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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Court File No.: 27-CR-20-12646

State of Minnesota,

Plaintiff,

STATE'S MEMORANDUM OF LAW REGARDING JURY INSTRUCTIONS

v.

Derek Michael Chauvin,

Defendant.

TO: The Honorable Peter Cahill, Judge of District Court, and counsel for Defendant, Eric J. Nelson, Halberg Criminal Defense, 7900 Xerxes Avenue South, Suite 1700, Bloomington, MN 55431.

INTRODUCTION

On February 8, 2021, the State and Defendant Derek Chauvin filed proposed jury instructions with the Court. Both the State and Defendant have proposed modifications to the Minnesota pattern jury instructions. The State objects to Defendant's proposed modifications to the following Minnesota pattern jury instructions:

1. CRIMJIG 3.01 – DUTIES OF JUDGE AND JURY
2. CRIMJIG 3.03 – PROOF BEYOND A REASONABLE DOUBT
3. CRIMJIG 3.16 – TESTIMONY AS TO OTHER CRIMES OR OCCURENCES
4. CRIMJIG 3.31 – CAUSATION
5. CRIMJIG 11.29 – MURDER IN THE SECOND DEGREE—WHILE COMMITTING A FELONY—ELEMENTS
6. CRIMJIG 11.56 – MANSLAUGHTER IN THE SECOND DEGREE—ELEMENTS
7. CRIMJIG 13.16 – ASSAULT IN THE THIRD DEGREE—SUBSTANTIAL BODILY HARM—ELEMENTS

Defendant's proposed modifications misstate the law and are likely to confuse the jury. By contrast, where the State has proposed modifications to these pattern instructions, those proposed

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modifications more accurately reflect governing legal standards and are less likely to cause jury confusion, unduly prejudice a party, or improperly present argument within an instruction.

Defendant also requests that the jury be instructed on police officers' authority to arrest, the offense level for passing or possessing a counterfeit bill, supposed negligence on the part of George Floyd, and a reimagination of the standard for assessing the reasonableness of a police officer's use of force. None of those instructions is proper. Accordingly, the Court should reject Chauvin's instructions to the extent they differ from the Minnesota pattern jury instructions.

ARGUMENT

This Court has considerable latitude in choosing jury instructions. *State v. Baird,* 654 N.W.2d 105, 113 (Minn. 2002). Jury instructions, however, must accurately define the charged offenses and the elements of those offenses. *State v. Vance,* 734 N.W.2d 650, 656 (Minn. 2007); *State v. Crace,* 289 N.W.2d 54, 59 (Minn. 1979). "An instruction is in error" and cannot be given to the jury "if it materially misstates the law," *State v. Kuhnau,* 622 N.W.2d 552, 556 (Minn. 2001), or if it "confuses" or "misleads" the jury, *State v. Larson*, 787 N.W.2d 592, 601 (Minn. 2010).

I. THE COURT SHOULD DENY CHAUVIN'S REQUEST FOR LANGUAGE ON 20/20 HINDSIGHT, SPLIT-SECOND JUDGMENTS, AND "GOOD FAITH" IN INSTRUCTING THE JURY ON THE REASONABLE USE OF FORCE.

The reasonableness of an officer's use of force is assessed under an objective standard based on "those facts known to the officer at the precise moment he acted with force," considering "the totality of the facts and circumstances confronting the officer." State Proposed Jury Instructions 10; CRIMJIG 7.19. Defendant proposes that the Court add to this instruction that the jury is not to assess the reasonableness of his use of force "with the 20/20 vision of hindsight," and that the jury's assessment of reasonableness must "allow[] for the fact that police officers are often forced to make split-second judgments about the amount of force that is necessary in a particular

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situation under circumstances that are tense, uncertain, and rapidly evolving." Def. Proposed Jury Instructions 11 (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)). That language—dicta borrowed from federal civil rights cases—should be excluded from the jury instructions in this state criminal prosecution, as it threatens to confuse and mislead the jury. The Court should also reject Defendant's proposed instruction that "[i]n considering the reasonableness of the use of force, the jury may consider whether the force was applied in good faith by the defendant." *Id.* Defendant's proposed language improperly injects a subjective component into what is an objective inquiry, and also risks misleading the jury.

A. "20/20 Hindsight" and "Split-Second Judgments"

The State is not aware of any precedential Minnesota appellate criminal decision that has authorized the use of the "20/20 hindsight" language from *Graham* in jury instructions. Instead, that particular phrase typically appears only in judicial opinions in civil rights cases that consider legal questions surrounding qualified immunity or the sufficiency of the evidence to establish a constitutional claim. *See, e.g.*, *Baker v. Chaplin*, 517 N.W.2d 911, 916 (Minn. 1994); *Johnson v. Morris*, 453 N.W.2d 31, 36-37 (Minn. 1990).[1] It does not appear in jury instructions in criminal cases. With good reason. In a criminal trial, what stops hindsight from being "20/20" is the burden of proof, the presumption of innocence, and the defendant's right to confront and cross-examine witnesses. The jury thus does not need to hear the phrase "with the 20/20 vision of hindsight" to objectively analyze the circumstances confronting the Defendant during the incident.

[1] Some courts have excluded this language from jury instructions even in the civil rights context. *See, e.g.*, *Simmons v. Bradshaw*, 879 F.3d 1157, 1161 n.3 (11th Cir. 2018) (finding no error in the district court's decision denying the defendant's request that the jury be instructed not to judge the reasonableness of the officer's use of force with "the 20/20 vision of hindsight").

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Indeed, that language could *discourage* the jury from properly evaluating whether the Defendant's use of force was reasonable. The phrase "20/20 hindsight" often explains away or justifies a person's failure to act properly at an earlier time. Thus, that phrase could discourage jurors from weighing the evidence for themselves, and may subtly (or not so subtly) suggest that jurors should not hold police officers accountable for misconduct after the misconduct occurs. That instruction would artificially inflate the State's burden to show that Defendant's use of force was unreasonable by suggesting that evidence of guilt must be disregarded as "20/20 hindsight."

Defendant's proposed "split-second judgment[]" language—that "[t]he determination of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments about the amount of force that is necessary in a particular situation under circumstances that are tense, uncertain, and rapidly evolving"—also risks misleading or confusing the jury. Def. Proposed Jury Instructions 11. The public is generally aware of the role and duties of police officers, and it is true enough that sometimes officers will need to make split-second decisions. But not every situation involving a police officer is "tense," "uncertain," or "rapidly evolving." And some situations may ultimately become calm, certain, or fully evolved, giving an officer ample time to assess his use of force. Just consider the facts of this case: Defendant pressed his knee into Floyd's neck and upper back for more than 560 seconds, and during a significant portion of that time Floyd lay unresponsive and without a pulse.

A jury need not be instructed that officers "often" need to make split-second decisions under circumstances that are tense, uncertain, and rapidly evolving to assess whether that is true *here*. Instead, the jury must assess the particular "situation" based on the "totality of the circumstances" and the "facts known to the officer at the precise moment he acted with force." *See* State Proposed Jury Instructions 10-11; CRIMJIG 7.19. From those facts, a jury can

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meaningfully assess whether "a reasonable peace officer in the same situation would believe [the force used] to be necessary." CRIMJIG 7.19. Defendant's proposed instruction falsely suggests to the jury that the use-of-force inquiry's proper focus on the particular circumstances of *this case* may give way to platitudes about police officers' duties *generally*. And that instruction improperly suggests that this case necessarily involved a "tense," "uncertain," or "rapidly evolving" situation by "emphasiz[ing] one factor, one piece of circumstantial evidence, bearing on [the jury's] determination, thereby suggesting to the jury that in the court's opinion that factor was of greater importance than other relevant factors." *State v. Olson*, 482 N.W.2d 212, 216 (Minn. 1992). Courts should "avoid as much as possible" instructions "on particular kinds of evidence, especially inferences." *Id.* Because this instruction could confuse or mislead the jury, it should reject Defendant's proposed instruction. *See State v. Davis*, 864 N.W.2d 171, 176 (Minn. 2015).

The "20/20 hindsight" and "split-second judgment" language from *Graham* also is not an essential part of the objective reasonableness standard under Minn. Stat. § 609.06. The most recent Minnesota appellate criminal decision to cite *Graham*'s analysis of the reasonable use of force, for example, emphasized that juries must "determine if the officer's actions were 'objectively unreasonable,'" giving "'careful attention to the facts and circumstances of each particular case.'" *State v. Scott*, A16-0557, 2018 WL 700173, at *7 (Minn. App. Feb. 5, 2018). That proposition lies at the core of *Graham*'s discussion of reasonable use of force, and those key aspects of *Graham*'s analysis are reflected in Minnesota's pattern jury instructions. The dicta from *Graham* that Defendant proposes to include, on the other hand, would only confuse the jury.

Other district courts in Minnesota therefore have regularly declined to instruct juries regarding "20/20 hindsight" or "split-second judgments" where the defendant has raised a reasonable-use-of-force defense under Minn. Stat. § 609.06. *See, e.g.*, *State v. Reiter*, No. 27-CR-

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17-6475; *State v. Hamilton*, No. 27-CR-17-2104; *State v. Noor*, 27-CR-18-6859. Minnesota, moreover, is not alone in excluding reference to "20/20 hindsight" and "split-second judgments" from its pattern instruction on the question whether an officer's use of force was reasonable. *See, e.g.*, *Judicial Council of California Criminal Jury Instruction* 507 (2020) (making no mention of Defendant's proposed language); *Indiana Pattern Criminal Jury Instructions* 10.1200 (2019) (same); *Massachusetts Superior Court Criminal Practice Jury Instructions* § 5.4.3(g) (2018) (same); *Michigan Nonstandard Jury Instructions Criminal* § 13:10 (2020) (same).

In support of his proposed jury instruction language, Defendant cites the Minnesota Supreme Court's decision in *Mumm v. Mornson*, 708 N.W.2d 475 (Minn. 2006), and claims that *Mumm* "adopt[ed] the *Graham* standard." *See* Def. Proposed Jury Instructions 11. But *Mumm* does not support Chauvin's argument. *Mumm* does cite *Graham*, but not in the way Defendant suggests. *Mumm*—a qualified immunity case—cites *Graham* only for its directive that civil rights claims for excessive force are analyzed under the Fourth Amendment objective reasonableness standard, not the Fourteenth Amendment's substantive due process standard. 708 N.W.2d at 482-483. That, of course, is well settled: The test is one of objective reasonableness, requiring careful attention to the totality of the circumstances in each case. *Graham*, 490 U.S. at 396; *see* State Proposed Jury Instructions 10-11. But *Mumm* did not consider *Graham*'s discussion of use-of-force further. It did not quote the "20/20 hindsight" or "split-second judgment[]" language from *Graham* that Defendant now proposes. And it certainly did not suggest that this language is appropriate in instructing juries on whether an officer's use of force in a criminal prosecution is proper. *Mumm* is not instructive here. The case law therefore does not support Chauvin's proposed addition of language regarding "the 20/20 vision of hindsight" and "split-second judgments."

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B. Defendant's "Good Faith"

As for Defendant's suggestion that the jury be instructed that it may consider whether his use of force was in "good faith," that instruction is foreclosed by precedent.[2] The Supreme Court in *Graham* held that the court of appeals had erred in considering "whether the individual officers acted in good faith or maliciously and sadistically." 490 U.S. at 397 (internal quotation marks omitted). The Supreme Court explained that such an inquiry could not be squared with the objective reasonableness inquiry required in this context because it "puts in issue the subjective motivations of the individual officers." *Id.* *Mumm*, the other case on which Chauvin relies, also does not suggest that "good faith" is an appropriate consideration for jurors weighing an officer's use of force, as that concept does not appear anywhere in *Mumm*. Accordingly, there is no basis for Defendant's proposed instruction regarding good faith. Such an instruction injects a subjective inquiry into what is an objective standard. That material misstatement of the law would be erroneous, and would materially mislead the jury. *Larson*, 787 N.W.2d at 601.

II. THE COURT SHOULD DENY DEFENDANT'S INSTRUCTION REGARDING AN OFFICER'S AUTHORITY TO ARREST, AS WELL AS HIS PROPOSED INSTRUCTION REGARDING COUNTERFEIT BILLS.

A. Defendant's request that the jury be instructed on an officer's authority to arrest is a red herring that distracts from the ultimate issues in the case. *See* Def. Proposed Jury Instructions 6 ("A police officer is authorized by law to make an arrest of a suspect 'when the person arrested has committed a felony, although not in the officer's presence,' and 'when a felony has in fact been committed, and the officer has reasonable cause for believing the person arrested to have

[2] As demonstrated by the State's proposed jury instructions and the Minnesota pattern jury instructions, Defendant's good faith is an appropriate consideration for the jury only with respect to the legal excuse of defense of self or others. State Proposed Jury Instructions 11.

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committed it.'"). Whether Defendant was authorized to arrest Floyd at the beginning of the encounter is largely irrelevant to his guilt. It is not an element of the charged offenses, and it is not a standalone defense to the charges against him. Instead, the jury must decide—irrespective of whether it was lawful to arrest Floyd—if Defendant used reasonable force during the course of the incident. Defendant's proposed instruction, however, invites the jury to presume that Defendant's authority to arrest Floyd is a standalone defense. And it risks confusing the issues and suggesting to the jury that the critical issue in the case is whether the arrest was authorized. Indeed, the instruction may suggest to the jury that if Defendant's arrest of Floyd were lawful, his use of force in making that arrest would likewise be "authorized by law" or, alternatively, that Defendant was entitled to apply any level or force to effect a lawful arrest. *Id.*

Defendant's proposed instruction, then, is more akin to "defense counsel's closing argument" than meaningful guidance on the elements of the charged offenses, and "could potentially distract the jury from making findings beyond a reasonable doubt." *State v. Lindsey*, 632 N.W.2d 652, 662 (Minn. 2001); *see also State v. Morgan*, A15-1466, 2016 WL 4262841, at *5 (Minn. App. Aug. 15, 2016). It also risks creating a largely irrelevant mini-trial regarding whether Floyd engaged in criminal activity. But Floyd is not on trial; Defendant is. By asking the jury to determine whether "the person arrested has committed a felony," the instruction diverts the focus away from Defendant's conduct. The Court should reject Defendant's attempt to deflect focus from his own actions as a way to unfairly prejudice the jury against Floyd.

B. Defendant's proposal that the jury be instructed that "[u]ttering or possessing counterfeit United States currency is considered a felony" makes that risk particularly acute—especially since it misstates the law. Contrary to Defendant's proposed instruction, possessing or passing a counterfeit bill is not a strict liability offense, and it is not necessarily a felony. A defendant is

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liable for uttering or possessing counterfeit currency *only* if he does so "with intent to defraud . . . having reason to know that the money . . . is forged, counterfeited, falsely made, altered, or printed." Minn. Stat. § 609.632 subd. 3; *see also* 18 U.S.C § 472 (also requiring an "intent to defraud"). Moreover, the charge for which Floyd was arrested—passing a counterfeit $20 bill—is a gross misdemeanor offense, not a felony, under Minnesota law. *See* Minn. Stat. §§ 609.632, subd. 4(b)(4), 609.02, subd. 4. Defendant's selective omission of these key points would mislead the jury into believing that if Floyd possessed a counterfeit bill—even without knowing that the bill was fake—Floyd committed a felony. That is simply not true. Indeed, even assuming the question whether Floyd committed a felony were relevant (it is not), Defendant's proposed instruction would improperly remove a key element from the jury's consideration of whether Floyd committed a felony offense. *See State v. Moore*, 699 N.W.2d 733, 737 (Minn. 2005) (a jury instruction may not be framed in a way that removes key elements from a jury's consideration).

This instruction is especially troublesome when read in conjunction with Defendant's instruction regarding authority to arrest. When read as a whole, Defendant's proposed instructions improperly suggest that the jury should presume that if Floyd used counterfeit currency, Floyd committed a felony, and that his commission of that felony necessarily excused Defendant's conduct. Directing the jury to presume facts in this manner improperly "invades the province of the factfinder." *State v. Williams*, 324 N.W.2d 154, 160 (Minn. 1982) (an "instruction that directs the jury to find intent from basic facts, without qualifying instructions that permit the jury to weigh evidence introduced . . . to rebut the presumption, invades the province of the factfinder").

Finally, Defendant's proposal to instruct the jury on counterfeiting would also confuse the issues and mislead the jury by injecting into the case an ultimately irrelevant issue. This case is about whether Defendant's conduct violated the law; it is not about George Floyd's conduct. To

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the extent Defendant wishes to raise the counterfeiting issue, that argument is more appropriate for "defense counsel's closing argument" than for jury instructions, as Defendant's proposed instructions "could potentially distract the jury" from addressing the elements of the relevant offenses. *Lindsey*, 632 N.W.2d at 662; *see also Morgan*, 2016 WL 4262841, at *5.

In short, because instructions may not "materially misstate the law" or "invade[] the province of the factfinder," this Court should reject Defendant proposed instruction regarding counterfeit currency. *Davis*, 864 N.W.2d at 176; *Williams*, 324 N.W.2d at 160.

III. THE COURT SHOULD REJECT DEFENDANT'S PROPOSED INSTRUCTIONS REGARDING FLOYD'S SUPPOSED NEGLIGENCE.

Defendant proposes that the Court instruct the jury that, although not a defense in a criminal case, it may consider supposed negligent conduct by Floyd to assess "whether or not the defendant exercised the care of a reasonably prudent peace officer." Def. Proposed Jury Instructions 11. Defendant then proposes to supplement that instruction with additional language about specific allegedly negligent conduct by Floyd. *Id.* at 12. The Court should reject Defendant's proposal.

"It is well settled that the contributory negligence of the victim is never a defense to a criminal prosecution." *Crace*, 289 N.W.2d at 59. The Minnesota Supreme Court has made clear that "the conduct of the victim" is relevant only "insofar as it tends to show that the defendant was not himself negligent or that his acts did not constitute the proximate cause of the accident." *Id.* at 60 n.5. Thus, in deciding whether the defendant's conduct was negligent, the "jury may take into consideration the conduct of the victim" the same way it takes into account "all of the other circumstances that existed at the time the [incident] occurred." *Id.* The conduct of the victim, in other words, does not receive pride of place among the factors the jury may consider in evaluating the defendant's negligence; it is one among many such factors.

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Relying on *State v. Crace*, 289 N.W.2d 54 (Minn. 1979), and *State v. Schaub*, 44 N.W.2d 61 (Minn. 1950), Defendant nonetheless suggests that, in a case involving a second-degree manslaughter charge, it is appropriate to expressly instruct the jury that it may consider the contributory negligence of the victim. But nothing in those cases requires the jury to be instructed on contributory negligence. And, in fact, a separate instruction that the jury must consider Floyd's conduct in assessing whether Defendant's actions were negligent is unnecessary and could mislead the jury. In assessing Defendant's use of force, the jury already must consider "those facts known to the officer at the precise moment he acted with force" "based on the totality of the facts and circumstances confronting the officer." *See* State Proposed Jury Instructions 10. That, of course, includes Floyd's conduct during the encounter. The pattern jury instructions and the State's proposed instructions therefore already allow the jury to consider Floyd's actions as one of the "facts and circumstances confronting" Chauvin. *Id.* In those circumstances, there is no reason to give a special instruction separately requiring the jury to consider Floyd's supposed negligence. Doing so elevates that one factor above "all of the other circumstances that existed at the time the [incident] occurred." *Crace*, 289 N.W.2d at 60 n.5. And if the Court "single[s] out and unfairly emphasize[s] one factor," the jury may again believe "that in the [C]ourt's opinion that factor was of greater importance than other relevant factors." *Olson*, 482 N.W.2d at 216.

Indeed, separately instructing the jury on contributory negligence would violate the principle that general instructions are often preferable to a particularized instruction that may overemphasize one side of the case or confuse the jury. *See Cameron v. Evans*, 62 N.W.2d 793, 799 (Minn. 1954). As the Supreme Court has explained, "a special requested instruction setting forth a litigant's theory of a case may be denied if the substance of it is adequately covered by the charge as a whole." *Poppenhagen v. Sornsin Constr. Co.*, 220 N.W.2d 281, 286 (Minn. 1974)

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(internal quotation marks omitted); *see Kallio v. Ford Motor Co.*, 391 N.W.2d 860, 864 (Minn. 1986). Allowing additional instruction on the jury's duty to consider Floyd's conduct would only confuse and mislead the jury, unduly shifting the jury's focus away from Defendant's conduct when other instructions make clear that the jury may consider Floyd's conduct.

The cases on which Defendant relies—*Crace* and *Schaub*—do not support his proposed instruction. In *Crace*, the defendant and his friend set out to hunt bears after a day of drinking. 289 N.W.2d at 56-57. After the pair decided to separate in the woods, Crace shot what he thought was a bear but turned out to be his hunting partner, who was wearing a black snowmobile jacket and a camouflage-type hat. *Id.* at 56. In *Schaub*, the defendant attempted suicide by filling his apartment with gas by opening the jets of his gas stove, but he was found and removed from the apartment by police when neighbors reported smelling gas. 44 N.W.2d at 62. After Schaub was taken to the police station, his landlord and the landlord's wife attempted to air out the apartment. *Id.* But when the landlord turned off the light switch in the kitchen, there was an immediate explosion, killing his wife. *Id.* Critically, in both *Crace* and *Schaub*, the Court held that the defendant could be convicted even if another person's acts could be deemed negligent. *See Crace*, 289 N.W.2d at 60 (noting that the jury could have found the hunting partner negligent, but that the jury "nonetheless determined that Crace was negligent"); *Schaub*, 44 N.W.2d at 62 (similar).

Here, Defendant and his codefendants drove Floyd face down into the pavement of Chicago Avenue for nine and a half minutes, rebuffing pleas to render aid from a concerned crowd. "For over four minutes and forty seconds, Floyd did not speak." Order & Mem. Op. on Defense Mots. to Dismiss for Lack of Probable Cause 29 (Oct. 21, 2020) (Probable Cause Mem. Op.). "For almost three and a half minutes, Floyd appeared not to be breathing." *Id.* "And for more than two and a half minutes, the Defendants were unable to locate a pulse." *Id*. Whatever supposed

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negligent conduct Floyd may have engaged in before being taken to the ground by Defendant does not bear on whether Defendant was negligent in maintaining his position after Floyd had fallen silent, limp, and without a pulse. Instead, Defendant's proposed instruction is yet another improper attempt to inject his closing arguments into the jury instructions and prejudice the jury against Floyd. *See Lindsey*, 632 N.W.2d at 662; *Morgan*, 2016 WL 4262841, at *5. Defendant's instruction again would mislead the jury into presuming that Floyd's conduct rendered his use of force reasonable. *Williams*, 324 N.W.2d at 157. That is not allowed.

As for Defendant's suggestion that the Court instruct the jury regarding specific examples of Floyd's alleged negligence, those instructions are improper on multiple fronts. As explained, the jury will already be required to consider Floyd's conduct during the incident, and additional instructions to that effect may confuse, mislead, and improperly bolster Defendant's theory of the case. *See supra* at 2-7, 11-12. These instructions may distract the jury from the key issues at hand—namely, the elements of the relevant offenses—and unfairly prejudice them against Floyd. They may also improperly emphasize certain pieces of evidence and lead the jury to incorrectly conclude that the Court finds that evidence particularly important, or more weighty than the rest of the evidence. *See Olson*, 482 N.W.2d at 216. Moreover, none of Defendant's citations supports an instruction regarding the crime of resisting arrest. Indeed, none deals with jury instructions at all. Nor has Defendant cited any precedent supporting his other instructions regarding alleged "additional forms of Mr. Floyd's negligence." Def. Proposed Jury Instructions 12.

Finally, Defendant's proposed instructions on negligence *again* misstate the law—and not only with respect to the law of counterfeiting. *See supra* pp. 8-10. Minn. Stat. § 609.50 does not specifically criminalize "not following orders," Def. Proposed Jury Instructions 12, and Minnesota's controlled substances statutes do not specifically criminalize ingestion of fentanyl,

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see Minn. Stat. § 152.01. Moreover, Defendant's instructions may suggest to the jury that they should presume that if they find that Floyd engaged in any of the alleged negligent acts, Floyd's conduct was necessarily unreasonable, and that Defendant's conduct was therefore reasonable as a matter of law. *Williams*, 324 N.W.2d at 160; *see* Def. Proposed Jury Instructions 12. The Court should reject Defendant's attempts to unfairly prejudice the jury against Floyd in that manner.

IV. THE COURT SHOULD NOT ADOPT DEFENDANT'S OTHER INCORRECT, CONFUSING, OR REDUNDANT INSTRUCTIONS.

A. The Court Should Instruct The Jury Not To Consider Potential Punishments.

Defendant's proposed instructions omit a standard instruction: The jury should not consider the defendant's potential punishment. *See* Def. Proposed Jury Instructions 2. There is no good reason for omitting that standard instruction here.

The standard instruction reflects longstanding Minnesota law: "The responsibility of imposing punishment upon a defendant in a criminal case rests exclusively with the court." *State v. Finley*, 8 N.W.2d 217, 218 (Minn. 1943). To that end, courts routinely instruct juries that "their responsibilities as triers of the facts do not extend to a consideration of the punishment." *Id.*; *see also State v. Chambers*, 589 N.W.2d 466, 474 (Minn. 1999) ("It is proper in a criminal case to admonish the jury that the punishment is a subject with which they have nothing to do." (quoting *State v. Gensmer*, 51 N.W.2d 680, 685 (Minn. 1951))). That standard instruction does not prejudice Defendant, and it ensures that the jury performs only its role as a fact finder.[3]

[3] Indeed, the Court wisely raised that legal principle in the questionnaire sent to prospective jurors to ensure that they could abide by it. Jury Questionnaire 12 (Dec. 22, 2020).

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B. The Court Should Reject Defendant's Reasonable-Doubt Instruction.

The Court should adopt the State's proposed instruction regarding reasonable doubt, which both correctly summarizes the law and provides the jury with clear and cogent instruction, including its directive that speculation and irrelevant details do not raise reasonable doubt. *See State v. Smith*, 674 N.W.2d 398, 401-403 (Minn. 2004). By contrast, Defendant's proposed instructions are redundant. *See Davis*, 864 N.W.2d at 176. In particular, Defendant suggests an instruction that if the jury "views the evidence" "as reasonably permitting either of two conclusions," then "the jury must, of course adopt the conclusion of innocence." Def. Proposed Jury Instructions 3. This instruction is unnecessary. Defendant's proposed instructions already inform the jury that "reasonable doubt" means "doubt based upon reason and common sense." *Id*. By definition, if the jury reasonably views the evidence as at equipoise, the jury will have a "doubt based upon reason and common sense." *Id*. It would only risk confusing the jury to specifically address a particular circumstance in which reasonable doubt might arise.

Defendant cites *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010), as support for including this additional instruction. Def. Proposed Jury Instructions 3. *Al-Naseer* has nothing to do with jury instructions, however, and does not require the proposed instruction in this case. Instead, in *Al-Naseer*, the Minnesota Supreme Court reviewed the sufficiency of the evidence in a case based on circumstantial evidence. *See* 788 N.W.2d at 473-474. In that context, the court noted that convictions based on circumstantial evidence warrant "heightened scrutiny," and the court stated that it would not defer to "the fact finder's choice between reasonable inferences." *Id*. at 473, 474 (internal quotation marks in second quotation omitted). But here, Defendant does not suggest that his proposed instruction clarifies how the jury should evaluate circumstantial evidence. That instruction is not needed to define reasonable doubt.

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C. The Court Should Use the State's Definition of Causation.

Defendant proposes two conflicting definitions of causation that will confuse the jury. *See* Def. Proposed Jury Instructions 7, 10. This Court should use the State's clear and consistent definition modeled after the Minnesota pattern jury instructions. Defendant's proposed instructions are deficient in at least four ways.

First, Defendant offers two definitions of causation—one for murder in the second degree, and one for manslaughter in the second degree. Multiple definitions for the same legal concept will undoubtably leave jurors to wonder whether and how the definitions differ.

Second, when defining causation for manslaughter—but not for second-degree murder—Defendant uses the undefined terms "proximate cause" and "efficient independent force," which are unnecessary legalisms. *See* Def. Proposed Jury Instructions 10. By contrast, the State's instructions define "cause" in plain language that lay jurors can more easily understand.

Third, Defendant offers legally improper, confusing, and suggestive definitions of a superseding cause. These definitions only further Defendant's theory of the case and improperly prejudice the State. *See Lindsey*, 632 N.W.2d at 662 (jury instructions are not intended to stand in for or supplement a party's closing arguments); *see also Morgan*, 2016 WL 4262841, at *5.

In his second-degree murder instructions, Defendant proposes that the Court explicitly instruct the jury that an "overdose or heart failure that causes death is a superseding intervening cause." Def. Proposed Jury Instructions 7. This instruction is improper. As Defendant's instructions elsewhere admit, the State need only prove that Defendant's actions were "a substantial causal factor" in Floyd's death. *Id.*; Probable Cause Op. 36 (citing CRIMJIG 11.29); *State v. Smith*, 835 N.W.2d 1, 4 (Minn. 2013) ("[T]he State must show that the defendant's acts were a substantial factor in causing the death."). The State need not prove that Defendant's actions

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were the *sole* or but-for cause of Floyd's death. But Defendant's instruction implies that jurors should presume that, if they find an overdose or heart failure occurred, there was a superseding cause and, in turn, that Defendant did not cause Floyd's death. That is legally incorrect. Even if jurors find an overdose or heart failure, that would not automatically mean that the overdose or heart failure was a superseding cause: If the jurors find, for instance, that Floyd's death would have occurred anyway based on Defendant's conduct, a finding of an overdose or heart failure would not constitute a superseding intervening cause. *See* Probable Cause Mem. Op. 44 (explaining that an occurrence is a "superseding intervening cause" only if that occurrence (i) "come[s] between the negligence and the occurrence at issue"; (ii) was not "brought about by the original negligence"; (iii) "turn[s] aside the natural sequence of events producing a result which otherwise would not have followed the original negligence"; and (iv) was not "foreseeable from the original negligence"). Likewise, if the overdose or heart failure was not "the sole cause" of Floyd's death, it would not qualify as a superseding cause. *State v. Gatson*, 801 N.W.2d 134, 146 (2011). Moreover, Defendant's proposal also does not "permit the jury to weigh evidence" and improperly "invades the province of the factfinder." *Williams*, 324 N.W.2d at 160. And it blatantly and improperly weaves Defendant's theory of the case into the jury instructions. *See Lindsey*, 632 N.W.2d at 662; *see also Morgan*, 2016 WL 4262841, at *5.

Defendant's definition of superseding cause in his proposed manslaughter instructions is even more confusing. Defendant also offers a confusing and unnecessary instruction that the "State must prove there was not an intervention of an efficient independent force in which the defendant did not participate or which he could not reasonably have foreseen." Def. Proposed Jury Instructions 11. Though this statement immediately follows the definition of a superseding cause, Defendant's instructions do not refer to the just-defined term. Instead, Defendant introduces an

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additional undefined legal concept ("efficient" force). The State's definition of superseding cause—based on the model jury instructions and the case law—is much simpler and easier to understand for lay jurors: "[T]he defendant is not criminally liable if a 'superseding cause' caused the death. A 'superseding cause' is a cause that comes after the defendant's acts, alters the natural sequence of events, and produces a result that would not otherwise have occurred. An action that occurs before the defendant's conduct and is not the sole cause of the death does not constitute a superseding cause." State Proposed Jury Instructions 9.[4]

Fourth, in stating that the "State must prove" the absence of a superseding cause, Defendant risks confusing the jury. The State must prove the existence of each element of manslaughter beyond a reasonable doubt. If the evidence leaves a reasonable doubt that a superseding event caused George Floyd's death, the State will not have met its burden. Defendant's instruction improperly suggests that the State must affirmatively disprove the total absence of superseding cause—without any discussion of reasonable doubt or the jury's ability to weigh the evidence. This, again, risks confusing the jury regarding the applicable legal standard.

D. The Court Should Not Add to the Elements Of Second-Degree Murder.

The State objects to Defendant's proposed instruction that the jury must find that the predicate offense for second-degree murder—in this case, assault in the third degree—created a

[4] Defendant also asks the Court to instruct the jury on a four-part test for determining whether a separate act or occurrence constitutes a superseding cause. Def. Proposed Jury Instructions 10. That four-part test is likely to be substantially more confusing to the jury than the definition offered by the State and the pattern jury instructions. More significantly, that four-part test is also inconsistent with the law. Among other things, Defendant's proposed instruction states that "the *harm*" must have "occurred after the original negligence." Def. Proposed Jury Instructions 10 (emphasis added). But as this Court indicated in its probable cause order, it is not enough for "the harm" to occur "after the original negligence"; it is the "independent action" that "must occur 'after the defendant's acts'" for that action to be a superseding cause. Probable Cause Mem. Op. 44 (quoting CRIMJIG 11.25 and citing *State v. Olson*, 435 N.W.2d 530, 534 (Minn. 1989)).

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"special danger to human life." Def. Proposed Jury Instructions 7. "By definition, felony murder involves an unintentional killing resulting from the commission of a crime against the person or from the commission of some other felony that, as committed, involves some special danger to human life." *State v. Mitjans*, 408 N.W.2d 824, 833 (Minn. 1987). The "special danger" test thus determines whether a property crime or a regulatory offense can constitute a predicate for felony murder. But the Minnesota Supreme Court has held that this test is irrelevant for "crime[s] against the person," including "assault," because those offenses categorically qualify as felony-murder predicates. *State v. Anderson*, 666 N.W.2d 696, 700 (Minn. 2003).

In *Anderson*, the Minnesota Supreme Court examined the origins of the "special danger" test and confirmed that the test is used to determine whether "a property offense can be used as an underlying [predicate] felony" for second-degree murder. *Id*. at 699. At common law, all felonies—and thus all felony-murder predicates—were *mala in se* and "most were life-endangering." *Id*. at 700. As "the number of felonies has increased and many comparatively minor offenses are classified as felonies," courts narrowed the felony-murder "doctrine so that not every felony offense serves as a predicate felony." *Id*. at 699. Likewise, until 1981, Minnesota's criminal code expressly limited felony murder to "those felonies committed upon or affecting the person whose death was caused." *Id*. (internal quotation marks omitted). This statutory language "isolate[d] for special treatment those felonies that involve *some special danger to human life*." *Id*. (emphasis added) (quoting *State v. Nunn*, 297 N.W.2d 752, 753 (Minn.1980)). In 1981, the legislature then deleted "the limiting language" in the felony-murder statue. *Id*.

In *Anderson*, the Supreme Court interpreted the current statute and held that "a property offense" may "be used as an underlying felony *when a special danger to human life is present*." *Id*. (emphasis in original). But *Anderson* made equally clear that, under the current statute, an

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offense that "is not a property crime but a crime against the person"—including "assault"—is categorically "a proper predicate felony to a felony-murder conviction." *Id*. at 700; *see State v. Heden*, 719 N.W.2d 689, 696 n.2 (Minn. 2006) (the "'special danger to human life' requirement . . . prevent[s] inherently nonviolent felonies—such as property crimes—from serving as a predicate offense for felony murder"); *State v. Cole*, 542 N.W.2d 43, 53 (Minn. 1996) ("Fourth, assault in the second degree itself forms a proper predicate felony to a felony murder conviction-assault is not a property crime, but a crime against the person.").

Third-degree assault is a quintessential example of a crime against a person that categorically qualifies as a predicate felony for felony murder. *Cf. Cole* 542 N.W.2d at 53 (holding the same regarding second-degree assault). Indeed, the Court of Appeals has already held as much in an unpublished opinion. *State v. Trevino*, No. A14-025, 2015 WL 1401464, at *8 (Minn. App. Mar. 30, 2015), *review denied* (Minn. June 30, 2015) ("The level of violence present in a third-degree assault—resulting in substantial bodily harm—easily meets the danger-to-human-life threshold."). There is no reason for a different result here. An element of third-degree assault is that the perpetrator "inflicts substantial bodily harm" on another. Minn. Stat. § 609.223, subd. 1. And the offense is codified in the subchapter of the Criminal Code titled "Crimes Against the Person." It would thus be legally incorrect to require a jury to find special danger for the predicate offense, and the Court should reject Defendant's instruction.

E. The Court Should Adopt The State's Proposed Definition Of "Intentional Infliction Of Bodily Harm," And Should Reject Defendant's Instruction.

Proper jury instructions "present[] to the jury the applicable law in clear, precise, and intelligible form so as to leave no reasonable likelihood for the drawing of erroneous inferences therefrom." *Nubbe v. Hardy Cont'l Hotel Sys. of Minn.*, 31 N.W. 332, 336 (Minn. 1948). The State's proposed instruction regarding the *mens rea* element of third-degree assault—that

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Defendant intentionally inflicted bodily harm—does just that, and this Court should adopt that instruction instead of Defendant's proposed instruction.

The Minnesota Supreme Court articulated the appropriate standard for the *mens rea* required for assault-harm in *State v. Dorn*, 887 N.W.2d 826 (Minn. 2016). There, the Supreme Court explained that "assault-harm requires 'only an intent to do the prohibited physical act of committing a battery,'" "without proof that [he] meant to or knew that [he] would violate the law or cause a particular result.'" *Id.* at 830 (quoting *State v. Fleck*, 810 N.W.2d 303, 308, 310 (Minn. 2012)). "The State must therefore prove that 'the blows to complainant were not accidental but were intentionally inflicted.'" *Id.* (quoting *Fleck*, 810 N.W.2d at 310). The State's proposed instruction accurately captures the *mens rea* element of third-degree assault. State Proposed Jury Instructions 5-6.[5] The Court should adopt those instructions.

Defendant's proposed instruction regarding intentional infliction of bodily harm, on the other hand, falsely suggests that the jury must find that Defendant had the specific intent to commit third-degree assault. *See* Def. Proposed Jury Instruction 8. That is wrong on the law, meaning that the jury will necessarily be misled into applying the wrong standard in assessing whether Defendant committed an assault in the third degree. *Fleck*, 810 N.W.2d at 309 (holding that assault is a general-intent crime). Because "[j]ury instructions that . . . materially misstate the law are erroneous," *Davis*, 864 N.W.2d at 176, the Court should reject Defendant's proposed instruction with respect to the *mens rea* for third-degree assault, and adopt the State's proposal.

[5] With respect to the instruction for "substantial bodily harm," the State proposed that—in addition to the standard jury instruction for "substantial bodily harm"—the jury be instructed that "[a] temporary loss of consciousness constitutes substantial bodily harm." State Proposed Jury Instructions 6. The State withdraws that proposed instruction.

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CONCLUSION

The State respectfully requests that the Court not adopt Defendant's proposed modifications to the pattern Minnesota jury instructions, and that the Court adopt the State's proposed modifications to the pattern jury instructions. The State also respectfully requests that the Court reject Defendant's additional proposed instructions regarding police officers' authority to arrest, the offense level for passing or possessing a counterfeit bill, supposed negligence on the part of Floyd, and reasonable use of force.

Dated: March 10, 2021

Respectfully submitted,

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