

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

**STATE'S SECOND SET OF
MOTIONS *IN LIMINE***

v.

J. Alexander Kueng, Court File No.: 27-CR-20-12953

Thomas Kiernan Lane, Court File No.: 27-CR-20-12951

Tou Thao, Court File No.: 27-CR-20-12949

Defendants.

TO: The Honorable Peter A. Cahill, Judge of District Court; and counsel for Defendants, Earl Gray, 1st Bank Building, 332 Minnesota Street, Suite W1610, St. Paul, MN 55101; Thomas Plunkett, U.S. Bank Center, 101 East Fifth Street, Suite 1500, St. Paul, MN 55101; Robert Paule, 920 Second Avenue South, Suite 975, Minneapolis, MN 55402.

NOTICE OF MOTIONS

PLEASE TAKE NOTICE that on June 13, 2022, or as soon thereafter as counsel may be heard, the State of Minnesota will bring the following motions *in limine*.¹

MOTIONS

1. The State moves this Court to prevent Defendants from arguing that: (i) the State must show that Derek Chauvin and/or Defendants intended to kill George Floyd or intended to cause him bodily harm; (ii) that the State must show “but for” causation in order to establish the causation element of the charged offenses; (iii) that the State must prove

¹ The State previously filed motions eight, nine, seventeen, and eighteen as part of an initial set of motions *in limine* in April. See State's First Set of Mots. *In Lim.* (Apr. 1, 2022). Those motions are repeated herein for reference. The State also previously filed a memorandum discussing the issues raised in motion seven. See State's Mem. of Law Regarding Audio Visual Coverage, Sequestration, Expert Disclosure Deadlines, and Expert Testimony (Apr. 7, 2022).

that Defendants' aid was effective; and (iv) the State must prove that Defendants violated a duty to intervene. *See State v. Dorn*, 887 N.W.2d 826, 830-831 (Minn. 2016); *State v. Taylor*, 869 N.W.2d 1, 16 (Minn. 2015); *State v. Fleck*, 810 N.W.2d 303, 310 (Minn. 2012); *State v. Smith*, 901 N.W.2d 657, 663 (Minn. Ct. App. 2017). The State also requests that the Court prohibit Defendants from presenting evidence or argument that specifically addresses whether these incorrect legal standards have been satisfied.

2. The State moves this Court to prevent Defendants from arguing that a Defendant's use of force was lawful because—when viewed in isolation—the Defendant's force would have been reasonable. The reasonableness of a Defendant's use of force depends on the totality of the circumstances. *See Graham v. Connor*, 490 U.S. 386, 396 (1989). The State also requests that the Court prohibit Defendants from presenting evidence or argument that specifically addresses whether that incorrect legal standard has been satisfied.
3. The State moves this Court to exclude the following testimony by Steve Ijames:
 - a. Any testimony that George Floyd exhibited symptoms of excited delirium, mental illness, or any other medical symptoms.
 - b. Any testimony that George Floyd was malingering or any other speculation about George Floyd's mental state.
 - c. Any hearsay, including statements that Defendant Kueng may have made to Ijames.
 - d. Any testimony speculating about the mental state of any of the Defendants.

-
-
-
- e. Any testimony that Defendant Chauvin had either formal or informal command of the scene.
4. The State moves this Court to exclude the following testimony by Greg Meyer:
 - a. Any testimony regarding the limits or benefits of video evidence.
 - b. Any testimony that Defendant Lane was or could have been confused because Minneapolis Police Department (MPD) policy—of which he was not aware—sanctioned an officer placing a knee on a suspect’s neck.
 - c. Any testimony that characterizes Defendant Lane’s intent, including the statement that Defendant Lane “twice attempted to stop the force being used.” Greg Meyer, Expert Witness Report at 9 (Feb. 22, 2021).
 - d. Any testimony that the State must prove that the use of force against George Floyd was clearly or obviously unlawful.
 - e. Any testimony about specific Lexipol materials, other departments’ policies, California law, or qualified immunity precedent.
 - f. Any testimony that it would be unreasonable to expect that, had a Defendant acted differently, the Defendant’s actions would have changed the course of events.
 - g. Any hearsay, including statements that Defendant Lane made to the Bureau of Criminal Apprehension (BCA).
5. The State moves this Court to exclude expert testimony from Dr. Shawn Pruchnicki as unqualified, lacking foundational reliability, unhelpful to the jury, an improper topic for expert testimony, and unduly prejudicial. *See Minn. R. Evid. 702, 704, 401, 403; State v. Garland*, 942 N.W.2d 732, 742 (Minn. 2020); *Doe v. Archdiocese of St. Paul*,

- 817 N.W.2d 150, 164 (Minn. 2012); *State v. Provost*, 490 N.W.2d 93, 104 (Minn. 1992). In the alternative, the State requests that the Court conduct an evidentiary hearing on the admissibility of such testimony outside of the presence of the jury.
6. The State moves this Court to exclude any expert testimony from Dr. Sidney Dekker as unqualified, lacking foundational reliability, unhelpful to the jury, an improper topic for expert testimony, and unduly prejudicial, and for the additional reason that Defendants have not properly disclosed an expert report for Dr. Dekker. *See Minn. R. Evid. 702, 704, 401, 403; State v. Garland*, 942 N.W.2d 732, 742 (Minn. 2020); *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 164 (Minn. 2012); *State v. Provost*, 490 N.W.2d 93, 104 (Minn. 1992). In the alternative, the State requests that the Court conduct an evidentiary hearing on the admissibility of such testimony outside of the presence of the jury.
7. The State moves this Court to prohibit Dr. David Fowler from testifying regarding the opinion of any other non-testifying expert he consulted in preparation of The Forensic Panel Report to which he is not independently qualified to testify, or testifying that other experts agree with Dr. Fowler's opinion, analysis, or conclusions. *See Minn. R. Evid. 702, 801(c); State v. Bradford*, 618 N.W.2d 782, 793-794 (Minn. 2000) (en banc), as amended on denial of reh'g (Oct. 25, 2000). In addition, the State moves this Court to prohibit Defendants from calling other members of The Forensic Panel to introduce the aspects of Dr. Fowler's report outside of Dr. Fowler's expertise, because Defendants have not provided the required disclosures for the other members of The Forensic Panel. *See Minn. R. Crim. P. 9.02, subd. 1(2)(b).*

8. The State moves this Court to prohibit Defendants from introducing irrelevant character evidence not permitted by the rules of evidence or case law. *See Minn. R. Evid. 404(a)(1)* (permitting only evidence “of a pertinent trait of character”); *State v. Lasnetski*, 696 N.W.2d 387, 395 (Minn. Ct. App. 2005).
9. The State moves this Court to prohibit reference to Defendants’ spouses, children, or other family members in opening statements, closing arguments, and direct or cross-examinations. *See Minn. R. Evid. 402, 403, 404(a)(1)*.
10. The State moves this Court to permit Inspector Katie Blackwell to testify to the number, type, and general nature of the incidents to which Defendants Lane and Keung responded during their work as Minneapolis police officers, as detailed in Minneapolis Police Department records.
11. The State moves this Court to prevent Defendants from questioning Inspector Blackwell about information in Derek Chauvin’s internal affairs file—which Inspector Blackwell has already testified to having not seen—to imply that Chauvin was not qualified to serve as a Field Training Officer.
12. The State moves this Court to prevent Defendants from presenting any evidence that MPD’s records do not show that officers have intervened in the past as proof that officers did not in fact intervene, unless Defendants lay a proper foundation that demonstrates records of intervention would have been regularly reported and kept, and a diligent search failed to uncover them. *See Minn. R. Evid. 803(10); McInnis v. Maine*, 638 F.3d 18, 23 (1st Cir. 2011). If Defendants intend to lay that foundation, the State requests the Court require Defendants to make an offer of proof outside of the presence of the jury.

13. The State moves this Court to exclude any argument, evidence, or testimony regarding the MPD's decision-making process in terminating Defendants' employment as MPD officers. The State also moves this Court to exclude any argument, evidence, or testimony referencing the City of Minneapolis's settlement with George Floyd's family. To the extent the Court determines that evidence on these topics may be admissible for the limited purpose of attempting to show purported bias on the part of testifying witnesses, the State respectfully requests that the Court properly limit evidence on such extraneous matters.
14. The State moves this Court to exclude any evidence of changes to MPD's policy and training that occurred after May 25, 2020. *See* Minn. R. Evid. 401, 402, 403, 407.
15. The State moves this Court to exclude the results of a survey related to the Field Training Officer program.
16. The State moves this Court to exclude the April 27, 2022 probable-cause report of the Minnesota Department of Human Rights entitled "Investigation into the City of Minneapolis and the Minneapolis Police Department."
17. The State moves this Court to prohibit defense counsel from engaging in speaking objections and to require all arguments in support of an objection to occur at a bench conference or to otherwise occur outside of the jury's perception. *See generally* Minn. R. Evid. 103(c).
18. The State moves this Court to prohibit Defendants' counsel from commenting at any time during the trial or during closing arguments on the failure or alleged failure of the prosecution to call a witness or introduce evidence equally available to either party.

See State v. Bernardi, 678 N.W.2d 465, 471 (Minn. Ct. App. 2004) (citing *State v. Thomas*, 232 N.W.2d 766, 768 (Minn. 1975)).

19. The State moves this Court for an order exempting experts from the witness sequestration order. *See Trial Scheduling and Management Order and Memorandum Opinion ¶ 12(a)* (Apr. 25, 2022) (ordering witness sequestration); Minn. R. Crim. P. 26.03, subd. 8; Minn R. Evid. 615.
20. The State moves this Court to advise the jurors that, while not a mandatory instruction the jurors must follow, the Court suggests jurors turn off push notifications on their cell phones to limit inadvertent exposure to media.
21. The State moves this Court for a ruling that technical medical papers and reports may not be received as exhibits, and as such are not available to the jury during deliberations. *See Minn. R. Evid. 803(18)* (explaining that learned treatises are an exception to the hearsay rule in certain circumstances, “but may not be received as exhibits”); 11 Minn. Prac., Evidence § 803.18 (4th ed.) (explaining this rule “guard[s] against the possibility that the jury will attach too much weight to the learned treatise, or perhaps use the treatise for personal research on the general subject matter”).
22. The State moves this Court to exclude testimony connecting BATES 2659 to issues of medical causation.
23. The State moves this Court to exclude any arguments or speculative testimony about George Floyd’s subjective intent. *See Minn. R. Evid. 402.*
24. The State moves this Court to prevent Defendants from making any of the following improper, irrelevant, and misleading statements in the presence of the jury:
 - a. Any unnecessary mention of race or the use of racially charged terms.

- b. Any reference to the State's prosecutorial motives, the political implications of the jury's verdict, or any other statements that improperly invite jury nullification.
 - c. Any reference to the number or nature of the State's lawyers, including but not limited to the use of the phrase "army of lawyers."
 - d. Any reference to "cancel culture."
 - e. Any reference to riots or protests.
 - f. Any reference to the civil suit and settlement.
 - g. Any reference to the Minnesota Department of Human Rights as the "State," and any similar insinuation that the Minnesota Department of Human Rights is somehow akin to the prosecution.
25. The State moves this Court to prohibit admission of any testimony or evidence regarding any alleged bad acts committed or allegedly committed by any witness without prior notice to the State; giving the State an opportunity to be heard on and litigate its admissibility; and a prior Court ruling on its admissibility. *See* Minn. R. Evid. 401, 402, 403, 404.
26. The State moves this Court for a ruling prohibiting Defendants from using improper methods of impeachment not permitted by the Minnesota Rules of Evidence, including but not limited to:
 - a. Impeaching a witness with evidence concerning a prior arrest or contact with law enforcement (as opposed to a prior conviction). *See* Minn. Stat. § 595.07; Minn. R. Evid. 609; *State v. Boykin*, 172 N.W.2d 754, 756-57

(Minn. 1969) (witness may be impeached by prior conviction but not prior arrest).

- b. Impeaching a witness with a statement from a third-party summary—such as a report prepared by the BCA or Federal Bureau of Investigation (FBI)—if the witness does not adopt that document as his or her prior statement.

See State v. Graham, 764 N.W.2d 340, 352-353 (Minn. 2009) (unless witness has “adopted the statement attributed to him as his own, counsel may not offer extrinsic evidence in the form of reading verbatim from a third-party summary to impeach the witness”).

27. The State moves this Court to permit medical experts to demonstrate physiological features of the human body by using phrases such as “If you were to do this, you might feel that.” The State additionally moves this Court to instruct the jury that they may follow such demonstrative suggestions, although they are not required to do so. *See* Tr. of Proceedings, Vol. 21 at 4495:5-12, *State v. Chauvin*, 27-CR-20-12646 (D. Minn. Apr. 8, 2021).

28. The State moves this Court to require Defendants to make a record before the guilt phase of trial of their informed consent to a unitary trial, to alternatively articulate a request for a bifurcated trial by a jury, or to unanimously, knowingly, voluntarily, and intelligently waive their rights to having a jury find aggravating sentencing factors. *See* Minn. R. Crim. P. 11.04 Subd. 2.

Dated: May 13, 2022

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*)
DANIELLE DESAULNIERS STEMPPEL
(*pro hac vice*)
NATHANIEL AVI GIDEON ZELINSKY
(*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)
(202) 637-5910 (Fax)
neal.katyal@hoganlovells.com

ATTORNEYS FOR PLAINTIFF