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4/30/2021 3:57 PM

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Court File No. 27-CR-20-12646

State of Minnesota,

Plaintiff,

vs.

Derek Michael Chauvin,

Defendant.

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO UPWARD DURATIONAL SENTENCING DEPARTURE

TO: THE ABOVE-NAMED COURT; THE HONORABLE PETER A. CAHILL, JUDGE OF HENNEPIN COUNTY DISTRICT COURT; AND MATTHEW FRANK, ASSISTANT MINNESOTA ATTORNEY GENERAL.

INTRODUCTION

On April 20, 2021, a jury convicted Defendant Derek Michael Chauvin of all three counts alleged in the Complaint against him in connection with the death of George Floyd: unintentional second-degree murder, third-degree murder, and second-degree manslaughter. The State has moved for an upward sentencing departure, alleging that facts support five different reasons for which the Court may impose an aggravated sentence. Mr. Chauvin, through his attorney Eric J. Nelson, Halberg Criminal Defense, submits the following in opposition to an upward durational sentencing departure.

ARGUMENT

The Minnesota Sentencing Guidelines Commission has enumerated a list of reasons on which a district court can base an upward departure in sentencing an offender. *See* Minn. Sent. Guidelines § 2.D.3(b). In its motion requesting an upward sentencing departure, the State alleged that four of the enumerated circumstances were present: The victim was particularly vulnerable. *Id.* at § 2.D.3(b)(1); the victim was treated with particular cruelty. *Id.* at § 2.D.3(b)(2); the offender

Filed in District Court
State of Minnesota
4/30/2021 3:57 PM

committed the crime as part of a group of three or more offenders who all actively participated in the crime. *Id.* at § 2.D.3(b)(10); and the offense was committed in the presence of a child. *Id.* at § 2.D.3(b)(13). The State also alleges one unenumerated factor that it urges the Court to consider: that Mr. Chauvin "abused a position of authority" in commission of the crime. The State bears the burden of proving the existence of facts supporting all alleged aggravating factors beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 301, 303-04 (2004); *State v. Rourke*, 773 N.W.2d 913, 919 (Minn. 2009). Mr. Chauvin waived his right to a jury trial on these matters, as is his prerogative, leaving it to the Court to determine whether the State has met its burden. *See* Minn. Stat. § 244.10, subd. 7.

As an initial matter, certain indisputable facts must be reiterated. Mr. Chauvin entered into the officers' encounter with Mr. Floyd with legal authority to assist in effecting the lawful arrest of an actively-resisting criminal suspect. Mr. Chauvin was authorized, under Minnesota law, to use reasonable force to do so. Early in the encounter with Mr. Floyd, officers had called for emergency medical services ("EMS"). The call to EMS was upgraded after Mr. Chauvin's arrival on scene. The entire period of time in which the offense of conviction was perpetrated was a matter of minutes—perhaps as little as three, but certainly less than six minutes.

Despite the fact that the list of factors is nonexclusive, "[t]he purposes of the sentencing guidelines will not be served if the trial courts generally fail to apply the presumptive sentences found in the guidelines." *State v. Leja*, 684 N.W.2d 442, 448 (Minn. 2004). "The reasons for departure from the guidelines 'are intended to describe specific situations involving only a small number of cases.'" *Id.* (quoting *State v. Schantzen,* 308 N.W.2d 484, 487 (Minn. 1981)).

I. MR FLOYD WAS NOT "PARTICULARLY VULNERABLE."

A court may consider a victim's particular vulnerability, and the offender's knowledge

Filed in District Court
State of Minnesota
4/30/2021 3:57 PM

thereof, when determining if an upward sentencing departure is appropriate. Minn. Sent. Guidelines § 2.D.3(b)(1). Facts establishing that a victim was particularly vulnerable, and that the offender knew or should have known about the vulnerability, must be proved beyond a reasonable doubt. *Blakely*, 542 U.S. at 303-04. Here, the State appears to assert that the fact that Mr. Floyd was handcuffed rendered him particularly vulnerable. The facts clearly show that simply being handcuffed did not render Mr. Floyd "particularly vulnerable."

Mr. Floyd was well over six feet tall, muscular, and weighed in excess of two hundred pounds. He was handcuffed at the beginning of the encounter and, as Officers Lane and Kueng attempted to put Floyd in their squad car, he began to actively resist arrest. While handcuffed behind his back, Mr. Floyd managed to prevent two trained, adult, male police officers from placing him in the back of their squad car. Once Mr. Chauvin joined in the struggle, Mr. Floyd still managed to prevent himself from being subdued until officers were finally able to restrain him on the ground, where he continued to struggle. He was on the ground for a total of around nine minutes before EMS arrived. Floyd was able to continue struggling during a portion of his restraint.

The factual scenario is considerably different from other instances in Minnesota law where a victim was found to be particularly vulnerable when bound. In cases where the victim was bound or handcuffed or knocked to the ground, the victim's vulnerability occurred as ***part of the offense***. *See Dillon v. State*, 781 N.W.2d 588, 600 (Minn. App. 2010) (defendant assaulted victim, knocking her to the floor, unconscious, and continued to assault her); *State v. Bock*, 490 N.W.2d 116, 121 (Minn. App. 1992) (victim fell to the ground after being assaulted, and was dazed, as the assault continued); *State v. Winchell*, 363 N.W.2d 747, 751 (Minn. 1985) ("Binding victims is not a normal occurrence in an aggravated robbery"). Here, officers were authorized to both handcuff Mr. Floyd and restrain him as part of their lawful duties. Mr. Chauvin did not place the handcuffs on Mr. Floyd.

Filed in District Court
State of Minnesota
4/30/2021 3:57 PM

At the time Mr. Floyd was placed on the ground and restrained, he was not particularly vulnerable and there is no reason for Mr. Chauvin to have suspected that he was. Mr. Floyd was handcuffed in the course of a lawful arrest, and not as a part of the offenses for which Mr. Chauvin was convicted.

Cases in which courts have found particularly vulnerability that was not caused by an offender as part of the offense typically involve victims of a young age or victims who were sleeping. *See State v. Yaritz,* 791 N.W.2d 138, 145 (victim chloroformed while sleeping); *See State v. Skinner,* 450 N.W.2d 648, 654 (Minn. App.1990) (concluding that the victim's vulnerability was increased because the offender began touching her while she was asleep), *review denied* (Minn. Feb. 28, 1990); *State v. Bingham,* 406 N.W.2d 567, 570 (Minn. App.1987) (concluding that the victim was in a vulnerable position when the offender began to assault her while she slept); *Winchell,* 363 N.W.2d at 751 (victim was particularly vulnerable because she was four years old and tied up). Here, the facts are clearly dissimilar to those of other cases in which a victim has been determined to be particularly vulnerable. As such, the State cannot prove beyond a reasonable doubt that facts existed, of which Mr. Chauvin was aware or should have been aware, rendering Mr. Floyd particularly vulnerable at the time of the assault that gave rise to the Defendant's conviction—especially in light of the facts that the initial handcuffing and restraint were clearly legal, and no clear determination was ever made as to ***when*** the assault began.

II. THE DEFENDANT'S ACTIONS WERE NOT "PARTICULARLY CRUEL."

A court may consider whether an offender treated a victim with particular cruelty when determining if an upward sentencing departure is appropriate. Minn. Sent. Guidelines § 2.D.3(b)(2). Facts establishing that a victim was treated with particular cruelty must be proved beyond a reasonable doubt. *Blakely,* 542 U.S. at 303-04. Here, the State appears to argue that Mr. Floyd was treated with particular cruelty because "eyewitnesses… had to watch Mr. Floyd die," and

Filed in District Court
State of Minnesota
4/30/2021 3:57 PM

"Defendant… did not provide Mr. Floyd with any medical assistance and discouraged the efforts of others to provide such assistance." The State also alleges that the officers' restraint of Mr. Floyd "inflicted gratuitous pain[.]" (State's *Blakely* Notice, Aug. 28, 2020).

First, the mere fact that bystander witnesses observed the death of George Floyd does not support the aggravating factor of particular cruelty, in itself. Cases in which courts have affirmed the use of involuntary observation of violent criminal behavior as an aggravating factor are distinguishable from the facts at bar. In those cases, the witnesses of the defendants' conduct either suffered from an age-related incapacity, making them particularly vulnerable, or were closely related to the victim as either relatives or friends. *See State v. Profit*, 323 N.W.2d 34, 36 (Minn. 1982) (declaring the commission of a violent crime in front of children a "particularly outrageous act," when a day care worker was assaulted in front of them); *State v. Hodges*, 384 N.W.2d 175, 179, 184 (Minn. App. 1986) (treating as particular cruelty the defendant's conduct in waking an 83-year-old woman at night, demanding money, and forcing her to watch as his accomplice held a knife to the throat of her older sister's nurse, thus literally scaring the elderly woman to death), *aff'd as modified*, 386 N.W.2d 709 (Minn. 1986); *see also State v. Morrison*, 437 N.W.2d 422, 429-30 (Minn. App.1989) (treating an older sister's observation of physical abuse as an aggravating factor), *review denied* (Minn. Apr. 26, 1989), *cert. denied*, 493 U.S. 858, 110 S.Ct. 167 (1989); *State v. Gaines*, 408 N.W.2d 914, 917-18 (Minn.App.1987) (considering the robbery, beating, and rape of a woman in front of her husband an aggravating factor), *review denied* (Minn. Sept. 18, 1987).

Here, none of the witnesses were friends or relatives of George Floyd, nor did any of the witnesses claim to know George Floyd. Importantly, none of the witnesses' observation of the

Filed in District Court
State of Minnesota
4/30/2021 3:57 PM

incident was involuntary, unlike those in relevant caselaw: They were all free—and in fact, encouraged by Officer Thao—to leave at any time they wished.

Second, the State's claim that Mr. Chauvin did not provide medical assistance to Mr. Floyd is specious at best. Officers called an ambulance before the struggle with Mr. Floyd began, and upgraded the call during the struggle. It was the arrival of the ambulance, within minutes, that ended the incident. The particular cruelty factor for failing to aid a victim is applied in cases where an offender leaves the victim without calling for medical help, such as an ambulance. *See State v. Harwell,* 515 N.W.2d 105, 109-10 (Minn. App. 1994); *State v. Strommen,* 411 N.W.2d 540, 544-45 (Minn. App. 1987); *State v. Jones,* 328 N.W.2d 736, 738 (Minn. 1983). Here, not only did officers call for medical assistance twice, but Mr. Chauvin remained on scene until it arrived.

Finally, the State alleges that Mr. Chauvin's actions inflicted "gratuitous pain" on Mr. Floyd. "[P]articular cruelty involves the gratuitous infliction of pain and cruelty of a kind not usually associated with the commission of the offense in question." *Tucker v. State,* 799 N.W.2d 583, 586 (Minn.2011) (quotations omitted). The predicate felony for the felony murder charge in this case was third-degree assault. Third-degree assault requires infliction of "substantial bodily harm" to the victim. Minn. Stat. § 609.223, subd. 1. Here, there is no evidence that the assault perpetrated by Mr. Chauvin against Mr. Floyd involved a gratuitous infliction of pain or cruelty not usually associated with the commission of the offense in question. The infliction of substantial bodily injury necessarily causes pain. The assault of Mr. Floyd occurred in the course of a very short time, involved no threats or taunting, such as putting a gun to his head and pulling the trigger, *see Harwell,* 515 N.W.2d at 109, and ended when EMS finally responded to officers' calls. The State cannot prove facts beyond a reasonable doubt that establish Mr. Floyd was treated with "particular cruelty" by Mr. Chauvin. As such, the Court may not consider this factor in sentencing.

Filed in District Court
State of Minnesota
4/30/2021 3:57 PM

III. ABUSE OF A POSITION OF AUTHORITY BY A PEACE OFFICER IS NOT A RECOGNIZED AGGRAVATING SENTENCING FACTOR IN MINNESOTA.

"Abuse of a position of authority" in the commission of a nonfinancial crime is not recognized as an aggravating sentencing factor in the Minnesota Sentencing Guidelines. *See* Minn. Sent. Guidelines § 2.D.3(b). However, the list of aggravating factors contained in the guidelines is "nonexclusive." Courts, in certain limited circumstances, have upheld the abuse of position of authority as an aggravating factor in sentencing a defendant, when proven beyond a reasonable doubt. *See 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). The facts of all of these cases, however, involve criminal sexual conduct, domestic abuse, or both, where the victim had a pre-existing relationship with the offender. Many such cases involved a minor victim, and none of them involved a police officer.

One nonprecedential case, *State v. Bennett,* No. C9-96-2506, 1997 WL 526313 (Minn. App. Aug. 26, 1997), involved a taxi-cab shooting in which no pre-existing relationship existed between the victim and the offender. In *Bennett,* the court found that the defendant had "abused his position of trust and commercial authority" over the victim, because the victim's employment required him "to keep his back turned to Bennett, to stop the cab at any point." *Id.* at *3. Although this was not a pre-existing relationship, it was far more similar to the employment relationship found in other cases, such as *State v. Konrardy,* No. CX-88-1867, 1989 14919 (Minn. App. Feb. 28, 1989) than the circumstances in this case. The defense is aware of no caselaw in Minnesota, precedential or otherwise, in which a peace officer's position has been considered an aggravating factor for an upward departure in sentencing.

In fact, given the resistance that Mr. Floyd was exhibiting at the time Mr. Chauvin arrived on the scene and subsequently, it is clear that Mr. Chauvin's authority as a police officer was ***entirely***

Filed in District Court
State of Minnesota
4/30/2021 3:57 PM

irrelevant to Mr. Floyd. From the onset of the May 25, 2020 encounter, when Officers Lane and Kueng had ordered Mr. Floyd to place his hands on the steering wheel of his vehicle, Floyd had largely ignored the authority of the officers over him. Because of this, the State cannot prove beyond a reasonable doubt that Mr. Chauvin's position as a peace officer was an aggravating factor that this Court should consider in making its sentencing determination.

IV. THE STATE CANNOT PROVE BEYOND A REASONABLE DOUBT THAT 'THREE OR MORE OFFENDERS' 'ACTIVELY PARTICIPATED' IN THE OFFENSE.

The Court may consider, as a factor supporting upward departure, that the offender "committed the crime as part of a group of three or more ***offenders*** who all actively participated in the crime," Minn. Sent. Guidelines § 2.D.3.b(10) (emphasis added), if the State proves such fact beyond a reasonable doubt. *Rourke,* 773 N.W.2d at 919. An "offender is a person who has committed a crime." *Jones v. Borchardt,* 775 N.W.2d 646, 648 (Minn. 2009) (cleaned up). "The state deems a person to have committed a crime upon conviction." *Id.* Here, none of Mr. Chauvin's codefendants have been convicted of a crime related to the offense of which he has been convicted. Moreover, it is clear that the term "offender," as used in the Sentencing Guidelines, can refer ***only*** to those individuals who have been convicted of a felony because the guidelines only apply to such individuals. Therefore, the State can, in no way, prove beyond a reasonable doubt that three or more "offenders" actively participated in the crime at issue in this matter.

Further, it cannot be proven beyond a reasonable doubt that Mr. Chauvin's codefendants ***actively participated*** in the crime of which he has been convicted. At this point, Mr. Chauvin's codefendants have merely been charged with accomplice liability for Mr. Chauvin's actions—which places the burden on the State to prove beyond a reasonable doubt that the codefendants

Filed in District Court
State of Minnesota
4/30/2021 3:57 PM

intentionally aided Mr. Chauvin in commission of the offense. *See* Minn. Stat. § 609.05, subd.1. This means that the codefendants must have been aware of Mr. Chauvin's intent to commit third-degree assault. However, the State has not yet met its burden of proving as much. In fact, at this point the codefendants must be presumed innocent of the alleged offenses. Minn. Stat. § 611.02. Therefore, the State cannot prove beyond a reasonable doubt that Mr. Chauvin's codefendants "actively participated" in the offense for which Mr. Chauvin was convicted. As such, the Court must not find that three or more offenders actively participated in commission of the offense.

V. THE PRESENCE OF CHILDREN WHO STOPPED TO WITNESS THE ARREST OF GEORGE FLOYD IS NOT A SUFFICIENT GROUND FOR AN UPWARD DEPARTURE.

A court may consider whether the offender committed his crime in the presence of children when determining if an upward sentencing departure is appropriate. Minn. Sent. Guidelines § 2.D.3(b)(13). Here, the State argues that an upward departure is appropriate because the assault of George Floyd occurred in the presence of children. The facts of this case, however, are considerably different from those of other cases in which the presence of children during the commission of a crime has been alleged as an aggravating factor.

In most such cases, the crime was committed in a home or a location in which children were present at the outset, actually witnessed the crime, and were unable to leave the scene while the crime was being committed. *See State v. Profit,* 323 N.W.2d 34, 36 (Minn. 1982) (children witnessed an assault at a daycare center); *State v. Vance,* 765 N.W.2d 390, 394 (Minn. 2009) (home); *State v. Robideau,* 796 N.W.2d 147, 151 (Minn. 2011) (home); *State v. Gayles,* 915 N.W.2d 6, 12 (Minn. App. 2017) (home). The defense is unaware of any case in Minnesota in which the presence of children factor has been considered in a bystander-witness situation where the children, themselves, were not placed in danger. *See State v. Fleming,* 883 N.W.2d 790, 797

Filed in District Court
State of Minnesota
4/30/2021 3:57 PM

(Minn. 2016) (firing gun six times in a park full of children). The facts of this case are distinguishable from other precedential authority in which this factor has been applied. As such, the Court may not consider the voluntary presence of children as bystander witnesses as a basis for an upward durational departure at sentencing.

CONCLUSION

Because the State has failed to meet its burden of proving the existence of the alleged aggravating factors beyond a reasonable doubt, the Court may not consider them in making its sentencing determination.

Respectfully submitted,

HALBERG CRIMINAL DEFENSE

Dated: April 30, 2021

/s/ *Eric J. Nelson*

Eric J. Nelson
Attorney License No. 308808
Attorney for Defendant
7900 Xerxes Avenue S., Ste. 1700
Bloomington, MN 55431
Phone: (612) 333-3673