

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

D.C. File No. 27-CR-21-7460

State of Minnesota, )

Plaintiff, )

vs. )

Kimberly Ann Potter, )

Defendant. )

**DEFENDANT’S MOTION FOR  
DISPOSITIONAL DEPARTURE**

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The Defendant, Kimberly Ann Potter, through and by her lawyers, Earl Gray and Paul Engh, and in accordance with Sec. 2.D, Minnesota Sentencing Guidelines, moves the Court for a dispositional departure. Our grounds:

1. Officer Potter presented legitimate fact questions for the jury’s consideration: for Count 2, whether, by “culpable negligence,” she “consciously [took] an unreasonable risk and consciously [took] chances of causing death or great bodily harm to another.” Minn. Stat. 609.205, Subd. 1; and for Count 1, whether she was aware she had a gun in her hand, and with that awareness of that risk, fired. See State v. Engle, 743 N.W.2d 592, 596 (Minn. 2008). Officer Potter believed she was about to engage her Taser. Her testimony was consistent with

the body camera evidence, as well as the officers on the scene.

2. That Officer Potter sought exoneration is not a reason to punish her.

There never can be a penalty imposed for the exercise of defendant's constitutional right to a jury trial. State v. Mollberg, 246 N.W.2d 463, 471 (Minn. 1976).

3. The Minnesota Guidelines suggest a prison term, 86 for Manslaughter in the First Degree and 48 months for the lesser included.

4. The Minnesota guidelines are “advisory to the District Court.” Minn. Stat. 244.09, Subd. 5. Departure from the suggested guidelines is warranted if, as here, there are factors “substantial and compelling to overcome the presumption in favor of the Guideline Sentence.” Comment, Sec. 2.D.103; State v. McIntosh, 641 N.W.2d 3, 8 (Minn. 2002). The availability of departure, for reasons set forth below, vitiates the argument that a grid application is meant to be static. State v. Shattuck, 704 N.W.2d 131, 138 (Minn. 2005).

5. The District Courts have long been encouraged to “avoid sentencing that is either mechanical or callous.” State v. Bendzula, 675 N.W.2d 920, 923 (Minn. App. 2004)(quoting State v. Curtiss, 353 N.W.2d 262, 264 (Minn. App. 1984)). The “sanctions imposed should be the least restrictive necessary to achieve the purposes of sentencing,” and this Court is encouraged to take into account “that

the capacities of state and local correctional facilities are finite,” Bendzula, 675 N.W.2d at 923.

6. The leading dispositional departure case is still State v. Trog, 323 N.W.2d 28 (Minn. 1982). There the defendant pleaded guilty to burglary and assault, crimes that called for a presumptive commit of twenty-four months. Mr. Trog’s pre-sentence report revealed “no prior involvement with the police,” that he “had done well in school, and had an excellent work record.” He had also “cooperated with police,” and had been “shaken by the incident and was extremely contrite.” Id. at 29. Mr. Trog had strong and continuous support from his family and friends, including a retired police officer. Id. at 30.

Rather than two years at the Stillwater prison, Dakota County District Court Judge Robert J. Breunig sentenced Mr. Trog to five years of probation conditioned upon six months incarceration. Id. The State appealed.

The Minnesota Supreme Court affirmed, holding “a defendant’s particular amenability to individualized treatment in a probationary setting will justify departure in the form of a stay of execution of a presumptively executed sentence.” Id. at 31 (citing State v. Wright, 310 N.W.2d 461 (Minn. 1981)). Chief Justice Amdahl, for whom this Court was once a law clerk, noted that “there was a strong reason for believing that defendant would be victimized in prison and that

both defendant and society would be better off if defendant were sent to the workhouse for a short term, then given treatment, and then supervised on probation . . .” Id. at 31. “Underlying the trial court’s decision is the belief that the chance that defendant will mend his ways and that society’s interests will be safeguarded are better if the probationary treatment approach is followed.” Id. (quoting Wright, 310 N.W.2d at 463).

In sum, Mr. Trog’s “age, his prior record, his remorse, his cooperation, his attitude while in court and the support of friends and/or family, are relevant to a determination whether a defendant is particularly suitable to individualized treatment in a probation setting. All these factors were present in this case and justify the dispositional departure.” Id.

7. Chief Justice Amdahl is credited with bringing to life the sentencing guidelines and establishing the law interpreting them. His name appears on the majority of early guideline cases. See Richard Frase, “Sentencing Guidelines in Minnesota, 1978-2003,” Crime and Justice 32: 131, 145 (2005).

8. Trog wasn’t written to be an aberration, nor has that case been ignored over time. A defendant’s “age, remorse, lack of a prior record, and willingness to assume responsibility for the offense,” continues to be a justification for a dispositional departure, as it has been for decades now. E.g., State v. Bauerly, 520

N.W.2d 760,762-63 (Minn. App. 1994).

9. Given Officer Potter's record and evident contrition, this Court will be affirmed on appeal if it makes a singular finding of particular amenability, and even if it imposes a gross-misdemeanor disposition. State v. Hickman, 666 N.W.2d 729, 733 (Minn. App. 2003). The Trog factors were all proven at trial – Officer Potter's age, her exemplary career, her crime-free life. She expressed remorse and apologized to Mr. Wright's family from the stand, and will again at sentencing. State v. Barley, 520 N.W.2d 760, 762-63 (Minn. App. 1995).

We hope, too, this Court compares Mr. Trog's life with Officer Potter's. Her complete lack of criminal record (nor any citizen complaint over twenty-six years of service) bears a greater weight than his burglary, his assault. Compare State v. Soto, 855 N.W.2d 303, 311 (Minn. 2014)(Defendant's convictions of possessing drug paraphernalia and driving with a suspended license, and assault against the mother of his son, evinced a lack of amenability; dispositional departure reversed). Mr. Trogg got a break. She should, too.

10. There are additional factors that must be considered. The defendant's vulnerability to victimization for one. Wright, 310 N.W.2d at 463. Officer Potter will be a walking target in prison. She represents authority, and police authority and investigation are what result in convictions and incarceration. Her "potential

for victimization” as a police officer has been recognized by the Supreme Court as a mitigation ground. Koon v. United States, 518 U.S. 81, 107 (1996)(citing United States v. Lara, 905 F.2d 599, 601 (2<sup>nd</sup> Cir. 1990)).

11. The enormous support of Officer Potter’s community and friends is yet another factor to consider. E.g., State v. Case, 350 N.W.2d 473, 475 (Minn. App. 1984)(community support deemed a factor supporting dispositional departure). By volume and depth, the letters to be submitted to the Court are beyond extraordinary.

12. We anticipate the State’s recommendation and its fault lines. The reflexive arguments: there has been a death; an eye for an eye; because it’s unfair that Mr. Wright is gone and Officer Potter is here.

The prosecution’s apparent and isolated belief that at least 86 months or more, reflected by its charging decision and Blakely notice, is an example of the ipsi dixit fallacy. The Attorney General’s office opining words to the effect, ‘we believe eight years is appropriate, ergo it must be’ is circular reasoning, persuasive of nothing. Kumho Tire Company v. Carmichael, 526 U.S. 137, 157 (1999) (holding the fallacy is not proof); see also Black’s Law Dictionary (6<sup>th</sup> Ed. 1999) (defining ipsi dixit as “a bare assertion resting on the authority of an individual”). The high time recommendation is, in base form, a political statement.

13. If there is a failure inherent in criminal law, it is that we have not used the behavioral sciences to help find the right point where too little time undercuts the seriousness of the crime, while too much does little good for society or the incarcerated defendant. Officer Potter's family support coupled with the lack of chemical dependency suggests a very low chance of recidivism, hence no need for society to be protected, nor the requirement of a prison term to so ensure. See James Q. Wilson's classic, The Moral Sense, at p. 154 (Free Press 1993) (the primary causes of crime are lack of family structure and chemical dependency). We also know that, "[w]ith a small number of exceptions, as people age, their risk of re-offending declines sharply." Emily Bazelon, *Charged: The New Movement to Transform American Prosecution and End Mass Incarceration* (Random House 2019), at p.87.

14. The Attorney General's charge is to enforce the law and to support police in their efforts to combat crimes. Without an iota of statistical proof, the State will argue a prison term is needed to deter future officers, including Officer Potter, from making the same mistake. Our response is two fold.

First, given the convictions and Officer Potter's resignation, she won't be on a police force again. She has no ability to recidivate.

Even assuming, arguendo, she could return in some capacity to law

enforcement, landmark research (which won a Nobel Prize) has found arguments that may be “logical” and “compelling” to predict behavior (here the threat of prison for others to see) are habitually ignored. Officer Potter’s unintended decision was not the kind of act that reflected, beforehand, on the possibility of punishment and its deterrent value. See generally Kahneman, Slovic, Tversky, eds., Judgement Under Uncertainty: Heuristics and Biases (Cambridge, 2<sup>nd</sup> Ed. 1982, 2006)(citing Nisbett, Borgida, Crandall and Reed, “Popular Induction: Information is Not Necessarily Informative”) at p. 116.

Research has long confirmed that stigma, as opposed to prison time, remains one of the strongest inducements for an individual’s change in behavior. See generally, Goffman, Stigma: Notes on the Management of Spoiled Identity (1983), at pp. 8-12, 23-25. That stigma has been placed. Officer Potter is branded for the rest of her life. This Court’s decision to have a televised trial resulted in her facial image viewed by the millions. She can go nowhere without being recognized. Public exposure is the cost or benefit a politician incurs by choice. Officer Potter didn’t wish for her life and face and tears to be on a flickering blue screen.

The second reason is that, if prison is imposed, and given the times and this prosecution, there may not be many officers in the future to deter. The Minneapolis Police Department is down 300 officers. See Liz Navratil and Libor

Jany, “Adding 190 Officers ‘A Heavy Lift,’ Frey says,” Minneapolis StarTribune, January 23,2020 (noting the 45% increase in police officer retirements in 2020). The Duluth Police Department has lost 25% of its force. Job postings across the state for police officers have been greeted with silence.

Who is going to work for Brooklyn Center? A substantial percentage of its officers have left through transfer or retirement.

15. The recent increase in violent crime, including car-jacks, assaults, robberies, may well be linked with a diminution of police patrols. See e.g., Randy Furst and Jeff Hargarten, “Robberies Have Store Owners Wary, Weary,” Minneapolis StarTribune January 23, 2020. In our case, one of the messages sent to patrol officers by the Attorney General is this: if you think about stopping a car nowadays, think again. It’s not worth the risk. If the driver has a warrant, just let him go, get away, tell the Judge later it was best to do nothing about the Court’s warrant.

To impose a prison term here sends the message that if an officer makes a mistake, the Attorney General will be quick to charge (the Complaint was filed within days), and that officer will be immediately ruined by the publicity alone. And a few in the community will try to kill you. Ms. Potter’s own house had to be surrounded with a cyclone fence and two patrol cars in the front yard. Without

that protection, it's not a stretch to say her house would have burned down.

16. Minnesota law enforcement now faces the milieu of demoralization.

Buttressing our claim is an email from Charles Valleau, President of LELS #82, Brooklyn Center, sent to Attorney General Ellison, dated January 3, 2022. We quote in part:

I worked alongside Officer Kim Potter for 21 years as both a patrol officer and fellow member of the negotiations team. I have watched her patiently with people in crisis for hours. She cared for people and could talk people into putting down whatever weapon they had to peacefully resolve situations. She was everything you would want a police officer to be and I was so proud of her.

Our police officers are hurt and scared. They are terrified about making a mistake and having one of our state or federal agencies prosecute them. They are terrified any proactive enforcement will lead to a complaint or prosecution. Most of the people who call the police for help in Brooklyn Center are black, and our officers work with the constant fear that any enforcement action will lead to a complaint either by your office or the Department of Human Rights. Our officers have been labeled as racist throughout this last year by many people in leadership positions in our state.

I'm afraid our profession is losing the ability to police our city and state. We have very few people in school for law enforcement and are losing more officers every week. The officers that remain are afraid to conduct proactive law enforcement. This has resulted in an almost unheard-of increase in crime and violence. It is easy to think of our victims as numbers, but every day I meet victims of violence whose only crime was trying to live their daily lives. Our elderly and most vulnerable citizens have become our most common victim.

I believe you are in a unique situation to improve the current environment in law enforcement. The death of Daunte Wright was a

tragedy. There is no escaping that reality. Kim Potter clearly made a mistake. She did not intentionally kill him and she immediately showed remorse and apologized when she testified. A smart person once said prisons are meant to deter and rehabilitate. Kim Potter does not need to be rehabilitated. She is already a shell of the amazing person she used to be and will carry the guilt and shame from this for the rest of her life.

I urge you to send a strong message of support to the law enforcement officers in this state and have Kim Potter sentenced to probation. Kim Potter was trying to do her job, a very difficult job that many people are walking away from right now. She made a tragic mistake that has already ruined her life and career. Putting her in prison will not change what happened and will not stop an accident from happening again in the future.

Our state needs police officers and it needs them confident and willing to do their jobs. We will make mistakes, we are human, and because of the nature of our job those mistakes may unfortunately result in tragedy. Please don't send Kim to prison. Our profession and our society can't absorb that loss and the message it sends with it.

17. We understand this Court's concern about sentencing Officer Potter in a consistent fashion with those who commit the same crime. But consistency can only be part of the fairness equation. Everyone comes before the Court having a different history. This is one of the reasons why there has been a shift in sentencing jurisprudence during the last decade, toward individualized sentencing as opposed to adhering to a set grid. E.g. Gall v. United States, 552 U.S. 38, 59-60 (2007). Despite the guidelines, "justice generally require[s] consideration of more than the particular acts by which the crime was committed . . .," Pepper v. United

States, 562 U.S. 476, 485 (2011)(quoting Pennsylvania ex rel Sullivan v. Ashe, 302 U.S. 51, 55 (1937)), and that “punishment should fit the offender and not merely the crime.” Id. at 1233 (quoting with approval Williams v. New York, 337 U.S. 241, 247 (1949)). Of course, all of this recent Supreme Court case law encouragement for lenience, especially for the first time offender, echos Chief Justice Judge Amdahl’s ruling in Trog.

Mercy for Ms. Potter is not only supported by the case law. Recent statistics from the Minnesota Sentencing Guidelines Commission show that, “in 2019, the mitigated dispositional departure rate for cases recommended prison under the Guidelines as 39.4 percent (2,535 of the 5,965 cases recommended prison”. Minnesota Sentence Guidelines Commission 2019 Sentencing Practices (December 1, 2020), at 29. “For non-CSC sex offenses, the rate remained nearly unchanged (48.8% in 2018). Id. The mitigated departure for females was higher yet, at 59.5%. Id. (emphasis added). The racial breakdown for mitigated dispositional departures “ranged from a low of 32.6 percent for the American Indian group to a high of 43.3 for the Asian group and 43.1 for the white group.” Id.

What these hard numbers show, beyond any argument that the State will make, is that a lot of first-time defendants receive a departure. Officer Potter

qualifies to be included in the 59.5% category of women who do.

The Guidelines Commission also breaks down the mitigated departure rates by offense. Assault in the Second Degree, which includes the use of a dangerous weapon and its three year minimum, reflect at 54% rate of departure. *Id.* at 31. Figure 17. She should be treated in accord with that group, too.

Given the statistics, the majority of women facing a prison sentence get a break unrelated to their race. Each year these same women hear this cadence from the Court: “You’ve lived a good life except for this mistake. Prison isn’t the place for you. I’m giving you a second chance.”

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The tragedy of this case is unending, with no way to recapture the moment. Hence we return to Soren Kierkegaard’s adage, “Life can only be understood backwards; but it must be lived forwards.” *See* Clare Carlisle, *Philosopher of the Heart, the Restless Life of Soren Kierkegaard* (Farrar, Straus, and Giroux 2019) at p. 5 (quoting *Kierkegaard’s Journals and Notebooks, Volume 2* (Princeton University Press 2008) at p. 179). What remains for Kimberly Potter is a starting over. To be someone new and now distant from the dark blue uniform and silver badge that had defined her. To do good with what is left of her gift of life, and to honor the dead.

Literature speaks to what she might see, hopefully without delay. A great book published last year is Cal Flynn's Islands of Abandonment (Viking 2021). The young author's writing is extraordinary, as is her message.

After visiting place after place that has been destroyed by, e.g., waste (the shores of New Jersey), by crime (Detroit), and by accident (Chernobyl), Ms. Flynn arrives at an enthralling conclusion. She refuses to accept “the inevitability of a fallen world, a ruinous future.” Id. at 320. “[E]verywhere I have looked, everywhere I have been – places bent and broken, despoiled and desolate, polluted and poisoned – I have found new life springing from the wreckage of the old, life all the stranger and more valuable for its resilience.” Id. at 321. “This is a corrupted world, yes – one long fallen from a state of grace — but it is a world too that knows how to live. It has a great capacity for repair, for recovery, for forgiveness . . .” Id.

In the course of her journey to abandoned places, the manifestation of tragedy in multiple forms, Ms. Flynn arrives at the meaning of her book, reflective of her own life and future: “I am no mystic,” she concludes. “I have received no visitation, no annunciation. There may be no absolution. But I do know this: all is not lost.” Id. at 324.

Dated: January 31, 2022

Respectfully submitted,

/s/ Paul Engh

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Paul Engh, Lic. 135685  
Suite 2860  
150 South Fifth Street  
Minneapolis, MN 55402  
(612) 252-1100

Earl Gray, Lic. 37072  
Suite 1600W  
445 Minnesota Street  
St. Paul, MN 55101  
(651) 223-5175

Lawyers for Officer Potter