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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,

v.

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

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.

The State of Minnesota submits this memorandum of law in support of the State's Motions in Limine 1 through 7, filed with the Court on February 8, 2021.

## ARGUMENT

### I. DEFENDANT CHAUVIN MAY NOT IMPEACH A WITNESS WITH A STATEMENT FROM A THIRD-PARTY SUMMARY IF THE WITNESS DOES NOT ADOPT THAT DOCUMENT AS HIS OR HER PRIOR STATEMENT.

The State moves this Court to prohibit Defendant Derek Chauvin from impeaching any witness with a statement from a third-party summary—such as a report prepared by the Bureau of Criminal Apprehension (BCA) or the Federal Bureau of Investigation (FBI)—if the witness does not adopt that document as his or her prior statement.

"Extrinsic evidence of a prior inconsistent statement by a witness is" admissible to impeach the witness under only limited circumstances. Minn. R. Evid. 613(b). The impeaching party must lay "a foundation [showing] that the statements are actually inconsistent." *State v. Martin*, 614

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N.W.2d 214, 224 (Minn. 2000) (en banc) (internal quotation marks omitted); *see Carroll v. Pratt*, 76 N.W.2d 693, 697 (Minn. 1956) ("[I]t is usually necessary to lay a proper foundation first on the cross-examination of the witness to be impeached by asking him whether he made the alleged inconsistent statement, giving its substance and the time, place, and person to whom made."). The witness must have been "afforded a prior opportunity to explain or deny" or admit the inconsistency. Minn. R. Evid. 613(b); *see Martin*, 614 N.W.2d at 224. The statement must also be disclosed to opposing counsel upon request. Minn. R. Evid. 613(a).

When the statement in question appears in a summary prepared by a third party, however, another limitation applies: Unless the witness has "adopted the statement attributed to him as his own, counsel may not offer extrinsic evidence in the form of reading verbatim from a third-party summary to impeach the witness." *State v. Graham*, 764 N.W.2d 340, 352 (Minn. 2009). To be sure, "defense counsel" can "ask questions about the contents of" that summary so long as counsel complies with other applicable evidentiary constraints. *Id.* at 353. But as the Minnesota Supreme Court has explained, it would be " 'grossly unfair' to allow defense counsel to read verbatim from" a third-party summary, like a report prepared by a law enforcement official, "to impeach the witness whose statements it purported to contain, 'unless the witness has subscribed to or otherwise adopted the statement as his own.' " *Id.* (quoting *United States v. Saget*, 991 F.2d 702, 710 (11th Cir. 1993), which applied the "identical [federal] rule of evidence")).

"The purpose of a motion in limine is to prevent 'injection into trial of matters which are irrelevant, inadmissible and prejudicial.' " *Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414, 418 (Minn. App. 2003) (quoting *Black's Law Dictionary* 1013 (6th ed. 1991)). Allowing defense counsel to impeach a witness with a BCA or FBI report or other third-party summary that he or she has not adopted would be "grossly unfair." *Graham*, 764 N.W.2d at 352 (internal

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quotation marks omitted). As such, the State respectfully asks that the Court grant its motion in limine and prohibit Chauvin from impeaching any witness with a statement from a third-party summary—such as a BCA report—that the witness has not adopted as a prior statement.

## II. THIS COURT SHOULD EXCLUDE ANY TESTIMONY BY AN EXPERT WITNESS CONCERNING THE OPINION OF ANY NONTESTIFYING EXPERT HE OR SHE CONSULTED.

The State moves this Court to prevent any expert witness from testifying regarding the opinion of any other expert he or she consulted who is not testifying at trial. In particular, the State moves to exclude any statement by a testifying expert witness that a nontestifying expert reviewed, supported, or contributed to the testifying expert's opinion, analysis, or conclusions, or that a nontestifying expert agreed with the testifying expert's opinion, analysis, or conclusions.

Chauvin has given notice that he has retained experts through The Forensics Panel, and that The Forensics Panel includes several "peer reviewers." Def. Chauvin's Initial Expert Disclosures (Jan. 15, 2021). As a result, there is a significant risk that the testifying experts in this case will testify that they have consulted nontestifying experts who have reviewed, supported, or contributed to the testifying expert's analysis or conclusions, or that other nontestifying experts agree with the testifying expert's opinions, analysis, and conclusions. Such testimony is a classic example of inadmissible hearsay and should be excluded.

Under Rule of Evidence 702, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Minn. R. Evid. 702. The scope of expert testimony, however, is limited by the rules against hearsay. A statement is hearsay if it is (1) not made "while testifying

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at the trial," and (2) is "offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). "Hearsay is not admissible" unless an exception applies. Minn. R. Evid. 802.

As relevant here, the Minnesota Supreme Court has made clear that an expert's "testimony regarding the opinions of . . . nontestifying experts [is] inadmissible hearsay." *State v. Bradford*, 618 N.W.2d 782, 793-794 (Minn. 2000) (en banc), *as amended on denial of reh'g* (Oct. 25, 2000). In *Bradford*, the medical examiner who performed an autopsy on the victim testified at trial "that, in his opinion, [the victim's] death was a homicide." *Id.* at 790. But he then added that "he had consulted with other experts, who agreed with his opinion." *Id.* The Minnesota Supreme Court held that this testimony concerning the opinions of other experts was inadmissible hearsay and "did not fall into any applicable exception." *Id.* at 794. It explained that "[i]f the opinions of the nontestifying experts were to be admitted, [those] experts should have appeared and testified." *Id.*

The Minnesota Supreme Court's conclusion in *Bradford* is consistent with the other Rules of Evidence governing expert testimony. Rule 702, for instance, provides that if an expert's "opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community." Minn. R. Evid. 702. That Rule focuses on whether the expert used a "generally accepted" scientific method in reaching his or her conclusion. *Id.* But it does not give a testifying expert license to testify as to whether other nontestifying experts agree with the testifying expert's analysis, findings, or ultimate conclusions in the case at issue. *See* Minn. R. Evid. 702 Committee Comment (2006) (explaining that this standard "asks first whether experts in the field widely share the view that the results of scientific testing are scientifically reliable, and second whether the laboratory conducting the tests in the individual case complied with appropriate standards and controls" (quoting *State v. Roman Nose*, 649 N.W.2d 815, 819 (Minn. 2002) (en banc)).

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Meanwhile, as the Minnesota Supreme Court explained in *Bradford*, Rule 703(a) also does not provide a permissible basis for admitting statements from nontestifying experts. In *Bradford*, the State argued that an expert can testify to the ultimate conclusions of nontestifying experts because Rule 703(a) "permits testifying experts to base their opinion on reliable hearsay." 618 N.W.2d at 794; *see* Minn. R. Evid. 703(a) ("If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."). But the Court rejected that argument. It explained that "the comments to Rule 703(a) state that '[a]lthough an expert may rely on inadmissible facts . . . in forming an opinion, the inadmissible foundation should not be admitted into evidence simply because it forms the basis for an expert opinion.' " *Bradford*, 618 N.W.2d at 794 (quoting Minn. R. Evid. S. Ct. Advisory Committee Note). This rule is "aimed at permitting experts to base opinions" on facts and data of the sort that "experts in the particular field" rely "in forming opinions or inferences upon the subject." Minn. R. Evid. 703(a) & S. Ct. Advisory Committee Note. But this does not mean that the inadmissible facts can be admitted at trial, or that the expert can testify to those facts before the jury. The Court therefore concluded that Rule 703(a) did not allow the expert to testify at trial "that two other nontestifying experts agreed with his opinion." *Id.* at 793.

In short, in light of *Bradford*, this Court should grant the motion and prohibit any expert from testifying to the opinion of a nontestifying expert. This includes, but is not limited to, any statements by a testifying expert that a nontestifying expert reviewed, supported, or contributed to the testifying expert's analysis, findings, or conclusions, or that the testifying expert has consulted other experts who agree with the testifying expert's analysis, findings, or conclusion.

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## III. CHAUVIN SHOULD BE FORECLOSED FROM ARGUING INCORRECT LEGAL STANDARDS TO THE JURY, OR FROM PRESENTING EVIDENCE SPECIFICALLY ADDRESSED TO THESE INCORRECT STANDARDS.

The State moves this Court to prohibit Defendant Chauvin from arguing at trial (i) that the State must show that he intended to kill George Floyd or that he intended to cause bodily harm; or (2) that the State must show "but for" causation to establish the causation element of the charged offenses. The State also requests that the Court prohibit Chauvin from presenting evidence or testimony that specifically addresses whether these incorrect legal standards have been satisfied.

As this Court made clear in denying Defendants' motions to dismiss for lack of probable cause, these intent and causation standards are not elements of any of the charged offenses. Order and Mem. Op. on Defense Mots. to Dismiss for Lack of Probable Cause (Oct. 21, 2020) ("Probable Cause Op."). "The purpose of a motion in limine is to prevent 'injection into trial of matters which are irrelevant, inadmissible and prejudicial.' " *Hebrink*, 664 N.W.2d at 418 (quoting *Black's Law Dictionary* 1013 (6th ed. 1991)). Because allowing Chauvin to refer to these inaccurate standards during trial risks potentially confusing or misleading the jury, the State's motion should be granted.

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

This Court has already provided a detailed explanation of the elements for second-degree unintentional murder and second-degree manslaughter. Those charges do not require the State to prove that Chauvin intended to kill Floyd or that he intended to cause Floyd bodily harm.

"[T]o prevail on its unintentional second-degree murder charge against Chauvin," the State must prove: (i) "Floyd's death"; (ii) "that Chauvin's conduct was a substantial causal factor in Floyd's death"; and (iii) that at the time of causing Floyd's death, Chauvin "was committing or attempting to commit" another felony. Probable Cause Op. 36-37 (internal quotation marks omitted). Here, the underlying felony is third-degree assault, which requires proof that Chauvin

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(i) assaulted Floyd, meaning he "intentionally inflicted or attempted to inflict bodily harm on Floyd or intended to cause Floyd to fear immediate bodily harm or death"; and (ii) "inflicted substantial bodily harm on Floyd." *Id.* at 37. Bodily harm is defined as "physical pain or injury, illness, or any impairment of a person's physical condition." *Id.* at 52 (quoting CRIMJIG 13.02). Substantial bodily harm means "bodily harm that involves a temporary but substantial disfigurement, causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or causes a fracture of any bodily member." *Id.* at 36-37 (quoting Minn. Stat. § 609.02, subd. 7a).

Critically, assault does not "require proof of intent to inflict a certain degree of bodily harm." *State v. Gorman*, 532 N.W.2d 229, 233 (Minn. 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). As the Minnesota Supreme Court has explained, "assault-harm . . . requires only the general intent to do the act that results in bodily harm." *Dorn*, 887 N.W.2d at 830. This "only requires proof that the defendant intended to do the physical act," and does not require "proof that he meant to or knew that he would violate the law or cause" bodily harm. *State v. Fleck*, 810 N.W.2d 303, 308 (Minn. 2012) (internal quotation marks omitted). As a result, this means that 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. *Dorn*, 887 N.W.2d at 830 (quoting *Fleck*, 810 N.W.2d at 310); Probable Cause Op. 52 (quoting *Dorn* and *Fleck*). The State need not show that Defendant had "the intent to cause bodily harm." *Fleck*, 810 N.W.2d at 309. In other words, the State need not prove that Chauvin intended to kill Floyd, or that he intended to inflict bodily harm on Floyd.

The same is true with respect to second-degree manslaughter. As this Court explained, "the State need not make any showing that Chauvin intended Floyd's death to prove second-degree manslaughter." Probable Cause Op. 75 (citing *State v. Swanson*, 240 N.W.2d 822, 825 (Minn.

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1976) (en banc), which upheld a second-degree manslaughter conviction where the defendant did "not intend[ ] to kill" the victim); *accord Daniels v. State*, No. A17-0623, 2018 WL 817286, at *9 (Minn. App. Feb. 12, 2018) ("second-degree manslaughter [does not] require[ ] that the jury find that appellant specifically intended to cause [the victim's] death"). Rather, to show that Chauvin committed second-degree manslaughter, the State need only prove: (i) "Floyd's death"; and (ii) "that Chauvin caused 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." Probable Cause Op. 68.[1]

The accomplice liability theories are no different. "A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." *Id.* at 76 (quoting Minn. Stat. § 609.05, subd. 1). "Intentionally aids" means that the defendant (i) knew his alleged accomplice was committing a crime, and (ii) intended his presence or actions to further its commission. *Id.* at 76-77. To show that Chauvin is liable on an aiding-and-abetting theory, the State must show that: (i) someone committed the underlying offense; (ii) Chauvin "knew" at some point during the crime that someone else was "going to commit or was committing" that offense; and (iii) Chauvin "intended that his presence or actions aid[]" the commission of that offense. *Id.* at 79, 100.

Thus, with respect to aiding and abetting second-degree unintentional murder and manslaughter, the State must show that Chauvin knew someone else was committing the

[1] On February 4, 2021, the State filed a motion to reinstate the third-degree murder charge against Chauvin or, in the alternative, for leave to amend the complaint to include a third-degree murder charge against Chauvin. That motion remains pending. The third-degree murder charge, like the other two charges, does not require proof of intent to kill or inflict bodily harm. It requires proof that Chauvin's conduct was "eminently dangerous," "performed without regard for human life," and done in a "reckless or wanton manner with the knowledge that someone may be killed and with a heedless disregard of that happening." Probable Cause Op. 53 (quoting CRIMJIG 11.38).

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underlying offense, and that Chauvin "intended to *aid*" someone else "in the assault on Floyd." *Id.* at 83 (emphasis added). But the State does not need not to show that Chauvin intended to commit an assault, or that he intended to kill or inflict bodily harm on Floyd.

In short, as this Court's probable cause opinion confirms, none of the charged crimes require Chauvin to have the intent to kill Floyd or cause him bodily harm.

**B. The State Need Not Prove "But For" Causation.**

For the second-degree murder and second-degree manslaughter charges, the State need not prove that Chauvin's actions were the "but for" cause of Floyd's death. Instead, the State must prove only that his actions were a "substantial causal factor" in Floyd's death.[2]

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 the defendant's conduct a substantial factor in bringing about the forbidden result?" *State v. Dorn*, 875 N.W.2d 357, 362 (Minn. 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). "A defendant's actions are a substantial causal factor so long as they 'contributed to the death.' " Probable Cause Op. 38 (quoting *State v. Torkelson*, 404 N.W.2d 352, 357 (Minn. App. 1987)). The State need not "prove the specific mechanism of death," *id.* (quoting *Torkelson*, 404 N.W.2d at 357), or that the defendant's "acts were 'the sole cause of death,' " *id.* (quoting *State v. Gatson*, 801 N.W.2d 134, 148 (Minn. 2011)). Instead, the defendant's acts need only be a "proximate cause of injury," meaning the defendant's acts "cause[d] injury directly or through [a] natural sequence of events." *State v. Hofer*, 614 N.W.2d 734, 737 (Minn. App. 2000) (citing *Lennon v. Pieper*, 411 N.W.2d 225, 228 (Minn. App.

[2] The same is true for third-degree murder, which requires proof that Chauvin was a "substantial causal factor in causing the death." Probable Cause Op. 53 (internal quotation marks omitted).

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1987)). As a result, even if the defendant's actions would not have independently caused the victim's death, a defendant 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 the victim would have survived but for Chauvin's actions.

It is true, of course, that a defendant cannot be held "criminally liable if a 'superseding cause' intervenes and 'cause[s] the [victim's] death.' " Probable Cause Op. 44 (quoting CRIMJIG 11.25) (alterations in original). But this does not mean that the State must prove "but for" causation to obtain a conviction. To qualify as a "superseding cause," the event must "(1) come between the negligence and the occurrence at issue; (2) not have been brought about by the original negligence; (3) turn aside the natural sequence of events producing a result which otherwise would not have followed the original negligence; and (4) not have been foreseeable from the original negligence." *Id.* (quoting *State v. Jaworsky*, 505 N.W.2d 638, 641 (Minn. App. 1993), *rev. denied* (Minn. Sept. 30, 1993), and *In Re Welfare of C.P.W.*, 601 N.W.2d 204, 209 (Minn. App. 1999), *rev. denied* (Minn. Nov. 23, 1999)). Thus, only an event that occurs "after the defendant's acts," was "in no way caused by defendant's actions," "alters the natural sequence of events," and was "the sole cause of the victim's death" can break the causal chain. *Id.* at 45 (internal quotation marks and brackets omitted). In other words, even if the defendant shows that the death might have occurred based on other causes, that alone is not enough to break the causal chain.

Accordingly, none of the charged crimes require the State to show "but for" causation. The "substantial causal factor" test is satisfied so long as the State proves that Chauvin's actions contributed to that result, even if another event contributed to it, too.

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### C. Chauvin Should Be Prohibited From Arguing These Erroneous Legal Standards To The Jury.

Because the State need not show that Chauvin intended to kill or inflict bodily harm on Floyd, and because the State need not establish "but for" causation, this Court should prohibit Chauvin from making reference to any such requirements at trial. This includes, but is not limited to, his opening and closing statements, and his examination of witnesses. This Court should likewise prohibit Chauvin from presenting any evidence or eliciting testimony that is specifically addressed toward whether those incorrect legal standards have been satisfied.

Motions in limine prevent the parties from raising "irrelevant, inadmissible and prejudicial" matters at trial that might mislead the jury. *Hebrink*, 664 N.W.2d at 418 (internal quotation marks omitted). Allowing Chauvin to claim that the State must show that he intended to kill or inflict bodily harm on Floyd is legally erroneous, and would confuse the jury with respect to the applicable legal standard for the charges here. *See supra* pp. 6-9. The same is true with respect to causation. As explained, the State need not show that Floyd would have survived but for Chauvin's actions; it is sufficient to show that Chauvin's actions substantially contributed to Floyd's death, even if some other event also contributed to it. *See supra* pp. 9-10.

Chauvin therefore should be prohibited from making any statements or arguments at trial suggesting that an incorrect legal standard applies. This includes, for example, arguments that Chauvin is not liable because he "did not intend to kill Floyd" or "did not intend to cause Floyd harm." *See, e.g.*, Mem. Of Law in Support of Def.'s Mot. to Dismiss 9 (Aug. 28, 2020) (arguing that the motion to dismiss should be granted because Chauvin did not "possess[] the intent to inflict bodily harm upon Mr. Floyd"). This also includes arguments that Chauvin's actions were not the "but for" cause of Floyd's death, that the State must prove that Floyd would have survived without Chauvin's actions, that the State must show that Chauvin's actions were the sole cause of Floyd's

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death, or that the State must prove that other causes or pre-existing conditions did not contribute to his death. *See, e.g.*, *id.* at 22-24 (suggesting that Floyd would not have died but for his alleged decision to ingest certain substances prior to his death and his alleged underlying health problems). Allowing Chauvin to make these erroneous statements "runs the high risk of making the jury believe there is an inapplicable standard." *Peterson v. City of Isle*, No. 48-CV-15-920, 2018 WL 4519599, at *2 (Minn. Dist. Ct. Aug. 02, 2018) (granting motion in limine to exclude reference to certain "legal standards and guidelines"); *Brandt v. W. Wis. Med. Ass'n*, No. C5053091, 2006 WL 3191785 (Minn. Dist. Ct. June 19, 2006) (granting motion in limine to limit counsel to asking questions and eliciting testimony on the correct legal standard).

By a similar token, Chauvin should not be permitted to introduce evidence or elicit testimony that specifically addresses whether these incorrect legal standards have been satisfied. This includes, but is not limited to, any testimony opining on whether other causes or pre-existing conditions were "but for" causes of Floyd's death, or any testimony suggesting that there is insufficient evidence to conclude that Floyd would have survived absent Chauvin's actions. This also includes testimony concerning whether Chauvin's conduct reflects an intent to kill Floyd or cause Floyd bodily harm. Any such evidence does not comport with the applicable legal standards, and therefore risks confusing the jury regarding the elements of the charged offenses. *See* Minn. R. Evid. 403 (allowing the court to exclude evidence that, if admitted, would "confus[e] . . . the issues, or mislead[ ] the jury"); *City of Moorhead v. Red River Valley Coop. Power Ass'n*, No. 14-CX-06-2515, 2010 WL 8399800 (Minn. Dist. Ct. Mar. 30, 2010) (granting motion in limine to exclude evidence irrelevant to the appropriate legal standard).

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Thus, the Court should grant the motion and prohibit Chauvin from arguing these inaccurate legal standards to the jury, and from introducing evidence or eliciting testimony that specifically addresses whether these incorrect legal standards have been satisfied.

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

The State moves the Court to exclude any argument, evidence, or testimony regarding the Minneapolis Police Department's (MPD's) decision-making process in terminating Chauvin's employment as an MPD officer. The State also moves the Court to exclude any argument, evidence, or testimony suggesting that MPD may face civil liability stemming from George Floyd's death. To the extent the Court determines that evidence on these topics may be admissible for the limited purpose of attempting to show bias on the part of testifying witnesses, the State respectfully requests that the Court limit evidence on such "extraneous matters" because it could lead to "decision making on an improper basis," "confusion of the issues," and "cross-examination that is . . . only marginally relevant." *State v. Lanz-Terry*, 535 N.W.2d 635, 641 (Minn. 1995).

### A. Factual Background

George Floyd died on May 25, 2020. The next day, Defendant Chauvin and his co-defendants—J. Alexander Kueng, Thomas Lane, and Tou Thao—were fired by MPD.

On July 15, 2020, Floyd's family filed a civil action under 42 U.S.C. § 1983 against Chauvin and his co-defendants, as well as the City of Minneapolis. *See* Compl., *Schaffer v. Chauvin*, No. 20-cv-01577-SRN (D. Minn. July 15, 2020). MPD is not identified as a defendant in that action. Nor is any current MPD employee. Instead, the suit alleges that City officials failed

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to properly train Chauvin, Kueng, Lane, and Thao, and promulgated policing policies "that failed to provide for the safety of arrestees, detainees, and the like during arrest." *Id.* ¶¶ 221-261.

### B. Chauvin Should Be Precluded From Eliciting Evidence Or Testimony Regarding MPD's Decision-Making Process When It Terminated Him.

1. This Court should preclude Chauvin from presenting argument, evidence, and testimony related to MPD's decision-making process in terminating his employment. In his motion to dismiss the complaint, Chauvin referenced his termination, and then suggested that the decision was based on community pressure and was rushed. *See* Memo. of Law in Support of Def.'s Mot. to Dismiss 6 (Aug. 28, 2020) ("Mot. to Dismiss"). He should not be permitted to make the same arguments at trial. 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 Chauvin's employment is not relevant to the elements of the charged offenses and Chauvin's defenses. "Evidence must be relevant to be admissible, and there is no constitutional right to present irrelevant evidence." *State v. Thiel*, 846 N.W.2d 605, 615 (Minn. App. 2014); *see also* Minn. R. Evid. 402. To be relevant, evidence must have some "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401.

Here, Chauvin is charged with second-degree unintentional murder, Minn. Stat. § 609.19, subd. 2(1), and second-degree manslaughter, Minn. Stat. § 609.205(1). To prove that Chauvin is guilty of second-degree unintentional murder, the State must prove at trial: (i) Floyd's death; (ii) that Chauvin's conduct was a "substantial causal factor" in Floyd's death; (iii) that Chauvin intentionally inflicted bodily harm upon the victim; and (iv) that Chauvin caused Floyd "substantial bodily harm." Order and Mem. Op. on Def. Mots. to Dismiss for Lack of Probable

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Cause 37 (Oct. 21, 2020) ("Probable Cause Op."). And to prove that Chauvin is guilty of second-degree manslaughter, the State must prove at trial: (i) Floyd's death; and (ii) "that Chauvin caused Floyd's death by culpable negligence, whereby Chauvin created an unreasonable risk and consciously took a chance of causing death or great bodily harm." *Id.* at 68.[3]

The decision-making process that culminated in Chauvin's firing has no bearing on any of the elements of the charged offenses. Why and how MPD decided to terminate Chauvin and the other officers after the incident with Floyd does not affect, for example, whether Chauvin's conduct was a "substantial casual factor" in Floyd's death. Nor does MPD's process for making personnel decisions have any bearing on whether Chauvin had the requisite *mens rea* to be convicted of these charges. MPD's process for terminating Chauvin the day after Floyd's death does not in any way illuminate his mental state during his encounter with Floyd.

For similar reasons, MPD's decision-making process is also not relevant to any of Chauvin's defenses. In his motion to dismiss for lack of probable cause, Chauvin argued that Floyd's drug usage and preexisting conditions caused his death. *See* Mot. to Dismiss 22-23. MPD's internal decision-making process in firing Chauvin, of course, has no bearing on what role, if any, these purported factors played in causing Floyd's death. Chauvin also argued in his motion to dismiss that his use of force was reasonably justified. *See* Mot. to Dismiss 14. But whether Chauvin's use of force was reasonable is an objective inquiry based on the circumstances that existed at the time of the incident. MPD's internal personnel decisions, which occurred after

[3] As noted, the State's motion to reinstate the third-degree murder charge against Chauvin or, in the alternative, for leave to amend the complaint against Chauvin to include that charge remains pending. *See supra* p. 8 n.1. To prove that Chauvin is guilty of third-degree murder, the State must show at trial: (i) Floyd's death; (ii) that Chauvin caused Floyd's death; and (iii) that Chauvin's conduct was "eminently dangerous to other persons and was performed without regard for human life." Probable Cause Op. 53 (quoting CRIMJIG 11.38).

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Chauvin's actions and Floyd's death, have little bearing on that inquiry. Rather, the jury must answer that question independently based on the extensive video evidence, eyewitness testimony, and testimony regarding MPD's use-of-force policies at trial.

*Second*, even if evidence and testimony related to MPD's decision-making process in firing Chauvin were relevant, that evidence 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.

Here, evidence and testimony regarding MPD's internal decision-making process in terminating Chauvin's employment carries the "potential to cause unfair prejudice." *Harris*, 521 N.W.2d at 352. "'Unfair prejudice' includes an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Bott*, 246 N.W.2d 48, 53 n.3 (Minn. 1976). That risk is certainly present here. In his motion to dismiss for lack of probable cause, for instance, Chauvin alleged that Minneapolis Police Chief Medaria Arradondo decided to terminate Chauvin "after conferring" with "several local faith leaders . . . from the African American community," and that Chauvin was fired "less than 24 hours after the incident." Mot. to Dismiss 6 (internal quotation marks omitted). The implication is that Chauvin's termination was not based on the evidence, and that it reflected a rush to judgment.[4] On that basis, Chauvin may improperly seek to elicit the jury's sympathy for Chauvin, or to suggest that he was unfairly

[4] That, of course, is not true. Nonetheless, the risk of unfair prejudice to the jury is no less significant if the evidence regarding MPD's decision-making process reflects that MPD's decision to terminate Chauvin was carefully considered and based on the evidence. There is a risk that jurors may improperly use MPD's decision to terminate Chauvin as a proxy for his guilt. After all, police departments are tasked with investigating crimes and occupy a position of public trust. That may cause jurors to conclude that MPD's decision-making process, and Chauvin's ultimate termination, is a reflection of Chauvin's guilt. For that reason, as well, any evidence regarding MPD's decision-making process in terminating Chauvin is likely to be unfairly prejudicial.

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fired. That line of argument, of course, has no bearing on whether Chauvin's conduct satisfies the elements of the charged offenses. Such arguments and evidence, in other words, have "an undue tendency to suggest decision on an improper basis." *Bott*, 246 N.W.2d at 53 n.3.

Such arguments and evidence also risk "confus[ing] the issues" and "misleading the jury." Minn. R. Evid. 403. Evidence and testimony regarding MPD's decision-making process may suggest to the jury that it should decide this case based on whether Chauvin's firing was justified, or whether his firing was an adequate punishment for his offense. Again, those factors have nothing to do with whether Chauvin's conduct satisfied the elements of the charged offenses. Admitting evidence and testimony regarding MPD's decision-making process therefore risks muddying the waters for the jury and distracting it from its primary task: adjudicating Chauvin's guilt based on the admissible direct and circumstantial evidence related to Floyd's death.

2. In light of these dangers, 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. 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. App. Aug. 31, 2020) (quoting *Lanz-Terry*, 535 N.W.2d at 640). Moreover, in considering whether to restrict cross-examination aimed at showing bias, the court must examine whether the jury has "sufficient other information to make a 'discriminating appraisal' of the witness's [purported] bias or motive to

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fabricate." *Lanz-Terry*, 535 N.W.2d at 641 (quoting *United States v. Hinton,* 683 F.2d 195, 200 (7th Cir.1982)). If the jury does, the court can limit cross-examination on the subject. *Id.* 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) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, (1986)).

Here, the Court should not permit defense counsel to impeach witnesses by attempting to elicit testimony concerning MPD's internal decision-making process in firing Chauvin. 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 Chauvin's firing from MPD, and asking those witnesses whether they played a role in that decision. If the Court permits defense counsel to ask MPD witnesses about the *fact* of Chauvin's termination, it should not permit examination regarding the specific *process* MPD uses to make personnel decisions. Informing the jury of the fact of Chauvin's termination and whether the witness played any role in that decision 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 *Hinton,* 683 F.2d at 200). The *internal process* MPD uses to make personnel decisions, by contrast, is not even "marginally useful" in probing the purported bias of individual MPD witnesses. *Id.* at 640. That human-resources process—for instance, the procedures MPD followed in terminating Chauvin, and how MPD makes personnel decisions after a use-of-force incident—has nothing to do with whether the "attitudes, feelings, or emotions" of a particular witness "might affect her testimony." *Id.* (internal quotation marks omitted).

Moreover, as noted, such questioning carries a significant risk of "prejudice" and "confusion of the issues." *Brown*, 739 N.W.2d at 720 (quoting *Van Arsdall*, 475 U.S. at 679); *see*

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*supra* pp. 16-17. In light of defense counsel's previous arguments regarding the MPD's internal decision-making process, such questioning has "an undue tendency to suggest decision on an improper basis." *Bott*, 246 N.W.2d at 53 n.3; *see supra* pp. 16-17. And questioning witnesses about MPD's internal process is likely to confuse the jury, creating the possibility that it will improperly consider whether Chauvin's firing was justified, whether his firing complied with MPD's personnel policies, or whether his firing was an adequate punishment. *See supra* p. 17.[5]

In short, this Court should preclude argument, evidence, and testimony regarding MPD's decision-making process in connection with Chauvin's termination, and it should not permit defense counsel to examine witnesses on MPD's decision-making process to show purported bias.

### C. Chauvin Should Be Precluded From Arguing or Introducing Evidence Suggesting That MPD May Face Civil Liability Related To Floyd's Death.

1. This Court should also preclude Chauvin from arguing, introducing evidence, or eliciting testimony suggesting 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.

*First*, the City's potential exposure to civil liability is not relevant to this case 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. Whether the City is civilly liable has no bearing on Chauvin's guilt or innocence. *See State v. Yeazizw*, No. CX-02-1486, 2003 WL 21789013, at *9 (Minn. App. Aug. 5, 2003) (holding that evidence of a parallel civil lawsuit "was not probative of any of the facts in the criminal case"); *cf. State v.*

[5] In light of these risks, to the extent this Court permits defense counsel to ask questions regarding MPD's decision-making process in terminating Chauvin, it should provide a limiting instruction that directs 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. App. Dec. 23, 2019) (noting that the district court gave a "limiting instruction direct[ing] the jury that it could only use the evidence to assess the credibility of [the witness's] testimony").

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*Nelson*, No. C8-98-1920, 1999 WL 993975, at *2 (Minn. App. Nov. 2, 1999) (finding evidence of separate civil suit relevant only because it could prove a charged element in the criminal proceeding). Civil liability must be evaluated under a different legal standard, in a different proceeding. Because this evidence is not relevant, it is not admissible. *Thiel*, 846 N.W.2d at 615.

*Second*, evidence regarding the City's potential civil liability is unduly prejudicial. Prejudice refers to the "unfair advantage that results from the capacity of the evidence to persuade by illegitimate means." *State v. Harris*, 560 N.W.2d 672, 678 (Minn. 1997) (internal quotation marks omitted). 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. Here, evidence or testimony about a separate civil lawsuit might lead the jury to assume that Chauvin is guilty. Alternatively, it might lead the jury to conclude that criminal liability is not appropriate because Chauvin might be subject to civil liability. Or the jury might believe that, because there is a pending civil lawsuit, the State has an untoward interest in seeing Chauvin convicted. All of this risks misleading the jury and distracting it from the critical inquiry in this case—namely, whether Chauvin's conduct satisfies the elements of the charged offenses. 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 pending civil lawsuit. 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. App. 1986),

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neither is true here. As far as the State is aware, no MPD official is contemplating a civil action for damages against Chauvin, and no such action is currently pending.

Moreover, because evidence regarding the pending civil lawsuit 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* potential exposure in the separate civil suit is largely irrelevant to whether *MPD* itself might potentially be exposed to civil liability. That is because it is the City, not MPD, that is subject to suit under Section 1983. *See Ketchem v. City of West Memphis*, 974 F.2d 81, 82 (8th Cir. 1992) (explaining that as a "department[] or subdivision[] of the City government," City police departments are not subject to suit under § 1983). The City's potential exposure 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 Chauvin. In fact, if anything, the presence of a separate civil suit against the City would arguably suggest that the MPD witnesses might be inclined to favor the *defense*: The City is a co-defendant with Chauvin, and a guilty verdict here might make it more—not less—difficult for the City to prevail in the civil suit. Thus, the civil suit is not probative of the bias of testifying MPD officers.

In addition, for the reasons noted above, examination regarding the civil suit carries a significant risk of "prejudice" and "confusion of the issues." *Brown*, 739 N.W.2d at 720; *see supra* p. 20. The existence of the civil suit might prompt jurors to believe that civil liability is an adequate punishment, or it might prompt them to treat the existence of the civil suit as an additional reason to deem Chauvin guilty. Either way, eliciting testimony regarding the civil suit risks prompting the jury to decide this case "on an improper basis." *Bott*, 246 N.W.2d at 53 n.3. That risk reinforces the strong need to prevent such cross-examination.

To the extent the Court disagrees, the State respectfully requests that the Court limit the

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evidence and argument defense counsel can offer on the civil suit. Specifically, because this evidence is at best "marginally useful" only for the limited purpose of showing that a separate civil proceeding exists, the Court should preclude the presentation of any evidence and argument on this subject that goes beyond showing the fact that there is a separate civil suit. The Court should limit any other potential use of this information or further mentions of pending civil liability to avoid, "among other things, harassment, prejudice, confusion of the issues," and "interrogation that is . . . only marginally relevant." *Brown*, 739 N.W.2d at 720 (quoting *Van Arsdall*, 475 U.S. at 679). And it should provide the jury with a limiting instruction that directs the jury to use the evidence only for the limited purpose of assessing the witness's credibility. *See supra* p. 19 n.5. The Court should therefore exercise its discretion to impose clear limits on defense counsel's impeachment of MPD or other witnesses based on the City's potential exposure to civil liability.

Thus, for the foregoing reasons, the Court should grant the motion, exclude any argument, evidence, or testimony regarding MPD's internal decision-making process in connection with Chauvin's firing, and exclude any argument, evidence, or testimony suggesting that MPD may face civil liability stemming from George Floyd's death.

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

The State moves to exclude any argument or evidence regarding changes that were made after May 25, 2020 to the Minneapolis Police Department (MPD) Policy and Procedure Manual or any other MPD training documents. Such evidence is inadmissible under Minnesota Rule of Evidence 403 because its probative value is low and is substantially outweighed by the potential danger that this evidence will cause unfair prejudice, confuse the issues, or mislead the jury. That conclusion, moreover, is reinforced by the rationale underlying Minnesota Rule of Evidence 407,

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which is a specific application of Rule 403's balancing test and makes clear that subsequent remedial measures are not admissible to establish a defendant's liability or culpability. *See* Minn. R. Evid. 407 Committee Comment (1989). The "policy considerations" underlying Rule 407 apply with full force here, and demonstrate that the Court should exclude any evidence regarding changes to MPD policies and training materials that postdate Floyd's death. *See* Minn. R. Evid. 407, Committee Comment (1989). This Court should therefore grant the motion.

**A. Factual Background**

At the time of Floyd's death on May 25, 2020, the MPD Policy and Procedure Manual provided that officers may use only "the amount of force that is objectively reasonable in light of the facts and circumstances known to that employee at the time force is used," and their use of force must "be consistent with current MPD training." Ex. 1 to State's Resp. to Chauvin Mot. to Dismiss, MPD Policy & Procedure Manual 5.301.01 ("May 25 Policy"). Among other things, the Manual provided that officers cannot use a "neck restraint"—"[d]efined as compressing one or both sides of a person's neck with an arm or leg"—"against subjects who are passively resisting." *Id.* at 5-311(I), (II)(C). It provided that "[a]n officer who has used a neck restraint or choke hold shall inform" emergency medical personnel "accepting custody of the subject[] that the technique was used on the subject." *Id.* at 5-311(II)(D)(2). And it provided that officers must render medical aid when their use of force necessitates it. All officers who "use[] force shall," "[a]s soon as reasonably practical," "determine if anyone was injured and render medical aid consistent with training and request Emergency Medical Service (EMS) if necessary." *Id.* at 5-306.

Since May 25, 2020, MPD has revised several aspects of its Policy and Procedure Manual. Over the course of several months, MPD made dozens of changes to its policies across a wide range of substantive issues, ranging from the use of force to sexual assaults to eyewitness

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identification to body-worn camera procedures. With respect to the use of force, the newly revised policy provides, among other things, that "Neck Restraints and choke holds are prohibited." *See* MPD Policy and Procedure Manual 5.302(II)(K), http://www2.minneapolismn.gov/police/policy/mpdpolicy_5-300_5-300 (last updated Dec. 22, 2020) ("Current MPD Policy & Procedure Manual"). It revises the language on the duty to intervene, adding the statement that "[r]egardless of tenure or rank, any sworn employee who observes another employee use any prohibited force . . . must attempt to safely intervene," and removing the prior statement that "[i]t shall be the duty of every sworn employee present at any scene where physical force is being applied to either stop or attempt to stop another sworn employee when force is being inappropriately applied." *Id.* at 5-301(III)(C)(2); *see* May 25 Policy 5-303.01(B). It expands the definitions for certain terms, such as "de-escalation," "passive resistance," and "active resistance." Current MPD Policy & Procedure Manual 5-301(II). And it adds detailed reporting requirements for all use-of-force incidents, including a report regarding any de-escalation efforts. *Id.* at 5-301(IV)(B).

### B. Evidence That MPD Revised Its Policies And Training Materials After May 25, 2020 Is Inadmissible Under Rule 403.

Under Rule 403, evidence "may be excluded if its 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." Minn. R. Evid. 403. Applying that test, this Court should not allow evidence and argument regarding changes MPD has made to its policies and training materials since May 25.

1. Evidence that MPD revised its policies after the death of George Floyd has little probative value in determining whether Chauvin committed the charged offenses on May 25.

MPD's policies and training materials *in effect at the time of Floyd's death* are relevant to proving the elements of the charged offenses in two critical respects. *First*, as the Minnesota Court

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of Appeals has explained, contemporaneous law enforcement policy manuals can be "relevant to prove . . . *mens rea*." *State v. Gruber*, 864 N.W.2d 628, 637 (Minn. App. 2015). For example, if the jury believes that Chauvin deviated from his training or from MPD policy, it may conclude that Chauvin had the requisite intent for the second-degree murder charge, or that Chauvin's actions were objectively grossly negligent and subjectively reckless, as is necessary for a conviction on the second-degree manslaughter charge. *See* Probable Cause Op. 42 ("Chauvin's training also reinforces . . . that he intended to inflict bodily harm on Floyd."); *id.* at 69-70 (noting that Chauvin's failure to comply with his training was "evidence of culpable negligence").[6] *Second*, contemporaneous law enforcement policy and training materials are relevant to whether Chauvin's use of force was "reasonable" based on the facts and circumstances as they existed at the time of Floyd's death. *See* Minn. Stat. § 609.06; *Graham v. Connor*, 490 U.S. 386, 396 (1989) ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene."); *see also* Probable Cause Op. 73 (discussing MPD policies in concluding that Chauvin's reasonable use of force defense does not defeat probable cause).

Those arguments all depend, however, on the MPD policies that were *actually in place* prior to and on the date of Floyd's death, not the policies in effect after Floyd's death. The jury must decide whether Chauvin possessed the relevant intent on May 25, and whether his actions were reasonable at that time. To answer those questions, the jury must rely on the policies on which Chauvin was actually trained, and the policies that were actually in effect on May 25. To

[6] As noted, the State's motion to reinstate the third-degree murder charge against Chauvin or, in the alternative, for leave to amend the complaint against Chauvin to include that charge remains pending. *See supra* p. 8 n.1. As is true of the other two charges, deviations from MPD policy or training can show the requisite *mens rea* for third-degree murder—namely, that the actions were performed in a "reckless or wanton manner with the knowledge that someone may be killed and with a heedless disregard of that happening." Probable Cause Op. 53 (quoting CRIMJIG 11.38).

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be sure, Chauvin may attempt to identify alleged inconsistencies in the policies on which he was trained that, in his view, demonstrate that his conduct was reasonable and authorized. But the jury must look to that evidence—and that evidence alone—to determine whether he had the requisite *mens rea*, and to determine whether his actions were unreasonable.

Moreover, the fact that MPD later updated its policies is also only minimally probative of whether Chauvin was in compliance with those policies as of May 25. For example, although MPD changed its policy to bar the use of neck restraints in the summer of 2020, *see supra* p. 24, that has no bearing on whether a neck restraint was authorized as of May 25 in the particular circumstances of this case. After all, a new policy expressly barring neck restraints hardly means that the old policy uniformly *allowed* neck restraints. *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). MPD's change in the policy regarding neck restraints also has no bearing on whether—even if a neck restraint may have been authorized as of May 25—Chauvin's particular use of force against Floyd was reasonable. Indeed, as the State intends to show at trial, Chauvin's conduct was plainly unauthorized under then-prevailing MPD policy, and Chauvin's use of force was plainly unreasonable under the circumstances.

The fact that MPD later updated its policies also is not probative of whether the policies were unclear at the time of Floyd's death. Police departments change their policies all the time, for reasons that have nothing to do with whether the policy in question was clear. A police department might seek to update its training manuals or policies as part of a regular review; to reinforce an already clear mandate; to incorporate community or officer feedback; to correct a perceived or actual culture issue within the police force; to restrict a previously permitted practice;

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or to reflect the availability of new technology or resources, like body-worn or dashboard cameras. Indeed, the large number of changes MPD has made to its Policy and Procedure Manual since May 25—many of them bearing no connection whatsoever to the issues in this case—suggest that MPD may have had a variety of reasons for revising the Manual. *See supra* pp. 23-24. As a result, these revisions do not mean that the old policy was unclear, or that it authorized Chauvin's actions.

Simply put, the question here is whether Chauvin violated the law on May 25. Evidence that MPD later updated its training policies is only minimally probative on that issue.

2. The risks associated with admitting evidence that MPD changed its policies heavily outweigh any slight probative value that evidence might have. Admitting this evidence would be unfairly prejudicial, confuse the issues, mislead the jury, and unduly delay the trial.

Admitting this evidence poses a substantial "danger of unfair prejudice." Minn. R. Evid. 403. In this context, "prejudice . . . refers to the unfair advantage that results from the capacity of the evidence to persuade [the jury] by illegitimate means." *State v. Garland*, 942 N.W.2d 732, 748 (Minn. 2020) (brackets in original) (internal quotation marks omitted). Evidence of changes to MPD policy is likely to prompt the jury to draw the unfairly prejudicial (and incorrect) inference that these changes are tantamount to a concession by MPD that Chauvin's actions were authorized under the old version of the policy. Indeed, such evidence may "illegitimate[ly]" "persuade" the jury that MPD is at fault for failing to make these policy changes sooner, and that MPD—not Chauvin—therefore should bear responsibility for Floyd's death. *Id.* (internal quotation marks omitted); *see Columbia & P. S. R. Co. v. Hawthorne*, 144 U.S. 202, 207 (1892) ("the taking of such precautions against the future is not to be construed as an admission of responsibility for the past," and "has no legitimate tendency to prove that the [party] had been negligent before the accident happened"). Moreover, if the Court admits evidence on the changes to MPD policies, the

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jury may be persuaded "illegitimate[ly]" to draw a conclusion about the policies in effect on May 25—and about Chauvin's liability—based on circumstances known to no one at that time.

Evidence that MPD updated its policies after Floyd's death also risks confusing the issues and misleading the jury. The issue is not what MPD's policies could have said on May 25, or what they say now. It is what MPD's policies said on May 25, and whether Chauvin complied with the policies and his 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 Chauvin's death. Admitting such evidence thus risks putting MPD—rather than Chauvin—on trial, needlessly confusing the critical issues for the jury. Some jurors also may be misled into believing that MPD changed its policies because Chauvin's conduct was authorized by MPD policy as of May 25, 2020. But the only way to determine what was permissible as of May 25 is to look at the policies in effect as of that date. Whether MPD sought to later update its policies is immaterial to that question.

Finally, admitting this evidence would not be in the interests of judicial economy, and would unduly prolong what is already likely to be a lengthy trial. This Court has allotted four weeks to present substantive evidence in this case. The State intends to call numerous witnesses and present extensive evidence regarding the events of May 25. Requiring it to also explain what changes to MPD policy were made after May 25, the impetus for each change, and why each change is unrelated to or has no bearing on Chauvin's criminal liability will unnecessarily complicate and delay an already complex and long trial. Because evidence regarding the updated policies has no bearing on Chauvin's training at the time of the incident, it should be excluded.

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In short, because the probative value of MPD's post-May 25 changes to its policies is substantially outweighed by the risks associated with admitting this evidence, the State respectfully requests that the Court exclude this evidence under Rule 403.

### C. Rule 407 Reinforces That Evidence Regarding Changes To MPD Policies After May 25, 2020 Is Inadmissible Under Rule 403.

That conclusion is also reinforced by the rationale underlying Rule 407, which prohibits the introduction of subsequent remedial measures to demonstrate liability. Unlike the typical Rule 407 case in which the plaintiff seeks to introduce evidence of defendant's subsequent remedial measures to show defendant's civil liability, the defendant here may seek to introduce evidence of MPD's subsequent measures to negate his own criminal liability. Even so, Rule 407 remains instructive in applying Rule 403's probative value and unfair prejudice balancing test. That is because, like its nearly identical federal counterpart, Rule 407 is just a "concrete application[]" of Rule 403's balancing test, and reflects that such measures rarely warrant admission under Rule 403. *See* Fed. R. Evid. 403, Advisory Committee Notes—1972 Proposed Rules; *see* Minn. R. Evid. 407 Committee Comment (2006) (noting that Minnesota Rule 407 "comes from Fed. R. Evid. 407").[7] Here, the rationale of Rule 407 clearly reflects that the probative value of such subsequent measures is slight compared to the danger of unfair prejudice, and that admitting such evidence may discourage police departments from changing their policies. This reinforces that evidence regarding changes to MPD policy should not be admitted into evidence.

1. Rule 407 states: "When, after an injury or harm allegedly caused by an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of

[7] In light of the nearly identical text of Minnesota Rule 407 and its federal counterpart, Minnesota courts have relied on federal case law in interpreting Minnesota Rule 407. *See Dahlbeck v. DICO Co.*, 355 N.W.2d 157, 165 (Minn. App. 1984).

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the subsequent measures is not admissible to prove . . . culpable conduct." Minn. R. Evid. 407. Such evidence may be admissible, however, "when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." *Id.*

Although Rule 407 most commonly applies to civil cases, the Rule is also applicable to criminal cases. The Rules of Evidence "apply to all actions and proceedings in the courts of this state," including criminal cases. Minn. R. Evid. 1101(a); *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."). When the legislature sought to limit the Rules of Evidence to particular types of cases, it said so expressly. For example, Rule 1101(b) provides that the Rules of Evidence do not apply to some types of proceedings, like grand jury proceedings and proceedings for extradition or rendition. And Rule 804(b) identifies hearsay exceptions, some of which apply only "[i]n a civil proceeding," and some of which apply only in "[i]n a criminal proceeding." Rule 407, by contrast, contains no such limitations. *Cf. United States v. Pac. Gas & Elec. Co.*, 178 F. Supp. 3d 927, 951 (N.D. Cal. 2016) (holding that while Federal Rule 407 "may more often find application in civil cases, 'neither harm nor injury are exclusively civil matters' " (quoting *United States v. DSD Shipping, A.S.*, No. 15-00102-CG-B, 2015 WL 5722805, at *1 (S.D. Ala. Sept. 29, 2015))).

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. As the Minnesota Supreme Court Advisory Committee noted, "subsequent repairs are frequently not indicative of past fault," and therefore have little probative value. Minn. R. Evid. 407 Committee Comment (1989). Indeed, "such evidence is irrelevant or has such minimal probative value that the costs of admitting such evidence outweigh the benefits." 23 Charles Alan Wright, Arthur R. Miller & Kenneth W. Graham, Jr.,

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Federal Practice and Procedure: Evidence § 5282 (2d ed. 2020 update) ("Fed. Prac. & Proc. Evid."). After all, "the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the [party] had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against [that party]." *Hawthorne*, 144 U.S. at 207.

*Second*, the Rule is based on "policy considerations aimed at encouraging people" to implement remedial measures after a victim suffers harm. Minn. R. Evid. 407, Committee Comment (1989). 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). "[A]dmitting that evidence," in other words, "may discourage activity that might prevent future harm." 23 Fed. Prac. & Proc. Evid. § 5282. Thus, Rule 407 broadly excludes such remedial measures for policy reasons. In so doing, this rule "[b]etter protect[s] . . . the public by encouraging" the correction of perceived issues "without fear that the corrections will be used . . . to raise the inference" of fault. *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 98 (Minn. 1987).

2. Both rationales for Rule 407's exclusion of subsequent remedial measures reinforce that evidence regarding changes to MPD's policies after May 25 is inadmissible.

*First*, because the probative value of subsequent remedial measures is outweighed by the danger for unfair prejudice, evidence regarding changes to MPD's policies after Floyd's death plainly fails the Rule 403 balancing test. *See supra* pp. 24-28. The changes to MPD's policies are "not indicative of past fault" in MPD's prior policies and cannot be "construed as an admission of responsibility for the past." Minn. R. Evid. 407 Committee Comment (1989); *Hawthorne*, 144 U.S. at 207. Thus, these changes cannot be taken to suggest that Chauvin's conduct was authorized

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under the prior policies. *See supra* pp. 25-26. Moreover, such evidence is "calculated to distract the minds of the jury from the real issue"—Chauvin's liability—"and to create a prejudice against" MPD instead. *Hawthorne*, 144 U.S. 207. That, too, strongly shifts the balance in favor of excluding this evidence. In short, the rationale underlying Rule 407 confirms what was already clear: The probative value of evidence regarding changes to MPD's policies is "minimal," and "the costs of admitting such evidence outweigh the benefits." 23 Fed. Prac. & Proc. Evid. § 5282.

*Second*, the same "policy considerations aimed at encouraging" remedial measures support the exclusion of evidence regarding changes to MPD's policies and training materials after May 25. Minn. R. Evid. 407 Committee Comment (1989). Admitting this evidence would discourage police departments from updating their policies and training procedures, as these departments may fear that other litigants could use such changes to impose liability (as in a civil case) or evade liability (as in a criminal case). That would harm public safety and "would be plainly against public policy." *Jackson*, 2017 WL 3336607, at *4. Excluding evidence of changes to MPD policies following Floyd's death is therefore essential to "protect[] . . . the public," as it would encourage departments to modify and improve their policies "without fear that the corrections will be used . . . to raise the inference" of fault. *Kallio*, 407 N.W.2d at 98.

Thus, even though this is not a typical Rule 407 case, *see supra* p. 29, the underlying rationales for Rule 407's exclusion of subsequent measures apply with exactly the same force here as in a typical case: The police department's subsequent measures are minimally probative and highly prejudicial, and admitting this evidence would harm public safety and violate public policy.[8] This Court, however, does not need to decide whether Rule 407 independently bars the

[8] None of Rule 407's limited exceptions allowing the admission of subsequent remedial measures apply here, either. Rule 407 permits the introduction of subsequent remedial measures for only limited purposes, including "proving ownership, control, or feasibility of precautionary measures."

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admission of this evidence. Because Rule 407 is just a "concrete application[]" of Rule 403's balancing test for probative value and prejudice, Fed. R. Evid. 403, Advisory Committee Notes—1972 Proposed Rules, the Court should simply exclude this evidence under Rule 403.

For the foregoing reasons, the State respectfully requests that the Court grant the motion and exclude any evidence that MPD updated its training manuals or policies after May 25, 2020.

## VI. THIS COURT SHOULD PROHIBIT CHAUVIN FROM INTRODUCING INTO EVIDENCE THE DOCUMENTS LABELED BATES 002566 THROUGH 002606 UNLESS HE CAN LAY A PROPER FOUNDATION FOR THEIR ADMISSION.

The State moves this Court to prohibit Chauvin from introducing into evidence the documents labeled Bates 002566 through 002606—a series of slides entitled "Excited Delirium Syndrome"—unless Chauvin can lay a proper foundation for their admission.

In particular, Chauvin is likely to rely at trial on one slide, labeled Bates 002596 and titled "Ok they are in handcuffs now what," that displays an image of three men restraining an unidentified individual on the ground. *See* Ex. 8 to Chauvin Mot. to Dismiss (Aug. 28, 2020). In his motion to dismiss the complaint for lack of probable cause, Chauvin relied on that slide as the basis for his claim that he "was trained" to "place a knee on a subject's neck and shoulders." Memo. of Law in Support of Def's. Mot. to Dismiss 17 (Aug. 28, 2020) ("Mot. to Dismiss"). But the available evidence indicates that Chauvin never saw the presentation in which it was included during his time as an MPD officer, and that he never saw Bates 002566 through 002606 or the image featured in Bates 002596 at any time prior to Floyd's death. Thus, the Court should not

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Minn. R. Evid. 407. This case, however, does not implicate any questions of ownership or control. And this case is not about whether MPD could have feasibly taken additional steps to prohibit Chauvin's conduct; it is about whether Chauvin violated the law on May 25.

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admit these documents as evidence of Chauvin's training unless he introduces "evidence sufficient to support a finding" that he saw them prior to Floyd's death. Minn. R. Evid. 104(b).

A. Before an item can be admitted into evidence, its proponent must "establish a link between the item and a matter in issue." 23 Minn. Prac., Trial Handbook For Minn. Lawyers § 19:3 (2020-2021 ed.). That link, or "foundation[,] must satisfy [the] requirements of relevancy and authentication or identification" in Minnesota Rules of Evidence 401, 104(b), and 901. *Id.*

Rule 401 provides: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. But when the relevance of evidence depends on the existence of another fact, Rule 104(b) also applies. That Rule provides that "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or in the court's discretion subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Minn. R. Evid. 104(b). In applying Rules 401 and 104(b), where the relevance of evidence "is dependent on the existence of a second fact," "the court's function is to determine whether there is sufficient evidence admitted for a jury decision as to the existence of the second fact." Minn. R. Evid. 104(b) Committee Comment (1977). For example, before admitting a document to show that it influenced a party, its proponent must first introduce sufficient evidence to show that a party "received" or viewed the document. *State v. Vance*, 714 N.W.2d 428, 444 (Minn. 2006).

Rule 901(a), meanwhile, provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Thus, a person with "no

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knowledge of or relationship to" a document cannot provide the proper foundation necessary to admit it into evidence. *Kelzer v. Wachholz*, 381 N.W.2d 852, 854-855 (Minn. App. 1986).

B. In light of the requirements of Rules 401, 104(b), and 901, this Court should prohibit Chauvin from introducing Bates 002566 through 002606—and, in particular, the slide labeled Bates 002596 and titled "Ok they are in handcuffs now what"—unless he can lay a proper foundation for those documents that establishes their relevance and authenticity.

In support of his motion to dismiss, Chauvin attached Bates 002596 as an exhibit. Ex. 8 to Mot. to Dismiss. Chauvin asserted that this image was allegedly obtained "from 2018 [Minneapolis Police Department (MPD)] training materials," and that it demonstrated that his restraint of George Floyd complied with his training. Mot. to Dismiss 17. Chauvin stated that the image demonstrated that he "was trained" to "place a knee on a subject's neck and shoulders." *Id.* The image, on a slide titled "Ok they are in handcuffs now what," depicts "three individuals taking control of one individual on the ground." Bates 33872-73 (Aug. 18, 2020 email from Nicole MacKenzie, Medical Support and Education, MPD).[9] The slide also contains several bullet points, one of which states that officers should "[p]lace the subject in the recovery position to alleviate positional asphyxia." Ex. 8 to Mot. to Dismiss, Bates 002596.

But the evidence indicates that Chauvin did not witness the original event at which this photograph was taken, that he did not view the presentation in which it was included during his time as an MPD officer, and that he did not see this slide or the photograph at any time prior to George Floyd's death. As Officer Nicole Mackenzie, the MPD officer "in the best position to speak to" the slide and the photograph, has explained, the individuals depicted in the photo are not

[9] The State offers a description of Bates 33872-73 in this memorandum as an offer of proof. In light of this Court's prior rulings requesting that the parties not attach evidentiary exhibits to substantive motions, however, the State has not attached this document as an exhibit to its filing.

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"Minneapolis Police Officers" and are "not in Minneapolis Police uniform." Bates 33872. And Chauvin would not have received the training in which this image was included. That training "was originally created in 2018 for the MPD Academy" and was shown to "Cades and Recruits . . . while they are participating in the MPD Academy." *Id.* Officer Mackenzie indicated, however, that "this presentation" has never "been included in the in-service training" provided "for the purpose of continuing education" for existing officers. *Id.* As a result, Chauvin would never have seen or been trained using this slide or photograph prior to Floyd's death.

To the extent Chauvin offers these documents to show that he "was trained" to "place a knee on a subject's neck and shoulders," however, the relevance of these documents depends on whether Chauvin actually saw this slide and the image it contains, or attended a training where this slide and the image were shown. Mot. to Dismiss 17. The State anticipates that, at trial, Chauvin will seek to introduce Bates 002596 to demonstrate that his actions on May 25 complied with his training and MPD policy. Based on this document and the image it contains, Chauvin may argue that the training he received suggests that he lacked the requisite *mens rea* to be convicted of the charged offenses, and that the training he received shows that his use of force was reasonable. To be relevant in showing that Chauvin was complying with his training, however, Chauvin must establish that he actually saw this slide prior to May 25. *See Vance*, 714 N.W.2d at 444. Otherwise, Chauvin cannot claim based on that slide that his actions were consistent with his training.

Thus, because the relevance of the evidence for this purpose "depends upon the fulfillment of a condition of fact"—namely, that Chauvin saw this document prior to May 25—Chauvin must first introduce "evidence sufficient to support a finding" that he saw this document prior to May 25. Minn. R. Evid. 104(b). That means he must demonstrate by a "preponderance of the evidence" that this condition of fact has been satisfied. Peter N. Thompson, 11 Minn. Prac., Evidence

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§ 104.02 (4th ed.). In light of the evidence indicating that Chauvin would not have seen this slide or the photograph it contains, however, this is likely to be a difficult bar for Chauvin to clear. Chauvin, moreover, must also satisfy the authentication requirements of Rule 901. In particular, a person with "knowledge of or [a] relationship to" this document must also authenticate it before it is admitted into evidence. Minn. R. Evid. 901; *see Kelzer*, 381 N.W.2d at 854-855.

In short, Chauvin must lay a proper foundation for Bates 002566 through 002606 before they can be admitted. Unless he does so at trial, this Court should exclude those documents.[10]

## VII. THE COURT SHOULD PROHIBIT CHAUVIN FROM RELYING ON UNAUTHENTICATED TRANSCRIPTS AT TRIAL, AND FROM ADMITTING ANY TRANSCRIPTS INTO EVIDENCE ABSENT THE STATE'S AGREEMENT.

The State moves this Court to prohibit Chauvin from relying on unauthenticated transcripts at trial, and from admitting any transcripts into evidence absent the State's agreement.

Under Minnesota Rule of Evidence 901, before any evidence may be admitted, it "must be authenticated by offering 'evidence sufficient to support a finding that the matter in question is what its proponent claims.' " *State v. Larson*, 787 N.W.2d 592, 599 (Minn. 2010) (quoting Minn. R. of Evid. 901(a)). This includes, but is not limited to, transcripts of police interviews, transcripts of witness videos, and transcripts of body-worn camera videos. *See id.* Thus, unless the moving party offers evidence that the transcript is "accurate," it is not admissible. *Id.*; *see* Minn. R. Evid. 901(b) (identifying acceptable methods of authentication); *State v. Olkon*, 299 N.W.2d 89, 103

[10] If the Court disagrees and concludes that these documents are relevant notwithstanding the evidence that Chauvin did not see them prior to May 25, the State reserves the right to object to the admission of these documents on other grounds under the Rules of Evidence. In particular, even if these documents are deemed relevant, the State reserves the right to object to the admission of these documents on Rule 403 grounds. Minn. R. Evid. 403. The probative value of these documents is (at best) minimal, and the potential for unfair prejudice is high, particularly if Chauvin never saw these documents prior to May 25 and was never trained using them.

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(Minn. 1980) (summarizing guidelines for the use of transcripts of tape recordings at trial, including ways to lay a proper foundation for a transcript).

Prior to this Court's severance decision, some of the Defendants submitted unauthenticated transcripts of body-worn camera videos and police interviews with the Defendants. *See, e.g.*, Exs. 1, 2, 4 to Lane Mot. to Dismiss for Lack of Probable Cause (July 7, 2020). The State does not stipulate to the accuracy of these transcripts. Thus, in order to rely on transcripts such as these at trial, Chauvin must lay a proper foundation as required by Minnesota Rule of Evidence 901.

Moreover, "[t]ranscripts should not ordinarily be admitted into evidence unless both sides stipulate to their accuracy *and* agree to their use as evidence." *State v. Xaysana*, No. C5-00-1102, 2001 WL 766760, at *3 (Minn. App. July 10, 2001) (emphasis added) (quoting *Olkon*, 299 N.W.2d at 103). To be sure, it may be appropriate in limited circumstances to allow the jury to follow along on a transcript when viewing a video or listening to a recording, such as when portions of the recording are "inaudib[le] . . . under the circumstances in which it will be replayed," or when there is a "need to identify the speakers." *Olkon*, 299 N.W.2d at 103 (internal quotation marks omitted). In such a situation, the Court may "furnish the jurors with" a properly authenticated "transcript to assist them in" reviewing this footage, provided it also "carefully instruct[s] the jury" that if there is any conflict between the two, they should "rely on what they [see and] hear rather than on what they read." *Id.* (internal quotation marks omitted). But even under those limited circumstances, "the transcript of a recorded statement should not be admitted as an exhibit that would be available to the jurors during their deliberations" absent both parties' consent. *State v. Campbell*, 861 N.W.2d 95, 100 (Minn. 2015); *see Olkon*, 299 N.W.2d at 103.

Because the State does not consent at this time to the admission of any transcripts into evidence, "the admission of these transcripts [would be] error." *State v. Swanson*, 498 N.W.2d

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435, 439 (Minn. 1993). The State also reserves its right to object to any request to provide the jury with an authenticated transcript in order to follow along with a recording during trial.

Thus, the Court should prohibit the use of unauthenticated transcripts at trial—including transcripts of body-worn camera videos, witness videos, and interviews of witnesses—and prohibit the admission of any transcripts into evidence absent the State's agreement.

## CONCLUSION

For the foregoing reasons, the State's motions in limine should be granted.

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Respectfully submitted,

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