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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

J. Alexander Kueng,

Tou Thao,

Defendants.

STATE'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS *IN LIMINE*

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

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

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

Together, Defendants Kueng and Thao have brought over 100 motions *in limine*.[1] The State submits the following memorandum opposing a number of those motions, and will oppose additional motions orally.

1. THE COURT SHOULD DENY DEFENDANTS' MOTIONS REGARDING CUMULATIVENESS (KUENG MOTS. 15, 20-24; THAO MOTS. 26, 41; LANE MOT. 3).

The State has the sole burden of proof in every criminal case. But that burden is particularly heavy when the accused are police officers charged with murder for conduct occurring on duty. This case involves weighty questions of medical causation and the reasonableness of Defendants' use of force in light of the totality of circumstances. The State should not be constrained from

[1] Defendant Kueng has adopted Defendant Lane's motions *in limine*. *See* Kueng Mot. 27. Defendant Kueng also originally filed a set of motions *in limine* on February 8, 2021. *See* Def.'s Mots. in Lim. (Feb. 8, 2021) (hereinafter "Kueng's First Mot."). Except where otherwise noted, the State's citations to Defendant Kueng's numbered motions refer to Defendant Kueng's second set of motions *in limine*, filed on May 13, 2022. *See* Def.'s Second Mots. in Lim. (May 13, 2022).

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meeting its burden by excluding or limiting relevant evidence solely for the sake of expedience. The State is mindful of the desire to promote trial efficiency but must be allowed to thoroughly present its case. The State also recognizes that this trial will involve two Defendants, which will increase the length of jury selection and the presentation of evidence, and the State will strive to maximize its use of the jury's time. For example, the State currently anticipates it will not call Lieutenant Johnny Mercil, Sergeant Ker Yang, or Dr. Lindsay Thomas.

But Defendants' motions have nothing to do with promoting trial efficiency or ensuring the jury receives an accurate account of the events that occurred on May 25, 2020. Instead, invoking nebulous concerns about "cumulativeness," Defendants seek to hamstring the State and leave the jury with a skewed account of what occurred. Thus, Defendant Kueng seeks to limit the State to calling a *single* witness who is either a Minneapolis Police Department (MPD) officer or an expert on the use of force. Kueng Mot. 23. Defendant Kueng also wants to limit the State's "medical experts"—in particular Dr. Thomas, whom the State already does not intend to call—and "bystanders." Kueng Mot. 20.[2] Defendant Kueng wants just 45 minutes for "direct examination of expert witnesses." Kueng Mot. 22. And Defendant Kueng asks to hold hearings for each expert before testifying. Kueng Mot. 24. Meanwhile, Defendant Thao wants to limit "the State to . . . one expert witness per area of expertise." Thao Mot. 41; *see also* Lane Mot. 3 (requesting a limit of two use of force experts) *see* Kueng's First Mot. 4, p. 4 (moving for an order "[p]rohibiting the State from calling multiple use of force experts or medical experts that will offer duplicative testimony on any issue").

[2] Because the State does not intend to call Dr. Thomas, Defendant Kueng's Motion 21 requesting this Court limit the State to one expert medical examiner is moot. Similarly, Defendant Thao's Motion 51 regarding impeaching Lieutenant Mercil is moot.

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Defendants' motions have no basis in law or fact. Nothing in Rule 403 supports arbitrarily limiting the State's case. Quite the opposite. Minnesota precedent and leading evidence treatises confirm that parties may—indeed, often must—present multiple witnesses on key issues. Defendants themselves have noticed numerous witnesses to testify, and Defendants will likely take the stand to defend their actions. This Court should not limit the State's case to a handful of witnesses testifying for an arbitrarily short amount of time.

1. Contrary to Defendants' claims, nothing in Rule 403 requires limiting the State to a restricted and stilted presentation. Rule 403 sets a high bar for excluding evidence as cumulative or because of undue delay. "[E]vidence 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 (emphasis added). As the Minnesota Supreme Court's Rules of Evidence Advisory Committee Comment explains, this "rule favors the admission of relevant evidence." Minn. R. Evid. 403 cmt. It does so "by requiring a determination" that the probative value of evidence is "substantially outweighed by the dangers listed in the rule before relevant evidence will be excluded." *Id.* (internal quotation marks omitted).

With respect to exclusion based on the "needless presentation of cumulative evidence," Minn. R. Evid. 403, evidence is typically excluded if it "only indirectly tend[s] to establish minor issues" or "indirectly touches on major issues that have already been firmly established by direct evidence or otherwise." Peter N. Thompson, 11 *Minnesota Practice, Evidence* § 403.01 (4th ed. 2021 Update). By contrast, evidence is unlikely to be cumulative where it speaks to "a central issue" in, or "an important, powerful, and distinct part" of, a case. *Bobo v. State*, 820 N.W.2d 511, 518-519 (Minn. 2012). Providing the jury with fulsome testimony pertaining to the two central

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and hotly contested aspects of the State's burden of proof—reasonableness of force and medical causation—is thus not needlessly cumulative.

As one leading evidence treatise puts it, "[n]ot all evidence that is duplicative is therefore cumulative, and evidence should not be excluded on this ground merely because it overlaps with other evidence." Christopher B. Mueller & Laird C. Kirkpatrick, 1 *Federal Evidence* § 4:15 (4th ed. 2021 Update).[3] The same treatise disapproves of "strict time limits," particularly those "imposed in advance." *Id.* "Insofar as they pressure counsel to forego presenting certain lines of proof or pursuing certain avenues of examination of witnesses, such limits may work injustice." *Id.*

Testimony is also by definition not cumulative if it is the "only evidence offered" on a "specific issue," or if the additional testimony provides corroboration for a fact from a witness that the jury may find more trustworthy. *State v. Penkaty*, 708 N.W.2d 185, 203 (Minn. 2006) ("In this context, corroboration of this testimony about Knight's prior acts of violence with testimony by police officers who had no personal interest in the case was not cumulative."). The Minnesota Court of Appeals applied this very principle in *State v. Noor*, 955 N.W.2d 644, 663 (Minn. Ct. App. 2021), *rev'd on other grounds*, 964 N.W.2d 424 (Minn. 2021). The Court of Appeals specifically held that the district court did not err in allowing the State to offer testimony from two

[3] The treatise explains: "To begin with, a single witness on an important point might not be persuasive, while two, three, or five witnesses might be: The corroborative force of overlapping testimony can be important in persuading juries, and multiple witnesses may be more persuasive because they reinforce each other and bring to bear different perspectives or experiences, and testimony from multiple sources about the same event is likely to differ in ways that are helpful to the factfinder. Of course the credibility of multiple witnesses may vary, and one witness might be rejected because of bias or something else, while others testifying to the same points might be accepted as persuasive. In short, sometimes it is reasonable for a party to insist that "one witness is good, but two or three will make my case much stronger, even though all will testify in a similar vein." When proof offered on a point is different in character or persuasive impact from other proof, the former is not merely cumulative of the latter." *Mueller et al.*, *supra*.

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use of force experts because the two experts had "very different backgrounds," "much of their testimony differed," and "one expert's testimony focused on national policing standards, [while] the other expert's testimony focused on Minnesota's policing standards." *Id*. Based on these same principles, the Court should decline Defendants' requests to hamstring the State's presentation.

2. Start with Defendants' requests to limit the State's presentation of MPD officers and its two use of force experts. Each of the witnesses from MPD will testify to "specific issue[s]." *Penkaty*, 708 N.W.2d at 203. For instance, Sergeant David Ploeger and Lieutenant Richard Zimmerman will testify to their respective efforts to secure the scene and investigate the incident, including their own personal interactions with various Defendants. Former MPD Chief Medaria Arradondo will testify as to Defendants' actions in light of MPD's policies and procedures. Meanwhile, Inspector Katie Blackwell will testify to MPD's general training policies and the specific training each Defendant received, which is particularly relevant for the jury to determine whether Defendants' use of force was reasonable given the totality of the circumstances. *See Graham v. Connor*, 490 U.S. 386, 396 (1989). Likewise, Officer Nicole McKenzie, a medical support trainer, will establish that MPD trained Defendants to place individuals into the side recovery position, including individuals Defendants may have believed were suffering from excited delirium, making Defendants' contrary actions unreasonable. *See id*.

The State's two use of force experts will offer their professional opinions regarding the reasonableness of Defendants' conduct. Because each of these experts has a different background, each will offer a unique perspective. *See Noor*, 955 N.W.2d at 663. Moreover, in *State v. Chauvin*, defense counsel sought to impeach the State's witnesses as unqualified, for instance suggesting that witnesses were too academic or not from Minnesota and so therefore were unqualified to offer an opinion. In this context, the State should be permitted to offer multiple witnesses to rebut the

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suggestion that any particular witness's testimony was unqualified or "biased." *Penkaty*, 708 N.W.2d at 203. And it is particularly imperative that the State can offer a complete presentation on the unreasonableness of Defendants' use of force. This is a central issue in this case, and Defendants will likely attempt to confuse the issues—for instance, by trying to make this case into a referendum on MPD's policy regarding intervention. The State strongly opposes such efforts. But the State must be able to present testimony that properly educates the jury.

Finally, if the Court needs an indication that the State's witnesses are far from cumulative, the Court need look no further than Defendants' own witness list. Between them, Defendants have noticed two use of force experts, two psychologists they intend to impermissibly testify about Defendants' use of force, and dozens of current or former MPD officers and employees. *See* Kueng Am. Witness List (May 18, 2022); Thao Witness List (May 13, 2022); *see also* Lane Witness List (May 12, 2022). In this context, it would be unjust to prevent the State from similarly educating the jury on this central issue.

3. The State also must present a fulsome case proving that Derek Chauvin's actions were substantial causal factors in George Floyd's death. The State needs a meaningful opportunity to prove, beyond a reasonable doubt, that George Floyd did not die from a drug overdose, an enlarged heart, carbon monoxide, or whatever other mechanism of death Defendants suggest to the jury.

The need for multiple medical experts is particularly acute because medical experts can only offer opinions within their respective medical fields. Thus, each of the State's experts will be necessary to prove that George Floyd died from the subdual and restraint, and not another cause. For instance, a toxicologist will demonstrate that George Floyd did not die of a drug overdose, while a cardiologist will prove that George Floyd did not die of a spontaneous heart attack. Indeed, despite claiming that too many of the State's witnesses testified about hypoxic asphyxia in *State*

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v. Chauvin, Defendant Kueng admits that each of witness testified "from their own perspective." Kueng Mot. 20. That testimony is not cumulative, but is instead highly probative, and should be admitted under the rules of evidence.

Medical causation is as complex as the human body and requires specialized knowledge not within the common knowledge and understanding of ordinary people. The State must be allowed to provide detailed medical testimony to facilitate jurors' comprehension.

4. The Court likewise should reject Defendants' request that the jury not hear from bystander witnesses. The bystanders took enormously probative video evidence, *see infra* pp. 11-14 (discussing importance of bystander videos), and interacted with Defendants, *see infra* pp. 14-15 (discussing Genevieve Hansen's interactions with officers). Additionally, Defendants will likely argue that their use of force was reasonable because they believed the crowd was dangerous or distracted them from their duties. Ensuring the jury has a complete picture of just who was in that crowd—including an old man, an off-duty firefighter, teenagers, and a nine-year-old girl—debunks that baseless claim. The bystanders' recollections of their contemporaneous impressions also matter. For instance, the fact that a young nine-year-old girl recognized George Floyd was in distress and having difficulty breathing demonstrates just how unreasonable Defendants' continued use of force was. *See infra* p. 9.

Finally, the State has sought and will continue to seek to minimize the emotional burden on all witnesses. But unfortunately, the State cannot change the horrific conduct or the people in front of whom it occurred. That scene was set by the Defendants. The bystanders were forced to watch these disturbing events unfold in real time, and were unable to prevent the police from killing George Floyd. While the State cannot control how a witness will respond once again to reliving an immensely difficult moment in their life, it took particular care when examining

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younger witnesses in *State v. Chauvin*. The State will adopt a similar approach in this trial. But as this Court knows, it is often challenging for a witness to testify to traumatic incidents. The State believes that, under the Court's careful management, the experienced counsel on both sides can professionally examine bystander witnesses of all ages. The Court should therefore reject Defendant Kueng's request to limit bystander testimony as too emotional, *see* Kueng Mot. 20, and similarly deny Defendants' vague motions to prohibit the State from asking "questions that would elicit an emotional response," Thao Mot. 26; *see* Kueng Mot. 15.

2. THE COURT SHOULD NOT PROHIBIT YOUNG WITNESSES FROM TESTIFYING, AND SHOULD PREVENT DEFENDANTS FROM ENGAGING IN IRRELEVANT CROSS-EXAMINATION (KUENG MOT. 16; THAO MOTS. 42, 54).

The Court should not deviate from its practice in *State v. Chauvin* and should continue to allow younger witnesses to testify. It also should prevent Defendants from engaging in irrelevant cross-examination of D.F. *See* Kueng Mot. 16; Thao Mots. 42, 54.

1. For three reasons, the testimony of younger bystander witnesses will provide the jury with unique evidence that is highly probative.

First, D.F.'s testimony is critical because she recorded a video of the incident that provides the jury extremely probative evidence of Defendants' actions. Contrary to Defendant Thao's conclusory assertion, D.F.'s video is not "non-unique." Thao Mot. 42. Quite the opposite. D.F.'s video offers a different perspective unlike other video evidence admissible through other witnesses.

Second, robust bystander testimony is necessary to rebut Defendants' argument that their actions were reasonable because the bystanders who gathered on the sidewalk were somehow violent or dangerous. *See, e.g.*, Tr. of Jury Trial Proceedings, Vol. XX, at 4096:23-24, *United States v. Thao*, No. 21-cr-108 (D. Minn. Feb. 22, 2022) (Defendant Kueng's counsel highlighting

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his client's testimony that he did not know "if the scene was safe"). Defendants' characterization of the bystanders is simply inaccurate. The crowd was anything but dangerous: It included an old man, an off-duty firefighter, teenagers, and a nine-year-old. The jury should see and hear from those bystanders. In particular, younger witnesses will testify that they did not perceive the crowd as threatening. Limiting the State to older witnesses would present a false picture of the crowd to the jury.

Third, it is particularly important that J.R. testify, just as she did in *State v. Chauvin*. Contrary to Defendant Kueng's motion, J.R.'s testimony would not be cumulative. Kueng Mot. 16. Her presence at the trial will allow the jury to consider whether she was a threat, as Defendants claim. Her age also provides a unique and necessary perspective. In addition to testifying that she was not threatened by the crowd, J.R. will also testify that she perceived George Floyd had difficulty breathing. J.R.'s testimony will help prove that Floyd was obviously in distress and that Defendants' actions were therefore objectively unreasonable. Put simply: If a nine-year-old girl realized that Defendants were killing George Floyd, it is hard to believe Defendants—with all of their training—did not also recognize the unreasonableness of their actions.

2. Despite professing a desire to reduce the potential "to further traumatize" younger witnesses, Thao Mot. 42, Defendant Thao has signaled his intent to question D.F. about irrelevant topics that may elicit the kind of emotional response he seeks to avoid. This Court should prevent Defendant Thao from engaging in this irrelevant cross-examination.

First, Defendant Thao intends to ask D.F. about Rachel Jackson taking a photo of D.F. talking to Attorney General Keith Ellison in the courthouse. Defendant Thao refers to this as a "photo-op with Keith Ellison during the trial of *State v. Chauvin*" and insinuates D.F. somehow intentionally violated "this Court's prior order." Thao Mot. 54. That claim is as misleading as it

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is provocative. As Ms. Jackson explained to this Court, Ms. Jackson was D.F.'s representative, and Ms. Jackson spontaneously "took a picture" of D.F. speaking with General Ellison in the Courthouse "so [D.F.] can look back on it one day; that's all. Not for public consumption for sure." Tr. of Proceedings, Vol. 14, at 3129:2-3, *State v. Chauvin*, No. 27-CR-20-12646 (D. Minn. Mar. 30, 2021). When the Court addressed the matter at the time, the Court recognized that Ms. Jackson was unaware of the rules regarding cameras in the courthouse. *Id.* at 3129:11-12. There is no reason for Defendant Thao to question D.F. about Ms. Jackson's "good faith mistake," *id*. at 3130:18, and certainly no reason to sensationally misconstrue Ms. Jackson's private photograph as a "photo-op," Thao Mot. 54.

Second, this Court should prevent Defendant Thao from questioning D.F. about awards she has received. As a result of filming a video of Defendants' misconduct, D.F. unwittingly became the subject of significant public attention. In addition to suffering online harassment, D.F. has also received awards, including a Pulitzer Prize special citation for "courageously recording the murder of George Floyd, a video that spurred protests against police brutality around the world, highlighting the crucial role of citizens in journalists' quest for truth and justice."[4] To the best of the State's knowledge, these awards were not, as Defendant Thao claims, "for her participation in *State v. Chauvin*," but for her actions on May 25, 2020. Thao Mot. 54. The awards are irrelevant, and at the very least would lead to a lengthy interrogation of collateral matters. To the extent this

[4] *[D.F.]*, The Pulitzer Prizes, tinyurl.com/58zrrve3; *see also NAACP Image Awards Unveils Fourth Round of Winners During the 53rd NAACP Image Awards Non-Televised Virtual Experience*, NAACP (Feb. 24, 2022), tinyurl.com/bdfrksvk ("[D.F.], was honored with the Humanitarian's Award which was presented by NAACP Vice-Chair Karen Boykin-Towns, to celebrate her courage, and her sense of history, by recording the face of racist depravity that we still must expose."); *BET Awards 2021: [D.F.] Honored With 'Shine A Light Moment' Award*, BET (June 28, 2021), tinyurl.com/mr2ydpxv ("[D.F.], the teenager who took the 9:26-minute cellphone video of George Floyd's fatal encounter with convicted former Minnesota policeman Derek Chauvin, was presented with the 'Shine A Light Moment' award at BET Awards 2021.").

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Court does permit Defendant Thao to question D.F. about any awards, the State requests the Court prevent Defendant Thao from mischaracterizing the nature of the award.

Third, Defendant Thao intends to question D.F. about a fundraiser launched "to support the healing and the restoration of hope for" D.F.[5] This is irrelevant and, even if marginally probative, would likewise lead to a lengthy inquiry about collateral matters, such as the third-parties who started the fund and D.F.'s involvement (if any). To the extent the Court allows Defendant Thao to inquire on this issue, the Court should limit the inquiry. *See* Minn. R. Evid. 403.

3. THE COURT SHOULD NOT LIMIT THE STATE'S VIDEO EVIDENCE (KUENG MOTS. 11-13, THAO MOTS. 61-62).

This Court should reject Defendants' invitation to exclude all bystander video and to prevent the State from playing synchronized videos to the jury. *See* Kueng Mots. 11-13; Thao Mots. 61-62; *see also* Kueng's First Mot. 14, p. 6. The videos are highly probative because they provide the jury a depiction of Defendants' actions as they unfolded. As it did in *State v. Chauvin*, this Court should permit both sides broad latitude to present this valuable evidence to the jury. None of Defendants' counterarguments move the needle.

First, Defendants suggest that all bystander footage is prejudicial, because it presents the jury with points of view other than the officers' own field of vision. Yet that is precisely *why* bystander videos are highly probative: The bystander videos are not limited to only the view from Defendants' chests. Instead, the bystander video capture Defendants' entire persons, and therefore provides the jury a complete account of Defendants' actions.

[5] *See The OFFICIAL Peace and Healing for [D.F.] Fund*, GoFundMe, https://tinyurl.com/4t8cz66r.

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Consider the following stills from a bystander video capturing Defendant Thao looking directly at the officers restraining George Floyd. This evidence—including Defendant Thao's demeanor—is probative of Defendant Thao's knowledge and intent to aid the subdual and restraint. It provides critical evidence of what Defendant Thao was actually doing at the time, which is necessary to determine the reasonableness of his actions. By contrast, because Defendant Thao's bodycam would not show his person, Defendant Thao's bodycam would not offer the jury this same valuable perspective.

There is no unfair prejudice in presenting the jury with multiple perspectives. Defendants' argument rests on the mistaken belief that bodycam footage provides the exclusive evidence of what Defendants perceived. That is not true. As the images above demonstrate, a bystander video can provide extremely probative evidence of a Defendant's perception. Nor do bodycam videos provide inherently better evidence of a Defendant's perception. A bodycam may be obstructed, while an officer's head may be unobstructed, as shown on a bystander video—as was the case for Derek Chauvin's bodycam. When that occurs, a bystander video, not a bodycam, provides the

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better account "of the facts and circumstances confronting" Defendants. *Graham*, 490 U.S. at 397.[6] In any event, the bystander evidence is far from so substantially prejudicial that it must be excluded. *See* Minn. R. Evid. 403.

Second, Defendants object to synchronized videos. These videos are also highly probative for much the same reasons. A synchronized video allows the jury to evaluate Defendants from multiple perspectives at once, which enables the jury to determine Defendants' precise actions at a given moment. To pick just one example, a bodycam may capture a Defendant's hands applying force to George Floyd, while the corresponding bystander video may depict the position of that Defendant's knees on George Floyd. By evaluating those two videos side-by-side, the jury gains a complete picture of that Defendant's contemporaneous actions. And synchronized videos best facilitate juror understanding of what the particular officers would have observed at the time of the events by showing their relative positions when the recordings were made. For example the bodycam video of Defendant Thao, by itself, only captures what was in front of him. But when synchronized with the Milestone video, the recordings show exactly where Defendant Thao was standing when the bodycam footage was created.

Third, Defendants are wrong: There is no prejudice from playing the audio portions of bystander videos, either standing alone or in a synchronized video. Quite the opposite. Bodycam microphones can record sounds that are likely imperceptible to the wearer (such as loud sounds of scuffling). By contrast, a bystander's phone may record a more accurate version of events. In any

[6] Defendant Kueng's suggestion that expert witnesses may only rely on bodycam footage fails for similar reasons: To determine the reasonableness of the use of force, for instance, that expert should evaluate what that defendant did and what that defendant perceived as revealed in the bystander videos. *See* Kueng Mot. 13. Additionally, an expert may rely on "facts or data" that is not "admissible in evidence," so long as it is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Minn. R. Evid. 703(a).

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event, there is no danger of such substantial prejudice to warrant excluding the audio portion of bystander videos.[7]

4. THE COURT SHOULD NOT PROHIBIT GENEVIEVE HANSEN FROM TESTIFYING IN UNIFORM (THAO MOT. 38).

The Court should deny Defendant Thao's arbitrary and legally unsupported motion to prevent Genevieve Hansen from wearing her firefighter's uniform while testifying. *See* Thao Mot. 38. Instead, consistent with *State v. Chauvin*, Ms. Hansen should be allowed to wear her uniform on the stand. There is no rule precluding Ms. Hansen from wearing her uniform just as there is no rule dictating the precise manner in which any other witness chooses to dress. It would not "confuse[]" the jury or somehow "improperly persuade[] jurors" about Ms. Hansen's "occupation." Thao's Mem. of Law In Supp. of Mots. In Lim. 38 and 39 at 2 (May 20, 2022). To the contrary—Ms. Hansen will be testifying in "the capacity of a firefighter." *Id*.

When she arrived on the scene, Genevieve Hansen repeatedly identified herself as a firefighter, sought to render medical assistance, and sought to encourage Defendants to do the same. Her background and occupation as a firefighter—which she disclosed to Defendants—made her qualified to provide aid and to offer advice. Indeed, in Defendants' federal trial, Ms. Hansen testified that she had a professional "duty to identify myself and offer medical assistance when I see it's fit." Tr. of Jury Trial Proceedings, Vol. V, at 771:10-11, *United States v. Thao*, No. 21-cr-108 (D. Minn. Jan. 26, 2022); *see also id*. at 735:3-7, 773:6-9. To the extent that Defendant Thao will argue that he disregarded Ms. Hansen because she was not wearing her uniform on May 25, 2020, Defendant Thao can make that argument to the jury. The jury will also be able to evaluate

[7] Defendant Thao also seeks to prevent the State from "editing the volume of the sound." Thao Mot. 62. It is unclear precisely what Defendant Thao is referring to. The level of sound the jury will hear is a function of how loudly the video is played in the courtroom. Thus, a very quiet sound recorded and played at a loud volume will be loud, and vice versa.

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Ms. Hansen's attire at the time of the incident based on video evidence. But there is no reason to treat Ms. Hansen—who identified herself and sought to intervene as a trained first responder—differently from any other servicewoman who would testify in uniform.

5. THE COURT SHOULD NOT LIMIT THE ADMISSION OF TRAINING MATERIALS (KUENG MOT. 17).

The Court should reject Defendant Kueng's request to "suppress[]" any training slides containing "links to missing or unavailable YouTube videos," and to prevent the government from "referencing or introducing any aspect of training associated with" these materials. Kueng Mot. 17. It is unclear which specific slides Defendant Kueng is referencing or on what basis Defendant Kueng seeks to exclude them. He does not cite a BATES range, a rule of evidence, or precedent. In any event, nothing requires excluding highly probative training materials that contain a link to an external YouTube video that is no longer available online.

MPD's training slides will provide the jury relevant information about the nature and extent of Defendants' training, which in turn informs whether Defendants' actions were reasonable under the totality of the circumstances. *See* Minn. R. Evid. 402; *Graham*, 490 U.S. at 396. If a training presentation included a slide and a separate YouTube video and the video no longer exists, the absence of the YouTube video at trial goes to the weight the jury should give the slide, not the slide's admissibility. In short, Defendant Kueng remains free to argue to the jury that the State has not offered an accurate depiction of Defendants' training, and to highlight the absence of the YouTube video. Moreover, even if the particular slide containing a broken or missing link is inadmissible (and it is not inadmissible), nothing prevents witnesses from discussing related "training associated with" the same materials. Kueng Mot. 17.[8]

[8] To the extent Defendant Kueng's motion is grounded in the original evidence rule, that argument would also fail. The training slides reflect the original file stored on MPD's computers. *See* Minn. R. Evid. 1001. The non-existence of an external YouTube video to which the slide linked does

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At a minimum, this Court should require Defendant Kueng to articulate the precise legal basis for his objection, identify the specific slides in question, and provide the State a meaningful opportunity to respond.

6. THIS COURT SHOULD NOT EXCLUDE OR LIMIT LIEUTENANT ZIMMERMAN'S TESTIMONY REGARDING DEFENDANT KUENG'S STATEMENTS TO LIEUTENANT ZIMMERMAN AT THE SCENE (KUENG MOT. 18).

This Court should deny Defendant Kueng's requests for an order prohibiting or limiting the testimony of Lieutenant Zimmerman regarding his interactions with Defendant Kueng at the scene of George Floyd's murder. *See* Kueng Mot. 18. Contrary to Defendant Kueng's assertion, these statements were not compelled by MPD policy and are not protected by *Garrity v. New Jersey*, 385 U.S. 493 (1967).

Lieutenant Zimmerman responded to the scene of George Floyd's murder after he learned that a critical incident had occurred. *See* BATES 027614; BATES 036135. When he arrived, Lieutenant Zimmerman asked Defendant Kueng and Defendant Lane "what's going on." In response, Defendant Kueng and Defendant Lane provided a joint account of the preceding events. During their account, Lieutenant Zimmerman occasionally said "yeah," "sure," or "okay." The only other question he asked was whether Defendant Kueng and Defendant Lane knew Floyd's condition, to which they responded no. Lieutenant Zimmerman never stated that Defendant Kueng and Defendant Lane were required to answer his questions, let alone that they were required to do so under threat of job loss.

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not make the slide itself any less original. But even if it did, the slide is *still* admissible under the exceptions for lost or unobtainable documents. *See* Minn. R. Evid. 1004(1)-(2). Finally, the training slides are also admissible under Minn. Stat. § 600.135, which permits the introduction of a reproduction of a document recording "any act, transaction, occurrence or event" so long as "in the regular course of business" "*any* or all of the same" was recorded. Minn. Stat. § 600.135, subd. 1 (emphasis added); *see id*. subd. 2 (noting that records are admissible regardless of "the manner in which an original is destroyed, whether voluntarily or by casualty or otherwise").

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Under *Garrity*, statements made by public employees under threat of termination are not a voluntary waiver of the Fifth Amendment right against self-incrimination and may not be used against the speaker in a criminal proceeding. 385 U.S. at 497. The defendant bears the burden of demonstrating that his testimony was given under compelled circumstances. *Kastigar v. United States*, 406 U.S. 441, 460 (1972). Defendant Kueng cannot meet that burden.

First, *Garrity* does not apply to a routine on-scene statement to a supervisor that is not explicitly compelled by threat of job loss. In *Garrity*, police officers were formally warned that their statements could be used against them in a criminal proceeding, they could refuse to answer if their answer was incriminating, and that refusing to answer would subject them to removal from office. 385 U.S. at 494. Because there was no similarly explicit warning here, Defendant Kueng's statements are not protected under *Garrity*. *See, e.g.*, *Diebold v. Civ. Serv. Comm'n of St. Louis Cnty.*, 611 F.2d 697, 701 (8th Cir. 1979) (*Garrity* inapplicable where "there is no showing that [the public employee] must either answer questions which might incriminate him in future criminal proceedings or forfeit his job").

Second, Defendant Kueng cannot carry his burden to show that his statement was compelled. Absent an explicit threat, *Garrity* is inapplicable unless the former public employee can show: (1) he subjectively believed the statement was compelled on threat of job loss; and (2) that belief was objectively reasonable at the time. *See State v. Mogler*, 719 N.W.2d 201, 209 (Minn. Ct. App. 2006). Because Defendant Kueng has not actually claimed that he subjectively believed the statements were compelled, that alone dooms his *Garrity* claim.[9] Any subjective belief of compulsion is also objectively unreasonable. Nothing about Defendant Kueng's

[9] Defendant Kueng has not separately asserted that the actual video recording of his conversation with Lieutenant Zimmerman is protected under *Garrity*. Defendant Kueng's failure to do so further undermines any claim that he subjectively believed those statements were compelled.

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interactions with Lieutenant Zimmerman objectively indicate his statement was compelled. Lieutenant Zimmerman did not order Defendant Kueng to appear for an interview or answer his questions. Lieutenant Zimmerman was not part of the internal affairs unit. Nor did Lieutenant Zimmerman ask the type of questions one might expect in a *Garrity*-protected interview, like how long Defendants restrained Floyd or whether Floyd was breathing or had a pulse. On the contrary, Lieutenant Zimmerman followed standard MPD procedure in questioning Defendant Kueng, asking only "what's going on" and whether Defendant Lane and Defendant Kueng knew Floyd's condition.

MPD policy also rebuts any claim that Defendant Kueng's statement was compelled. Under MPD policy, after a critical incident occurs, involved officers are asked to give a "voluntary" statement outlining the details of the critical incident. BATES 005211 (MPD Policy § 7-810.01). A voluntary statement, by definition, is not compelled under threat of job loss.[10] By contrast, when MPD conducts administrative investigations and compels statements from employees, the employee must sign a sworn *Garrity* waiver, explaining that the statement is protected and cannot be used against them in a criminal proceeding. BATES 004821-22 (MPD Policy § 2-106). Finally, MPD policy provides that "[a]ll employees shall answer all questions truthfully and fully render material and relevant statements to a competent authority in an MPD investigation when compelled by a representative of the Employer, *consistent with the constitutional rights of the individuals*." BATES 004821 (MPD Policy § 2-106) (emphasis added). As the Minnesota Court of Appeals has explained, if an officer "was asked a question that could

[10] MPD's critical-incident policy also provides for a "Public Safety Statement," which is a mandatory, "narrowly focused" statement that "provides information necessary to ensure public safety"—the direction of fire, whether anyone was injured, the location of any weapons, and whether there are outstanding suspects BATES 005211-12 (MPD Policy § 7-810.01-02). This likewise is not compelled under threat of job loss.

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reasonably be expected to elicit incriminating evidence, the regulation expressly permit[s]" the officer to "assert the Fifth Amendment privilege and refuse to answer." *State v. Przynski*, No. A11-790, 2011 WL 6306675, at *6 (Minn. Ct. App. Dec. 19, 2011).

Defendants Kueng and Lane provided their statements voluntarily at the scene of a critical incident. Those statements were not compelled, signed, or sworn. And even if Defendant Kueng subjectively believed his statements to Lieutenant Zimmerman were compelled, because MPD policy provides that the proper course in that circumstance is to assert privilege, any subjective belief that asserting "privilege would lead to discipline" is not "reasonable." *Id.* For all these reasons, Defendant Kueng's statements to Lieutenant Zimmerman were not compelled.

7. THIS COURT SHOULD NOT EXCLUDE TESTMONY OR EXHIBITS CONCERNING THE AVERAGE HYPOPHARYNX OR PHARYNX (KUENG MOTS. 3, 4).

This Court should deny Defendant Kueng's motions 3 and 4, which seek to preclude the use of a demonstrative "MRI of a pharynx in a normal person" and testimony about the "narrowing of the hypopharynx and the effect of airway narrowing on a patient's effort to breathe" unless the State can first "establish[] the actual dimensions of" Floyd's pharynx and hypopharynx. Kueng. Mots. 3, 4.

The State's expert, Dr. Martin Tobin, is prepared to lay an adequate foundation for the use of this demonstrative and this testimony. Specifically, Dr. Tobin is prepared to testify to a reasonable degree of medical certainty that Floyd would have had a normal sized hypopharynx while alive. There are three typical causes of a smaller hypopharynx: obesity, a tumor or similar obstruction, and certain congenital conditions. With respect to Floyd, Dr. Tobin can rule out all three. A typical autopsy would not discuss, photograph, or attempt to measure the deceased's hypopharynx or pharynx, absent some reason to believe the deceased's pharynx or hypopharynx were abnormal. Moreover, Dr. Tobin will testify that, because the dimensions of the hypopharynx

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are the result of 23 pairs of muscles that keep the hypopharynx open during life, posthumous measurements of the hypopharynx are not the same as or indicative of the size of the hypopharynx during life.

This Court should permit Dr. Tobin to employ a demonstrative of an MRI of a pharynx in a normal person. *See* Kueng Mot. 3. "The standard for the admissibility of demonstrative evidence and visual aids is whether the evidence is relevant and accurate and assists the jury in understanding the testimony of a witness." *State v. Stewart*, 643 N.W.2d 281, 293 (Minn. 2002). That standard is met here. First, this demonstrative is relevant; as Kueng admits, "[t]his evidence specifically applies to the mechanisms of death for Floyd." Kueng's Mem. In Supp. of Mots. In Lim. at 2 (May 20, 2022). Second, Dr. Tobin will testify that this is an accurate depiction of a normal pharynx and hypopharynx. Third, this depiction will assist the jury in understanding Dr. Tobin's testimony about the placement of the pharynx and hypopharynx and their respective functions, both of which are material to Floyd's death. *See Stewart*, 643 N.W.2d at 294 ("[V]isual aids such as photographs are admissible as an aid to a verbal description of objects and conditions when they are accurate and relevant to some material issue."). Because Dr. Tobin is prepared to testify to a reasonable degree of medical certainty that Floyd's hypopharynx was also normal, this evidence is therefore relevant and accurate as to Floyd, too, and will assist the jury in understanding how Defendants' actions restricted Floyd's use of his pharynx and hypopharynx, thereby causing Floyd's death. *See, e.g.*, Tr. of Proceedings, Vol. 21, at 4489-93, 4496-97, 4501-02, 4507-09, 4517-19, *State v. Chauvin*, No. 27-CR-20-12646 (D. Minn. Apr. 8, 2021).

This Court should also permit testimony or exhibits related to the narrowing of the hypopharynx, without requiring the State to establish "the precise dimensions of Floyd's hypopharynx" for all the same reasons—and one more. *See* Kueng Mot. 4. As Dr. Tobin is

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prepared to explain, posthumous measurements of the hypopharynx are not indicative of the size of the hypopharynx while alive. *See supra* pp. 19-20. In other words, not only are these types of measurements not typically collected, even if they had been collected in this case, they would not be useful or accurate to determining the size of Floyd's hypopharynx while alive, or whether and how Defendants' actions narrowed Floyd's airway. This Court should therefore deny Kueng's third and fourth motions *in limine*.

8. THIS COURT SHOULD NOT PREVENT WITNESSES FROM REFERRING TO FLOYD AS DEAD PRIOR TO WHEN HE WAS LEGALLY PRONOUNCED DEAD (THAO MOT. 2).

This Court should deny Defendant Thao's motion to prohibit any references to Floyd as dead, deceased, the body, or a body prior to when he was legally pronounced dead at Hennepin County Medical Center (HCMC). *See* Thao Mot. 2. Defendant Thao does not provide any basis for this requested ruling. The events surrounding Floyd's death—including when he no longer had a pulse and his heart and lungs stopped working—are highly relevant to this case. Minn. R. Evid. 401, 402. Nor is referring to Floyd as "deceased" prior to when he was legally pronounced dead at HCMC more prejudicial than probative. *See* Minn. R. Evid. 403. When an individual is *medically* considered dead differs from when an individual is *legally* pronounced dead. A person whose heart and lungs stop on Monday morning is medically dead as of that time, even if they are not legally pronounced dead until Tuesday afternoon. Witnesses should not be precluded from testifying as to their impression of when and whether Floyd was medically dead, regardless of whether he had been pronounced legally dead at that time.

9. THE COURT SHOULD PERMIT DR. TOBIN'S TESTIMONY ABOUT THE HILLSBOROUGH STADIUM INCIDENT (KUENG MOT. 5).

This Court should deny Defendant Kueng's motion "for an order prohibiting testifying witnesses from referring to and/or relying on images from events other than those involving

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Mr. Floyd," specifically "the Hillsborough Football Stadium Tragedy or other sporting or concert events where persons died from crowds pressing against them." Kueng Mot. 5. This evidence is relevant, and its probative value is not substantially outweighed by a danger of unfair prejudice. *See* Minn. R. Evid. 402, 403.

At trial, the State intends to introduce testimony from Dr. Tobin about the mechanics of breathing and why Defendants' conduct prevented oxygen from reaching Floyd's brain. Specifically, Dr. Tobin will testify that the body must engage in two actions—the "bucket handle movement" and "pump handle" movement—to breathe. *See* Tr. of Proceedings, Vol. 21, at 4476:15-4478:14, *State v. Chauvin*, No. 27-cr-20-12646 (D. Minn. Apr. 8, 2020). The bucket handle movement occurs when a person's diaphragm contracts, causing the ribcage to expand outward. *Id.* at 4477:7-14. The pump handle movement refers to the "front to back expansion" of a person's chest while breathing. *Id.* at 4477:16-4478:6.

Testimony about the Hillsborough Football Stadium incident (or any similar event) will help the jury better understand the pump handle, the bucket handle, and what happens when those movements are impaired. The Hillsborough Stadium incident occurred when a stadium lost control of a high-density crowd and dozens of attendees died of compressive asphyxiation. Dr. Tobin will use this incident to demonstrate how the compressive weight of several individuals can impede pump-handle and bucket-handle functioning even when someone is unrestrained, standing up, and has an open airway. That example is even more forceful here where Chauvin and Defendant Kueng applied their compressive weight to George Floyd when he was prone, face-down, and physically restrained with handcuffs. Allowing Dr. Tobin to testify about the Hillsborough Stadium incident would permit him to provide a specific, real-world example of a technical, medical phenomenon. And it would assist the jury substantially in understanding the

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physiological consequences of compressive force Chauvin applied to Floyd. *See* Minn. R. Evid. 401, 402, 703.

Nor is this testimony unduly prejudicial or misleading. Dr. Tobin will merely describe the event in question; he will not provide a graphic illustration that might elicit an emotional response.[11] Dr. Tobin will not ascribe fault to Hillsborough law enforcement or even discuss the role that law enforcement officers had during the incident. And the context of the Hillsborough Stadium incident so differs from the facts at issue here that it poses little risk that jurors will conflate Dr. Tobin's example with the issues presented in the case at hand.

For these reasons, Defendant Kueng's motion to exclude Dr. Tobin's testimony about the Hillsborough event should be denied.

10. THIS COURT SHOULD PERMIT LIEUTENANT ZIMMERMAN TO TESTIFY REGARDING INTERVENTION (KUENG MOT. 7; THAO MOT. 27).

Defendants move this Court for an order prohibiting the State's witnesses "from testifying as to their personal ethic or applying their personal ethics to intervention and use of force." Kueng Mot. 7; Thao Mot. 27. Defendant Kueng identifies a snapshot of Lieutenant Zimmerman's testimony in the federal trial as emblematic of this type of "personal ethic" testimony. Kueng's Mem. In Supp. of Mots. In Lim. at 2-3 (May 20, 2022). This Court should deny Defendants' motions; Lieutenant Zimmerman's testimony is relevant, and Defendants' motions are too vague to provide the State any reasonable guidance in the presentation of evidence.

At the federal trial, the United States presented evidence from Lieutenant Zimmerman, the most senior officer at MPD, about MPD's policy on the duty to intervene. Tr. of Jury Trial Proceedings, Vol. XIII, at 2436:12-2444:12, *United States v. Thao*, No. 21-cr-108 (D. Minn. Feb.

[11] The State does not seek to introduce the photograph of the Hillsborough Stadium incident which was excluded during the Chauvin trial. *See* Tr. of Proceedings, Vol. 21, at 4479:8-14, *State v. Chauvin*, No. 27-cr-20-12646 (D. Minn. Apr. 8, 2020).

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10, 2022). Lieutenant Zimmerman testified that he has worked at MPD since 1985, *id.* at 2434:20, and received "constant[]," ongoing training since then, *id.* at 2436:22, including training on the duty to intervene, *id.* at 2437:23. Lieutenant Zimmerman's understanding of what MPD's duty-to-intervene policy is based on his "training and experience," *id.* at 2437:20-23, 2438:3-7, 2438:24-2439:2, and it has obvious tendency to prove what MPD policy requires. *See State v. Ture*, 632 N.W.2d 621, 628-629 (Minn. 2001) (department policy established through testimony of officer); *State v. Rodewald*, 376 N.W.2d 416, 421 (Minn. 1985) (similar).

Based on 37 years of MPD training and experience, Lieutenant Zimmerman understands MPD's duty to intervene as part and parcel with a lay-understanding of a duty to intervene—a duty reflected by lessons learned "growing up" and the innate human instinct "that you should help people." Tr. of Jury Trial Proceedings, Vol. XIII, at 2443:6-9, *United States v. Thao*, No. 21-cr-108 (D. Minn. Feb. 10, 2022). Far from being irrelevant, Lieutenant Zimmerman's testimony directly speaks to what a reasonable police officer would do in like circumstances and assists the jury in deconstructing an abstract principle by providing an analog that is easy for jurors to understand and relate to. This Court should deny Defendants' motions to the extent that they seek to exclude this aspect of Lieutenant Zimmerman's duty-to-intervene testimony.

To the extent that Defendants' motions seek to exclude testimony from other witnesses, the State requests that this Court deny the motions as unduly vague. Other than identifying Lieutenant Zimmerman's federal trial testimony, Defendants provide no explanation of what it means for a witness to "apply[] their personal ethics to intervention and use of force." *See* Kueng's Mem. In Supp. of Mots. In Lim. at 2 (May 20, 2022). Nor do Defendants identify any other witness whose testimony may implicate this purportedly improper topic. Granting Defendants' motions

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would provide the State little guidance on what duty-to-intervene testimony is admissible. Defendants' motions should be denied.

11. THE COURT SHOULD NOT PREVENT WITNESSES FROM USING PHRASES SUCH AS "FIRMLY" (KUENG MOT. 1).

This Court should deny Defendant Kueng's motion to (in his terms) prevent "the State's witnesses from using inflammatory language," which he defines broadly to include "characterizing knee or hand placement as ramming into Mr. Floyd or Mr. Kueng's grip as 'firmly.' " Kueng Mot. 1. As drafted, this motion is extremely vague and, if granted, would provide the State no guidance on how to properly prepare or examine its witnesses. Nothing prevents Defendants from objecting to specific language a witness uses during trial. This motion, however, seems designed to trap the State into accidentally violating a pre-trial order, through no fault of its own, even though the motion is so vague it likely would not even preserve issues for appellate review.

Moreover, to the extent that a witness perceived or assessed Defendants' actions to have been forceful—as Defendants' actions indeed were—phrases such as "ramming" and "firmly" accurately describe the witness's perception or assessment or Defendants' actions. *Cf*. Minn. R. Evid. 602. There is nothing unduly inflammatory about these particular words or similar words. They do not persuade by impermissible means; they accurately describe Defendants' incriminating conduct. They are probative, not prejudicial. Indeed, requiring witnesses to testify in stilted and sanitized language would unduly favor *the Defendants*. It would restrict witnesses' abilities to accurately describe the severity of Defendants' force and would, therefore, leave the jury with the false impression that Defendants used less force.

12. THIS COURT SHOULD NOT SUPRESS WILLIAMS'S AND HANSEN'S 911 CALLS (THAO MOT. 60).

This Court should deny Defendant Thao's motion to suppress "the 911 calls made by Donald Williams and Genevieve Hansen" because the calls are not hearsay, are admissible as

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excited utterances if they are hearsay, and are not more prejudicial than probative. *See* Thao Mot. 60.

Under Minnesota Rule of Evidence 801, a witness's prior statement is not hearsay if the witness "testifies at the trial" and "is subject to cross-examination concerning the statement" if one of four conditions is met. Minn. R. Evid. 801(d)(1). At least two are satisfied here. *First*, the 911 calls describe events immediately after Williams and Hansen perceived them. *See id.* 801(d)(1)(D). Both calls were made at 8:32 p.m. on May 25, just minutes after Floyd was taken away by ambulance. *See Williams 911 call* (explaining that he "just watched" the Defendants kill Floyd); *Hansen 911 call* (explaining that she had "literally watched" the events that had unfolded); *see also State v. Farrah*, 735 N.W.2d 336, 344 (Minn. 2007) (concluding that victim's statements made after sexual assault "were properly admitted at trial"); *State v. Taylor*, 650 N.W.2d 190, 204 (Minn. 2002) (district court ruled hearsay objections were cured by "present sense impression" exclusion); *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980) (holding statements "made within a few minutes of the accident" were admissible under Rule 801(d)(1)(D)).

Second, because the 911 calls are "consistent with" the testimony that Williams and Hansen will offer about how events unfolded, they will help the jury evaluate their "credibility." Minn. R. Evid. 801(d)(1)(B). *See Williams 911 call* (explaining that Floyd "wasn't resisting arrest," "was already in handcuffs," "stopped breathing" under Chauvin's knee, and was "not responsive when the ambulance came and got him"); *Hansen 911 call* (explaining that she "literally watched police officers not take a pulse and not do anything to save a man").

Even if they are hearsay, the 911 calls are admissible as "[e]xcited utterances," Minn. R. Evid. 803(2), because Williams and Hansen made the statements in the "aura of excitement," *State v. Banjo*, No. A17-2073, 2018 WL 6729824, at *4 (Minn. Ct. App. Dec. 24, 2018); *see also State*

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v. Hallmark, 927 N.W.2d 281, 289 n.1, 304 (Minn. 2019) (noting that audio and transcript format of 911 call was admissible and concluding that district court did not err in instructing that jury could consider call "for all purposes"); *State v. Lemieux*, No. A18-1509, 2019 WL 2415253, at *3 (Minn. Ct. App. June 10, 2019) (district court properly admitted 911 call as excited utterance where witness "made the call only a few minutes after the incident," the "subject of the call—a physical assault—[wa]s a startling event," the witness's "emotional state" including "voice and pitch changes" and "frequent cursing" supported admission, and "the circumstances surrounding the statements tend to show trustworthiness" where the witness "was still under the impact of the startling event." (internal quotation marks and citation omitted)); *State v. Fields*, No. A13-0679, 2014 WL 684665, at *4 (Minn. Ct. App. Feb. 24, 2014) (calls admissible where "distress is evident in the 911 recording"); *State v. Hanson*, No. A06-567, 2007 WL 2177334, at *5 (Minn. Ct. App. July 31, 2007) (same). Indeed, the Minnesota Supreme Court held that a district court abused its discretion when it excluded excited utterances to a 911 operator by a mother and daughter that the daughter had been sexually abused. *State v. Edwards*, 485 N.W.2d 911, 912, 914 (Minn. 1992).

Defendant Thao offers no explanation of why the calls are prejudicial, let alone unduly prejudicial. They are not. The 911 calls have legitimate probative force because they confirm Williams's and Hansen's testimony about the events they perceived, and demonstrate the severity of the situation and how unreasonable Defendants' actions were—so unreasonable that Hansen and Williams called 911 on the police. The calls are admissible.

13. THE COURT SHOULD READOPT ITS RULINGS IN *STATE V. CHAUVIN* (THAO MOTS. 3, 8, 19, 22-23, 29, 33, 35-36, 43, 48; KUENG MOT. 9; LANE MOT. 2).

A number of Defendants' motions *in limine* ask this Court to depart from express rulings in *State v. Chauvin*. This Court's rulings in *State v. Chauvin* were correct—and this Court should not change course. The State highlights the following specific issues:

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1. Defendant Thao has moved to preclude "any spark of life testimony of George Floyd, except within precedential limitations." Thao Mot. 3; *see* Lane Mot. 2; *see also* Kueng's First Mot. 17, p. 7. As in *State v. Chauvin*, the Court should permit the State to "call one or two witnesses" "necessary to humanize the victim." Order on Def.'s Mots. *In Lim.* at 9, *State v. Chauvin*, No. 27-CR-20-12646 (D. Minn. Mar. 24, 2021) ("Order on Chauvin's Mots.").

2. Defendant Thao has requested that the State provide "any documents, information, and/or criminal background checks" regarding any prospective juror. Thao Mot. 19. Consistent with this Court's ruling in *State v. Chauvin*, the Court may require the State to provide "criminal background records in its possession and any other documents or information not available to the defense through publicly available sources." Order on Chauvin's Mots. at 2. The State should not be required to disclose its work product generally and specifically reports based on information available publicly. *See* Minn. R. Crim. Pro. 9.01, subd. 3.

3. In *State v. Chauvin*, this Court permitted expert witnesses to watch the testimony of other expert witnesses testifying on the same or similar topics. *See* Order on Chauvin's Mots. at 4. The State has similarly requested that expert witnesses be exempt from sequestration. *See* State Mot. 19. Allowing experts to watch the trial will promote efficiency. This Court should therefore sequester lay witnesses, but permit expert witnesses to watch other experts' testimony on the same or similar topics. *See* Thao Mots. 22-23.

4. Defendant Thao has moved to question "medical experts" regarding "Mr. Floyd's opiate addiction, prior overdose, and hospitalization exactly one year before the incident." Thao Mot. 29. It thus appears that Defendant Thao intends to introduce evidence of George Floyd's encounter with police on May 6, 2019. Consistent with this Court's ruling in *State v. Chauvin*, the Court should limit Defendant Thao to presenting the following evidence from the incident itself:

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(1) testimony "of the officer who removed Mr. Floyd from the car," and audio and video the Court previously identified; (2) the photograph of the passenger seat in which Floyd was sitting; and (3) testimony "of the treating paramedic." Order Allowing 404(b) Evid. Offered by Def. at 6, *State v. Chauvin*, No. 27-CR-20-12646 (D. Minn. Mar. 24, 2021).

5. Consistent with this Court's ruling in *State v. Chauvin*, the Court should allow the State to use a Defendant's "pre-arrest silence" "as impeachment of Defendant's testimony," and should only exclude reference to Defendants' silence "if the silence was after the incident was deemed by the Minneapolis Police Department to be an officer involved 'critical incident' or if the silence was after Defendant consulted with counsel." Order on Chauvin's Mots. at 6; *see* Thao Mot. 8; Kueng's First Mot. 8, p. 5.

6. Defendants have moved to preclude questions or testimony about a firefighter's ability to determine the cause and manner of George Floyd's death. Thao Mot. 33; Kueng's First Mot. 6, p. 5. Consistent with this Court's ruling in *State v. Chauvin*, paramedics and Minneapolis Fire Department personnel should be permitted to "testify as to their emergency medical training and experience, what they observed," including George Floyd's vitals, "why they did or did not believe Mr. Floyd was in medical distress," and any "emergency intervention" they performed and "why those measures were taken." Order on Chauvin's Mots. at 6.

7. Defendants have moved to prohibit any testimony concerning Donald Williams's training, expertise in martial arts or boxing, or his understanding of a "blood choke." Thao Mots. 35, 36; *see also* Kueng's First. Mot. 12, p. 6. As this Court ruled in *State v. Chauvin*, Donald Williams should be permitted to testify to "his training and experience in martial arts, what he observed on May 25, 2020, why he thought the restraint being placed on Mr. Floyd was a 'blood

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choke' and a 'shimmy,' " and "why be believed, based on his martial arts training and experience, that these maneuvers were dangerous." Order on Chauvin's Mots. at 6.

7. Defendant Thao has moved for an order precluding medical witnesses from "referencing their personal clinical experiences and anecdotal testimony," absent documentation that this information was peer reviewed and "available for inspection." Thao Mot. 48. Consistent with this Court's order in *State v. Chauvin*, medical witnesses with "clinical experience" should be permitted to "describe generally the types of patients and number of patients they have treated." Order on Chauvin's Mots. at 8.

8. Defendants have moved for an order preventing police officers from speculating about how they "would have handled" George Floyd's arrest and detainment, had they been in Defendants' places. Thao Mot. 43; Kueng's First Mot. 1, p. 4. Defendant Kueng has also moved for a similar, but broader order "directing that *no witness* for the state be allowed to offer speculative testimony about how they would have acted had they been in the place of any of the defendant officers." Kueng Mot. 9 (emphasis added); *see also* Kueng's First. Mot. 5, pp. 4-5. In *State v. Chauvin*, this Court ordered that non-experts cannot testify "how they would have handled the arrest of Mr. Floyd differently," but ruled that use of force experts with appropriate foundation can offer an opinion about how they would have handled arresting and detaining George Floyd, with explicit permission following a sidebar. Order on Chauvin's Mots. at 5. This Court further ruled that Genevieve Hansen may testify to her training, her observations, why she believed George Floyd was in distress, "and what emergency intervention she would have provided if allowed to do so." *Id.* Consistent with this Court's prior orders, the following types of individuals should be permitted to testify, with proper foundation, how they would have "acted" or handled the situation involving George Floyd, including as appropriate "what emergency intervention

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[they] would have provided if allowed to do so": all other expert witnesses, including medical, use of force, and police training experts; emergency medical technicians; firefighters; and paramedics.

CONCLUSION

The State respectfully requests the Court deny Defendants' motions *in limine*.

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Respectfully submitted,

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