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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

Derek Michael Chauvin,

Defendant.

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

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTIONS *IN LIMINE*

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 submits this memorandum of law in opposition to Defendant Derek Chauvin's Motions in Limine. In particular, the State files this memorandum to address in writing Chauvin's Motions 14, 18, 19, 21, 22, 23, 31, 32, and 36. The State intends to address and respond to Chauvin's remaining motions when motions in limine are heard at trial.

ARGUMENT

I. THE COURT SHOULD DENY MOTION 14 TO THE EXTENT IT CONFLICTS WITH RULES OF EVIDENCE 704 AND 404(a).

In Motion 14, Chauvin asks the Court "for an Order directing the State to instruct State witnesses that they are not to assert a personal belief or opinion as to the Defendant's guilt or innocence, or whether or not the Defendant is the type of person who could commit such an offense." *See* Def.'s Mots. in Limine 3 (Feb. 8, 2021). The State does not dispute that witnesses generally cannot testify regarding their "personal belief" as to whether the Defendant is guilty or innocent. And the State does not dispute that, under Rule 404(a), "[e]vidence of a person's

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character or a trait of character is"—with limited exceptions—"not admissible for the purpose of proving action in conformity therewith on a particular occasion." Minn. R. Evid. 404(a). The State believes, however, that this motion may conflict with the Rules of Evidence in two respects.

First, Rule 704 provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Minn. R. Evid. 704. To be sure, under the Rules of Evidence, a witness's testimony may not address an "ultimate issue" if it "embraces legal conclusions or terms of art," *State v. DeWald*, 463 N.W.2d 741, 744 (Minn. 1990), and a witness may not "merely tell the jury what result to reach," *State v. Lopez-Rios*, 669 N.W.2d 603, 613 (Minn. 2003). But so long as the witness's testimony complies with those prerequisites and is "otherwise admissible," the witness's testimony may "embrace[] an ultimate issue" in the case. Minn. R. Evid. 704.

Thus, the Minnesota Supreme Court held in *DeWald* that Rule 704 permitted a witness to testify on redirect that, "in his opinion, [the] defendant killed" the victim, as the witness had "avoided the legal term 'murder' " and had expressed a "factual rather than legal" conclusion. 463 N.W.2d at 744. Likewise, the Supreme Court has repeatedly held that a qualified expert witness may testify that "the manner of . . . death was homicide." *State v. Dao Xiong*, 829 N.W.2d 391, 397 (Minn. 2013). Indeed, "[i]n Minnesota, the law has long been that medical experts are permitted to give their opinions upon the very issue which the jury will have to decide." *Id.* (quoting *State v. Langley*, 354 N.W.2d 389, 401 (Minn. 1984), *abrogated on other grounds by State v. Her*, 781 N.W.2d 869 (Minn. 2010)); *see Langley*, 354 N.W.2d at 401 (allowing testimony under Rule 704 from qualified expert regarding "cause and manner of death"). Because a witness may offer an opinion as to an ultimate issue in the case, the State respectfully requests that the

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Court clarify as much, and that the Court deny Chauvin's motion to the extent it could be construed to preclude opinion testimony as to ultimate issues.

Second, under Rule 404(a)(1), where the defendant offers "[e]vidence of a pertinent trait of character," that opens the door for the "prosecution to rebut the same." Minn. R. Evid. 404(a)(1). As the Minnesota Supreme Court has explained: "[T]he prosecution may not attempt to establish the bad character of the defendant until the defendant has put that character i[n] issue by offering evidence of good character." *State v. Sharich*, 209 N.W.2d 907, 911 (Minn. 1973). Once the defendant does so, however, the State is not precluded from introducing evidence to rebut the defendant's evidence. For example, if "defense counsel specifically asks whether a criminal act is out of *character* for an accused, defense counsel opens the door to the introduction of character evidence." *State v. Willis*, 559 N.W.2d 693, 699 (Minn. 1997). Thus, the Court should deny Chauvin's motion to the extent it precludes the State from questioning its witnesses regarding Chauvin's character in the event that Chauvin opens the door on that issue.

II. THE COURT SHOULD DENY MOTION 18 BECAUSE POLICE WITNESSES MAY OFFER TESTIMONY ON HOW FLOYD'S ARREST SHOULD HAVE BEEN HANDLED PURSUANT TO MPD POLICIES.

In Motion 18, Chauvin requests "an Order precluding witness police officers from speculating or rendering an opinion on how they would have handled the arrest of Mr. Floyd differently." *See* Def.'s Mots. in Limine 4. This Court should deny the motion. Police witnesses may testify regarding how an officer should have handled Floyd's arrest in light of Minneapolis Police Department (MPD) policies and training. Such testimony is not foreclosed by *Graham v. Connor*, 490 U.S. 386 (1989), or by Rules 701 or 702, as Chauvin suggests.

As *Graham* makes clear, part and parcel of evaluating whether an officer's use of force is reasonable under Minn. Stat. § 609.06, subd. 1, is determining what a "reasonable officer on the

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scene" would have done under the circumstances. 490 U.S. at 396. As the Minnesota Supreme Court has explained, this standard is assessed based on how an "objectively reasonable police officer"—that is, "one who is reasonably well trained"—should have acted in light of the circumstances. *Baker v. Chaplin*, 517 N.W.2d 911, 916 (Minn. 1994). A police witness's opinion testimony regarding how the scene should have been handled—based on MPD policy and training, and based on the witness's own experience and training—is plainly relevant in establishing what a "reasonable officer on the scene" would have done. *Graham*, 490 U.S. at 396. It provides evidence that helps the jury decide whether Chauvin's actions complied with MPD policy, and in turn helps the jury decide whether Chauvin used "reasonable force." Minn. Stat. § 609.06, subd. 1. And it is not inherently "speculati[ve]," so long as the witness's opinion is grounded in MPD policies and training, and the witness's own training and experience. Def.'s Mots. in Limine 4.

Rules 701 and 702 also do not categorically require exclusion. Rule 701 provides that lay witnesses may testify as to opinions that are "rationally based on the perception of the witness" and "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Minn. R. Evid. 701. Rule 702, meanwhile, provides that a "witness qualified as an expert by knowledge, skill, experience, training, or education" may testify "thereto in the form of an opinion or otherwise," so long as the opinion has "foundational reliability." Minn. R. Evid. 702. Nothing in these Rules prohibits all police witnesses from testifying as to how an officer should have handled Floyd's arrest and restraint pursuant to MPD policy and training, and whether Chauvin acted in accordance with MPD policy and training. Such testimony by lay police witnesses is "based on the perception of the witness" and "helpful to . . . the determination of a fact in issue," as it assists the jury in evaluating whether Chauvin's use of force was reasonable. Minn. R. Evid. 701; *see State v. Middlebrook*, No. A15-0783, 2016 WL 4064903, at *9 (Minn.

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App. 2016) (permitting lay witness to testify to opinions based on perceptions of video of the incident that he had seen). And to the extent any police witnesses testify as experts, nothing in the nature of such testimony lacks "foundational reliability." Minn. R. Evid. 702. To be sure, Chauvin is free to raise specific objections to the testimony of particular police witnesses at trial under Rules 701 and 702. But these Rules do not support the categorical exclusion Chauvin requests.

III. THE COURT SHOULD DENY MOTION 19 TO THE EXTENT IT PRECLUDES TESTIMONY ON MPD POLICIES ON WHICH CHAUVIN WAS TRAINED.

In Motion 19, Chauvin moves "for an Order precluding testimony about any police policy and [*sic*] that was not in effect at the time of Mr. Floyd's arrest or any subsequent changes in policies." Def.'s Mots. in Limine 4. The State agrees with Chauvin that this Court should preclude testimony regarding "any subsequent changes" in police policies; indeed, the State requested the same relief in its motions. *See* State's Memo. in Support of Mots. in Limine 22-33 (Feb. 8, 2021).

The State, however, opposes Chauvin's motion to the extent it would preclude testimony regarding MPD policies and procedures on which Chauvin may have been trained, but that may not have been in effect at the time of Floyd's arrest. Such training is plainly relevant in determining whether 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* Order and Mem. Op. on Def. Mots. to Dismiss for Lack of Probable Cause 69-70 (Oct. 21, 2020) ("Probable Cause Op.") (noting that Chauvin's failure to comply with his training was "evidence of culpable negligence"). It is also highly relevant in determining whether Chauvin's use of force was "reasonable" based on the circumstances as they existed at the time of Floyd's death. *See State v. Koppi*, 798 N.W.2d 358, 363 (Minn. 2011) ("reasonableness is evaluated in light of an officer's training and experience"); *see* State's Memo in Support of Mots. in Limine 25 ("To answer those questions, the jury must

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rely on the policies on which Chauvin was actually trained, and the policies that were actually in effect on May 25."). That training also is not unfairly prejudicial: Admitting that evidence would not confuse the issues or "persuade [the jury] by illegitimate means." *State v. Garland*, 942 N.W.2d 732, 748 (Minn. 2020) (internal quotation marks omitted); *see* Minn. R. Evid. 403.

Accordingly, the Court should grant Motion 19 only to the extent it precludes testimony about "subsequent changes" in MPD policies that postdate George Floyd's death.

IV. THE COURT SHOULD DENY MOTION 21 AND PERMIT THE STATE TO LAY FOUNDATION FOR MS. HANSEN'S TESTIMONY AT TRIAL.

In Motion 21, Chauvin requests "an Order precluding the speculative testimony from Genevieve Hanson"—the off-duty firefighter who arrived on the scene while Floyd was pinned to the ground, and who repeatedly asked the Defendants to check Floyd's pulse and to begin chest compressions—"that she believes that if she intervened, she could have saved Mr. Floyd." Def.'s Mots. in Limine 4. Chauvin also asserts that Hansen "should not be allowed to testify as to her understanding of police officer training." *Id.* In support of his motion, Chauvin relies on Rule 602, which provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Minn. R. Evid. 602. Rule 602, however, does not support Chauvin's request. The Court should deny the motion at this time and allow the State to lay a proper foundation for any such testimony at trial.

Rule 602 stands for a simple proposition: "The party offering the testimony has the burden of laying a foundation showing that the witness had an adequate opportunity to observe, actually observed, and presently recalls the observation." 1 McCormick on Evidence § 10 (8th ed. 2020 update); *see* Minn. R. Evid. 602 Committee Comment (1977) (citing the McCormick treatise). "[T]he proponent's burden," however, "is a minimal one." 1 McCormick on Evidence § 10. "When reasonable persons could differ as to whether the witness had an adequate opportunity to

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observe, the witness's testimony is admissible; and the jury will later make its own appraisal of his opportunity to know in evaluating the weight of the testimony during deliberations." *Id.*

For one thing, Rule 602's personal knowledge requirement does not bar Hansen from testifying to her opinion at the time of the incident that medical intervention may have saved Floyd's life. While Floyd was pinned face-down to the ground, Hansen asked Defendants to check Floyd's pulse, and asked Defendants to begin chest compressions. *See* State's Opp. to Def.'s Mots. to Dismiss 11-12 (Sept. 18, 2020). Those observations were plainly based on her first-hand observations at the scene, as she made those vocal demands while the incident was ongoing. And they reflected Hansen's belief at the time that first-aid intervention may have saved Floyd's life. Moreover, Hansen can testify at trial that she observed that Floyd was taking "agonal breaths" when she arrived on the scene, that she has heard agonal breaths before, and that she has seen that people taking agonal breaths can nonetheless be revived with proper medical care. *See* Bates 043177. That likewise suggests that Hansen's own observations on the scene form the basis for her opinion at the time of the incident that medical intervention may have saved Floyd's life. As a result, nothing in Rule 602 prevents Hansen from testifying to that opinion at trial.

Moreover, to the extent Hansen might testify that she believed that her *own* intervention may have saved Floyd's life, the State can lay foundation for that testimony under Rule 602 in two respects. *First*, the State can show that Hansen had first-hand knowledge of Floyd's condition on the scene. The body-camera and other surveillance videos plainly demonstrate as much. They show that Hansen personally observed Floyd at close proximity for several minutes while Defendants pinned him to the ground. Hansen can also testify to her first-hand observations at the time regarding Floyd's condition, including her observations as to Floyd's condition that prompted her to ask the officers repeatedly to check Floyd's pulse and to begin chest compressions.

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Second, the State can show that Hansen's opinion was based on her personal knowledge of CPR and first-aid techniques, and of the warning signs that merit use of those techniques. The State can elicit testimony that Hansen is a certified EMT and knows CPR. *See* Bates 040649. It can also elicit testimony demonstrating that the vast majority of calls she handles on her fire department shifts are medical in nature, including calls regarding individuals who are unconscious. *See* Bates 040650.[1] And Hansen can testify that she has previously responded to medical calls where CPR was necessary, and that she has successfully administered aid in those circumstances. *See* Bates 043174. All of that provides a foundation for her opinion based on her personal observations that she may have been able to save Floyd's life if she had been able to intervene.

Separately, Chauvin also contends that Hansen "should not be allowed to testify as to her understanding of police officer training" based on Rule 602. Def.'s Mots. in Limine 4. At this time, the State does not intend to elicit such testimony from Hansen. Nonetheless, the Court should deny this motion at this time and permit the State to offer a proper foundation for such testimony in the event the State or Chauvin attempts to elicit testimony on this subject. Such a foundation would include, for example, any personal knowledge Hansen has obtained regarding police officer training based on her own training as a firefighter or her work alongside police on emergency calls.

[1] Eliciting foundation evidence regarding Hansen's experience as a firefighter does not convert her testimony into expert testimony. For example, in *State v. Ards*, 816 N.W.2d 679 (Minn. App. 2012), a police officer "testified about her personal observations" of the defendant's intoxication. *Id.* at 682. She also "testified that she underwent the standard week-long training for police officers to learn how to detect impaired drivers" and that, "during her seven years as a police officer," she "had been involved in over 100 arrests or investigations concerning DWI offenses." *Id.* The Court of Appeals concluded that this was not expert testimony. "Simply because [she] has specialized training and experience did not convert her impairment testimony to expert testimony," as her testimony was still "based on her personal observation." *Id.* at 683, 685; *see also Ptacek v. Earthsoils, Inc.*, 844 N.W.2d 535, 540 (Minn. App. 2014) (farmers relying on 30 years of "experience" could testify as lay witnesses as to "causes of crop growth"); Minn. R. Evid. 701 Committee Comment (2016) (noting that a lay witness with " 'particularized knowledge' developed in day-to-day affairs" may testify as to such particularized knowledge under Rule 701).

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Thus, the Court should deny Chauvin's motion at this time and allow the State to lay a proper foundation for any such testimony at trial, as Rule 602 plainly permits.

V. THE COURT SHOULD DENY MOTION 22 BECAUSE MR. WILLIAMS SHOULD BE PERMITTED TO OFFER TESTIMONY REGARDING CHOKEHOLDS.

In Motion 22, Chauvin requests "an Order precluding the testimony of Donald Williams"—one of the individuals who witnessed Floyd's death on May 25, 2020—"as to his training, experience and/or expertise in mixed martial arts, boxing or other training." Def.'s Mots. in Limine 4. He argues that this testimony is inadmissible because: (i) "it is irrelevant and overly prejudicial" under Minn. R. Evid. 401 and 403; and (ii) "foundation for expertise cannot be established" and has not "been disclosed" as required by Minn. R. Crim. P. 9.01, subd. 1(4)(c). These arguments miss the mark. Williams' testimony regarding chokeholds is relevant and admissible, and the State can lay a proper foundation for such testimony at trial.

At trial, Williams will testify regarding what he witnessed as Chauvin pinned Floyd to the ground and pressed his knee into Floyd's neck and upper back. Among other things, Williams may explain that—as the body-camera and other bystander videos presented at trial will show—he exclaimed during the incident that Chauvin was placing Floyd in a "blood choke," and had pleaded with Chauvin to take Floyd out of that chokehold. *See* Bates 026881; *see, e.g.*, Thao, BWC at 20:25:17-19.[2] In explaining what he said during the incident, Williams may testify that he has been a professional fighter and has experience in wrestling and Mixed Martial Arts. In that context, Williams learned that the position in which Chauvin had placed Floyd cuts off circulation and is therefore sometimes called a "blood choke." *See* Bates 026881. Williams may testify that he has been placed in such chokeholds during his fights, and knows first-hand how quickly this

[2] This body-worn camera video was submitted in support of the State's motion for joinder.

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sort of chokehold can cut off circulation and affect a person's breathing. *See* Bates 026882. He may also testify that the movement he saw Chauvin make—a back-and-forth rocking motion with his knee—tightens the chokehold, and is known as a "shimmy." *See id.* This explains why Williams pleaded so forcefully for Chauvin to remove his knee from Floyd's neck and upper back.

This testimony is plainly admissible, and Chauvin's arguments to the contrary are incorrect. *First*, this testimony is relevant and is not unfairly prejudicial. Under Rule 401, evidence is relevant so long as it has 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. Williams' testimony regarding chokeholds easily clears that low bar. This testimony aids the jury in understanding Chauvin's actions from the perspective of the bystanders who were watching Chauvin's actions with a clear view from just feet away. It provides valuable context for understanding Williams' contemporaneous description of Chauvin's actions as a "blood choke," and supports his testimony that Chauvin's actions were dangerous to Floyd. This testimony is also relevant because it tends to suggest—based on the experience of someone familiar with chokeholds, who has been subject to such chokeholds, and who observed Chauvin's actions in this case—that Chauvin's actions in pressing his knee into Floyd's neck and upper back were likely to cause Floyd to lose consciousness quickly. That, in turn, is relevant to whether Chauvin applied "reasonable force." Minn. Stat. § 609.06, subd. 1.

That testimony also is not "overly prejudicial," as Chauvin claims. Def.'s Mots. in Limine 4. Under Rule 403, evidence may be excluded only "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Minn. R. Evid. 403. But there is no reason why Williams' testimony regarding chokeholds—elicited in the context of explaining what Williams observed and said on May 25—would unfairly

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prejudice the jury, confuse the issues, or mislead the jury. Williams' testimony explains his observation on the scene that Chauvin had placed Floyd in a "blood choke," provides important context for why Williams believed that Floyd was in grave danger during the encounter, and helps explain Chauvin's positioning atop Floyd to the jury. That sort of testimony does not "suggest decision on an improper basis," as it provides the jury helpful information to aid its understanding of Chauvin's actions, and does not suggest that the case should be decided based on something other than the defendant's actions in this case. *State v. Bott*, 246 N.W.2d 48, 53 n.3 (Minn. 1976).

Chauvin nonetheless suggests that "because Williams' training/experience is not the same as the training of Minneapolis Police Officers, it is irrelevant." Def.'s Mots. in Limine 5. That is incorrect. There is no reason why Williams' experience must be the same as the training of MPD officers to be relevant. Instead, Williams' experience is relevant because it helps the jury understand his own real-time description of Chauvin's actions, and because it sheds light on the likelihood that Chauvin's actions would cause Floyd to lose consciousness. *See supra* p. 10. That testimony does not depend on Williams having received the same training as MPD officers. At most, then, Chauvin's argument goes to the weight the jury should assign Williams' testimony, not its admissibility. Chauvin can argue at trial that the jury should discount Williams' testimony because he was not trained as an MPD officer. But that is no reason to exclude the testimony.

Second, Chauvin argues that the "foundation" for Williams' experience with wrestling and Mixed Martial Arts "cannot be established nor has it been disclosed." Def.'s Mots. in Limine 5.[3]

[3] Chauvin describes Williams' experience as "expertise," and points to Rule 9.01, subdivision 1(4), which governs the disclosure of expert testimony. Def.'s Mots. in Limine 5. But Williams is not testifying as an expert; he is testifying as a skilled lay witness who observed Chauvin's actions. A lay witness does not testify as an expert just because his testimony touches on the witness's particularized knowledge or "experience." *Ptacek*, 844 N.W.2d at 540. Because Williams' testimony is not the sort that "involves inferences or thought processes not common to everyday

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Incorrect again. The State can easily establish a proper foundation through Williams' own testimony. Williams can testify that he is a professional fighter who has trained eight hours a day, five days per week, and has participated in more than a dozen professional fights. He also has been training in Mixed Martial Arts for the last ten years. And he has been placed in a chokehold several times before. *See* Bates 026881-026882. All of this provides a foundation for Williams' testimony. The State also disclosed this information to defense counsel well in advance of trial. *See* Bates 026877-026960, 039999-040001, 040647-040648.

In short, Chauvin's motion should be denied to the extent it prohibits Williams from testifying regarding chokeholds, including the one Chauvin applied here. Such testimony is plainly relevant, and the State can lay a proper foundation for such testimony at trial.

VI. THIS COURT SHOULD DENY MOTION 23 BECAUSE PARAMEDICS AND FIRE DEPARTMENT WITNESSES MAY TESTIFY TO THEIR OBSERVATIONS AND FIRST-HAND ASSESSMENT OF FLOYD'S CONDITION.

In Motion 23, Chauvin asks the Court "for an Order precluding any member of the Minneapolis Fire Department and paramedics from testifying as to cause and manner of Mr. Floyd's death or any contributing factors to Mr. Floyd's death," relying on Rules of Evidence 602 and 702. *See* Def.'s Mots. in Limine 5. This Court should deny that motion. Paramedics and fire department witnesses may testify as to their observations and first-hand assessments of Floyd's condition when they arrived on the scene. That includes their observations, made in the course of treating Floyd, as to the possible causes of Floyd's condition.

Fire department personnel and paramedics who arrived on the scene during or after the incident may testify to their first-hand observations regarding Floyd's condition, as well as any

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life," it is not subject to the expert disclosure requirements of Rule 9.01. Minn. R. Evid. 701 Committee Comment (2016) (internal quotation marks omitted); *see supra* p. 8 n.1.

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treatment they provided to Floyd. Indeed, paramedics routinely offer testimony on "the nature of the" victim's condition and "the treatment that was provided." *State v. Van Richards*, No. A19-2022, 2020 WL 6554655, at *3 (Minn. App. Nov. 9, 2020). As part of that testimony, they may describe the reasons why they chose a particular course of treatment. Those reasons, of course, are based on the witness's assessment—made based on the witness's observations, experience, and training—of the "cause" of Floyd's condition, as well as any "contributing factors" that led to Floyd's condition. Def.'s Mots. in Limine 5. Case law demonstrates that fire department personnel and paramedics can testify regarding that assessment at trial. For example, in *Van Richards*, a paramedic witness testified—based on his "knowledge and training" and his observations of the victim—that the victim's injury was consistent with the typical markers of a stab wound, which in turn informed the paramedic's assessment of the victim's injury and the appropriate treatment. 2020 WL 6554655, at *1. Likewise, in *State v. Dye*, a paramedic testified to her observations regarding the cause of the victim's injury in the course of describing the victim's physical condition and the treatment she chose. 871 N.W.2d 916, 920 (Minn. App. 2015).

Rules 602 and 702 do not support the exclusion of this testimony. Rule 602 merely requires the State to introduce evidence "sufficient to support a finding that the witness has personal knowledge of the matter." Minn. R. Evid. 602. Here, so long as the State introduces sufficient evidence to lay a foundation establishing that testifying fire department personnel and paramedics had personal knowledge regarding Floyd's condition, Rule 602 does not bar their testimony. Any testimony on the "cause" of Floyd's condition is likewise permissible so long as it is grounded in witnesses' own observations regarding Floyd's condition. Thus, for example, first responders can properly testify that Floyd's condition at the time they observed him was not consistent with a drug overdose, and that they did not treat him as though he had suffered an overdose for that reason.

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Rule 702, meanwhile, governs expert testimony. That Rule would prohibit fire department personnel or paramedics from offering scientific opinions on medical causation if they are not otherwise qualified as experts on that subject. But the Rule would not prohibit fire department personnel or paramedics from testifying regarding their observations of Floyd, the medical interventions they attempted, and the reasons they chose to treat Floyd the way they did. Those factual observations are based on the witness's first-hand knowledge and perceptions of the scene, and so would not be barred by Rule 702. The Court should therefore deny this motion.

VII. THE COURT SHOULD NARROW THE SCOPE OF MOTION 31 TO REFLECT THE LIMITS SET FORTH BY THE CONFRONTATION CLAUSE.

In Motion 31, Chauvin requests "an Order precluding the State from playing, publishing or otherwise relying upon the statements of co-defendants Thao and Lane on the grounds that the Defense would not be permitted to cross-examine these co-defendants in violation of his Constitutional rights." Def.'s Mots. in Limine 6. This motion sweeps too broadly. The Court should narrow the scope of this motion in two respects, so as to properly reflect the limits the Confrontation Clause imposes on the use of statements by non-testifying declarants.

First, the Court should limit the scope of this motion to only the *testimonial* statements of co-defendants Thao and Lane—and, in particular, the interviews both defendants gave to the Bureau of Criminal Apprehension (BCA) shortly after Floyd's death. The Confrontation Clause, after all, bars the admission only of certain " 'testimonial statements' made by a declarant out of court." *State v. Wright*, 726 N.W.2d 464, 472 (Minn. 2007). Here, the Confrontation Clause does not apply to any non-testimonial statements Thao and Lane made during their encounter with Floyd that were captured by the body-worn cameras—including statements made to Floyd and to one another during the incident. That evidence cannot be excluded based on the Confrontation Clause. The Court should reject Chauvin's motion to the extent it suggests otherwise.

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Second, the Court should limit the scope of this motion to the extent that Thao and Lane decide not to testify in this trial. If Thao and Lane do ultimately decide to testify in this trial, the Confrontation Clause would not bar the admission of the sit-down interviews Thao and Lane both gave to the BCA. Accordingly, the Court should rule that the State is precluded from "playing, publishing or otherwise relying upon" these statements only in the event that these witnesses do not testify and Chauvin cannot cross-examine these witnesses.

VIII. THE COURT SHOULD DENY MOTION 32 BECAUSE DR. VINSON'S TESTIMONY SATISFIES RULE 702 AND IS OTHERWISE ADMISSIBLE.

In Motion 32, Chauvin asks this Court "for an Order precluding the entirety of the proffered testimony of Dr. Sarah Vinson," a forensic psychiatrist the State has retained in this case. Def.'s Mots. in Limine 6. Chauvin argues that her testimony should be excluded because her testimony "is speculative, based upon multiple levels of inadmissible hearsay, fails to meet scientific standards, offers no assistance to the jury, or so favors one party." *Id.* In the alternative, Chauvin "moves for an *in camera* review of her report and a Frye-Mack hearing to address the admissibility thereof." *Id.* at 7. Chauvin's motion should be denied because Dr. Vinson's testimony is admissible and plainly satisfies the requirements of Rule 702.

Dr. Vinson did not, as Chauvin contends, perform a "psychiatric evaluation of George Floyd." *Id.* at 6. Instead, Dr. Vinson's expert report and testimony describes the typical signs and symptoms of anxiety, fear responses to traumatic events, and panic attacks, including during police encounters. Expert Report of Dr. Sarah Y. Vinson 11-12.[4] It describes the counterintuitive

[4] The State offers a description of relevant aspects of Dr. Vinson's expert report as an offer of proof. In light of this Court's prior rulings requesting that the parties not attach evidentiary exhibits to substantive motions, the State has not attached this document as an exhibit to its filing.

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neurobiological and physiological manifestations of adrenaline-based fear responses that some people display in "situations where fighting or fleeing is unsafe or impossible, such as encounters with law enforcement officers." *Id.* at 12. These biological and physiological manifestations include sweating, shaking, an increased rate of breathing, thick saliva, and a sensation of shortness of breath. *Id.* The report explains that Floyd's counterintuitive conduct and physical condition during his encounter with Chauvin was consistent with an adrenaline-based fear response, and that Floyd manifested signs of a panic attack and Trauma and Stressor Related Disorders. *Id.* Based on the "neurobiology of fear responses," Dr. Vinson concluded that Floyd's conduct "was not indicative of disorientation or psychosis," and was not consistent with a state of "Excited Delirium" or "Agitated Delirium." *Id.* at 14.

Dr. Vinson's testimony is admissible under Rule 702. Under that Rule, expert testimony is admissible if: "(1) the witness is qualified as an expert; (2) the expert's opinion has foundational reliability; (3) the expert testimony is helpful to the jury; and (4) if the testimony involves a novel scientific theory, it must satisfy the *Frye-Mack* standard." *State v. Obeta*, 796 N.W.2d 282, 289 (Minn. 2011); *see* Minn. R. Evid. 702. Dr. Vinson's testimony clears each of these hurdles.

First, Chauvin does not dispute that Dr. Vinson is "qualified as an expert." *Obeta*, 796 N.W.2d at 289. She is a Triple Board-Certified Child and Adolescent, Adult, and Forensic Psychiatrist and a Clinical Associate Professor of Psychiatry and Pediatrics at Morehouse School of Medicine. Expert Report of Dr. Sarah Y. Vinson 3. She completed her General Psychiatry training at Harvard Medical School, where she received specialized training in Trauma, and completed two psychiatric subspecialty training programs at Emory School of Medicine on Child and Adolescent Psychiatry and Forensic Psychiatry. *Id.* She also has substantial experience diagnosing and treating patients suffering from trauma- and stressor-related disorders, anxiety

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disorders, and psychoses, and has been recognized as an expert in forensic psychiatry in state and federal courts. *Id.* at 3-4. Dr. Vinson thus qualifies as an expert by any definition of the term.

Second, Dr. Vinson's testimony has "foundational reliability." Minn. R. Evid. 702. "[F]oundational reliability" requires "that the theory forming the basis for the expert's opinion or test is reliable." *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 166 (Minn. 2012). This requires the Court to "analyze the proferred testimony in light of the purpose for which it is being offered" and to "consider the underlying reliability, consistency, and accuracy of the subject about which the expert is testifying." *Id.* at 168. Here, the "theory forming the basis for the expert's opinion" is "reliable." *Id.* at 166. Her testimony—the "purpose" of which is to illuminate the symptoms and signs of anxiety, fear responses to traumatic events, and panic attacks—discusses well-known neurological and biological responses to external stimuli. *Id.* at 168; *see* Expert Report of Dr. Sarah Y. Vinson 11-12 (describing basic neurobiological principles, including the body's release of epinephrine and the fight-or-flight response). Chauvin does not meaningfully dispute the "reliability, consistency, and accuracy" of Dr. Vinson's testimony. *Doe*, 817 N.W.2d at 168.[5]

Instead, Chauvin argues that a "psychiatric evaluation of George Floyd" would be "speculative," and "based upon multiple levels of inadmissible hearsay." Def.'s Mots. in Limine 6. But Dr. Vinson will not testify to a "psychiatric evaluation" of Floyd; instead, she will testify regarding the standard signs of anxiety, fear responses to traumatic events, and panic attacks. That testimony does not require any speculation on her part, and is based on well-established scientific and psychiatric principles. Meanwhile, to the extent Dr. Vinson's testimony is based on any

[5] In any event, even if this Court were uncertain about the "foundational reliability" of Dr. Vinson's testimony, it should admit the testimony and allow the opposing party to expose any alleged inadequacies in the factual basis during cross-examination at trial. *McPherson v. Buege*, 360 N.W.2d 344, 348 (Minn. App. 1984) ("[A]ny alleged deficiencies in the factual basis go more to the weight of the expert's testimony than to its admissibility.").

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"hearsay," that alone is not a reason for excluding her testimony, as Rule 703 permits experts to rely on hearsay in forming their opinions. *See* Minn. R. Evid. 703(a); *see* Minn. R. Evid. 703 Committee Comment (1989) ("The rule is aimed at permitting experts to base opinions on reliable hearsay and other facts that might not be admissible.").

Third, Vinson's testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702. The Minnesota Supreme Court has held in other contexts that expert testimony as to "counterintuitive . . . behaviors and beliefs" that are "contrary to society's expectations of how a person" would behave under the circumstances may be admissible. *Obeta*, 796 N.W.2d at 290. As *Obeta* explained, "recent case law has recognized that such expert opinion testimony on the typical behaviors of victims of similar crimes may be helpful to the jury." *Id.* at 291. For example, the Minnesota Supreme Court has allowed testimony regarding "typical rape-victim behaviors" because "the mental and physical reactions of an adult sexual-assault victim may lie outside the common understanding of an average juror." *Id.* at 291, 293; *see id.* at 293 ("The lay notion of what behavior logically follows the experience of being raped may not be consistent with the actual behavior which social scientists have observed from studying rape victims. . . . Expert testimony that challenges or explains these assumptions could be seen as valuable information which the jury should hear and consider in its search for the truth" (internal quotation marks and alteration omitted)). It has likewise "allowed expert witnesses to educate jurors about battered woman syndrome (BWS) and counterintuitive behaviors commonly associated with BWS." *Id.* at 291. It has permitted such expert testimony because it "would help to explain a phenomenon not within the understanding of an ordinary lay person," and would thereby "dispel the common misconception that a normal or reasonable person would not remain

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in such an abusive relationship." *State v. Hennum*, 441 N.W.2d 793, 798 (Minn. 1989); *see also State v. MacLennan*, 702 N.W.2d 219, 234 (Minn. 2005).

The same principle applies here. Dr. Vinson's testimony as to the "counterintuitive . . . behaviors" of some individuals who are confronted by the police and who behave in a manner "contrary to society's expectations of how a person" should behave when confronted by police is helpful to the jury. *Obeta*, 796 N.W.2d at 290. Such testimony "challenges . . . the[] assumption[]" that Floyd's behavior reflects his active resistance to arrest, and is therefore "valuable information which the jury should hear and consider in its search for the truth" and in deciding whether Chauvin's use of force was reasonable. *Id.* at 293 (internal quotation marks omitted). That testimony also assists the jury in determining whether Floyd's actions were an expected—if counterintuitive—response to external stimuli, or whether instead they were indicative of excited delirium. *See* Expert Report of Dr. Sarah Y. Vinson 14. And they assist the jury in determining whether Floyd's behavior during the minutes leading up to his death were expected responses to external stimuli, or were instead the result of intoxication. *See id.* at 11-14. In that respect, Dr. Vinson's testimony also provides the jury evidence relevant to causation.

Fourth, contrary to Chauvin's assertion, there is no need for a *Frye-Mack* analysis or hearing because Dr. Vinson's testimony is not based on any novel scientific theory. The *Frye-Mack* admissibility standard applies only when "the opinion or evidence involves novel scientific theory." Minn. R. Evid. 702; *see State v. DeShay*, 645 N.W.2d 185, 191 (Minn. App. 2002) (holding that a *Frye-Mack* hearing was not necessary where expert testimony did not rest on novel scientific evidence). Here, by contrast, Dr. Vinson's testimony rests on widely accepted postulates regarding the neurobiological and physiological manifestations of adrenaline-based fear responses.

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Chauvin does not identify any aspect of this testimony that rests on "novel scientific theory" that would merit a *Frye-Mack* hearing to address the admissibility of this evidence.

The cases Chauvin cites are not to the contrary. For instance, in *State v. Nystrom*, 596 N.W.2d 256, 260 (Minn. 1999), the Court excluded proposed expert testimony that residents of north Minneapolis might tend to fear for their lives and preemptively strike another person in self-defense. The district court excluded the testimony, and the Court of Appeals affirmed based in part on the fact that the "expert was not offering evidence of a scientifically recognized and accepted syndrome." *Id*. Here, by contrast, Dr. Vinson's testimony rests on research regarding "scientifically recognized and accepted" phenomena, including anxiety, panic attacks, and other fear responses to traumatic events. *Id. Nystrom* thus does not favor exclusion of her testimony.

Hanson v. Christensen, 145 N.W.2d 868, 877 (Minn. 1966), is even further afield. There, a court refused to permit the defendant's expert to testify in a tort case about "the general rules of diving as they pertain to depth of water." *Id*. The Court held that the expert's testimony would be "immaterial, irrelevant, and repetitious" because the "plaintiff admitted he knew it was dangerous to dive into water." *Id*. And the Court noted that the expert's testimony would not have fallen "outside the range of common knowledge." *Id*. Here, however, Dr. Vinson's testimony explains counterintuitive behaviors that lie outside of the range of common knowledge, and her testimony is relevant and not cumulative of other evidence. *See supra* pp. 18-19.

Similarly, in *State v. Fitzgerald*, 382 N.W.2d 892, 894 (Minn. App. 1986), the district court properly excluded evidence related to the typical traits of pedophiles "as irrelevant, as not generally accepted in the psychiatric community, as an indirect presentation of profile or syndrome testimony, and as confusing to the jury." The Court of Appeals provided no meaningful analysis in concluding that the exclusion of that evidence was "not an abuse of discretion." *Id*. at 895. That

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brief decision provides no guidance at all with respect to Dr. Vinson's testimony, as Dr. Vinson's methods are accepted, and her testimony would be relevant and would not confuse the jury.

Chauvin cites *State v. DeShay*, 669 N.W.2d 878, 888 (Minn. 2003), as a case in which the Minnesota Supreme Court allowed the exclusion of expert gang testimony that was "duplicative and of little real assistance to the jury in evaluating the evidence." But *DeShay* involved a "noncomplex drug conspiracy," and the jury already heard from "[w]itnesses with first-hand knowledge" about the gang in question, including testimony about the gang's "drug trafficking operation," and the fact that the group "used gang terms, flashed gang signs, and referred to the group as a gang." *Id*. at 886. The Court thus explained that "unlimited development of the roles and activities of gangs in general and gangs unrelated to the defendant is unnecessary, potentially prejudicial and, as a practical matter, places the defendant in the position of defending allegedly criminal activities of others, regardless of formal charges." *Id*. at 887. None of the facts on which *DeShay* relied as a basis for excluding the testimony in that case apply to Dr. Vinson's testimony. Dr. Vinson's testimony is not cumulative of the testimony provided by other first-hand witnesses or experts, and Chauvin does not contend that this testimony would unfairly prejudice him.

Finally, in *State v. Ritt*, 599 N.W.2d 802 (Minn. 1999), the Supreme Court affirmed a district court's refusal to have an expert "take the jury through the videotape of" a defendant's custodial interview "to point out the use of specific interview techniques" and "illustrate" how the interrogator "coerced" the defendant "into adopting certain statements." *Id.* at 810. The Supreme Court explained that "credibility is ordinarily within the understanding of a lay jury," but that expert "testimony is helpful and admissible if it explains a behavioral phenomenon not within the understanding of an ordinary lay jury, such as battered woman syndrome or the behavior of sexually abused children." *Id*. That distinction precisely explains why the district court in *Ritt*

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excluded the expert's testimony about an issue within the ordinary juror's experience, and why this Court should admit Dr. Vinson's testimony here: Her testimony "explains a behavioral phenomenon not within the understanding of an ordinary lay jury." *Id.*; *see supra* pp. 18-19.

In short, Dr. Vinson's testimony is admissible because it satisfies Rule 702 and is otherwise admissible. The Court should therefore deny Chauvin's motion to exclude that testimony.

IX. THE COURT SHOULD CLARIFY THAT MOTION 36 DOES NOT PRECLUDE THE STATE FROM INTRODUCING EVIDENCE REGARDING THE *SPREIGL* INCIDENTS THIS COURT HAS ALREADY ADMITTED.

In Motion 36, Chauvin asks this Court "for an Order precluding any evidence of or reference to citizen complaints filed against Mr. Chauvin in his capacity as a police officer or investigated by the Minneapolis Police Department whether sustained or deemed unfounded." Def.'s Mots. in Limine 7-8. In support, Chauvin cites Rule 608(c). That Rule does not support Chauvin's motion: It pertains only to the introduction of specific instances of a witness's conduct "for the purpose of attacking or supporting the witness' character for truthfulness." Minn. R. Evid. 608(b); *see* Minn. R. Evid. 608(c) (imposing a further limitation on the introduction of specific instances of a witness's conduct in criminal cases). It has nothing to do with whether citizen complaints filed against a non-testifying defendant should be admitted into evidence.

Instead, such evidence is governed by Rule 404(b). The Court should therefore clarify that this motion does not preclude the State from offering evidence regarding the Rule 404(b) *Spreigl* incidents this Court has already admitted into evidence. This Court held that the State could introduce evidence of the August 22, 2015 incident involving Chauvin, "provided the State presents clear and convincing evidence that Chauvin was present when a medical professional made the remarks summarized in the State's offer of proof," and of the June 25, 2017 incident involving Chauvin. Order on *Spreigl* Mots. 8 (Jan. 26, 2021). The June 25, 2017 incident was the

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subject of a complaint. The State therefore requests that the Court clarify that Chauvin's motion does not extend to evidence regarding those *Spreigl* incidents.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court deny Chauvin's Motions 18, 21, 22, 23, and 32. It also requests that the Court deny in part or limit the scope of Motions 14, 19, 31, and 36. The State will address Chauvin's remaining motions at trial.

Dated: March 4, 2021

Respectfully submitted,

KEITH ELLISON
Attorney General
State of Minnesota

/s/ Matthew Frank
MATTHEW FRANK
Assistant Attorney General
Atty. Reg. No. 021940X

445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 757-1448 (Voice)
(651) 297-4348 (Fax)
matthew.frank@ag.state.mn.us

NEAL KUMAR KATYAL (*pro hac vice*)
SUNDEEP IYER (*pro hac vice*)
Special Attorneys for the State of Minnesota
Hogan Lovells U.S. LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600 (Voice)
neal.katyal@hoganlovells.com

ATTORNEYS FOR PLAINTIFF