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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

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

State of Minnesota,

Plaintiff,

vs.

J. Alexander Kueng,

Defendant.

DEFENDANT KUENG'S RESPONSE TO STATE'S SECOND MOTIONS IN LIMINE AND MOTION FOR DISMISSAL OF COUNT 1

TO: The Honorable Peter Cahill, Judge of Hennepin County District Court; Mathew Frank, Assistant Attorney General.

On May 25, 2022 this Court issued a Trial Scheduling and Management Order and Memorandum Opinion. The Court's order directed that Motions in Limine shall be filed no later than the end of the day on Friday, May 13, 2022. The Court further directed that any responsive memoranda shall be filed by the end of the day on Friday, June 3, 2022. On May 13, 2022 the state filed Motions In Limine to which Mr. Kueng now responds.

1. Mr. Kueng respectfully asks the Court to follow the law as it is written, not as the State explains it. This requires dismissal of Court 1 of the Complaint, rather than the restrictions imposed in the State's motion in limine. The State seeks to abrogate the element of intent when in-fact, count 1 of the complaint cannot be found because it is based on an assault as the predicate

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offense. The defendants in this matter were working in their capacity as police officers. That status comes with a duty to effect arrests which are inherently an "assault" on 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. Thus, the State seeks to convict under a strict liability standard because the State must be required to prove intent. 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). Also, courts must apply the rule of lenity in construing any penal statute. *Id.* Applying lenity to each of these statutes would require the State prove Chauvin and the officers intended to inflict "substantial bodily injury" on Floyd when Chauvin placed his knees on Floyd's back to restrain Floyd. So too the jury must be instructed regarding Chauvin's "intent" to inflict bodily injury on Floyd and that the other officers appreciated this intent.

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."

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Finally, the U.S. Supreme Court has placed a further requirement on convicting police officers of crimes committed while affecting an arrest under the Fourth Amendment:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *** With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," *Johnson v. Glick,* 481 F.2d, at 1033, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.
>
> *Graham v. Connor*, 490 U.S. 386, 396–97 (1989).[1]

Based on these standards, the several defendants cannot be convicted of felony-murder because they were authorized to arrest Floyd and therefore "touch" Floyd when Floyd resisted arrest. Because *State v. Dorn,* as cited by the State, 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 because the State did not have to prove any "intent" with respect other than the intent to "touch" Floyd which Chauvin and the defendant

[1] In 2020, the Minnesota Legislature incorporated this standard by statute into Minn. Stat. §609.066.

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officers were authorized and duty bound as a police officer to do. Mr. Kueng now moves this Court to dismiss Count 1 of the Complaint.

Based on this motion, Mr. Kueng further requests that the State be prohibited from raising or offering testimony on the duty to intervene as outlined in MPD policy because that duty is not found in statute and cannot be implied. This motion and the State's memorandum in support make clear that Mr. Kueng is not charged with a policy violation. The State must be limited to only duties imposed by statute.

2. This motion seeks an order limiting the Defendant's from offering a complete defense and misstates the *Graham* standard. *Graham* provides an objective and subjective standard to be applied. *Graham* provides that the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. The Court also cautioned, that the "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. Applying this standard allows officers to testify that their conduct was lawful in the context of their specific situation.

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3. Mr. Kueng opposes this motion as all of the matters listed are within Mr. Ijames knowledge and expertise and all are relevant to the issues the jury must decide. The State's motion requests to have this Court prevent the defendant's from presenting a complete defense. This is especially true in light of the many and repetitive experts being brought by the State. All of which the defense needs to confront.

4. Mr. Kueng submits that this motion is mute due to Mr. Lane's recent departure from the case.

5. Mr. Kueng opposes the State's motion to limit Dr. Pruchniki's testimony. Dr. Pruchniki's testimony is necessary to confront the many experts the State will likely call on the issue of use of force and intervention. The State is certain to ask their experts about training in the area of use of force and intervention. It is important for the jury to understand how minimally effective the MPD training and FTO programs were in the past to be able to fully evaluate the dump truck loads of evidence the State will present. Dr. Pruchniki's testimony is necessary to allow Mr. Kueng to confront and cross examine the State's witnesses.

6. Mr. Kueng puts forth the same arguments for Dr. Dekker.

7. Mr. Kueng submits that this motion is mute.

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8. Mr. Kueng's reputation for peacefulness, non-violence, and compliance with authority are all relevant character traits. Each must be considered by this jury in determining the mental states characterization of actions for the crimes charged. Further, the jury must be allowed some insight into Mr. Kueng's background to understand and evaluate his state of mind.

9. Mr. Kueng opposes this motion. It is first important to note the State's citation to *Lohman v. Gen. Am. Life Ins. Co.*, 478 F.2d 719, 728 (8th Cir. 1973) is misplaced to the point of questioning the State's understanding of the duty of candor toward a tribunal. The *Lohman* case was a civil matter dealing largely with procedural matters attending civil litigation. The *Lohman* case found that in the context of that case the comments about family were of no particular concern, neither are they here. Further, the jury must be able to evaluate the individual defendants and their testimony. Jury trials in criminal matters are not conducted in a sterile legal laboratory. Criminal trials are about people and why they acted. Having background is absolutely relevant and fairly presented in this matter. These are the very building blocks that allow a jury to understand the standards they are to decide.

10. Mr. Kueng opposes this motion because it asks a witness to testify about a matter beyond the scope of their duties. Insp. Blackwell was in charge of training at the time Mr. Kueng was in the police academy. What police calls Mr.

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Kueng responded to during his FTO program is not a matter within Insp. Blackwell's purview. Having a summary of calls is inherently misleading because in the different phases of FTO the student is nothing more than an observer. The State seeks to mislead the jury with this testimony suggesting that Mr. Kueng has experience when in fact they are taking that experience out of context.

Should Mr. Kueng choose to testify, the State would be free to cross examine him on those points. Allowing the State to bring these matters into their case-in-chief through Insp. Blackwell impacts Mr. Kuneg's decision to testify and thereby deprives him of his State and Federal Constitutional right not to testify. Further, if a witness is to be brought in to testify on this matter, it would need to be Mr. Chauvin, who was in charge of Mr. Kueng for a majority of his training period and the entirety of his training period where Mr. Kueng was allowed to be the "primary officer."

11. Mr. Kueng notes that Mr. Chauvin's personnel file has information that reveals he should have never been allowed to work as an FTO. Inspector Blackwell, who had a relationship with Mr. Chauvin going back to a time prior to their academy days hand picked him for the position of FTO. The defense must be allowed to point out these matters to the jury. Should the state chose to argue that the reasonableness of an officer's use of force is assessed based on the totality of the circumstances and bring up the details of Mr. Kueng's prior field experience,

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Mr. Kueng must be allowed to confront that testimony by pointing out the failure of Insp. Blackwell to properly vet FTO's.

12. Mr. Kueng will agree to forgo this line of evidence provided the State does not question witnesses about their personal experience with intervening in other situations.

13. Mr. Kueng will agree to forgo testimony related to the termination process. The record settlement the Floyd family received is another matter. The settlement is illustrative of former Chief Arradondo's lack of competence to lead and his failure to implement training or appropriately supervise training. Because the State is certain to argue and present evidence suggesting the reasonableness of an officer's use of force is assessed based on the totality of the circumstances, the details of Defendants' prior training experience is extremely relevant. The fact that Chief Arradondo and Inspector Blackwell failed to provide an adequate environment to grow officers is also relevant. The fact that former Chief Arradondo's and current Insp. Blackwell's failures led to the death of Mr. Floyd and a record settlement is important as it puts the magnitude of those failures in context.

14. Mr. Kueng takes no position on this motion, but joins any position taken by co-defendant.

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15. Mr. Kueng opposes this motion. The survey is both a record of regularly conducted business activity and a public record or report. Minn. R. Evid. 803 (6) and (8). Further the exhibit is needed to confront all witnesses who may testify about training within the MPD. In particularly Former Chief Arradondo, Insp. Blackwell and expert witnesses. Importantly Insp. Blackwell actually created the survey and specifically relied on the survey to make changes to the FTO program and training. The survey's content shows the inadequate adjustments to the FTO program which directly affected Mr. Kueng's training to include his FTO experience. The survey is part of the body of knowledge relied on by Insp. Blackwell, the right to confrontation demands she explain her startling decisions that lead to Mr. Floyd's death. Her failure to act diligently in the face of the survey is a matter the jury must consider in determining her competence and credibility. The survey clearly outlines many failings and puts context of the inadequacy of the adjustments in training made by Insp. Blackwell. Mr. Kueng will be denied an opportunity to present a complete defense and confront the testimony against him.

16. Mr. Kueng opposes this motion and requests that the Court admit the entire *Investigation into the City of Minneapolis and the Minneapolis Police Department*, Minneapolis Dep't of Human Rights 5 (Apr. 27, 2022). Alternatively, the Mr. Kueng must be allowed to rely on the report during cross examination of

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the many witnesses that will be called to testify. In particular testimony from use of force experts, the former chief, Lt. Zimmerman and Insp. Blackwell. The report is both a record of regularly conducted business activity and a public records or report. Minn. R. Evid. 803 (6) and (8). Further the report is necessary to satisfy the right to confrontation. The report outlines the many deficiencies in training and culture in the MPD and reflects the astonishing inadequacy of the command. All of which are relevant to the training and culture of the MPD.

17. Mr. Kueng takes no position on speaking objections, but reasserts his right to an open and public trial which will be denied by the complete closure which occurs in off the record discussions regarding objections.

18. This motion asks the Court to apply a rule too broadly. This line of argument began with *State v. Swain*, 269 N.W.2d 707, 716 (Minn. 1978) which relied on *State v. Yaedke*, 308 Minn. 345, 242 N.W.2d 601 (1976) to conclude the defense could not comment on the State's failure to call a witness who was an alternative perpetrator. (Apparently unnoticed by the defense). *Id*. In *Swain,* which was relied on by *State v. Bernardi* – the case cited by the State – defense counsel wished to raise an inference that Diane Swain, the Defendant's mother, was a likely suspect and that the police failed to fully investigate this possibility. The *Swain* decision is limited in that it holds that a Defendant was **not** precluded from arguing that Diane Swain was the killer, but only that the state's failure to

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call her somehow raises a reasonable doubt about defendant's guilt. *Id*. (emphasis added). The *Swain* Court relied heavily on the fact that Diane Swain was not under the control of the State while a majority of the witnesses in this matter are under State control. The policy behind the *Swain* decision was to avoid surprise and confusion, not to preemptively handcuff the defense as the motion in this case is designed to do. The *Swain* decision should not be read to do more than this. Applying *Swain* to witnesses under the control of the State's control is broadening the rule beyond the policy relied on in the decision. This places police officers/deputies, professional witnesses and witnesses under State subpoena outside of the scope of this motion. The decision in *State v. Bernardi* is equally inapplicable and only relevant to the specific facts of that matter. In *Bernardi* the witnesses were equally available to both the state and the defense and defense counsel actually called the witnesses to testify. Thus, the jury saw and heard the witnesses, and they were subject to impeachment by either party. The *Bernardi* decision points out that such an inference may be argued, if allowed at all, about witnesses who do not testify when it would be natural to expect one party or the other to call them. *State v. Bernardi*, 678 N.W.2d 465, 471 (Minn. App. 2004).

19. Mr. Kueng opposes this request and asks this court to make clear that no witnesses may be informed of or consulted on the testimony of another testifying expert until both experts testimony is complete.

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20. Mr. Kueng takes no position on the guidance the Court may provide on push notifications.

21. Mr. Kueng takes no position on this motion.

22. Mr. Kueng opposes this motion. Bates 2659 is a page from a training PowerPoint that depicts the relative amounts of Heroin, Fentanyl and Carfentanyl necessary to cause death. This is both a matter that the defendants were trained on and illustrative of Mr. Floyd's actual cause of death. As such it is relevant.

23. Mr. Kueng respectfully asks this Court to direct the State provide a brief explaining this objection.

24. Mr. Kueng opposes this motion to the extent it asks the Court to limit testimony or argument about the motives behind the prosecution and references to the obscene amount of resources brought to bear on a matter where convictions have already occurred. The number of lawyers and other resources applied to witness interviews goes to the possible bias of the witness's subsequent testimony. Mr. Ellison's presence in the Courtroom, while not actually participating as a lawyer, is again another fact that shows how witness testimony is biased and coerced. Bringing a show pony to court, yet not allowing the defense to point that fact out prevents Mr. Kueng from confronting the obvious political purpose behind Mr. Ellison's presence and this prosecution.

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25. Mr. Kueng opposes this motion. Mr. Kueng anticipates relying on any and all the past bad acts previously disclosed by the State regarding Mr. Chauvin and Mr. Thao.

26. Mr. Kueng opposes this motion to the extent it asks the Court to deviate from the accepted law in each of these areas. Prior arrests where a witness was given preferential treatment because of their status as a witness in this case is relevant to bias for the witness and any law enforcement officer who participated in the investigation because it shows benefit received and rules bent to gain a conviction.

27. Mr. Kueng opposes this motion and in fact filed a motion in limine opposing just this sort of demonstration. The State seeks to have witnesses address the jury directly and enjoy an interactive exchange. This is an inappropriate form of persuasion, especially in light of the extraordinary number of State expert witnesses. This is tantamount to asking the jury to view the scene of the crime or perform an independent investigation. This conduct is asking the jury to conduct an independent scientific experiment as well.

28. Mr. Kueng objects to this request as is not the subject of a proper motion in limine. Mr. Kueng notes that the joint trial is being conducted over his objection. Mr. Kueng renews the motion for severance and notes that the motion for severance applies to the sentencing phase separately form the guilt phase.

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Finally it is premature to ask Mr. Kueng to make such a decision before he is even aware of the make-up of his jury.

Respectfully submitted,

Dated: June 3, 2022

/s/ Thomas C. Plunkett

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