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July 7, 2021

Hon. Peter Cahill
Hennepin County Govt. Center
1251 Court Tower
300 South Sixth Street
Minneapolis, MN 55487

***Re: Request to Correct Sentencing Memorandum Opinion***
***State of Minnesota v. Derek Chauvin***
**Court File No. 27-CR-20-12646**

Dear Judge Cahill:

On behalf of the State of Minnesota, I write to respectfully request that the Court modify pages 16-17 of its Sentencing Memorandum Opinion, relating to the presence-of-children aggravating factor. The State expressly does not request that the Court modify any part of Defendant's 22.5 year sentence for the murder of George Floyd. Rather, the State asks that the Court modify two aspects of its analysis of the presence-of-children factor to correct the public record, more accurately reflect the experiences of the four children who witnessed Mr. Floyd's murder and subsequently testified at trial, and prevent potentially causing further harm by discounting the trauma suffered by these young girls.

*First*, the State respectfully requests that the Court remove the suggestion that, because the children in this case were not forcibly held at the scene or otherwise prevented from leaving, an aggravating factor should not apply. That suggestion is contrary to law and common sense. The Minnesota Supreme Court has clearly stated that an aggravating factor applies when children *witness* criminal activity. Children lack the adult capacity for decision-making, including the ability to maturely "walk away." Moreover, the law does not place the burden on a child to choose between staying—whether to stand witness or in an attempt to aid a victim—or leaving the scene of a crime. For good reason: The responsibility of shielding a child from witnessing a crime should not fall on the child. In other words, under Minnesota law, a child is akin to a victim when she perceives a horrific event—such as murder—without anything more.

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The State is deeply worried about the message sent by suggesting that instead of attempting to intervene in order to stop a crime—which children did in this case—children should simply walk away and ignore their moral compasses. Children should never be put in this position.

The State therefore asks that the Court remove the phrases "were free to leave the scene whenever they wished," and "were never coerced or forced by him or any of the other officers to remain a captive presence at the scene" from page 16 of its opinion.

*Second*, the State vehemently disagrees with the Court's factual assertion that the demeanor the children exhibited in the video of Mr. Floyd's death indicates that the children were not traumatized. The children's emotional testimony at trial—including that one of them stays awake at night and another cannot return to Cup Foods—belies that conclusion.

*Third*, the best social science research also supports modifying the opinion's reliance on the children's demeanor. Although the Court's opinion ignored the fact that children courageously confronted Mr. Chauvin and his codefendants —by pleading repeatedly for Mr. Chauvin to remove his knee from Mr. Floyd's neck so that he could breathe, and by begging Mr. Chauvin and his codefendants to check Mr. Floyd's pulse—the opinion relied on its observation that the children smiled or giggled at various points during the incident. But that observation is completely immaterial: Children process traumatic experiences in ways that may seem unusual to the untrained eye.[1] Moreover, as social science research demonstrates, for humans of all ages, giggling or smiling can actually be normal responses to stressful experiences.[2] Additionally, and particularly relevant here, research demonstrates that "adults view Black girls as less innocent and more adult-like than their white peers."[3] This phenomenon of "adultification" is unfortunately common in American society, including in the criminal justice system, and has led even careful observers to discount a young Black girl's trauma.[4]

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[1] *See generally* David J. Schonfeld & Thomas Demaria, *Providing Psychosocial Support to Children and Families in the Aftermath of Disasters and Crises*, 136 Am. Acad. of Pediatrics 1120, 1122 (Oct. 2015), available at: https://tinyurl.com/4usvnaen.

[2] *See* Stanley Milgram, *Behavioral Study of Obedience*, J. Abnormal and Soc. Psych. 6 (1963), reprinted at: https://tinyurl.com/jrazybpx; Dacher Keltner & George A. Bonanno, *Interpersonal Relations and Group Processes: A Study of Laughter and Dissociation: Distinct Correlates of Laughter and Smiling During Bereavement*, 73 J. Personality & Soc. Psych. 687, 688 (1997) ("In terms of intrapersonal processes, it is widely believed that laughter accompanies the dissociation of the experience of distress."), available at: https://tinyurl.com/2kxf9wkh.

[3] Rebecca Epstein, Jamilia J. Blake & Thalia González, *Girlhood Interrupted: The Erasure of Black Girls' Childhood* 1, Ctr. on Poverty and Equal., Geo. L. Sch., available at: https://tinyurl.com/3ac54bj7 (emphasis omitted).

[4] *See* Jamilia J. Blake & Rebecca Epstein, *Listening to Black Women and Girls: Lived Experiences of Adultification Bias*, Ctr. on Poverty and Equal., Geo. L. Sch., available at: https://tinyurl.com/wvc6bwse; Anne Baetzel et al., *Adultification of Black Children in Pediatric Anesthesia*, 129 Anesthesia & Analgesia 1118 (2019), available at: https://tinyurl.com/2eywafke;

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Had a separate sentencing proceeding been held, the State's witnesses could have confirmed the fact and extent of the children's trauma in this case, and the unusual ways that children process disturbing events more generally. But the Court held a unitary trial, and this evidence likely would have been inadmissible at this unitary trial. The most that could ever be said in this case is that the State did not demonstrate the extent of trauma experienced by each of these child witnesses, and so the Court should therefore not make a conclusive finding or characterization regarding the children's lack of trauma. Indeed, had the State known that the Court would have based its analysis of this factor on the extent of the children's trauma, the State would have moved for a separate hearing to present that evidence.

Accordingly, the State respectfully requests the Court delete or modify the Court's findings about the extent of the trauma suffered by the children who witnessed Mr. Floyd's murder. In particular, the State requests the Court delete footnote 8 and the first two sentences of the accompanying paragraph.

The State makes these requests with utmost respect for the Court, including its tremendous efforts to reduce implicit bias in this trial. And, again, the State does not request here that the Court modify Defendant's 22.5 year sentence in any way. This Court found that two other aggravating factors supported an upward durational departure, and the Court did not rely on the presence of children to enhance Defendant's sentence. As a result, modifying the portion of the opinion relating to the presence-of-children factor will not impact Defendant's 22.5 year sentence. But discounting the trauma of the children who testified at trial—in an authoritative judicial opinion, no less—will only *exacerbate* the trauma they have suffered. The Court should correct the public record to avoid that result.

**I. The Court should remove the reference to the children's failure to leave the scene because the law does not require children to be unable to walk away.**

Minnesota law does not support the conclusion that an upward departure is not warranted because the children in this case were not forcibly detained or otherwise prevented from leaving. Because the State analyzed the case law in its memorandum of law on sentencing, this letter refrains from fully repeating those legal arguments. *See* State's Mem. of Law on Sent. 12-15 (June 2, 2021). However, the following three points are relevant:

*First*, in its most recent opinion on the subject, the Minnesota Supreme Court confirmed that the "aggravating factor of an offense committed in the presence of a child is limited to those situations where the child sees, hears, or otherwise witnesses some portion of the commission of the offense in question." *State v. Robideau*, 796 N.W.2d 147, 152 (Minn. 2011). The Court explained that the presence of a child makes "the defendant's conduct" "particularly outrageous

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*see also* Linda Burton, *Childhood Adultification in Economically Disadvantaged Families: A Conceptual Model*, 56 Fam. Rels. 329 (2007).

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because the child, while technically not a victim of the offense, is a victim for having *witnessed* the offense." *Id*. (emphasis added). But a child witnesses an offense regardless of whether a child is or is not forcibly prevented from leaving. In other words, under Minnesota law, a child is akin to a victim when she perceives a horrific event—such as murder—without anything more.[5]

*Second*, because children lack the adult ability to make judgments, it makes little sense to apply a sentencing enhancement only if a child was prevented from leaving the scene of a crime. A child may not comprehend the effect of witnessing a particularly outrageous crime on her psyche and may not understand why she should leave. Moreover, as a practical matter, children may be physically able to absent themselves but may not choose to do so for countervailing and legitimate reasons. Consider 9-year old J.R., who went to Cup Foods to purchase snacks with her 17-year old cousin. The law should not and does not place the burden on someone as young as J.R. to choose between leaving her older cousin or witnessing a horrific event—which is no real choice at all.

*Third*, it is similarly unfair to place the burden on a child—at any age—to refrain from following her moral compass and confronting injustice. Consider D.F., who tried to help Mr. Floyd and courageously confronted police abuse. D.F. testified that she is nonetheless haunted by the thought that she could have done more. It may well have been even more traumatic to require D.F.—or any other child—to ignore her moral intuition and potentially be haunted by that decision.

**II. The Court should remove the language suggesting these children were not traumatized.**

The Court should also delete the references on page 17 of its opinion suggesting that witnessing a brutal murder did not traumatize these children. The State similarly detailed evidence of the children's trauma in its memorandum in support of finding aggravating sentencing factors. *See* State's Mem. of Law in Support of *Blakely* Aggravated Sent. Factors 23-25 (Apr. 30, 2021). This letter will not repeat that evidence, but two particular pieces of evidence deserve mention:

- D.F. broke down in tears on the stand. She also testified that she stayed up at night apologizing for not doing more to save George Floyd. Frankly, it is hard to imagine a more compelling and genuine indicium of trauma than D.F.'s testimony.

- A.F. testified that she has been unable to return to Cup Foods since the incident.

This evidence supports a common-sense conclusion: After they witnessed a brutal, minutes-long murder committed by police officers, the children suffered trauma. As Dr. Sarah Vinson concludes in the attached declaration, "it is fair to conclude, to a reasonable degree of

[5] *See also State v Profit*, 323 N.W.2d 34, 36 (Minn. 1982) (noting that, although the child witnesses were not "technically victims of the crime, they were victims in another sense" . . . "particularly since defendant knew . . . there would be children present who would witness part of what he planned to do").

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medical certainty, that the minor witnesses experienced trauma as a result of having witnessed the Defendant's actions." Vinson Decl. ¶ 56.

It is also worth emphasizing why the record for some of these children—in particular, J.R.—may not have been as fully developed. Because of the unitary trial in this case, the State could not present specific evidence related to the children's trauma. This evidence was not relevant to Mr. Chauvin's guilt or innocence and could potentially have been prejudicial. Because the law does not require proof of trauma to prove the factual existence of this aggravating factor beyond a reasonable doubt, the lack of focus on this issue is understandable. The Court's conclusion that the children did not suffer trauma is therefore difficult to reconcile given the limited evidence and the lack of a specific inquiry. The State asks the Court to modify its findings to eliminate this unnecessary and potentially damaging determination.

**III. How children process trauma and the phenomenon of "adultification."**

In addition, the Court should specifically remove its reference to the children's demeanor in footnote eight for two reasons.

*First*, because children process trauma in sometimes counterintuitive ways, their physical demeanor is not a useful indicator of whether those children have experienced trauma. According to a report from the American Psychological Association, although children display short-term distress in the wake of trauma, "[c]hildren and adolescents vary in the nature of their responses to traumatic experiences. The reactions of individual youths may be influenced by their developmental level, ethnicity/cultural factors, previous trauma exposure, available resources, and preexisting child and family problems."[6] Moreover, as another report from the American Academy of Pediatrics detailing the aftereffects of disasters explains, many children do not "externally express[]" symptoms of stress. Indeed, even "parents, teachers, and other caregivers tend to underestimate the level of children's distress after a disaster and overestimate their resilience, especially if relying on the observation of overt behaviors rather than inquiring specifically about feelings and reactions."[7]

It is also well documented that human beings nervously laugh under stress. "Laughter, as theory and evidence indicate, is a transient, mild form of dissociation from distress that promises joy and perhaps peace in response to stressful events."[8] For instance, in Stanley Milgram's famous electric shock study, scientists found that "[o]ne sign of tension was the regular occurrence of nervous laughing fits. Fourteen of the 40 subjects showed definite signs of nervous laughter and

[6] Annette M. La Greca et al., Am. Psych. Ass'n Presidential Task Force on Posttraumatic Stress Disorder & Trauma in Children & Adolescents, *Children and Trauma: Update for Mental Health Professionals* 2 (2008), available at: https://www.apa.org/pi/families/resources/update.pdf.
[7] Schonfeld & Demaria, *supra*, at 1122.
[8] Keltner & Bonanno, *supra*, at 688.

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smiling. The laughter seemed entirely out of place, even bizarre."[9] As Dr. Vinson explains, with respect to the witnesses in this case, "the most reasonable explanation is that the laughter was a stress response." Vinson Decl. ¶ 23.

*Second*, a growing body of research suggests that observers discount the experiences of young Black girls. *See* Vinson Decl. ¶¶ 40-45. As a leading report from the Center on Poverty and Equality at Georgetown Law details, we tend to "perceive[] Black girls as needing less protection and nurturing than white girls."[10] Those researchers summarized some of their key findings as follows:

> [B]eginning as early as 5 years of age, Black girls were more likely to be viewed as behaving and seeming older than their stated age . . . and more likely to take on adult roles and responsibilities than what would have been expected for their age.[11]

This phenomenon—known as "adultification"—also means that observers can discount young Black girls' trauma. Subsequent research confirms that:

> when Black girls do behave maturely, adults may be more likely to mistakenly view such behavior as evidence that the girls do not need protection or nurturing. Mature behavior, in other words, can effectively mask girls' actual developmental stage and lead to inappropriate responses to Black girls that do not align with their age.[12]

Such discounting can be especially harmful if it bears the imprimatur of authority. *See* Vinson Decl. ¶ 25 ("Therefore, discounting the children's own accounts of their experiences has the potential to exacerbate the harm to the minors' psyches in this case."). It is therefore imperative that the Court not minimize "the emotional and developmental vulnerability of D.F. and her nine-year-old cousin as they witnessed a murder." *Id*. ¶ 45.



[9] Milgram, *supra*, at 6.
[10] Epstein et al., *supra*, at 8.
[11] *Id*. (emphasis omitted).
[12] Blake & Epstein, *supra*, at 12.

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**IV. Conclusion.**

The Court should remove or modify the identified portions of the opinion. Doing so will not, in any way, affect Defendant's 22.5 year sentence but will avoid the risk of sending the message that the pain these young women have endured is not real or does not matter, or worse, that it is a product of their own decisions and not a consequence of Defendant's.

Sincerely,

**/s/ Keith Ellison**

KEITH ELLISON
Attorney General