

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

**SUPPLEMENTAL BRIEF IN SUPPORT
OF NOTICE OF INTENT TO SEEK AN
UPWARD SENTENCING DEPARTURE**

vs.

Derek Michael Chauvin,

Court File No: 27-CR-20-12646

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 Cahill, Judge of District Court, and counsel for Defendants: Eric J. Nelson, Halberg Criminal Defense, 7900 Xerxes Avenue South, Suite 1700, Bloomington, MN 55431; Robert Paule, 920 Second Avenue South, Suite 975, Minneapolis, MN 55402; 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.

PLEASE TAKE NOTICE THAT, in response to this Court's request at the hearing on September 11, 2020, the State submits this Supplemental Brief in Support of its Notice of Intent to Seek an Upward Sentencing Departure. As the State explained in its Notice, there are at least five bases for an upward sentencing departure, including that George Floyd, the victim, was particularly vulnerable, and that Defendants—police officers in full uniform—abused their position of authority in committing the crime. At the September 11 hearing, the Court asked the State for additional briefing addressing the following questions: (i) Whether the particular vulnerability of the victim justifies an upward sentencing departure when the defendants are responsible for creating the victim's vulnerability; and (ii) Whether a defendant's abuse of a

position of authority supports an upward sentencing departure even if there is not a pre-existing relationship of trust between the defendant and the victim. The answer to both questions is yes.

1. When a defendant commits a crime against a victim who was “particularly vulnerable due to . . . reduced physical or mental capacity, and the offender knew or should have known of this vulnerability,” an upward sentencing departure is permissible. Minn. Sent. Guidelines 2.D.3.b(1); *see* Minn. Stat. § 244.10, subd. 5a(a)(1). That standard is readily met here. Defendants handcuffed Floyd’s arms behind his back, pressed him chest-down into the pavement, and rendered him unconscious. As a result, Floyd was “particularly vulnerable” when Defendants committed the crime, and Defendants knew or should have known as much.

This factor applies regardless of whether defendants are responsible for creating the victim’s vulnerability. The Minnesota Court of Appeals has previously upheld the application of this enhancement where the victim became “particularly vulnerable” as a result of a defendant’s actions. For example, in *Dillon v. State*, the defendant attacked the victim and “continued to assault [her] after she fell to the floor and . . . appeared to be unconscious.” 781 N.W.2d 588, 600 (Minn. App. 2010). The court held that the “district court’s vulnerability assessment [was] well-supported” because the defendant’s “assault rendered [the victim] vulnerable, and his assault was more effective because she was vulnerable.” *Id.* Likewise, in *State v. Bock*, the victim was deemed “particularly vulnerable” where he “fell from the impact of the first blow” and “therefore was dazed and in a vulnerable condition when [the defendant] hit him the second time.” 490 N.W.2d 116, 121 (Minn. App. 1992). Courts have also recognized that physical restraints applied or imposed by the defendant may increase a victim’s vulnerability. Accordingly, a victim may be deemed particularly vulnerable when the defendant handcuffs him before committing an assault, *Halter v. State*, No. A08-0029, 2008 WL 5136978, at *1-3 (Minn.

App. Dec. 9, 2008); *State v. Taylor*, No. C1-89-164, 1989 WL 131588, at *1 (Minn. App. Nov. 7, 1989), “physically restrain[s] the victim,” *Briviesca v. State*, No. C3-94-21, 1994 WL 233606, at *2 (Minn. App. May 31, 1994), or otherwise holds the victim “captive,” *State v. Blocker*, No. A17-0847, 2017 WL 3864007, at *4 (Minn. App. Sept. 5, 2017) (finding that the victim was particularly vulnerable in part “because [the victim was] held captive in appellant’s van”).

In short, the particular vulnerability factor applies even when it is the defendant’s actions that create the defendant’s vulnerability. Here, because Defendants’ actions rendered Floyd particularly vulnerable, an upward sentencing departure is warranted.

2. An upward departure is also warranted because Defendants, licensed police officers in full uniform, abused their position of authority in the course of committing a crime. *See State v. Lee*, 494 N.W.2d 475, 482 (Minn. 1992). This factor supports an upward departure regardless of whether the Defendant had a preexisting relationship of “trust” with Floyd.

The Minnesota Court of Appeals has explained that this factor supports an upward sentencing departure when the defendant and victim are in a “relationship[] fraught with power imbalances that may make it difficult for a victim to protect himself.” *State v. Rourke*, 681 N.W.2d 35, 41 (Minn. App. 2004), *review granted and remanded on other grounds* 2005 WL 525522 (Minn. App. Mar. 8, 2005). Such “power imbalances” may be present even when a defendant occupies a position of authority but has no pre-existing relationship with the victim. That is why an upward departure is warranted so long as the defendant holds either “a position of trust *or* [a] position of authority.” *State v. Cermak*, 344 N.W.2d 833, 839 (Minn. 1984) (emphasis added).

Consistent with that principle, courts have affirmed the application of this factor even when there is not a preexisting trust relationship between the defendant and the victim. For

example, the Court of Appeals concluded in *State v. Bennett* that this factor supported an upward departure where the defendant shot a cab driver with whom he had no preexisting relationship. No. C9-96-2506, 1997 WL 526313, at *3 (Minn. App. Aug. 26, 1997). The court explained that the victim’s “occupation and duties as a cab driver” by themselves “allowed [the defendant] to create and take advantage of a defined relationship with” the cab driver. *Id.* After retaining the cab driver to transport him, the defendant “was in a position to dominate and control” the cab driver. *Id.* The defendant “had authority to tell [the cab driver]” where to go and “to stop the cab at any point.” *Id.* That “position of control,” the court concluded, allowed the defendant “to manipulate the circumstances and commit the crime,” and so constituted an “abuse[] [of a] position of trust and commercial authority” over the victim. *Id.* Other cases have reached similar conclusions, holding that this factor applies without requiring evidence of a preexisting relationship between the defendant and the victim. *See State v. Konrardy*, No. CX-88-1867, 1989 WL 14919, at *3 (Minn. App. Feb. 28, 1989) (noting that the “offender’s position of authority” supported an upward departure where the defendant “used his position as employer” to commit the crime, with no mention of a preexisting “trust” relationship between the defendant and the victim).

Here, as police officers in full uniform, Defendants had a “defined relationship” of authority over Floyd, and were “in a position to dominate and control” him. *Bennett*, 1997 WL 526313, at *3. That “position of control” allowed them to handcuff and restrain Floyd, and therefore to “manipulate the circumstances and commit the crime.” *Id.* That conclusion, moreover, is reinforced by the Minneapolis Police Department’s Code of Ethics, which makes clear that Defendants occupied a position of “public trust” and “public faith.” Exhibits to State’s Oppositions to Chauvin, Kueng, Lane, and Thao Mots. to Dismiss, MPD Policy & Procedure

Manual 5-102.1. Defendants abused that position of trust and authority by handcuffing and restraining Floyd in a manner that led to his death. An upward departure is accordingly warranted.

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Respectfully submitted,

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