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No. A21-1228

STATE OF MINNESOTA

IN COURT OF APPEALS

State of Minnesota,

Respondent,

vs.

Derek Michael Chauvin,

Appellant.

APPELLANT DEREK CHAUVIN'S REPLY BRIEF

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A. The Unprecedented Pre-Trial Publicity Coupled with Threats of Violence to the Courthouse Required a Change of Venue.

The Sixth Amendment "secures to criminal defendants the right to trial by an impartial jury." *Skilling v. United States*, 561 U.S. 358, 377 (2010). To uphold this right, Minnesota law requires a district court to grant a motion for a continuance or a change of venue "whenever potentially prejudicial material creates a reasonable likelihood that a fair trial cannot be had. Actual prejudice need not be shown." Minn. R. Crim. P. 25.02 subd. 3. The District Court abused its discretion by failing to transfer venue to another Minnesota district where due process was possible.

Pretrial publicity coupled with threats of violence poisoned the jury against Appellant Derek Chauvin ("Chauvin"). *Appellant's Brief 6–12* (outlining local daily media coverage from day of events to the start of trial); *id. at 12–22* (discussing protests at the courthouse during *voir dire* and trial as well as potential and actual juror concern for personal and local public safety in the event of a Chauvin acquittal); *id. at 3–5* (summarizing riots in response to the events in question in what was the second-most destructive riots in American history that caused $500,000,000 in property damage and two deaths in the local Hennepin County area).

U.S. Supreme Court precedent directly contradicts the State's argument that juror prejudice can be presumed. *Respondent's Brief 14–21*. The Supreme Court established two tiers regarding the prejudicial effect of pretrial publicity: (1) "whether pretrial publicity was so extensive and corrupting that a reviewing court is required to presume

unfairness of constitutional magnitude" and (2) in cases without presumed prejudice "whether the *voir dire* testimony of those who became trial jurors demonstrated such actual prejudice that it was an abuse of discretion to deny a timely change-of-venue motion." *United States v. Petters*, 663 F.3d 375, 385 (8th Cir. 2011) (distilling *Skilling*, 561 U.S. at 377–99). The District Court erred on each tier.

1. The District Court Was Required to Presume Prejudice From Adverse Publicity and Threats of Violence to the Jury and Community as a Result of the Floyd Riots.

Skilling held under the first tier that prejudice is presumed when the community from which jurors are drawn is sufficiently poisoned either by adverse publicity or the effects of the very events at issue – in this case the second worst riots in U.S. history. Presumed prejudice requires changing venue because *voir dire* cannot perform its usual function of securing a fair and impartial jury. *Mu'Min v. Virginia*, 500 U.S. 415, 429-30 (1991); *Patton v. Yount*, 467 U.S. 1025, 1031-33, 1040 (1984); *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966); *Rideau v. Louisiana*, 373 U.S. 723, 726-27 (1963); *Irvin v. Dowd*, 366 U.S. 717, 725-28 (1961). These cases hold that juror promises to be impartial do not overcome this presumption. *Patton*, 467 U.S. at 1031 ("[A]dverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed.").

First tier *de novo*[1] analysis of presumed prejudice "requires this court to evaluate the complained-of publicity, as well as the circumstances surrounding that publicity, and

[1] The State suggests ignoring and abandoning the U.S. Supreme Court's two-tiered approach to apply abuse of discretion analysis to both tiers. *Respondent's Brief 17 n.3.*

to determine whether a reasonable juror exposed to such publicity could remain impartial, or whether the publicity was of such a nature as to render impartiality impossible." *United States v. McVeigh*, 153 F.3d 1166, 1179 (10th Cir. 1998). *Skilling* set forth four non-exclusive factors to analyze whether prejudice should be presumed: (1) the size of the jury pool, (2) the presence of blatantly prejudicial media coverage, (3) the years-long cooling period between the events at-issue and the trial, and most importantly, (4) the fact that the jury acquitted Skilling of nine insider-trading counts—far from an overwhelming victory for the state—demonstrated that the jury could fairly apply the law to the facts. *Skilling*, 561 U.S. at 382–84. Here, the additional circumstance of violent threats to the courthouse and community should also factor into the analysis. Because hindsight is necessary for first-tier presumed prejudice analysis (particularly regarding the jury verdict factor), the appellate court must review *de novo*. Of the *Skilling* factors, only the size of the jury pool could possibly weigh in-favor of the State. With the biased media coverage, the Floyd riots, the Brooklyn Center riots *during the trial*, the lack of cooling period, and legally-impossible conviction on all charged counts, Chauvin's case lands in the company of extreme cases where publicity went beyond the bounds of mere news media and had a physical effect on the venue community such that *voir dire* was impotent and prejudice is presumed. *Id.* at 381.

The extent and nature of the pretrial publicity must be examined before factoring in other surrounding circumstances. The media publicity was pervasive, and overwhelmingly hostile to Chauvin and police in general. The pretrial publicity was constant and overwhelming from May 25, 2020 through trial. The major media outlets in

the Twin Cities had coverage regarding the case literally every day from May 26, 2020 until trial concluded. The coverage glorified Floyd and demonized Chauvin. https://www.startribune.com/memorial-for-george-floyd-looks-ahead-to-what-s-next/571016152/. The Minneapolis Police Chief and Minnesota's head of the Department of Public Safety called the incident a murder (a legal conclusion) on June 4, 2020 in conjunction with announcing the firing of Chauvin. https://m.startribune.com/police-chief-derek-chauvin-knew-what-he-was-doing/571443282/. Pretrial publicity of the firing of a police officer on the heels of an event giving rise to criminal charges is a significant factor in finding that prejudice is presumed. *Nevers v. Killinger*, 990 F. Supp. 844 (E.D. Mich. 1997); *Nevers v. Killinger*, 169 F.3d 352, 372–73 (6th Cir. 1999) abrogated on other grounds by *Harris v. Stovall*, 212 F.3d 352, 372–73 (6th Cir. 1999). Numerous news stories detailed that Chauvin falsely had his knee on Floyd's neck thereby choking Floyd. Black Lives Matter began a campaign based on the slogans "get your knee off our neck" and "I can't breathe" all suggesting that Chauvin caused Floyd's death by cutting off the airway in his neck and causing Floyd to suffocate. https://www.startribune.com/memorial-for-george-floyd-looks-ahead-to-what-s-next/571016152/. This was not simply pretrial publicity regarding the facts of the case - the pretrial publicity held up Chauvin as the symbol of police brutality.

After examining the extent and nature of publicity, first-tier analysis looks at the circumstances. *Skilling* looked to size of jury pool, the pervasiveness of the pretrial

publicity, time between events and trial, and the actual jury verdict. Here, at least three of the four weigh in favor of finding prejudice should have been presumed.

a. The Size of the Jury Pool Did Not Alleviate the Prejudice.

Skilling noted that the 4,500,00 population size of Houston Texas mitigated against prejudice because jurors could be found who had not been subject to the publicity. However, at footnote 15, *Skilling* relied on a survey that found over 66% of the respondents had not heard of the defendant Skilling. Here, every seated juror, and virtually every juror involved in *voir dire*, knew of the riots and Chauvin and Floyd specifically.

b. Pretrial Publicity Was Pervasive and Prejudicial.

The overwhelming media coverage had exposed the jurors—literally every day—to news demonizing Chauvin and glorifying Floyd was more than sufficient to presume prejudice in the Hennepin County community. This was not objective factual coverage. That publicity highlighted the unique pressures by the physical proximity to the events, the responding protests, and property destruction in Hennepin County.

c. There Was No Sufficient Cooling Period.

There was no sufficient cooling period in this case to let the publicity or the physical pressure on the courthouse to simmer down. Skilling, 561 U.S. at 383 ("[U]nlike Rideau and other cases in which trial swiftly followed a widely reported crime, over four years elapsed between Enron's bankruptcy and Skilling's trial" (citing e.g., 373 U.S., at 724)). In Rideau, it was less than three full months between events and trial commencement. As discussed below, the District Court not only abused its

discretion in refusing to grant a continuance, the District Court actually accelerated the trial such that there was less than ten full months between events and jury voir dire. The timeline was much closer to Rideau than Skilling. Meanwhile, publicity on Chauvin continued most every day and physical pressure on the courthouse continued.

d. The Jury's Conviction on All Counts Lends Itself in Hindsight That Prejudice Should Have Been Presumed.

As discussed below, Chauvin should never have been charged with third-degree murder. That the jury could not acquit on *that* crime is a sign on review that fair trial was impossible in the Hennepin County venue and that prejudice should have been presumed. Three of the four *Skilling* circumstance factors weigh in favor of presuming prejudice, and the fourth—the size of the jury pool—is not alleviated under these facts.

e. The Threats of Physical Violence to the Jury and Community Demonstrates Actual Prejudice.

Finally, threats of physical violence were not at issue in *Skilling*. Those threats are the predominant factor here for presuming prejudice. Threats included the second worse riots in the U.S. history, physical violence to the officer's attorneys at pretrial hearings, extensive security at the Courthouse during the trial due to the threats of physical violence, riots in Brooklyn Center during trial, and elected Congresspersons egging on the violence. The jurors and Judge Cahill's own statements confirm the actual threats of rioting. The effects of the events at issue were threats that heavily weigh to presume prejudice, and as discussed below, these effects also contributed to actual prejudice by the jury. Chauvin should never have been tried in Hennepin County.

2. The District Court Abused Its Discretion by Denying Chauvin's Motion to Change Venue Based on *Voir Dire* Testimony of Actual Jurors Demonstrating Actual Prejudice.

Under *Skilling's* second tier, the District Court abused its discretion by denying Chauvin's motion to change venue. On the second tier, courts "independently evaluate the voir dire testimony of the impaneled jury in order to determine whether an impartial jury was selected, thus obviating the necessity for a change of venue." *United States v. Blom*, 242 F.3d 799, 804 (8th Cir. 2001). In this case, *voir dire* revealed Hennepin County was not a fair district to try Chauvin. In fact, actual juror misconduct occurred. Had *voir dire* revealed information Juror 52 (Brandon Mitchell) concealed, Mitchell would have been struck for-cause. The State's contention that *voir dire* must have been fair simply because Chauvin declined to use the three additional peremptory strikes does not cover the underlying problem in this case, that jurors were operating under threat to their communities. *Respondent's Brief 16*.

Juror prejudice was apparent throughout the *voir dire* process where jurors expressed concern for their safety and riots breaking out if they acquitted Chauvin. Juror concerns are laid out in Chauvin's original appellate brief. *Appellant's Brief 13–22*. For those venire members not actually selected to serve, their *voir dire* testimony illuminates the pretrial prejudice of the venue.

Seated jurors actually stated their concerns during *voir dire*. *Id.* There are few cases involving such violent threats in the event the jury acquits the defendant. Those rare cases—which all involved defendant police officers—required transfer of venue. *Lozano v. State*, 584 So. 2d 19, 22–23 (Fla. Dist. Ct. App. 1991) (Miami police officer

killed two black males fleeing police); *Nevers v. Killinger*, 990 F. Supp. 844 (E.D. Mich. 1997) (police officer killed a suspect). *Nevers* said it best:

> The Court cannot imagine a more prejudicial extraneous influence than that of a juror discovering that the City he or she resides in is bracing for a riot—including activating the National Guard and closing freeways—in the event the defendant on whose jury you sit is acquitted.

Id. at 871.

The State argues the Twin Cities were "calm leading up to and throughout the proceedings." *Respondent's Brief 19*. This is absurd. "Calm" is not evidenced by the necessity to surround the courthouse with concrete block, barbed wire, two armored personnel carriers and a squad of National Guard Troops throughout the trial. *Appellant's Brief 29–31*. "Calm" is not evidenced by Governor Walz deploying National Guard troops around the Twin Cities five days prior to jury deliberations. https://www.startribune.com/as-chauvin-verdict-looms-military-presence-in-twin-cities-unsettles-some-reassures-others/600047529/. "Calm" is not evidenced by barricades and barbed wire going up around the metropolitan area. The Twin Cities were not "calm" – they were bracing for a riot in the event Chauvin was acquitted. *Id.* As local newspaper *Star Tribune* reported:

> As the end of the Derek Chauvin trial draws closer, state and local officials have ordered a show of force that some say has transformed the Twin Cities into an eerie, alarming, almost alternate-reality version of their hometowns. Thousands of armed Guard members in fatigues are stationed on street corners — in front of libraries, laundromats, pharmacies, restaurants, office buildings and grocery stores. Businesses have boarded up windows, public buildings are surrounded by razor wire and for several nights last week curfews forced Twin Cities residents indoors after dark.

Id. The jury was not sequestered until after closing arguments on April 19, 2021. *Appellant's Brief 30*. Just as in *Nevers*, the circumstances of Chauvin's trial were the height of prejudicial extraneous influence. *Nevers*, 990 F. Supp. at 871.

First-tier analysis shows that the District Court should have presumed prejudice and transferred venue. On the second tier analysis, *voir dire* highlighted that pretrial publicity had been so pervasive in the community that the District Court abused its discretion by failing to transfer venue. A new trial in a fair venue should be ordered.

3. The Harm Done by Refusing to Change Venue Might Have Been Mitigated Had the Court Not Abused Its Discretion in Leaving Jurors Unsequestered.

Jury sequestration usually occurs at the discretion of the Court. Minn. R. Civ. P. 26.03, subd. 5(1); *State v. Morgan*, 246 N.W.2d 165, 168 (Minn. 1976). However, "[s]equestration must be ordered if the case is of such notoriety or the issues are of such a nature that, in the absence of sequestration, highly prejudicial matters are likely to come to the jurors' attention." *Id.* at subd. 5(2) (emphasis added). Once a court finds that jurors have been exposed to prejudicial materials—the rule only requires a likelihood such matters "come to jurors' attention"— the court's discretion is removed and sequestration must be ordered *sua sponte*. *State v. Mastrian*, 171 N.W.2d 695, 707 (Minn. 1969); *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966).

The quotations above answer the question whether sequestration should have been ordered here. This was a notorious case dealing with explosive issues—the very foundations of law enforcement and race relations in the United States, such that sequestration was required. While the District Court ordered sequestration only for

deliberations, this accomplished nothing—in fact, at common law, juries were always sequestered for deliberations. *Dietz v. Bouldin*, 579 U.S. 40, 52 (2016). Due to the failure to sequester, jurors were exposed to the City of Minneapolis paying Floyd's beneficiaries $27,000,000 to settle their claims against Chauvin, the Brooklyn Center riots, and the Cities bracing for further riots. If venue was not changed, sequestration should have been ordered for the entire case.

4. The District Court Abused Its Discretion by Accelerating Chauvin's Trial When It Should Have Delayed to Allow for a Cooling Period.

A court must grant a continuance if there is "reasonable likelihood that a fair trial cannot be had." Minn. R. Crim. P. 25.02 subd. 3. The District Court already failed to grant physical distance between the events and the trial, but a continuance at least would have offered temporal distance to allow strong community feeling to "cool." *Skilling*, 561 U.S. at 383. Here, instead of delay, the court hastened Chauvin's trial. The Minnesota Supreme Court had suspended in person jury trials due to COVID-19. It was not until March 15, 2021 that the Supreme Court allowed in person jury trials to continue. Chauvin's trial started one week earlier on March 8, 2021. Not only did the District Court accelerate this trial, it did not afford Chauvin's trial additional time that might have mitigated the publicity and prejudicial effect in the community arising from riots and property damage. Chauvin is not asking to "fend off trial indefinitely," *Respondent's Brief 21*, but rather to continue the trial to a date which would have allowed community anger to cool. It is not mere speculation to anticipate that allowing a longer, reasonable

duration of time would allow the community to feel less of the pressure from fallout from the Floyd riots. The District Court abused its discretion by refusing to continue the trial.

B. The Court Abused Its Discretion By Denying a Schwartz Hearing to Investigate Juror Misconduct, Given Evidence of False *Voir Dire* Testimony.

In addition to pervasive publicity and threats of riots, there was at least one juror whose conduct poisoned the jury. As a threshold matter, a prima facie case for a *Schwartz* hearing was presented before the District Court and the initial appellate brief preserved the claim in the brief's argument section. *Appellant's Brief 53*. The cases the State cites in an attempt to dispose of Chauvin's *Schwartz* argument held that what counts is whether an issue was argued in the brief-not whether it was listed in the issues section. *Ward v. El Rancho Manana, Inc.*, 945 N.W.2d 439 (Minn. Ct. App. 2020); *In re Application of Olson for Payment of Servs.*, 648 N.W.2d 226, 228 (Minn. 2002).

The District Court abused its discretion in denying a *Schwartz* hearing which would have allowed the Court to investigate and establish a record of juror misconduct. *Frank v. Frank*, 409 N.W.2d 70, 72–73 (Minn. App. 1987); *Schwartz v. Minneapolis Suburban Bus Co.*, 104 N.W.2d 301 (Minn. 1960). *Schwartz* hearings are to be granted liberally. *State v. Benedict*, 397 N.W.2d 337, 339 (Minn. 1986). The party requesting a *Schwartz* hearing need only supply evidence, which *standing alone and unchallenged*, would support finding jury misconduct. *State v. Larson*, 281 N.W.2d 481, 484 (Minn. 1979). Though there is significant alarming evidence that juror deliberation began from a position of assuming guilt rather than innocence, and was not based facts set forth at trial, setting aside misconduct by juror alternates or evidence from deliberations that may be

barred by Minn. R. Evid. 606(b), there was abundant evidence for a prima facie case of juror misconduct. *Dkt-570* (*Defendant's Memorandum in Support of Post-Verdict Motions) 49–53*.

Chauvin supplied evidence (which occurred only after the jury verdict) that Juror 52 (Mitchell) lied regarding his views of the case and the extent of his activism. *Id.* Mitchell had traveled 1,000 miles to participate in an August 28, 2020 protest march in Washington D.C. That march used the slogan "Get Your Knees Off Our Necks" in direct reference to Chauvin and George Floyd. At that march, Mitchell wore a t-shirt with a photo of Dr. Martin Luther King, Jr. and words saying "BLM * Get Your Knee Off Our Necks." Had this come to light at *voir dire*, it would have allowed Chauvin to evaluate whether to strike Mitchell for-cause.

In his juror questionnaire, Mitchell was asked "Did you, or someone close to you, participate in any of the demonstrations or marches against police brutality that took place in Minneapolis after George Floyd's death?" *Juror Questionnaire 52* at 4. Mitchell checked "No." *Id.* In *isolation*, this answer to the question specifically about Minneapolis *could* have been candid, but this question did not stand alone. Two pages later, Mitchell was asked: "Have you, or someone close to you, ever helped support or advocated in favor of or against police reform." *Id.* at 6. Mitchell checked "No." Here, Mitchell lied. The march Mitchell had traveled 1,000 miles from home mere months before had this as the first paragraph on its registration page: "Instigated from the protest movement that has risen up since the police killing of George Floyd, the 'Get Off Our Necks' Commitment March on Washington will be a day of action that will demonstrate

our commitment to fighting for policing and criminal justice." NATIONAL ACTION NETWORK, *Register for NAN's Commitment March: Get Your Knee Off Our Necks!* https://nationalactionnetwork.net/register-for-nans-march-on-washington-get-your-knee-off-our-necks/ (last visited October 5, 2022).

That same evidence about the purpose of the march shows Mitchell was lying when asked: "have you, or anyone close to you, participated in protests about police use of force or police brutality." *Id.* at 8. Mitchell checked "No." *Id.* Mitchell answered "No" to the question "Is there anything else the judge and attorneys should know about you in relation to serving on this jury." *Id.* at 14. Chauvin highlighted the first and last of these listed questions when presenting the *prima facie* case of jury misconduct that should have resulted in grant of a *Schwartz* hearing. Jury *voir dire* is to be considered in context. As raised below, the context illuminates both lies of commission and omission where had the truth been known, Mitchell would have been struck from the jury for-cause.

Instead of giving this due consideration, the Court abused its discretion and denied Chauvin's *Schwartz* motion without analysis. *Dkt-580-Addendum-27-28*. The remedy for denial of a *Schwartz* hearing is remand for that hearing to take place so investigation and a full record may be made. From there, the District Court will have to decide whether to impeach the verdict for violation of Chauvin's Constitutional right to a trial by an impartial jury.

C. The District Court Erred by Allowing an Impossible-to-Prove Third-Degree Murder Charge to Become Part of Chauvin's Trial Because It Wrongly Permitted the State to Prejudicially Present Evidence That Was Not Probative of the Provable Charges.

Chauvin was tried and convicted by the jury of third-degree murder. He never should have been charged with third-degree murder because Chauvin's actions were directed against an individual person. *State v. Noor*, 964 N.W.2d 424, 438 (Minn. 2021) Third-degree murder is only possible with an undirected *mens rea*. Contrary to the State's contention, this issue was raised. *Respondent's Brief 36*. At the time of post-trial motions, *Noor* had not yet been decided. *Dkt-570*; *Dkt-406* (*Defendant's Memorandum of Law in Support of New Trial and Change of Venue*, 3/18/2021). The third-degree murder charge allowed the State to introduce arguments that the evidence showed Chauvin's "depraved mind" which was not relevant to the *unintentional* second-degree murder charge. The State argued the look on Chauvin's face in the video and Chauvin's statements to Floyd was evidence of a depraved mind. While it is true the video would have been admitted regardless, *Respondent's Brief 36–37*, the third-degree murder charge allowed the prosecution to opine on a heightened, prejudicial *mens rea* for a crime the law applied to the facts would find impossible. *Trial Transcript ("TT"); 5757–61*. This could only serve to inappropriately inflame the passions of the jury and was a structural error a new trial could fix.

D. Chauvin's Conviction Should Be Reversed Because Police Officers Cannot Be Convicted for Felony-Murder Under Minnesota Law.

Chauvin was convicted of second degree felony-murder. Minn. Stat. §609.19. The predicate felony was third degree assault. Minn. Stat. §609.223 subd. 1. Assault is

defined as "the intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. §609.02 subd. 10 (2). Third degree assault is "[w]hoever assaults another and inflicts substantial bodily harm." Minn. Stat. §609.223 subd. 1. Under *State* v. *Dorn*, 887 N.W.2d 826, 830-31 (Minn. 2016), the intent element for assault is the intent to commit the act – i.e., the intent to physically touch someone and not the intent to commit injury.

As a police officer, Chauvin was statutorily authorized to commit "assaults" to effect an arrest under Minn. Stat. §629.33—"the officer may use all necessary and lawful means to make the arrest but may not use deadly force unless authorized to do so under §609.066." Minn. Stat. §609.066 defines "deadly force" as "force which the actor uses with the purpose of causing, or which the actor should reasonably know creates a substantial risk of causing, death or great bodily harm." The law authorizes police to commit "assault" with "reasonable" touches. Minn. Stat. §609.06 subd. 1; *Respondent's Brief 39*. As-applied to police officers, whenever an authorized assault crosses the "reasonable" territory line and the one touched dies related to that touch, the officer could then be convicted of felony murder with no heightened *mens rea* on part of the officer than that with which they committed the original assaulting touch, which is mere general intent to touch. There is no requirement that the officer have intent to act unreasonably, and it would not matter if he did. *Graham v. Connor*, 490 U.S. 386, 396–97 (1989); *see also Dkt-493* (Jury Instructions). While *State v. Dorn* holds that assault is not a strict liability offense as-applied to the everyday citizen, it is as-applied to police officers. 887 N.W.2d 826, 831 (Minn. 2016).

Because police officers are duty bound to "assault" suspects resisting arrest, Minnesota's assault statute becomes a strict liability statute for a police officer because the officer always "intends" to physically touch the suspect, if it is later found that the touch crossed the line of "reasonableness." Thus, Chauvin was convicted under a strict liability standard because the State was not required to prove any intent—i.e., the State was not required to prove Chauvin intended to inflict bodily injury on Floyd. Strict liability offenses are disfavored and the legislative intent to impose strict liability must be clear. *In re Welfare of C.R.M.*, 611 N.W.2d 802, 805 (Minn. 2000). Courts must apply the rule of lenity in construing any penal statute. *Id.* Applying lenity would require the State prove Chauvin intended to inflict "substantial bodily injury" on Floyd when Chauvin placed his knees on Floyd's back to restrain Floyd. Because the jury was not instructed that regarding Chauvin's "intent" to inflict bodily injury on Floyd, Chauvin's conviction must be reversed.

Moreover, in order for a police officer to be convicted of murder, Minnesota statutes require the officer to be using "deadly force"—force one knows will cause either death or "great bodily harm." Putting your knees on the back of a suspect does not create a "substantial risk of causing, death or great bodily harm." The State says this is harmless because "[t]he jury would not have returned a guilty verdict on third-degree murder *and* found that Chauvin's same act did not constitute a special danger to human life." *Respondent's Brief 43* (ignoring that the third-degree murder charge should never have been brought as a guilty verdict was impossible with the law applied to the facts).

Based on these standards, Chauvin cannot be convicted of felony-murder because he was authorized to arrest Floyd and therefore "touch" Floyd when Floyd resisted arrest. Because *State v. Dorn* held the intent necessary to commit an assault is the intent to "touch," and police officers must always "touch" suspects who resist arrest, the State has converted the second-degree murder statute into a strict liability offense where the underlying offense is an assault. Thus, the State did not have to prove any "intent" with respect to Chauvin other than the intent to "touch" Floyd which Chauvin was authorized and duty bound as a police officer to do.

E. Chauvin's Conviction Should Be Reversed Because the Judge Allowed Cumulative Opinions on the Use of Force.

The combined testimony of seven officers and experts on reasonable use of force was unfairly prejudicial as cumulative, and should have been barred by Minn. R. Evid. 403. The seven points from the State's brief can be summed up into two arguments: (1) that the various witnesses comprehensively testified from their distinct point-of-view, and (2) that the District Court could not have abused its discretion because cumulative evidence is harmless. As to the first argument, the fact each individual witness testifies from their own point-of-view—which is true of every witness—does not mean the evidence is not cumulative. Because so many officers were allowed to testify, the State was able to argue in closing:

> You have heard from numerous experts, police use of force experts, the training department from the Minneapolis Police Department, you've heard from police officers, street police officers, Sergeant Edwards, Sergeant Pleoger, right, so you've heard from these people and they have given you their opinions at various stages as to the reasonableness of the use of force. But one of the things that all of these police officers effectively agreed to is

> that when you look at the question of what would a reasonable police officer do…

TT; 5791–92.

In fact, the District Court itself expressed its "concern that this is becoming cumulative" and that allowing another witness to testify on the reasonable use of force "probably giv[es] more than the State deserves by allowing you to talk about national standards" *TT-4953–54*. At that point, the District Court's attempt to limit the unfairly prejudicial cumulative effect was nullified because the harm had already been done.

Cumulative expert testimony "dissuade[s] [the jury] from exercising its own independent judgment." *State v. DeShay*, 669 N.W.2d 878, 885 (Minn. 2003). This negates the State's second main argument, because by taking away the jury's independent judgment in the face of too much expert testimony, the District Court abused its discretion in a way that did harm Chauvin. State argues use of reasonable force was both a "central issue" in the case (it was), *Respondent's Brief 34*, but that any error arising from admitting seven cumulative expert opinions on this *central* issue was harmless. *Id.* at 46. The State's contradictory arguments demonstrate the harm – cumulative expert testimony on a *central* issue is not harmless.

The other non-cumulative evidence, *Respondent's Brief 45–46*, is not probative of the reasonableness of a police officer with like knowledge, experience and training. Without persuading the jury that the use of force was unreasonable, the underlying charge of assault could not be proven. The problem was not that the State presented any opinion of reasonableness to try to meet their burden. Rather, it was allowing the State to elicit

seven individual "expert" opinions on the reasonableness of Chauvin's use of force that was unfairly prejudicial cumulative evidence barred by Minn. R. Evid. 403. Because the cumulative opinions unfairly prejudiced Chauvin, a new trial should be ordered.

F. The Court Improperly Excluded Evidence of MPD Training Materials Establishing That MPD Trains Officers to Put Their Knees on the Back of Suspects Resisting Arrest.

The District Court's exclusion of the photo from the MPD training manual showing an officer doing exactly what Chauvin did was highly prejudicial and a serious error that undermined Chauvin's right to present the full defense of authorized use of force by a police officer. Exclusion of such evidence results in a reversal unless the evidence is found harmless beyond a reasonable doubt, i.e., there is a reasonable possibility the error complained of may have contributed to the conviction. *State v. Larson*, 389 N.W.2d 872, 875 (Minn. 1986). The State's contention that Chauvin forfeited this argument is wrong. It is true, as the State highlighted, that Chauvin's counsel "agreed" with the District Court that the training photo would be relevant as "an impeachment question on one hand" but the State misleads this Court by insinuating that Chauvin's counsel argued only for impeachment relevance. *TT-3694*. The fuller context includes a discussion of the Minneapolis Police Department's variety of trainings for officers and that "ultimately it's part of their training." *TT-3692*. Redacting the image from the training power point that was introduced later was entirely inappropriate. *TT-5277*.

As the State admits, whether Chauvin restraining Floyd by putting Chauvin's knees on Floyd's back was a reasonable use of force was the *central* issue in this case. If

the police department Chauvin worked for trained on this method and included a photo in its training manual showing an officer with his knees on a suspects back, such evidence is not only highly probative on this issue, it is likely conclusive. The exclusion of this photo passes the plain error review as (1) error (2) that is plain, (3) affected substantial rights (the defendant's ability to present a full defense), and (4) seriously affected the fairness of the trial. *Johnson v. United States*, 520 U.S. 461, 467 (1997).

The State also argues this MPD training manual photo should be excluded because Chauvin failed to prove he personally saw this particular training manual and photo. However, a police officer's reasonable use of force is an *objective* standard – i.e., the issue is whether what the officer actually did was reasonable - period. A police officer does not need to prove the officer received training on the actual use of force at issue in order to introduce the training into evidence. MPD's training manual evidences it trained officers to restrain suspects suffering from excited delirium by placing the officer's knees on the suspects back including the photo at issue showing an officer doing what Chauvin did. Would that photo—from the police force Chauvin actually worked for—be probative on the issue of *objectively* reasonable use of force? The question answers itself. As this photo shows what MPD regarded as a reasonable use of force in placing an officer's knees on Floyd's back, excluding this photo was not harmless error. Therefore, the District Court's decision on this evidence must be reversed.

G. Morries Hall's Exculpatory Testimony or Statement Should Have Been Admitted.

The State correctly concedes that Hall's statements would have been evidence that Floyd was under the influence of drugs at the time of his death - Respondent's Brief 49 – thereby providing evidence that the drugs in Floyd led to his death. As Hall invoked his Fifth Amendment right to not testify and successfully quashed the subpoena, Hall became an unavailable witness under Minn. R. Evid. 804(a)(l)-(2). Thus, Chauvin moved to subpoena Agent Henning to testify to Hall's statements under the statement-against-interest exception to hearsay. Minn. R. Evid. 804(b)(3). The District Court violated Chauvin's Constitutional right to present a complete defense and abused its discretion when it found that admission of the police interview was not permissible under Minn. R. Evid. 804(b). "When an error implicates a constitutional right," reversal is required "unless the State shows beyond a reasonable doubt that the error was harmless." State v. Morrow, 834 N.W.2d 715, 729 n.7 (Minn. 2013). The State cannot show that the Court's error was harmless beyond a reasonable doubt because the evidence would show Floyd died of a drug overdose rather than from Chauvin placing his knees on Floyd's back. A new trial must be granted.

H. Chauvin's Conviction Should Be Reversed Because Of Prosecutorial Misconduct from Discovery through Closing Argument.

Prosecutorial misconduct has been a documented denial of due process towards the defendant from discovery through closing argument. Perhaps some instances may be mere mistakes, *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008); *Respondent's Brief 53*, but not all, and the District Court abused its discretion by denying Chauvin's motions

and alerts to attempt to ameliorate the prejudice suffered as a result. *E.g.*, *Dkt-219*; *TT-568–70*. In addition to the visible "Black Lives Matter" messaging visible through prosecution witness's white button-down shirt, in violation of court order, *Appellant's Brief 64*, the closing and rebuttal arguments were not "mistakes." They were calculated to obfuscate the prosecution's burden of proof and to fall short of the high standard our court system holds for our prosecutors. Chauvin is not seeking to limit the prosecution to a "colorless argument," *Respondent's Brief 57*, but insisting, at the minimum, Chauvin's defense not to be belittled. *TT-5887* (objecting during trial to the repeated belittlement of the defense case theory as "a number of what I [Mr. Blackwell] call stories."; *Dkt-570*; *Appellant's Brief 65*.

I. Chauvin's Conviction Must Be Reversed as Full Review Is Impossible Because the Court's Failure to Transcribe the Entire Proceedings and Refusal to Supplement the Record Violates Due Process.

The State's dismissal of Chauvin's argument on this point hinges on Minn. R. Civ. Pro. 110.03, but that rule conditions its applicability on lack of report made to the trial court: "If no report of all or any part of the proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the proceedings from the best available means. . ." Minn. R. Civ. App. P. 110.03. The Rule applies only if *no report* of all or any part of the proceedings at trial had been made. Here, a report was given, so the rule does not apply.

Chauvin's counsel reported notes of the untranscribed sidebar discussions in an attempt to supplement the deficiency left by the trial Court's mystifying choice to decline to transcribe the entire proceeding in apparent violation of Minn. Stat. §486.02 (requiring

a complete verbatim transcript). The District Court set up and ran the proceedings. Chauvin's counsel had no choice but to work within those parameters and submitted his notes as directed by the Court. *Dkt-570*. From that point, the notes were in the possession of the District Court, but the District Court did nothing with them. The notes indicate some of the sidebars (April 2, 9, 6, and 12) included objections on cumulative opinion testimony. Without sidebar transcripts, it is impossible to review the verbatim arguments raised and rulings made, or to determine if additional errors were created or mitigated, thus denying Chauvin the right to fully make a meaningful appeal.

J. Cumulative Errors Rendered the Trial "Structurally Defective."

As set forth above, the proceedings in this matter were so pervaded by error, misconduct and prejudice that they were structurally defective. *United States v. Hasting,* 461 U.S. 499, 508-09 (1983) (certain errors involve "rights so basic to a fair trial that their infraction can never be treated as a harmless error"). Far from flinging the "kitchen sink" at this Court, Chauvin has repeatedly outlined numerous due process deprivations. Several of these errors alone are enough to remand for a new trial. *Id.* Together, even the lesser errors add up to a denial of constitutionally guaranteed due process. *State* v. *Duncan,* 608 N.W.2d 551, 551-58 (Minn. App. 2000), *review denied* (Minn. May 16, 2000) ("when the cumulative effect of numerous errors"—even if, alone, the errors are harmless—"constitutes the denial of a fair trial, the defendant is entitled to a new trial"). As here, *Duncan* noted numerous instances of erroneous admission of evidence and prosecutorial misconduct as rendering the trial structurally defective. As a result of this trial being structurally defective, a new trial must be ordered.

K. Chauvin's Sentence Should be Reduced to the Presumptive Range.

The District Court abused its discretion when sentencing Chauvin by departing upward to a 270 month sentence, which is nearly double the 150 month presumptive sentence for one with a criminal history score of zero. The court based this upward departure on factual findings of abuse of position of trust and authority and particular cruelty. As-applied to Chauvin, the court's use of "abuse of authority" is a departure from its previous uses. *Dkt-455*. Abuse of authority, while not found in the Minnesota Sentencing Guidelines, has been recognized by courts primarily always in criminal sexual or domestic abuse cases. *State v. Lee*, 494 N.W.2d 475, 482 (Minn. 1992); *State v. Rourke*, 681 N.W.2d 35, 41 (Minn. App. 2004); *State v. Cermak*, 344 N.W.2d 833, 839 (Minn. 1984). None of these involved a police officer. Even the case the Court and State cite to substantiate a different scenario, *State v. Bennett*, No. C9-96-2506, 1997 WL 526313, at *3 (Minn. App. Aug. 26, 1997); *Dkt-455* (cited at *Respondent's Brief 61*), was characterized by the Court of Appeals as an "abuse[] of position of trust and *commercial* authority" (emphasis added) when the defendant, who had a preexisting criminal history score, shot a taxi cab driver in the back of the head. This is a dramatically different scenario than Chauvin's.

The State suggests that criminal history score has no bearing on sentencing. *Respondent's Brief 63–64*. This is not true. Minn. Sent. Guidelines 2.B. ("*The Guidelines provide uniform standards for the inclusion and weighting of criminal history information.*"). Criminal history information is to be weighed, and presumably, would be reason for an upward departure sentence where appropriate. True enough, the guidelines

do not condition "eligibility for aggravating factors upon their criminal history score," *Respondent's Brief 64*, but when the score is zero, there is nothing else lingering in the background to weigh towards upward departure. There are only two cases where the defendant's criminal history score is zero, and both "abuse of a position of trust or authority" and "particular cruelty" were cited as aggravating factors. Those cases involved particularly vulnerable victims—three-year-old children—which is why particular vulnerability was discussed extensively in the opening brief. *Appellant's Brief* 68–69, *contra Respondent's Brief 64*. To depart from the regularly used definition of "abuse of authority" and apply it to police officers is to lay the ground to apply "abuse of authority" to nearly any scenario involving a lay person and government official. If this Court affirms the conviction, the Court should remand for sentencing in the presumptive range.

CONCLUSION

For the reasons set forth above, Chauvin did not receive due process and this Court should either reverse his conviction, reverse and remand for a new trial in a new

venue or remand for re-sentencing.

Dated: October 7, 2022.

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Certificate of Compliance with Minn. R. App. P. 132.01

I certify that this brief contains 6,911 words and thus complies with Minn. R. Civ. P. 132.01 subd. 3 (b)(1) because it contains no more than 7,000 words. In making this certificate, I relied on the word-count function of Microsoft Word 2016, which is the word-processing software that I used to prepare this brief.

This brief was produced with a proportional typeface and complies with Minn. R. App. P. 132.01's typeface requirements.

Dated: October 7, 2022.

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Certificate of Service

I hereby certify that I served a copy of the following Appellant's Brief on the following parties, by using the Court's e-filing and e-service function. :

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I also state that I did not serve a paper copy of the brief on Respondent's counsel as the Minnesota Supreme Court Order foregoing the requirement to serve and file appellate briefs is still suspended due to Covid-19.

/s/ William F. Mohrman
William F. Mohrman

Subscribed and affirmed before me
this 7th day of October, 2022.

/s/Mary Gynild, comm. expires 1/31/2025
Notary Public