

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

**STATE'S MEMORANDUM OF
LAW IN SUPPORT OF *BLAKELY*
AGGRAVATED SENTENCING
FACTORS**

Court File No.: 27-CR-20-12646

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 an aggravated sentence for Defendant Derek Chauvin, a former police officer convicted of second-degree murder, third-degree murder, and second-degree manslaughter in connection with the death of George Floyd. *See Blakely v. Washington*, 542 U.S. 296 (2004); Minn. Stat. § 244.10; Minn. R. Crim. P. 7.03. The facts proven beyond a reasonable doubt at trial demonstrate that five aggravating factors support an upward sentencing departure.

First, Mr. Floyd was a particularly vulnerable victim. *See* Minn. Stat. § 244.10, subd. 5a(a)(1); Minn. Sent'g Guidelines 2.D.3.b(1). Defendant's criminal conduct occurred while Mr. Floyd was in a vulnerable position on the ground: The evidence at trial showed that the officers handcuffed Mr. Floyd's arms behind his back and held him down in the prone position, with his chest against the pavement. Defendant was trained that this position posed a significant risk of positional asphyxia. Indeed, Defendant's own use-of-force expert witness acknowledged at trial that police officers have been trained for more than 30 years regarding the risks of positional

asphyxia. A substantial portion of Defendant's conduct also occurred after Mr. Floyd was in a vulnerable medical state: Defendant continued to kneel on Mr. Floyd's neck and upper back even after Mr. Floyd said he could not breathe 27 times, for almost four minutes after he became non-responsive, and for approximately three minutes after officers knew that he had no pulse. Mr. Floyd also was intoxicated, and Defendant knew as much during the incident. Thus, the facts proven beyond a reasonable doubt demonstrate that Mr. Floyd was particularly vulnerable.

Second, Mr. Floyd was treated with particular cruelty. *See* Minn. Stat. § 244.10, subd. 5a(a)(2); Minn. Sent'g Guidelines 2.D.3.b(2). Despite Mr. Floyd's repeated pleas that he could not breathe, and despite the repeated pleas of bystanders on the scene, Defendant pressed his knee into Mr. Floyd's neck and upper back for nine minutes and 29 seconds. As noted, Defendant maintained that position—again, for a matter of minutes, not seconds—even after Mr. Floyd went silent, and even after officers knew that Mr. Floyd no longer had a pulse. Mr. Floyd also sustained significant facial abrasions and bruising as a result of being pressed forcibly into the pavement. Defendant's actions inflicted gratuitous pain, and caused psychological distress to Mr. Floyd and to the bystanders. Moreover, despite Mr. Floyd's obvious signs of medical distress, and despite Defendant's training, Defendant made no attempt to perform CPR or give Mr. Floyd medical attention, and discouraged others on the scene from providing Mr. Floyd with medical attention. Taken together, these facts show that Defendant treated Mr. Floyd with particular cruelty.

Third, Defendant abused his position of authority. *See State v. Lee*, 494 N.W.2d 475, 482 (Minn. 1992). He was a licensed police officer in full uniform who, in conjunction with other officers, had full custody of Mr. Floyd. The policies of the Minneapolis Police Department (MPD) state that officers occupy a position of "public trust." They require officers in Defendant's position to "protect with courage" and "serve with compassion." They require officers to treat the "sanctity

of life” and the “protection of the public” as paramount objectives when using force. And officers are required to abide by the principle of “in your custody, in your care.” As the trial testimony of Chief of Police Medaria Arradondo, Sergeant Jody Stiger, and Lieutenant Richard Zimmerman makes clear, Defendant did not follow any of these directives. He abused his position of authority as a licensed police officer when he pressed his knee into Mr. Floyd’s neck and upper back for nine minutes and 29 seconds while Mr. Floyd was in his custody.

Fourth, 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); *see* Minn. Sent’g Guidelines 2.D.3.b(10). Defendant acted in concert with three other former MPD officers—J. Alexander Kueng, Thomas Lane, and Tou Thao—who actively participated in the crime. As Defendant pressed down on Mr. Floyd’s neck and upper back, Mr. Kueng pressed his knee into Mr. Floyd’s back and held down Mr. Floyd’s handcuffed arm, Mr. Lane held down Mr. Floyd’s legs, and Mr. Thao stood between Defendant and the bystanders, pushing them back to the sidewalk and preventing them from interceding to assist Mr. Floyd.

Fifth, Defendant committed the crime in the presence of multiple children. *See* Minn. Sent’g Guidelines 2.D.3.b(13). Four of the individuals who witnessed Defendant’s actions and testified at trial were minors on May 25, 2020. One of those four was nine years old at the time. In addition, the body-worn camera footage and the surveillance video footage show that at least two other children saw Defendant kneeling atop Mr. Floyd at various points during the incident.

Any one of these five aggravating factors would be sufficient on its own to warrant an upward sentencing departure. Here, all five apply. The State therefore respectfully requests that the Court find the facts necessary to support the existence of these five aggravating factors, and that the Court impose an aggravated sentence on that basis.

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.” *State v. Hicks*, 864 N.W.2d 153, 157 (Minn. 2015) (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).

Where, as here, the defendant has waived the right to findings by a jury on the facts that support an aggravated sentence, the court must find those facts necessary to support the existence of an aggravating factor, and then must determine whether “those additional facts support a substantial and compelling reason . . . to impose a sentence outside the presumptive sentencing range.” *State v. Rourke*, 773 N.W.2d 913, 922 (Minn. 2009).

The State need only prove the existence of one aggravating factor to justify the imposition of an aggravated sentence. *See State v. Solberg*, 882 N.W.2d 618, 624 (Minn. 2016). Here, the facts proven at trial demonstrate that five separate and distinct factors support an upward sentencing departure: (i) Mr. Floyd was a particularly vulnerable victim; (ii) Mr. Floyd was treated with particular cruelty; (iii) Defendant abused his position of authority; (iv) Defendant committed the crime as part of a group of three or more offenders who all actively participated in the crime; and (v) Defendant committed the crime in the presence of multiple children. Because the testimony and facts offered at trial prove that there is a “substantial and compelling reason . . . to impose a sentence outside the presumptive sentencing range,” *Rourke*, 773 N.W.2d at 922, the

State respectfully requests that the Court find the facts necessary to support these aggravated factors, and impose an aggravated sentence in this case.

I. MR. FLOYD WAS PARTICULARLY VULNERABLE.

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 warranted. Minn. Sent’g Guidelines 2.D.3.b(1); *see* Minn. Stat. § 244.10, subd. 5a(a)(1). This aggravating factor is most likely to apply where the victim’s vulnerability is a “substantial factor in defendant’s accomplishing” the offense. *State v. Gardner*, 328 N.W.2d 159, 162 (Minn. 1983). A finding that the vulnerability was a “substantial factor,” however, “is not required in order to justify an upward departure based on particular vulnerability.” *State v. Rabold*, 935 N.W.2d 902, 907 (Minn. App. 2019).

Of particular note here, this factor applies even where the defendant is responsible for creating the victim’s vulnerability. 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 of Appeals 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 “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 may render a victim vulnerable. Thus, 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 this case, the facts proven at trial beyond a reasonable doubt show that Mr. Floyd was a particularly vulnerable victim for at least three reasons.

First, Mr. Floyd was placed in a particularly vulnerable position during Defendant’s assault: His arms were handcuffed behind his back, and he was pinned to the pavement in the prone position. Defendant knew or should have known that Mr. Floyd was in a vulnerable position, and his vulnerable position was a “substantial factor” in the offense. *Gardner*, 328 N.W.2d at 162.

For one thing, the body-worn camera footage demonstrates that Mr. Floyd was handcuffed, and Defendant knew as much. *See* Trial Ex. 47 (Lane BWC) at 20:11:00-40, 20:23:31 (showing body-worn camera footage demonstrating former officers Lane and Kueng handcuffing Mr. Floyd, and Defendant later holding Mr. Floyd’s handcuffed hand while kneeling on top of him). Moreover, based on his training as a Minneapolis police officer, Defendant should have been aware that handcuffing Mr. Floyd’s arms behind his back could hinder Mr. Floyd’s breathing. *See* Testimony of Lt. Richard Zimmerman at 1:41:10-1:42:30 (Apr. 2, 2021)¹; *see also* Testimony of Inspector Katie Blackwell at 7:01:48-7:02:40, 7:18:20-7:20:33 (Apr. 5, 2021) (confirming the police training curriculum, and that Defendant had participated in that training).²

¹ <https://www.youtube.com/watch?v=C-cmPlfRd2g>.

² <https://www.youtube.com/watch?v=VXPICZ0FK3w>.

Mr. Floyd was also vulnerable because he was restrained in the prone position for an extended period. *See* Trial Exs. 43, 47 (Kueng BWC & Lane BWC) at 20:19:10- 35 (body-worn camera footage of Defendant placing Mr. Floyd into the prone position and holding him there). Again, Chauvin knew or should have known of the dangers of the prone position based on his training. *See* Testimony of Lt. Zimmerman at 1:40:36-1:41:02³; Testimony of Inspector Blackwell at 7:18:20-7:20:33⁴; Testimony of Lt. Johnny Mercil 2:50:10-2:51:22 (Apr. 6, 2021).⁵ Indeed, even the defense’s use-of-force expert witness acknowledged in his testimony that police officers have known and been trained on the dangers of positional asphyxia for at least 30 years. *See* Testimony of Barry Brodd at 1:03:24-1:04:14 (Apr. 13, 2021).⁶

Mr. Floyd’s vulnerable position—pinned prone on the ground, with his arms handcuffed behind his back—was also a “substantial factor in defendant’s accomplishing” the offense. *Gardner*, 328 N.W.2d at 162. Defendant was able to maintain his position atop Mr. Floyd’s neck and upper back—and thereby assault Mr. Floyd—precisely because Mr. Floyd was pinned down in a vulnerable position. The State’s use-of-force experts also testified that Defendant’s vulnerable positioning on the ground during the offense was one of the reasons why Defendant’s conduct was unreasonable. *See* Testimony of Sgt. Jody Stiger 6:47:12-40, 6:51:40-6:54:04 (Apr. 6, 2021)⁷; Testimony of Sgt. Stiger 28:00-31:45, 2:39:40-2:43:25 (Apr. 7, 2021).⁸

Moreover, as Dr. Tobin, one of the State’s medical experts, explained, Mr. Floyd was unable to breathe adequately because he was handcuffed and pressed against the pavement in the

³ *See supra* p. 6 n.1.

⁴ *See supra* p. 6 n.2.

⁵ <https://www.youtube.com/watch?v=hHjlqyScmU0>.

⁶ https://www.youtube.com/watch?v=3h_W4b5eEdo.

⁷ <https://www.youtube.com/watch?v=hHjlqyScmU0>.

⁸ <https://www.youtube.com/watch?v=-42255BbVEc>.

prone position. Testimony of Dr. Martin Tobin at 26:35-27:30 (Apr. 8, 2021)⁹; *see also* Testimony of Dr. Lindsey Thomas at 48:57-49:46 (Apr. 9, 2021).¹⁰ Dr. Tobin opined at trial that the prone position narrows the hypopharynx and lowers lung volume, inhibiting breathing. Testimony of Dr. Tobin at 1:43:15-38, 1:51:45-1:56:00, 2:01:00-2:03:35.¹¹ Dr. Tobin also emphasized that the handcuffs were an “extremely important” factor, as Defendant’s manipulation of the handcuffs—in combination with Mr. Floyd’s position on the pavement—“interfere[d] with central features” of Mr. Floyd’s breathing. *Id.* at 36:21-37:51. In particular, “the hands of the police and the handcuffs, particularly on the left side,” played a significant role in effectively preventing Mr. Floyd from using his left lung. *Id.* at 43:12-44:47. The small chain between the handcuffs also prevented Mr. Floyd from expanding his right side, *id.* at 46:49-47:10, and from adjusting his position so that he could breathe. *Id.* 2:51:30-2:52:46. Other experts agreed with Dr. Tobin’s conclusion that Mr. Floyd’s vulnerable position contributed to his death. Testimony of Dr. William Smock at 6:57:12-6:58:05 (Apr. 8, 2021) (testifying that Mr. Floyd died of positional asphyxia because of pressure on his chest and back in the prone position)¹²; Testimony of Dr. Jonathan Rich at 1:21:00-1:22:15 (Apr. 12, 2021) (testifying that Mr. Floyd died of low oxygen induced by the prone restraint and positional asphyxiation).¹³ In short, Mr. Floyd’s vulnerable position was a “substantial factor in defendant’s accomplishing” the offenses of second-degree murder, third-degree murder, and second-degree manslaughter. *Gardner*, 328 N.W.2d at 162.

Second, Mr. Floyd was particularly vulnerable because of his medical condition—not talking, not breathing, unconscious, and without a pulse—during a substantial portion of

⁹ <https://www.youtube.com/watch?v=o0aF9EEMBpU>.

¹⁰ <https://www.youtube.com/watch?v=oNx1UtsetVo>.

¹¹ *See supra* p. 7 n.9.

¹² <https://www.youtube.com/watch?v=o0aF9EEMBpU>.

¹³ https://www.youtube.com/watch?v=_XjpoTN2b3E.

Defendant's criminal conduct. As the body-worn camera videos demonstrate, Mr. Floyd clearly and repeatedly told Defendant that he could not breathe—27 times, in fact. Trial Exs. 43, 47 (Kueng BWC & Lane BWC) at 20:19:14-20:23:59. The testimony at trial also shows that Mr. Floyd was rendered unconscious and stopped breathing at approximately 8:25 p.m. *See* Testimony of Senior Special Agent James Reyerson at 4:27:50-4:33:40 (Apr. 7, 2021) (explaining that Mr. Floyd became nonverbal and unconscious at that time)¹⁴; Trial Exs. 43, 47 (Kueng BWC & Lane BWC) at 20:23:58-20:25:00. Shortly thereafter, former officer Kueng checked for a pulse, and indicated that he could not find one. Trial Exs. 43, 47 (Kueng BWC & Lane BWC) at 20:25:45-20:26:12; *see* Testimony of Dr. Tobin at 2:52:50-2:54:08 (testifying that Defendant remained on Mr. Floyd's neck even after he had stopped breathing and the officers could not find a pulse).¹⁵ Yet Defendant continued to press his knee into Mr. Floyd's neck and upper back—for four minutes and 44 seconds *after* Mr. Floyd spoke his final words, for three minutes and 51 seconds *after* Mr. Floyd became silent and non-responsive, and for almost three minutes *after* Mr. Kueng checked for a pulse and indicated that he could not find one. Just as in *Dillon*, where the defendant's continued assault on a person who “appeared to be unconscious” triggered the application of the particular vulnerability factor, Defendant's actions in this case plainly warrant an aggravated sentence in light of Mr. Floyd's vulnerability. 781 N.W.2d at 600.

Third, Mr. Floyd was also particularly vulnerable because he was intoxicated. “A victim's vulnerability due to intoxication may be considered as a reason for departure.” *State v. Gettel*, 404 N.W.2d 902, 906 (Minn. App. 1987); *see also Ture v. State*, 353 N.W.2d 518, 522 (Minn. 1984). Here, Mr. Floyd had drugs in his system at the time of his death. *See* Testimony of Dr. Daniel

¹⁴ <https://www.youtube.com/watch?v=-42255BbVEc>.

¹⁵ *See supra* p. 7 n.9.

Isenschmid at 5:19:30-5:20:51 (Apr. 8, 2021).¹⁶ And the officers' comments during and after the incident establish that they knew Mr. Floyd was intoxicated. *See* Trial Exs. 43, 47 (Kueng BWC & Lane BWC) at 20:20:59-20:21:06 (officers discussing finding a pipe on Mr. Floyd); *id.* at 20:21:50-20:22:20 (officers suggest Mr. Floyd may be on PCP); Trial Ex. 45 (Chauvin BWC) at 20:34:44-30:25:02 (Chauvin telling a bystander that "it looks like [Floyd was] probably on something"). Under MPD policy, Mr. Floyd's intoxication should have prompted Defendant to de-escalate his use of force against Mr. Floyd. *See* Trial Ex. 219 (MPD Policy & Procedure Manual 5-304(B)(1)(b)) (instructing officers that, in evaluating whether the use of force is appropriate, they must consider whether the suspect is intoxicated). Defendant did not do so.

In short, the facts proven beyond a reasonable doubt at trial demonstrate that Mr. Floyd was "particularly vulnerable due to . . . reduced physical or mental capacity, and the offender knew or should have known of this vulnerability." Minn. Sent'g Guidelines 2.D.3.b(1).

II. MR. FLOYD WAS TREATED WITH PARTICULAR CRUELTY.

An aggravated sentence is also separately appropriate if the "victim was treated with particular cruelty for which the offender should be held responsible." Minn. Stat. § 244.10, subd. 5a(a)(2); *see* Minn. Sent'g Guidelines 2.D.3.b(2). The cruelty in question must be "of a kind not usually associated with the commission of the offense in question." *State v. Schantzen*, 308 N.W.2d 484, 487 (Minn. 1981). Both "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), can render conduct particularly cruel. Courts may also look "at the impact of a crime on people other than the victim." *Id.* at 146 n.2.

¹⁶ <https://www.youtube.com/watch?v=o0aF9EEMBpU>.

For at least four reasons, the facts proven beyond a reasonable doubt at trial demonstrate that Mr. Floyd was treated with particular cruelty for which Defendant should be held responsible.

First, Defendant's actions inflicted "gratuitous . . . pain." *Tucker*, 799 N.W.2d at 586. As the body-worn camera videos showed, Defendant placed Mr. Floyd on the ground, and then pressed his knee into Mr. Floyd's neck and upper back. Trial Exs. 43, 47 (Kueng BWC & Lane BWC) at 20:19:14-20:28:43. Defendant continued to maintain his position atop Mr. Floyd even as Mr. Floyd cried out that he was in pain, even as Mr. Floyd exclaimed 27 times that he could not breathe, and even as Mr. Floyd said that Defendant's actions were killing him. *Id.* at 20:19:14-20:23:59. Defendant also rolled his knee back and forth at various points during the restraint, increasing the downward force on Mr. Floyd's neck and back. *See* Testimony of Donald Williams at 8:49:40-8:52:39 (Mar. 29, 2021).¹⁷ And he lifted his toes off the ground at various points during the restraint, pressing the full weight of his knee into Mr. Floyd's neck and upper back and again increasing the downward force on Mr. Floyd. *See* Testimony of Dr. Tobin at 1:15:07-1:16:41¹⁸; *see also* Testimony of Sgt. Stiger at 14:05-25 (Apr. 7, 2021) (noting that most of Defendant's body weight would have been centered over his knee).¹⁹ Defendant continued to maintain his position atop Mr. Floyd even as Mr. Floyd's voice became softer and his breathing became more labored. *See* Trial Exs. 43, 47 (Kueng BWC & Lane BWC) at 20:22:24-20:23:59. And he maintained his position even after Mr. Floyd stopped speaking and lost consciousness, and even after Mr. Kueng could no longer find a pulse. *See id.* at 20:24:00-20:28:43; Testimony of Senior Special Agent Reyerson at 4:27:50-4:33:40 (explaining that Mr. Floyd became nonverbal and unconscious at

¹⁷ <https://www.youtube.com/watch?v=IWbA2brcEbg>

¹⁸ *See supra* p. 7 n.9.

¹⁹ *See supra* p. 7 n.7.

approximately 8:25 p.m.).²⁰ Moreover, as a result of being pressed forcibly into the pavement, Mr. Floyd sustained significant facial abrasions and bruising. *See* Trial Exs. 185-187 (autopsy photos of Mr. Floyd’s body). Defendant’s actions therefore plainly inflicted gratuitous pain.

Critically, this use of force went well beyond the minimum amount of force necessary to commit unintentional second-degree murder. Defendant’s prolonged restraint of Mr. Floyd was much longer and more painful than, for example, a near-instantaneous death by gunshot, which is one “typical” scenario for this type of offense. *Cf. id.* at 587-588 (finding no particular cruelty in second-degree unintentional felony murder case where defendant “did not shoot [the victim] in a manner that gratuitously inflicted additional pain”). It is certainly much longer and more painful than a typical felony 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) (noting that a felony assault requires only that the defendant “intentionally apply force to another person without his consent”). In any event, by any measure, the force Defendant applied to Mr. Floyd was plainly “gratuitous”: Defendant continued to kneel atop Mr. Floyd’s neck and upper back for several minutes after Mr. Floyd lost consciousness. *Schantzen*, 308 N.W.2d at 487; *see State v. Smith*, 541 N.W.2d 584, 590 (Minn. 1996) (finding particular cruelty in robbery case in part because defendant continued beating the victim after “he was knocked unconscious by the first blow”).

Second, Defendant’s actions caused Mr. Floyd significant “psychological” distress. *Norton*, 328 N.W.2d at 146. While Defendant pressed his knee into Mr. Floyd’s neck and upper back, Mr. Floyd exclaimed 27 times that he could not breathe. *See* Trial Exs. 43, 47 (Kueng BWC & Lane BWC) at 20:19:14-20:23:59. He cried out for his deceased mother almost a dozen times. *Id.* He told Defendant that “[M]y stomach hurts. My neck hurts. Everything hurts.” *Id.* at

²⁰ *See supra* p. 9 n.14.

20:22:24. Yet Defendant responded dismissively to Mr. Floyd's pleas. He nonchalantly said "uh huh" several times in response to Mr. Floyd's statements. *Id.* at 20:22:25-30. And he said: "You're doing a lot of talking, a lot of yelling. It takes a heck of a lot of oxygen to say things." *Id.* at 20:22:39-50. He continued to press his knee into Mr. Floyd's neck and upper back until he was no longer speaking or breathing, and until he no longer had a pulse. Defendant thus did not just inflict physical pain. He caused Mr. Floyd psychological distress during the final moments of his life, leaving Mr. Floyd helpless as he squeezed the last vestiges of life out of Mr. Floyd's body.

Third, Defendant's actions provoked psychological distress not just in Mr. Floyd, but also in the witnesses on the scene. The comments of the bystanders on the scene are a testament to the psychological distress they suffered during the nine minutes and 29 seconds during which Defendant pressed his knee into Mr. Floyd's neck and upper back. The bystanders exclaimed that Defendant was "stopping [Mr. Floyd's] breathing"; that Mr. Floyd was "pass[ing] out"; that Mr. Floyd was "not fucking moving"; and that Mr. Floyd was "dying." Trial Ex. 49 (Thao BWC) at 20:24:40-20:25:10, 20:27:11-17, 20:27:35-36. The bystanders also repeatedly pleaded with the officers to check Mr. Floyd's pulse. *See id.* at 20:25:55-20:26:03. And they became more upset as Mr. Floyd lost consciousness and stopped breathing. Moreover, when Defendant pulled out his mace and appeared ready to use it against the bystanders, that only added to the distress of the bystanders. Some bystanders appeared to be startled and upset by Defendant's actions, with one shouting: "What the fuck. He got mace, he got mace." Trial Ex. 15 (D.F. video) at 4:28-37. The bystanders' comments reflect the psychological distress Defendant's actions inflicted.

The in-court testimony of the bystanders, moreover, further confirms that Defendant's actions traumatized the bystanders. To take just a few examples:

- D.F. testified that she stays up at night thinking about what she could have done to save Mr. Floyd. Testimony of D.F. at 03:04:40-03:05:46 (Mar. 30, 2021)²¹; *infra* pp. 23-24.
- Charles McMillan broke down in tears as he described what he witnessed. *See* Testimony of Charles McMillan at 27:12-24 (Mar. 31, 2021) (“I feel helpless. I don’t have a mama either, and I understand him.”).²²
- Donald Williams testified that he was extremely upset by Defendant’s actions, and that he thought Defendant’s actions were killing Mr. Floyd. *See* Testimony of Donald Williams at 1:41:35-1:42:00, 1:45:59-1:46:05 (Mar. 30, 2021) (Williams explaining that he became upset during the incident because “I felt like I had to speak out for Floyd”).²³
- Genevieve Hanson testified that she felt “totally distressed” when officers prevented her from administering medical aid to Mr. Floyd, and began crying during her testimony. *See* Testimony of Genevieve Hanson at 2:39:51-59 (Mar. 30, 2021).²⁴ She felt “helpless” “because there was a man being killed” in front of her. *Id.* at 2:48:40-49:06.

The “impact” of Defendant’s offenses “on people other than the victim” therefore supports the conclusion that Defendant’s criminal conduct was particularly cruel. *Norton*, 328 N.W.2d at 146.

Fourth, Mr. Floyd was treated with particular cruelty because Defendant failed to provide Mr. Floyd with medical aid even after Mr. Floyd was no longer conscious or breathing, and even after it became clear that Mr. Floyd no longer had a pulse. “Failure to aid” a victim in need of

²¹ https://www.youtube.com/watch?v=5_xbXSB9XII.

²² https://www.youtube.com/watch?v=OOQBx5Gmwi0&list=PLh-mzc9wtCFIBkmv7lCSzBqOX2uu56I4_&index=4.

²³ https://www.youtube.com/watch?v=5_xbXSB9XII&list=PLh-mzc9wtCFIBkmv7lCSzBqOX2uu56I4_&index=1.

²⁴ https://www.youtube.com/watch?v=LvjnBm4Kbog&list=PLh-mzc9wtCFIBkmv7lCSzBqOX2uu56I4_&index=2.

medical attention “is relevant to whether a person . . . has acted in a particularly cruel manner.” *Tucker*, 799 N.W.2d at 587; *see also State v. Jones*, 745 N.W.2d 845, 849 (Minn. 2008).

Here, Defendant did not begin CPR or chest compressions even after Mr. Floyd exhibited clear signs of medical distress. Instead, Defendant continued to press his knee into Mr. Floyd’s neck and upper back for four minutes and 44 seconds after Mr. Floyd stopped speaking, for three minutes and 51 seconds after Mr. Floyd became silent and non-responsive, and for almost three minutes after Mr. Kueng checked for a pulse and could not find one. Trial Exs. 43, 47 (Kueng BWC & Lane BWC) at 20:24:00-20:28:43; *see supra* p. 9. Moreover, Defendant continued to maintain his position atop Mr. Floyd even when paramedics arrived on the scene, and did so until the moment before the officers rolled Mr. Floyd onto the stretcher. *See id.* at 20:27:00-20:28:43. And he discouraged others on the scene from providing Mr. Floyd with medical attention, warning Genevieve Hanson—the off-duty firefighter—not to “come over here” when she asked to provide Mr. Floyd with medical assistance. Trial Ex. 43 (Kueng BWC) at 20:25:26-47.

Defendant’s refusal to administer medical aid to Mr. Floyd was particularly egregious because he was trained to administer CPR in those circumstances. *See, e.g.*, Trial Exs. 277, 278 (Defendant’s CPR certifications); Testimony of Officer Nicole Mackenzie at 00:10-11:00 (Apr. 6, 2021) (describing first aid and CPR training Defendant would have received).²⁵ In fact, MPD policy *required* Defendant to “render medical aid consistent with training.” Trial Ex. 221 (MPD Policy & Procedure Manual 5-306). Even Defendant’s own medical expert, Dr. Fowler, testified that it is essential to administer CPR immediately after a person is found to no longer have a pulse. *See* Testimony of Dr. David Fowler at 1:01:36-1:02:10 (Apr. 14, 2021) (testifying that “immediate

²⁵ https://www.youtube.com/watch?v=OoRuZvArP_I&list=PLh-mzc9wtCFIBkmv7lCSzBqOX2uu56I4_&index=11

medical attention for a person who has gone into cardiac arrest may well reverse that process,” and agreeing that Mr. Floyd should have been given immediate medical attention).²⁶ But that is not what Defendant did. Instead, he continued to press Mr. Floyd’s lifeless body into the pavement.

In short, the facts proven beyond a reasonable doubt show that Mr. Floyd was treated with particular cruelty. That aggravating factor therefore applies to Defendant’s criminal conduct here.

III. DEFENDANT ABUSED HIS POSITION OF AUTHORITY.

Minnesota courts have recognized that an “abuse of [a] position of trust and authority” is a proper ground for an upward sentencing departure. *Lee*, 494 N.W.2d at 482. This factor supports an upward 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 proper when 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).

Thus, in *State v. Bennett*, the Court of Appeals concluded 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”

²⁶ https://www.youtube.com/watch?v=u_6UIR9bGZM&list=PLh-mzc9wtCFIBkmv7lCSzBqOX2uu56I4_&index=30

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.*

Here, Defendant occupied a prominent position of public trust and authority as a licensed police officer in full uniform who, in conjunction with other officers, took full custody of Mr. Floyd. Indeed, it is hard to imagine a more textbook example of a “relationship[] fraught with power imbalances” than that between a police officer and an individual in his custody. *Rourke*, 681 N.W.2d at 41. Defendant’s position of public trust and authority is clear from MPD’s policies and the testimony at trial. MPD policies provide that officers occupy a position of “public trust” and “public faith.” Trial Ex. 215 (MPD Policy & Procedure Manual 5-102.01). MPD requires its officers in Defendant’s position to “protect with courage” and “serve with compassion.” Testimony of Chief Medaria Arradondo at 2:16:20-30 (Apr. 5, 2021).²⁷ And, according to MPD’s code of ethics, an officer’s “fundamental duty” is to “serve mankind” and “safeguard lives and property.” Trial Ex. 215; Testimony of Chief Arradondo at 3:09:01-45.

This obligation to “safeguard lives” takes on special importance when officers exercise their legal authority to take someone into their custody. Officers are required to abide by the principle: “In your custody, in your care.” As Chief Arradondo put it at trial, officers have a “duty of care,” “so when someone is in our custody, regardless” of whether “they are a suspect, we have an obligation to provide for their care.” Testimony of Chief Arradondo at 33:33-47 (Apr. 5,

²⁷ https://www.youtube.com/watch?v=u2_1KzBJVcM&list=PLh-mzc9wtCFIBkmv7lCSzBqOX2uu56I4_&index=8.

2021).²⁸ This duty of care is owed even to “people to whom defensive tactics are being applied.” *Id.* at 33:49-34:10. Chief Arradondo explained that those people “are still in our custody and they have rights and the humanity of this profession [means] we need to make sure we are taking care of them.” *Id.* Lieutenant Zimmerman likewise testified that, from the moment an officer handcuffs someone, that person becomes the officer’s “responsibility.” Testimony of Lt. Zimmerman at 1:23:30-56 (Apr. 2, 2021).²⁹ “His safety is your responsibility,” and “his wellbeing” “is your responsibility.” *Id.* Even Defendant’s own use-of-force expert agreed that “once someone is in your custody, they’re in your care.” *See* Testimony of Barry Brodd at 1:17:40-1:18:00.³⁰

For this reason, MPD’s official use of force policy requires officers using force to focus—first and foremost—on preserving human life. “Sanctity of life and the protection of the public” are the “cornerstones of the MPD’s use of force policy.” Trial Ex. 216 (MPD Policy & Procedure Manual 5-301). As Chief Arradondo testified, “sanctity of life” is the “pillar” of the use of force. Testimony of Chief Arradondo at 16:20-16:35 (Apr. 5, 2021).³¹ Similarly, when dealing with individuals experiencing a behavioral or emotional crisis, officers are required to “handle encounters” “in a manner that reflects the values of protection, safety and sanctity of life.” Trial Ex. 231 (MPD Policy & Procedure Manual 7-809). All of this reinforces the simple conclusion that MPD officers occupy a position of “trust” and “authority,” which empowers them to take individuals into custody and deploy reasonable—and only reasonable—force. When officers exercise that authority, they have a sacrosanct duty to protect the lives of those in their custody.

²⁸ https://www.youtube.com/watch?v=RL1mEXR0XZg&list=PLh-mzc9wtCFIBkmv7lCSzBqOX2uu56I4_&index=9.

²⁹ https://www.youtube.com/watch?v=jvA4xOFOpYQ&list=PLh-mzc9wtCFIBkmv7lCSzBqOX2uu56I4_&index=7.

³⁰ https://www.youtube.com/watch?v=3h_W4b5eEdo&list=PLh-mzc9wtCFIBkmv7lCSzBqOX2uu56I4_&index=28.

³¹ *See supra* p. 17 n.28.

Mr. Floyd also recognized that Defendant occupied a position of authority over him, and that he was at the mercy of Defendant and the other officers. He used respectful language with the officers, and pleaded with the officers not to hurt him from the moment Mr. Lane and Mr. Kueng approached his vehicle. *See, e.g.*, Trial Ex. 47 (Lane BWC) at 20:10:35-37 (“Mr. Officer, please don’t shoot me.”). Mr. Floyd repeatedly referred to the officers using the title “Mr. Officer.” *See, e.g.*, Trial Ex. 45 (Chauvin BWC) at 20:17:30-20:17:50 (using the title “Mr. Officer” as Defendant approached). When the officers placed Mr. Floyd on his knees, before they placed him in the prone position, Mr. Floyd said “thank you.” Testimony of Sgt. Stiger 1:33:19-47 (Apr. 6, 2021).³² And even while Mr. Floyd was in the prone position and was pleading for his life, he said “please” when asking Defendant to remove his knee from Mr. Floyd’s neck. Trial Exs. 43, 47 (Kueng BWC & Lane BWC) at 20:21:53-57 (“Please, your knee in my neck.”). Mr. Floyd’s respectful language shows that he understood that the officers occupied a position of authority over him. This was a “relationship[] fraught with power imbalances” that “ma[d]e it difficult for” Mr. Floyd “to protect himself,” and Mr. Floyd knew as much. *Rourke*, 681 N.W.2d at 41.

As a police officer in full uniform, Defendant had a “defined relationship” of authority over Mr. Floyd, and was “in a position to dominate and control” him. *Bennett*, 1997 WL 526313, at *3. That “position of control” enabled Defendant to restrain Floyd, and therefore to “manipulate the circumstances” of the incident “and commit the crime.” *Id.* And that is exactly what Defendant did: He pulled Mr. Floyd to the ground under color of his authority as a police officer, and held him down in the prone position with his arms handcuffed behind his back—all by virtue of Defendant’s position of authority over Mr. Floyd as a licensed police officer in full uniform.

³² https://www.youtube.com/watch?v=OoRuZvArP_I&list=PLh-mzc9wtCFIBkmv7lCSzBqOX2uu56I4_&index=11.

In so doing, Defendant clearly abused his authority. As Sergeant Stiger testified, Defendant had an obligation to modify his restraint when it became clear that Mr. Floyd was in medical danger: “As the time went on, clearly in the video you could see that Mr. Floyd’s . . . health was deteriorating, his breath was getting lower, his tone of voice was getting lower, his movements were starting to cease. So at that point, as an officer on scene, you have a responsibility to realize that OK something is not right, something has changed drastically from what was occurring earlier. So therefore, you have a responsibility to take some type of action.” Testimony of Sgt. Stiger 2:37:54-2:38:29 (Apr. 7, 2021).³³ But that is not what Defendant did. Instead, even after Mr. Floyd no longer had a pulse, Defendant kept pressing Mr. Floyd into the ground—a far cry from protecting those in his custody. Defendant therefore abused his position of trust and authority as a police officer. That makes this a very different crime than one committed by a non-officer or civilian. An upward sentencing departure is therefore warranted.

IV. DEFENDANT COMMITTED THE CRIME AS PART OF A GROUP OF THREE OR MORE INDIVIDUALS WHO ACTIVELY PARTICIPATED IN THE CRIME.

An aggravated sentence is also appropriate when “[t]he offender 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); *see* Minn. Sent’g Guidelines 2.D.3.b(10).³⁴ Courts have repeatedly held

³³ https://www.youtube.com/watch?v=u2_1KzBJVcM&list=PLh-mzc9wtCFIBkmv7lCSzBqOX2uu56I4_&index=8.

³⁴ 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/msgc-stat/documents/Rewrite%20Project/Revision%20Project%20Adopted%20Modifications.pdf>. The statute, however, still uses the word “persons,” and “the statutory provision . . . control[s].” *State v. Jones*, 848 N.W.2d 528, 537 (Minn. 2014). In any event, as the Commission made clear, “[t]he scope of the revision” to the Guidelines “was primarily stylistic” and was not intended to “substantively rewrit[e] the Guidelines.” *Guidelines Revision Project: Adopted Modifications* 3.

that there is a low threshold for finding the kind of “active[] participa[tion]” that triggers the application of this aggravating factor. For instance, in *State v. Losh*, a kidnapping case, the Supreme Court found this factor applied when one defendant merely “drove the vehicle,” while two others “placed [the victim] in and removed [her] from the vehicle.” 721 N.W.2d 886, 896 (Minn. 2006). Similarly, in *State v. Hough*, the Supreme Court found that there was active participation by at least three people when four defendants traveled together to a victim’s house and fired at it from their car, even though only one defendant actually fired the gun. 585 N.W.2d 393, 397 (Minn. 1998). In neither case did the Supreme Court 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).

Here, Defendant committed the charged offenses as part of a group of three or more individuals. As the body-worn camera footage demonstrates, Defendant acted in concert with Mr. Kueng, Mr. Lane, and Mr. Thao while committing the charged offenses. Defendant pressed his knee into Mr. Floyd’s neck and upper back for nine minutes and 29 seconds. Trial Exs. 43, 47 (Kueng BWC & Lane BWC) at 20:19:14-20:28:43. During that period, Mr. Kueng held down Mr. Floyd’s back and handcuffed arm. Trial Ex. 47 (Lane BWC) at 20:19:17-20:28:43. Mr. Lane held down Mr. Floyd’s legs. *Id.* at 20:19:14-20:28:25. And Mr. Thao stood between Defendant and the bystanders, pushing the bystanders back to the sidewalk and preventing them from interceding. Tr. Ex. 49 (Thao BWC) at 20:21:36-20:29:51. Mr. Thao also attempted to dissuade the others from using a Hobble to restrain Mr. Floyd, noting that “a Sergeant’s going to have to come over” if the officers used a Hobble. *Id.* at 8:20:30-40. All four of these individuals therefore acted in concert in keeping Mr. Floyd prone on the pavement, with his arms handcuffed behind his back.

All four of these individuals also “actively participated in the crime.” Minn. Sent’g Guidelines 2.D.3.b(10). Mr. Kueng and Mr. Lane both applied force to Mr. Floyd throughout the duration of the restraint, holding down other parts of Mr. Floyd’s body and thereby enabling Defendant to maintain his position atop Mr. Floyd’s neck and upper back for the entire nine minutes and 29 seconds of the restraint. That application of force to Mr. Floyd plainly constitutes active participation. Indeed, at least two medical experts—Dr. Tobin and Dr. Rich—testified that the actions of Mr. Kueng and Mr. Lane directly contributed to Mr. Floyd’s inability to breathe adequately. *See* Testimony of Dr. Tobin at 26:30-27:30, 29:59-35:05, 36:30-37:05, 43:10-47:00, 1:59:30-2:03:00 (suggesting that Mr. Kueng affected Mr. Floyd’s ability to breathe)³⁵; Testimony of Dr. Jonathan Rich at 1:43:00-1:45:20 (stating that Mr. Floyd was “restrained in a life-threatening manner” due in part to the actions of Mr. Lane and Mr. Kueng).³⁶

Mr. Thao also actively participated in the crime. He not only dissuaded the other officers from restraining Mr. Floyd using the Hobble, but also enabled Defendant and the other two former officers to maintain their restraint by positioning himself between the bystanders and Defendant. Mr. Thao prevented the bystanders from interceding, at one point pushing one of the bystanders back to the curb. The “law is that ‘the lookout’—someone who stands watch nearby and does not make direct contact with the victim, but who seeks to prevent others from interfering with the crime—‘is a classic example’ of an ‘aider and abettor.’” Order & Mem. Op. Regarding Mots. to Dismiss for Lack of Probable Cause 98-99 (Oct. 21, 2020) (quoting *State v. Parker*, 164 N.W.2d 633, 641 (Minn. 1969)). Because Mr. Thao served as the lookout and enabled Defendant to commit the crime, the evidence demonstrates that he, too, actively participated in the crime.

³⁵ *See supra* p. 7 n.9.

³⁶ *See supra* p. 8 n.13.

In sum, the evidence demonstrates that Defendant committed the crime as part of a group of three or more individuals who “actively participated in the crime.” Minn. Stat. § 244.10, subd. 5a(a)(10). An upward sentencing departure is therefore warranted on this basis.

V. DEFENDANT COMMITTED THE CHARGED OFFENSES IN THE PRESENCE OF SEVERAL MINORS.

Under the Guidelines, an aggravated sentence is also warranted if “the offense was committed in the presence of a child.” Minn. Stat. § 244.10, subd. 5a(a)(13); Minn. Sent’g Guidelines 2.D.3.b(13). This factor requires “the actual presence of a child.” *State v. Robideau*, 796 N.W.2d 147, 151 (Minn. 2011) (citing *State v. Vance*, 765 N.W.2d 390, 393 (Minn. 2009)); *see also State v. Profit*, 323 N.W.2d 34, 36 (Minn. 1982). An offense is committed in the “presence of a child” when “the child sees, hears, or otherwise witnesses some portion of the commission of the offense in question.” *Robideau*, 796 N.W.2d at 152.

Here, Defendant committed the charged offenses in the presence of at least four different individuals who were minors at the time of Mr. Floyd’s death and who testified at trial: D.F., J.R., A.F., and K.G. All four testified that they witnessed at least “some portion” of Defendant’s conduct. *Id.* And all four were traumatized by Defendant’s actions, as their testimony at trial makes clear. *See Profit*, 323 N.W.2d at 36 (noting a basis for this aggravating factor is that “while the children maybe were not technically victims of the crime, they were victims in another sense”).

First, D.F. was 17 years old when Defendant committed the charged offenses in front of her on May 25, 2020. In her trial testimony, D.F. described Defendant’s conduct in detail. She also testified that Defendant’s conduct had traumatized her. D.F. explained that “there have been nights that I have stayed up apologizing . . . to George Floyd for not doing more, and not physically

interacting and not saving his life.” Testimony of D.F. at 03:04:55-03:05:46.³⁷ D.F. felt immense guilt and anguish because she was unable to save Mr. Floyd’s life. *See id.*

Second, J.R. was nine years old when Defendant committed the charged offenses in front of her on May 25, 2020. Testimony of J.R. at 3:09:18-32 (Mar. 30, 2021).³⁸ J.R. testified that she saw an officer put a knee on the neck of Mr. Floyd. *Id.* at 3:12:00-20. She identified Defendant as that officer. *Id.* at 3:12:30-3:13:05. She also testified that Defendant’s conduct made her “sad” and “kinda mad” because Defendant had stopped Mr. Floyd from breathing. *Id.* at 3:14:12-28. Her testimony suggests that Defendant’s actions are likely to have shaken her trust in the police.

Third, A.F. was 17 years old when Defendant committed the charged offenses in front of her on May 25, 2020. In her testimony, A.F. described what she witnessed. Testimony of A.F. at 11:05-47:35 (Mar. 30, 2021).³⁹ She testified that “this was a lot to take in at first, I almost walked away at first because it was a lot to watch, but I knew that it was wrong and I couldn’t just walk away, even though I couldn’t do anything about it.” *Id.* at 47:35-48:59. She explained that she felt helpless to stop Defendant’s actions: “I felt like there wasn’t anything I could do as a bystander. . . . I felt like I was failing [Mr. Floyd].” *Id.* at 18:18-28. She also testified that she has not been able to return to Cup Foods because she does not want to be “reminded” of Mr. Floyd’s death. *Id.* at 48:48-58. She, too, has been traumatized by Defendant’s actions.

Fourth, K.G. was 17 years old at the time she testified and was a minor when Defendant committed the charged offenses in front of her on May 25, 2020. K.G., like the other minors, testified regarding Defendant’s conduct on that day: “I saw [Defendant] kinda digging his knee

³⁷ *See supra* p. 13 n.21.

³⁸ https://www.youtube.com/watch?v=5_xbXSB9XII.

³⁹ <https://www.youtube.com/watch?v=LvjnBm4Kbog>.

into [Mr. Floyd's] neck more. He was putting a lot of pressure on his neck that wasn't needed.”
Testimony of K.G. at 1:12:51-59 (Mar. 30, 2021).⁴⁰

In addition to these four witnesses who testified at trial, there were also at least two other children who appeared to witness Defendant kneeling atop Mr. Floyd. The body-worn camera of Tou Thao shows that a toddler was on the scene and witnessed at least a portion of Defendant's conduct. Trial Ex. 49 (Thao BWC) at 20:29:02-21. And the surveillance video from Cup Foods shows yet another child walking down the street who appears to look over at Mr. Floyd just as the ambulance arrives. Trial Ex. 33 (Cup Foods surveillance camera) at 8:27:45-8:28:05.

Because all of these individuals were minors and witnessed at least “some portion of the commission of the offense in question,” *Robideau*, 796 N.W.2d at 152, Defendant committed the charged offenses “in the presence of a child,” Minn. Sent'g Guidelines 2.D.3.b(13). An upward sentencing departure is therefore warranted on this basis, as well.

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⁴⁰ <https://www.youtube.com/watch?v=LvjnBm4Kbog>.

CONCLUSION

The State respectfully requests that the Court find the facts necessary to support the existence of all five aggravating factors and state those facts on the record. Based on these aggravating factors, the State respectfully requests an upward sentencing departure in this case.

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