in a different proceeding.

Meanwhile, the brief sections of the report discussing MPD's academic and field training program are not particularly probative. These sections are thinly sourced, provide little detail about the program, and mainly offer "top-line" conclusions. *See supra*, p. 56. The report therefore does not provide the jury much—if any—useful information about the nature of the academy or field training Defendants actually received.

Any marginal probative value the report offers will be "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Minn. R. Evid. 403. For starters, if the Court excludes the vast majority of the report addressing MPD's potential discriminatory practices, which it should, the jury would be left with an incomplete picture of the report's nature and scope. And because "the report was prepared for very different purposes"—namely, evaluating systemic discrimination—than "those for which it [would be] offered at trial," it would be particularly misleading to offer an out-of-context snippet evaluating MPD's academy training and FTO process. *Pullman*, 662 F.2d at 915.

Introducing the report would also require the jury to grapple with a variety of other confusing factors—including the tentative nature of a probable-cause finding and the broader nature of the Department's investigatory process; the Department's potential motivations; and the fact that the Department is a separate entity from the prosecuting authority in this case.[18] But

[18] The State has separately moved this Court to prevent Defendants from incorrectly characterizing the Department as "the State" or otherwise suggesting the Department is akin to the prosecution.

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because it is "a so-called government report," "the report would [be] presented to the jury in an aura of special reliability and trustworthiness which would not have been commensurate with its actual reliability." *Id*. (internal quotation marks and citation omitted).

Finally, the report could lead the jury to decide this case "on an improper basis." *Bott*, 246 N.W.2d at 53 n.3. For instance, the jury may view the Department's findings that other officers have generally engaged in misconduct as reason enough to find these Defendants guilty. Or the jury might excuse these Defendants' actions—even if they found Defendants committed each element of the charges beyond a reasonable doubt—because jurors felt that MPD deserved more blame. Or the jury may conclude that there is no reason to punish these Defendants because the Department is engaged in efforts to reform MPD. In any event, a report alleging a pattern of unreasonable practices by an organization has no place in evaluating whether the defendants acted reasonably here. In light of these concerns, and the report's marginal probative value, this Court should exclude it.

29. THIS COURT SHOULD EXCLUDE ANY TESTIMONY FROM DR. KIMBERLY ANN COLLINS.

This Court should exclude any testimony from Dr. Kimberly Ann Collins, who was named on Defendant Kueng's initial witness list. Defendant Kueng Witness List at 3 (May 16, 2022).[19] On January 15, 2021, Chauvin disclosed Dr. Collins's name as a "Peer Reviewer" on The Forensic Panel. Initial Expert Disclosures, *State v. Chauvin*, No. 27-CR-20-12646 (Jan. 15, 2021). No Defendant has provided any additional information about Dr. Collins, and she is not listed as a signatory on The Forensic Panel Report. Because Dr. Collins "created no results or reports in connection with the case," Defendant Kueng was required to disclose by May 1 "a written

[19] Dr. Collins was not listed on Defendant Kueng's amended witness list. *See* Defendant Kueng Witness List Amended (May 18, 2022).

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summary of the subject matter of the expert's testimony, along with any findings, opinions, or conclusions the expert will give, [and] the basis for them." Minn. R. Crim. P. 9.02, subd. 1(2)(b); *see* Trial Management Order ¶ 1 (Apr. 25, 2022). Because Defendants have not produced the required disclosures, they should not be permitted to call Dr. Collins to testify.

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CONCLUSION

The State respectfully requests the Court grant its motions *in limine*.

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Respectfully submitted,

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