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6/2/2021 3:01 PM

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

State of Minnesota, Court File No.: 27-CR-20-12646

Plaintiff,

v. **STATE'S MEMORANDUM OF LAW ON SENTENCING**

Derek Michael Chauvin,

Defendant.

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.

INTRODUCTION

The State respectfully requests a sentence of 360 months, or 30 years, for Defendant Derek Chauvin, a former police officer convicted by a jury of second-degree murder, third-degree murder, and second-degree manslaughter in connection with the death of George Floyd.

This Court has already concluded that the facts proven beyond a reasonable doubt at trial support the existence of four separate aggravated sentencing factors: Defendant (i) abused a position of trust and authority; (ii) acted with particular cruelty; (iii) acted in concert with three other individuals who all actively participated in the crime; and (iv) committed the offenses in the presence of children. *See* Verdict and Findings of Fact Regarding Aggravated Sentencing Factors 1-5 (May 11, 2021) ("Sentencing Findings of Fact"). At sentencing, the Court should take the next step and hold that each of these aggravating factors supplies a "substantial and compelling reason" for imposing an aggravated sentence. *State v. Rourke*, 773 N.W.2d 913, 922 (Minn. 2009).

As this Court has already found, Defendant's conduct was not just an abuse of his position of trust and authority, but an "egregious abuse" of that position. Sentencing Findings of Fact 3.

Filed in District Court
State of Minnesota
6/2/2021 3:01 PM

Defendant's conduct was also "particularly cruel," as it resulted in Mr. Floyd's "prolonged . . . asphyxiation" as Mr. Floyd "was begging for his life" and was "obviously terrified by the knowledge that he was likely to die." *Id.* at 4. Defendant's conduct was witnessed by four children, including a nine-year-old child, who saw Mr. Floyd "being asphyxiated as he begged for his life." *Id.* at 4-5. And Defendant's conduct was committed alongside three other individuals who actively participated in the crime: Defendants Lane and Kueng "were actively involved in the restraint" of Mr. Floyd, and Defendant Thao "was actively involved by keeping bystanders away," thereby enabling the other officers "to continue an unreasonable use of force." *Id.* at 5. Each of these facts demonstrate that "the defendant's conduct in the offense[s] of conviction was significantly more . . . serious than that typically involved in the commission" of these offenses. *State v. Hicks*, 864 N.W.2d 153, 157 (Minn. 2015) (internal quotation marks omitted). In other words, all four of these aggravating factors—individually and together—strongly support an upward sentencing departure.

In light of these four separate aggravating factors, the Court should order a sentence that is "twice the upper end of the presumptive sentencing range." *State v. Barthman*, 938 N.W.2d 257, 269 (Minn. 2020). The Minnesota Supreme Court has made clear that where one or more aggravating factors are present, the district court can impose a sentence up to "double the upper limit of the presumptive range." *Id.* at 275. Here, the existence of four separate aggravating factors reflects the seriousness of Defendant's conduct. The severity of several of these aggravating factors—this Court found that Defendant's abuse of his position of trust and authority was "egregious," and that multiple aspects of Defendant's conduct were "particularly cruel," Sentencing Findings of Fact 3-4—reflects the extreme nature of Defendant's conduct. And each of these aggravating factors reinforce and exacerbate the severity of the others: It is especially

Filed in District Court
State of Minnesota
6/2/2021 3:01 PM

serious, for example, when a defendant's abuse of authority or particular cruelty is witnessed by children, as it was in this case. The four separate aggravating factors therefore strongly support a sentence "double the upper limit of the presumptive range." *Barthman*, 938 N.W.2d at 275.

Such a sentence would properly account for the profound impact of Defendant's conduct on the victim, the victim's family, and the community. Defendant brutally murdered Mr. Floyd, abusing the authority conferred by his badge. His actions traumatized Mr. Floyd's family, the bystanders who watched Mr. Floyd die, and the community. And his conduct shocked the Nation's conscience. No sentence can undo the damage Defendant's actions have inflicted. But the sentence the Court imposes must hold Defendant fully accountable for his reprehensible conduct.

In short, the Court should order a sentence that is twice the upper end of the presumptive sentencing range. The presumptive sentencing range for Defendant's conviction on the second-degree unintentional murder conviction is 128 to 180 months. The State therefore respectfully requests that the Court sentence Defendant to 360 months, or 30 years, in prison.

ARGUMENT

An aggravated sentence is warranted where there are "[s]ubstantial and compelling circumstances" supporting such a sentence—that is, where "the defendant's conduct in the offense of conviction was significantly more . . . serious than that typically involved in the commission of the crime in question." *Hicks*, 864 N.W.2d at 157 (internal quotation marks omitted). The Sentencing Guidelines refer to these "substantial and compelling circumstances" as "aggravating factors." Minn. Sent'g Guidelines 2.D.3.b. The Guidelines set out a "nonexclusive list" of such factors. *State v. Van Gorden*, 326 N.W.2d 633, 634 (Minn. 1982).

This Court has already found facts beyond a reasonable doubt that show the Defendant did not commit a "typical[]" version of each offense, and that therefore support the existence of four

Filed in District Court
State of Minnesota
6/2/2021 3:01 PM

separate aggravating factors. At sentencing, the Court should conclude that each of the four aggravating factors supplies a "substantial and compelling reason . . . to impose a sentence outside the presumptive sentencing range." *Rourke*, 773 N.W.2d at 922.

Because four separate aggravating factors support an upward sentencing departure in this case, and because of the profound impact of Defendant's conduct on the victim, the victim's family, and the community, the State respectfully requests that the Court impose a sentence twice the top end of the presumptive range and sentence Defendant to 360 months in prison.

I. FOUR AGGRAVATING FACTORS STRONGLY SUPPORT AN UPWARD SENTENCING DEPARTURE IN THIS CASE.

This Court, "acting as the trier of fact with regard to sentencing facts," has found facts supporting the existence of four separate aggravating factors: (i) Defendant abused a position of trust and authority; (ii) Defendant treated Mr. Floyd with particular cruelty; (iii) Defendant committed the offense in the presence of children; and (iv) Defendant committed the crime as part of a group of three or more persons who actively participated in the offense. *See* Sentencing Findings of Fact 1-5. All four aggravating factors support an upward departure.[1]

A. Defendant Abused a Position of Trust or Authority.

This Court's factual findings plainly demonstrate that Defendant's abuse of his position of trust or authority is a "substantial and compelling reason" for an upward sentencing departure. *Rourke*, 773 N.W.2d at 922. As the Court of Appeals has held, this aggravating factor supplies a

[1] The State incorporates in this memorandum the arguments it made in support of these aggravating factors in its April 30, 2021 memorandum of law regarding sentencing. *See* State's Memorandum of Law in Support of *Blakely* Aggravated Sentencing Factors (Apr. 30, 2021) ("State's *Blakely* Memo"). The State's arguments here focus specifically on this Court's findings of fact regarding these aggravating factors, and respond to the legal arguments Defendant made in his April 30, 2021 memorandum of law opposing an upward sentencing departure. *See* Def.'s Memorandum of Law in Opposition to Upward Durational Sentencing Departure (Apr. 30, 2021) ("Def.'s Opp.").

Filed in District Court
State of Minnesota
6/2/2021 3:01 PM

"substantial and compelling reason" for an upward departure where the defendant and victim are in a "relationship[] fraught with power imbalances that may make it difficult for a victim to protect himself," and the defendant abuses his or her position of trust or authority in committing the crime. *State v. Rourke*, 681 N.W.2d 35, 41 (Minn. App. 2004), *review granted and remanded on other grounds* No. A03-1254, 2005 WL 525522 (Minn. App. Mar. 8, 2005). That is true here.

This Court has already found beyond a reasonable doubt that Defendant was employed as a licensed peace officer who "held a position of trust and authority with respect to the community and its members." Sentencing Findings of Fact 1. This Court has also found that the "trust placed in Defendant included trust that anyone arrested would be treated with respect and only with reasonable force and that medical needs would be addressed in a timely fashion." *Id.* at 1-2.

This Court then found that Defendant "abused his position of authority" by using unreasonable force to hold "a handcuffed George Floyd in a prone position on the street"—"a position that Defendant knew from his training and experience carried with it a danger of positional asphyxia"—for more than nine minutes, "an inordinate amount of time." *Id.* at 2. The Court further found that "Defendant's placement of his knee on the back of George Floyd's neck was an egregious abuse of the authority to subdue and restrain because the prolonged use of this maneuver was employed after George Floyd had already been handcuffed and continued for more than four and a half minutes after Mr. Floyd had ceased talking and had become unresponsive." *Id.* at 3-4. And the Court found that Defendant "abused his position of trust and authority by not rendering aid, by declining two suggestions from one of his fellow officers to place George Floyd on his side, and by preventing bystanders, including an off-duty Minneapolis fire fighter, from assisting." *Id.* at 2-3. That "failure to render aid became particularly abusive after Mr. Floyd had passed out, and was still being restrained in the prone position, with Defendant continuing to kneel on the back

Filed in District Court
State of Minnesota
6/2/2021 3:01 PM

of Mr. Floyd's neck with one knee and on his back with another knee, for more than two and a half minutes after one of his fellow officers announced he was unable to detect a pulse." *Id.* at 3.

These facts are more than sufficient to establish that Defendant abused his position of trust and authority. Indeed, as this Court has already concluded, the State proved not only that Defendant abused his position of trust and authority, but that Defendant's conduct amounted to an "egregious" abuse of that position. *Id.* at 3. Here, by virtue of his position as a police officer, Defendant "was in a position to dominate and control" Mr. Floyd. *State v. Bennett*, No. C9-96-2506, 1997 WL 526313, at *3 (Minn. App. Aug. 26, 1997). That "position of control" allowed him to "manipulate the circumstances and commit the crime." *Id.* And it "ma[d]e it difficult" for Mr. Floyd "to protect himself" from Defendant's conduct. *Rourke*, 681 N.W.2d at 41.

Defendant nonetheless asserts that this aggravating factor does not apply here because it typically applies only in cases involving "criminal sexual conduct, domestic abuse, or both, where the victim had a pre-existing relationship with the offender." Def. Memo. in Opp. to Upward Durational Sentencing Departure 7 (Apr. 30, 2021) ("Def.'s Opp."). That is wrong. The Court of Appeals has made clear that this aggravating factor is not so limited. In *Rourke*, the defendant pressed the same basic argument Defendant presses here—that "generally, the cases that have used the defendant's position of power as an aggravating factor" involved a particular type of pre-existing relationship between a victim and an "adult authority figure[]." *Rourke*, 681 N.W.2d at 40. The Court of Appeals rejected that argument, noting that it had "found no cases that limit the application of this factor" in that manner. *Id.* at 41. The Court of Appeals then clarified that the key question is not whether there is a pre-existing relationship or a particular type of offense at issue, but instead whether the relationship between the victim and the defendant is one among the

Filed in District Court
State of Minnesota
6/2/2021 3:01 PM

many "relationships fraught with power imbalances that may make it difficult for a victim to protect himself or herself." *Id.* So long as it is, this aggravating factor can apply.

Other cases confirm that this aggravating factor is not limited only to cases in which "the victim had a pre-existing relationship with the offender." Def.'s Opp. 7. In *Bennett*, for example, the Court of Appeals held that this factor supported an upward departure where the defendant shot a cab driver with whom he had no pre-existing relationship. 1997 WL 526313, at *3.[2] Similarly, in *State v. House*, the Court of Appeals affirmed the application of this factor to a hospital worker who was "entrusted with the responsibility of protecting hospital personnel, patients and visitors" and who used that position of trust to assault a victim with whom he had no ostensible prior relationship. No. C3-90-1158, 1991 WL 42587, at *2 (Minn. App. Apr. 2, 1991).

The case law likewise confirms that this aggravating factor does not apply only in cases involving "criminal sexual conduct" or "domestic abuse." Def.'s Opp. 7. *Bennett* was a murder case; there was no allegation there that the defendant committed criminal sexual conduct or domestic abuse. Likewise, in *State v. Campbell*, the Supreme Court found sufficient evidence to support the trial court's conclusion that the defendant "violated a position of trust" in a murder case where the defendant was not accused of committing criminal sexual conduct or domestic abuse. 367 N.W.2d 454, 461 (Minn. 1985). Put simply, the case law forecloses Defendant's argument that this factor applies only in cases of "criminal sexual conduct, domestic abuse, or both, where the victim had a pre-existing relationship with the offender." Def.'s Opp. 7.

[2] Defendant attempts to distinguish *Bennett* on the ground that "it was far more similar to the employment relationship found in other cases . . . than the circumstances in this case." Def.'s Opp. 7. But the key factors the Court of Appeals relied on in *Bennett* are present here: Defendant "was in a position to dominate and control" Mr. Floyd, "had authority to tell" Mr. Floyd what to do, and used his "position of control" to "take advantage of a defined relationship" with Mr. Floyd and "manipulate the circumstances and commit the crime. *Bennett*, 1997 WL 526313, at *3.

Filed in District Court
State of Minnesota
6/2/2021 3:01 PM

Defendant also claims that there is "no caselaw in Minnesota, precedential or otherwise, in which a peace officer's position" has triggered the application of this aggravating factor. *Id.* That observation is unsurprising: Successful prosecutions of police officers are rare, and there is no prior case in Minnesota in which a police officer has been convicted of murder and the State has sought an upward sentencing departure. It is also legally irrelevant. The Court of Appeals made clear in *Rourke* that it does not matter if "this particular aggravating factor has not routinely been applied" to cases involving a particular type of defendant or victim. 681 N.W.2d at 41. So long as the relationship between an officer and a victim qualifies as a "relationship[] fraught with power imbalances that may make it difficult for a victim to protect himself or herself," *Rourke* makes clear that this aggravating factor can apply. *Id.* Defendant does not suggest otherwise, and does not point to any case that would foreclose the application of this factor here.[3] And, if anything, the case for an enhancement is heightened, not reduced, when a defendant commits crimes while imbued with the authority of the State, as Defendant did here.

In short, the facts this Court found beyond a reasonable doubt demonstrate that Defendant's "egregious" abuse of his position of authority and trust, Sentencing Findings of Fact 3, is a

[3] Moreover, at least one district court decision has suggested that a peace officer's position of trust and authority is an appropriate basis for an upward departure. In *State v. Arrington*, the district court concluded that the defendant abused the victim's trust because the defendant, who was not a police officer, falsely told the victim that he was a police officer and used that claimed position to commit the crime. *See* No. A14-1945, 2016 WL 102476, at *2 (Minn. App. Jan. 11, 2016). On appeal, the Court of Appeals declined to decide "whether abuse of trust is a proper aggravating factor here" because the district court had "relied upon numerous other factors that support[ed] the upward sentencing departure." *Id.* The Court of Appeals did note, however, that the primary arguments against applying the abuse-of-authority factor in that case were that "impersonating a police officer is a separate offense," and that the defendant "was not in a position of trust because he was not a police officer." *Id.* Nowhere did the Court of Appeals or the defendant suggest that the abuse-of-trust aggravating factor is inapplicable to someone who is actually a police officer.

Filed in District Court
State of Minnesota
6/2/2021 3:01 PM

"substantial and compelling reason" for an upward sentencing departure. *Rourke*, 773 N.W.2d at 922. The Court should hold that this aggravating factor applies here.

B. Defendant Treated Mr. Floyd With Particular Cruelty.

Defendant's particularly cruel treatment of Mr. Floyd is also a separate "[s]ubstantial and compelling" basis for an upward sentencing departure. *Hicks*, 864 N.W.2d at 157; *see* Minn. Stat. § 244.10, subd. 5a(a)(2) (noting that an aggravated sentence is appropriate if the "victim was treated with particular cruelty for which the offender should be held responsible"); Minn. Sent'g Guidelines 2.D.3.b(2) (same). Here, the cruelty of Defendant's conduct was "of a kind not usually associated with the commission of the offense[s] in question." *State v. Schantzen*, 308 N.W.2d 484, 487 (Minn. 1981). Defendant's "gratuitous infliction of pain," *Tucker v. State*, 799 N.W.2d 583, 586 (Minn. 2011) (internal quotation marks omitted), and "psychological" cruelty, *State v. Norton*, 328 N.W.2d 142, 146 (Minn. 1982), plainly warrant an upward sentencing departure.

As this Court has already found, the State proved beyond a reasonable doubt that "[i]t was particularly cruel to kill George Floyd slowly" by inhibiting "his ability to breathe when Mr. Floyd had already made it clear he was having trouble breathing." Sentencing Findings of Fact 4. The "prolonged use" of the prone position was "particularly egregious" because "George Floyd made it clear he was unable to breathe and expressed the view that he was dying as a result of the officers' restraint." *Id.* at 2; *see id.* at 4 (incorporating the facts found with respect to the abuse-of-authority aggravating factor). Defendant manifested his indifference to Mr. Floyd's pleas for his life and Mr. Floyd's medical distress by, among other things, "not rendering aid"; by "declining two suggestions from one of his fellow officers to place George Floyd on his side"; by "preventing bystanders, including an off-duty Minneapolis fire fighter, from assisting"; by failing to render aid even "after Mr. Floyd had passed out"; and by "continuing to kneel on the back of Mr. Floyd's

Filed in District Court
State of Minnesota
6/2/2021 3:01 PM

neck . . . for more than two and a half minutes after one of his fellow officers announced he was unable to detect a pulse." *Id.* at 3. As this Court put the point, the "slow death of George Floyd occurring over approximately six minutes of his positional asphyxia was particularly cruel in that Mr. Floyd was begging for his life and obviously terrified by the knowledge that he was likely to die but during which the Defendant objectively remained indifferent to Mr. Floyd's pleas." *Id.*

In making these findings, this Court also singled out two aspects of Defendant's conduct that were particularly cruel in their own right. *First*, it noted that restraining Mr. Floyd "in the prone position against the hard street surface by kneeling on the back of Mr. Floyd's neck with his other knee in Mr. Floyd's back, all the while holding his handcuffed arms in the fashion Defendant did for more than nine minutes," is "by itself a particularly cruel act." *Id.* at 4. *Second*, it found that the "prolonged nature of the asphyxiation" was also "by itself particularly cruel." *Id.*

These factual findings provide a "[s]ubstantial and compelling" basis for an upward sentencing departure, as they demonstrate that Defendant's conduct "was significantly more . . . serious than that typically involved in the commission of the crime[s] in question." *Hicks*, 864 N.W.2d at 157 (internal quotation marks omitted). The Minnesota Supreme Court has held that the "gratuitous infliction of pain," *Tucker*, 799 N.W.2d at 586, and "psychological" cruelty, *Norton*, 328 N.W.2d at 146, can render a defendant's conduct "more . . . serious" than the conduct typically involved in committing the offense of conviction, *Hicks*, 864 N.W.2d at 157. Here, Defendant's actions inflicted "gratuitous . . . pain," *Tucker*, 799 N.W.2d at 586, by inhibiting Mr. Floyd's "ability to breathe when Mr. Floyd had already made it clear he was having trouble breathing" and after he "expressed the view that he was dying as a result of the officers' restraint," Sentencing Findings of Fact 2, 4. And Defendant's actions caused Mr. Floyd significant "psychological" distress, *Norton*, 328 N.W.2d at 146, because "Defendant objectively remained

Filed in District Court
State of Minnesota
6/2/2021 3:01 PM

indifferent to Mr. Floyd's pleas" even as "Mr. Floyd was begging for his life and obviously terrified by the knowledge that he was likely to die," Sentencing Findings of Fact 3.

Defendant's prolonged restraint of Mr. Floyd was also much longer and more painful than the typical scenario in a second-degree murder, third-degree murder, or second-degree manslaughter case. The "prolonged nature of the asphyxiation" makes this offense different in kind than, for example, a near-instantaneous death by gunshot, which is one typical scenario for this type of offense. Sentencing Findings of Fact 4; *cf. Tucker*, 799 N.W.2d at 587-588 (finding no particular cruelty in a second-degree unintentional murder case where defendant "did not shoot [the victim] in a manner that gratuitously inflicted additional pain").

The conduct this Court has deemed particularly cruel also occurred over a much longer period and was substantially more painful than a typical third-degree assault, the predicate felony offense for Defendant's second-degree murder conviction in this case. *See, e.g.*, *State v. Dorn*, 887 N.W.2d 826, 831 (Minn. 2016) (holding that a felony assault requires only that the defendant "intentionally apply force to another person without his consent"). Defendant's conduct went beyond just inflicting "substantial bodily harm." Minn. Stat. § 609.223, subd. 1; *see* Def.'s Opp. 6. It "kill[ed] George Floyd slowly"—over the course of more than nine minutes—by inhibiting "his ability to breathe when Mr. Floyd had already made it clear he was having trouble breathing." Sentencing Findings of Fact 4. Indeed, Defendant's continuation of the assault after Mr. Floyd was no longer conscious and no longer had a pulse—Defendant "continu[ed] to kneel on the back of Mr. Floyd's neck . . . for more than two and a half minutes after one of his fellow officers announced he was unable to detect a pulse," Sentencing Findings of Fact 3—plainly sets Defendant's conduct apart from the typical case involving a felony assault that results in substantial bodily harm and death to the victim. *See State v. Smith*, 541 N.W.2d 584, 590 (Minn.

Filed in District Court
State of Minnesota
6/2/2021 3:01 PM

1996) (finding particular cruelty in a robbery case in part because the defendant continued beating the victim after "he was knocked unconscious by the first blow").

Against the overwhelming weight of the evidence, Defendant argues that his conduct was not particularly cruel because the "assault of Mr. Floyd occurred in the course of a very short time," and Defendant's conduct "involved no threats or taunting." Def.'s Opp. 6. But this Court found that the assault occurred over "an inordinate amount of time," that Defendant killed Mr. Floyd "slowly," and that the "prolonged nature of the asphyxiation was by itself particularly cruel." Sentencing Findings of Fact 3, 4. And Defendant identifies no reason why particular cruelty necessarily requires "threats or taunting," Def.'s Opp. 4, particularly where Defendant "objectively remained indifferent" to the fact that "Mr. Floyd was begging for life" and was "obviously terrified by the knowledge that he was likely to die," Sentencing Findings of Facts 4.[4]

Because this Court's finding that Defendant acted with particular cruelty is a substantial and compelling reason for an upward sentencing departure, this Court should find that the particular-cruelty factor applies here and order an upward sentencing departure on this basis.

C. Defendant Committed the Offense in the Presence of Multiple Children.

An aggravated sentence is also warranted because "the offense was committed in the presence of a child." Minn. Stat. § 244.10, subd. 5(a)(13); Minn. Sent'g Guidelines 2.D.3.b(13). This factor provides a substantial and compelling basis for an upward departure when the State proves "the actual presence of a child" during "some portion" of the crime. *State v. Robideau*, 796 N.W.2d 147, 151-152 (Minn. 2011) (citing *State v. Vance*, 765 N.W.2d 390, 393 (Minn. 2009)). The rationale behind that principle is straightforward: The "presence of a child" renders the

[4] In any event, Defendant did taunt Mr. Floyd, responding dismissively to his pleas. *See* State's *Blakely* Memo 13 (noting that Defendant dismissively said "uh huh" several times in response to Mr. Floyd's pleas, and that he said "[i]t takes a heck of a lot of oxygen to say things").

Filed in District Court
State of Minnesota
6/2/2021 3:01 PM

"defendant's conduct . . . particularly outrageous because the child, while technically not a victim of the offense, is a victim for having witnessed the offense." *Robideau*, 796 N.W.2d at 151.

Here, this Court found beyond a reasonable doubt that "[c]hildren were present on the sidewalk adjoining Chicago Avenue standing only a few feet from where Defendant and the other officers were restraining George Floyd prone in the street and observed Mr. Floyd being asphyxiated as he begged for his life." Sentencing Findings of Fact 4-5. Three of those children were 17 years old at the time, and one was nine years old. *Id.* at 5. The Court found that "[a]lthough these four children did not observe all the events, they did observe a substantial portion of the Defendant's use of force and witnessed the last moments of Mr. Floyd's life." *Id.*

Those findings make clear that Defendant's actions were committed in the presence of at least four children who "s[aw], hear[d], or otherwise witnesse[d] some portion of the commission of the offense in question." *See Robideau*, 796 N.W.2d at 152. And these children were all plainly "victim[s] for having witnessed the offense," as their trial testimony makes clear. *Id.* at 151; *see* State's *Blakely* Memo 23-25 (describing the trauma of the four witnesses who testified at trial). That is more than sufficient to establish that an upward sentencing departure is warranted here.

Defendant nonetheless claims that this aggravating factor applies only when the children present during the offense "were unable to leave the scene while the crime was being committed." Def.'s Opp. 9. Defendant asserts that this factor cannot apply where the presence of children was "voluntary." *Id.* at 10. That is wrong. The only requirement for applying this aggravating factor is that the child must actually be present during the commission of the offense, meaning that the child must "see[], hear[], or otherwise witness[] some portion of the commission of the offense in question." *Robideau*, 796 N.W.2d at 152. As the Court of Appeals has held: "[T]he presence of a child, by itself, is a sufficient basis for an upward durational departure. There is no additional

Filed in District Court
State of Minnesota
6/2/2021 3:01 PM

requirement." *State v. Bates*, No. A17-1842, 2018 WL 4558173, at *5 (Minn. App. Sept. 24, 2018) (citation omitted). That is with good reason: This aggravating factor recognizes that committing an offense in the presence of children, a particularly vulnerable class of persons, makes any child on the scene a "victim for having witnessed the offense." *Robideau*, 796 N.W.2d at 151. Nothing in that logic turns on whether the child was "unable to leave the scene" during the commission of the offense. The case law also makes plain that it does not matter whether the child was "unable to leave the scene." Def.'s Opp. 9. *Robideau* held that a child need only witness "some portion" of the commission of the offense for this aggravating factor to apply. 796 N.W.2d at 152. Thus, this aggravating factor applies regardless of whether a child arrives late to the scene or—as relevant here—removes himself or herself from the scene while the crime is ongoing.[5]

Defendant's argument is also unavailing in light of the facts of this case. The children who witnessed Mr. Floyd's murder did not leave the scene because they were deeply disturbed by what they saw and wanted to help save Mr. Floyd's life. *See* State's *Blakely* Memo 23-25. These children pleaded with Defendant to save Mr. Floyd's life because they knew that Defendant's conduct was wrong and that Defendant was killing Mr. Floyd. Thus, the fact that these children chose to stay on the scene to help Mr. Floyd is not a reason to foreclose the application of this aggravating factor. If anything, it reinforces that Defendant's conduct was "particularly outrageous" and so strongly supports an upward departure. *Robideau*, 796 N.W.2d at 151.

[5] Courts in Minnesota have also affirmed the application of this aggravating factor even where the facts suggested that children were free to leave the scene of the crime. In *State v. Gayles*, 915 N.W.2d 6 (Minn. App. 2018), for example, the Court of Appeals held that this aggravating factor could apply where the defendant sold drugs out of his home and left his children at home alone with the drugs. *Id.* at 12-13. At no point did the Court of Appeals indicate that those children, one of whom was a teenager, were forced to be in the home during the drug deals or while the defendant left the house. The Court of Appeals certainly did not require a showing that the children were "unable to leave the scene," Def.'s Opp. 9, as a precondition for applying this aggravating factor.

Filed in District Court
State of Minnesota
6/2/2021 3:01 PM

Defendant also asserts that there are no cases in Minnesota "in which the presence of children factor has been considered" where the children themselves "were not placed in danger." Def.'s Opp. 9. As noted, however, there is "no additional requirement" beyond the actual presence of a child. *Bates*, 2018 WL 4558173, at *5. Thus, Defendant's attempt to engraft a "danger" requirement onto this aggravating factor falters right out of the gate. Defendant is also wrong about the case law. In *State v. Johnson*, for example, the Supreme Court affirmed an upward departure based on the presence of two infants who were not directly in harm's way during the offense. 450 N.W.2d 134, 135 (Minn. 1990). In *State v. Profit*, the defendant sexually assaulted a woman in charge of a day care, but none of the facts suggested that the children were directly endangered by the defendant's conduct. 323 N.W.2d 34, 35, 36 (Minn. 1982). And in *Gayles*, the facts did not suggest that children were endangered by the presence of drugs in the house or by the drug deals defendant conducted. 915 N.W.2d at 12-13. In each of these cases, the danger to the children who witnessed some portion of the offense was less significant than the danger to the children who witnessed Mr. Floyd's death. Unlike the children who witnessed the offense in these other cases, the children in the crowd of bystanders in this case were directly endangered by Defendant's conduct. After all, at one point during his restraint of Mr. Floyd, Defendant pulled out his mace and appeared ready to use it against the bystanders, prompting one of the children to exclaim in fear: "What the fuck. He got mace, he got mace." *See* State's *Blakely* Memo 13.

In short, the law and the facts are clear: Because Defendant committed these offenses in the presence of multiple children, an upward sentencing departure is appropriate here.

D. Defendant Committed the Crime as Part of a Group of Three or More Individuals Who Actively Participated in the Offense.

Finally, the fact that Defendant "committed the crime as part of a group of three or more persons who all actively participated in the crime" provides yet another substantial and compelling

reason for an upward sentencing departure. Minn. Stat. § 244.10, subd. 5a(a)(10); *see* Minn. Sent'g Guidelines 2.D.3.b(10). The Minnesota Supreme Court has not imposed additional conditions or prerequisites for applying this aggravating factor: So long as the defendant commits the crime with two or more other persons "who all actively participated in the crime," an upward sentencing departure based on this aggravating factor is appropriate. *See State v. Losh*, 721 N.W.2d 886, 896 (Minn. 2006); *State v. Hough*, 585 N.W.2d 393, 397 (Minn. 1998).

As this Court found beyond a reasonable doubt, "Officers Lane and Kueng were actively involved in the restraint of George Floyd that ultimately resulted in his death": Defendant Kueng held down Mr. Floyd's back and handcuffed arm, and Defendant Lane held down Mr. Floyd's legs. Sentencing Findings of Fact 5; *see* State's *Blakely* Memo 21. This Court also found that "Officer Thao was actively involved by keeping bystanders away from Mr. Floyd and, in so doing, allowed the other officers to continue an unreasonable use of force and to prevent bystanders from rendering medical aid to Mr. Floyd." Sentencing Findings of Fact 5; *see* State's *Blakely* Memo 21. Because this Court found that at least three other individuals actively participated in the crime Defendant committed, an upward sentencing departure is warranted here.

Defendant nonetheless argues that this aggravating factor does not apply in this case because the Sentencing Guidelines use the phrase "three or more *offenders*," and therefore require that the other individuals who participated in the offense were "convicted of a felony." Def.'s Opp. 8. That is incorrect for at least four reasons.

First, the aggravating factors statute does not require the participation of "three or more offenders"; it requires the participation of "three or more *persons*." Minn. Stat. § 244.10, subd. 5a(a)(10) (emphasis added). As the Minnesota Supreme Court has held, the "statutory provision . . . control[s]" where the statute and the Sentencing Guidelines differ. *State v. Jones*, 848 N.W.2d

Filed in District Court
State of Minnesota
6/2/2021 3:01 PM

528, 537 (Minn. 2014). Here, because the statute requires only the participation of "three or more *persons*," this aggravating factor does not require proof that the other individuals who participated in the offense were "convicted of a felony." Def.'s Opp. 8.

Second, the relevant provision of the Guidelines does not use the word "offenders" to mean individuals "convicted of a felony." *Id.* In 2012, the Sentencing Guidelines Commission replaced the word "persons" in Guideline 2.D.3.b(10) with the word "offenders." *See* Minn. Sent'g Guidelines Comm'n, *Guidelines Revision Project: Adopted Modifications* 97 (Apr. 2012), https://mn.gov/msgcstat/documents/Rewrite%20Project/Revision%20Project%20Adopted%20Modifications.pdf. But the Commission made clear that "[t]he scope of the revision" to the Guidelines "was primarily stylistic" and was not intended to "substantively rewrit[e] the Guidelines." *Id.* at 3. Indeed, the Commission made the stylistic decision to replace the word "person" with "offender" throughout the Guidelines. *See, e.g.*, *id*. at 18, 31, 34, 44, 45, 47, 50, 51, 98. There is no indication that the Commission intended this global, stylistic change to substantively alter the legal standard governing this particular aggravating factor.

Third, the State is not aware of a single Minnesota case in which a court has required the other active participants to be convicted of a crime before applying this aggravating factor. In *Losh* and *Hough*, for example, the Supreme Court did not require a finding that the other individuals satisfied the standard for aiding and abetting liability or co-conspirator liability based on their active participation in the defendant's crime. *See Losh*, 721 N.W.2d at 896 (not addressing whether the other active participants were criminally liable); *Hough*, 585 N.W.2d at 397 (same).

Fourth, it would make little sense to require proof of the other participants' convictions in applying this aggravating factor. It is often the case—as it was here—that the participants in a group crime are tried at different times. Whether a defendant receives an upward sentencing

Filed in District Court
State of Minnesota
6/2/2021 3:01 PM

departure based on this aggravating factor should not turn on whether the defendant is tried before or after his or her co-defendants. It should not turn, in other words, on a quirk of timing. That is especially so where, as here, the defendant seeks to be tried separately from his co-defendants. Defendant should not be able to benefit from that choice at sentencing. Under Defendant's theory, however, this aggravating factor can never apply to defendants who are tried before their co-defendants. That is not the law, and Defendant offers no legal support for that theory.

The bottom line: Because Defendant committed the crime "as part of a group of three or more persons who all actively participated in the crime," Minn. Stat. § 244.10, subd. 5a(a)(10), an upward sentencing departure is warranted on this basis, as well.

II. THE COURT SHOULD ORDER A DOUBLE UPWARD SENTENCING DEPARTURE AND SENTENCE DEFENDANT TO 360 MONTHS IN PRISON.

Because the facts and the law support the existence of four separate aggravating factors, this Court should order a sentence twice the upper end of the presumptive sentencing range.

Generally, "in a case in which an upward departure in sentence length is justified" by the existence of one or more aggravating factors, a district court may impose a sentence that is up to "double the presumptive sentence length." *State v. Evans*, 311 N.W.2d 481, 483 (Minn. 1981). As the Minnesota Supreme Court has clarified, this means that, where aggravating factors are present, the district court may impose a sentence that is up to "twice the upper end of the presumptive sentencing range." *State v. Barthman*, 938 N.W.2d 257, 269 (Minn. 2020).

The State, however, need only prove the existence of a single aggravating factor to justify the imposition of a sentence "double the upper limit of the presumptive range." *Id.* at 275; *see State v. Solberg*, 882 N.W.2d 618, 624 (Minn. 2016) ("[W]e have affirmed upward durational departures that were based on a single aggravating factor."). Thus, in *Barthman*, the Supreme Court held that a district court had "the discretion to impose a sentence . . . of up to double the

Filed in District Court
State of Minnesota
6/2/2021 3:01 PM

upper limit of the presumptive range" even though only a single aggravating factor applied. 938 N.W.2d at 275; *see also State v. Gaines*, 408 N.W.2d 914, 918 (Minn. App. 1987) (finding double upward departure appropriate where only one aggravating factor applied).

Here, there is not just one aggravating factor that supports an upward sentencing departure. There are four. *See supra* pp. 4-17. That alone demonstrates that Defendant's conduct was far more "serious than that typically involved in the commission of the crime in question." *State v. Jones*, 745 N.W.2d 845, 848 (Minn. 2008) (internal quotation marks omitted); *see, e.g.*, *State v. Graham*, 410 N.W.2d 395, 397-398 (Minn. App. 1987) (double upward departure was proper where five aggravating factors applied); *State v. Felix*, 410 N.W.2d 398, 401-402 (Minn. App. 1987) (double upward departure was proper where two aggravating factors applied).

Moreover, in light of the facts of this case, several of these aggravating factors are especially severe. *See Barthman*, 938 N.W.2d at 272 (noting that "severe aggravating factors" weigh strongly in favor of a substantial upward sentencing departure (internal quotation marks omitted)). Defendant pressed his knee into Mr. Floyd's neck and upper back for 9 minutes and 29 seconds, and he continued to maintain that position even as Mr. Floyd "made it clear he was unable to breathe and expressed the view that he was dying as a result of the officers' restraint," even as the gathered bystanders—including at least four children—pleaded with Defendant to save Mr. Floyd's life, and even after "one of the other officers involved . . . was unable to detect a pulse." Sentencing Findings of Fact 2. That is why this Court found beyond a reasonable doubt that Defendant's conduct was not just an abuse of a position of trust and authority, but "an *egregious* abuse" of that position of trust and authority. *Id.* at 3 (emphasis added). And that is why this Court found beyond a reasonable doubt that the "prolonged" nature of Defendant's use of force and Mr. Floyd's "asphyxiation" was "particularly egregious" and "particularly cruel." *Id.* at 2, 4.

Filed in District Court
State of Minnesota
6/2/2021 3:01 PM

What's more, some of the aggravating factors exacerbated the other aggravating factors, making the crime even more severe. For example, the abuse of a position of trust was especially heinous because it was viewed by children, who risk being traumatized for the rest of their lives. The same is true for the particular cruelty of the acts that these children witnessed. Each aggravating factor made the crimes worse, and made the other aggravators worse still.

In short, the number and severity of the aggravating factors applicable to Defendant's conduct reflect both Defendant's culpability and the extraordinary nature of this case. They plainly warrant a sentence "twice the upper end of the presumptive sentencing range." *Barthman*, 938 N.W.2d at 269 (internal quotation marks omitted).

As the State will argue at greater length at the sentencing hearing, a double upward sentencing departure would properly account for the profound impact of Defendant's conduct on the victim, the victim's family, and the community. Defendant cruelly murdered Mr. Floyd in public view. His actions traumatized Mr. Floyd's family—Mr. Floyd's daughter, his siblings, his cousins, his aunts and uncles, his nephews and nieces. None of them will ever be able to see their beloved "Perry" again. His actions traumatized the bystanders who pleaded with Defendant as they watched him kill Mr. Floyd. *See* State's *Blakely* Memo 13-14. His actions traumatized the community, prompting an outpouring of grief and protest across Minneapolis and the State. And his actions shocked the conscience of the Nation. No sentence can undo Mr. Floyd's death, and no sentence can undo the trauma Defendant's actions have inflicted. But the sentence the Court imposes must show that no one is above the law, and no one is below it. Defendant's sentence must hold him fully accountable for his reprehensible conduct.

The State therefore respectfully requests that the Court enter a sentence that is "twice the upper end of the presumptive sentencing range." *Barthman*, 938 N.W.2d at 269. The presumptive

Filed in District Court
State of Minnesota
6/2/2021 3:01 PM

sentencing range for Defendant's second-degree murder conviction is 128 to 180 months.[6] The Court should therefore sentence Defendant to 360 months in prison.[7]

CONCLUSION

The State respectfully requests that the Court find that four aggravating factors support an upward sentencing departure, and sentence Defendant to 360 months in prison.

Dated: June 2, 2021

Respectfully submitted,

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[6] The maximum statutory penalty for second-degree murder is 40 years' imprisonment. Minn. Stat. § 609.19, subd. 2(1).

[7] The pre-sentence investigation report also recommended that the Defendant pay restitution in an amount determined by the Court. The State takes no position at this time on restitution, and reserves the right to address restitution at the sentencing hearing or thereafter.