

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

State of Minnesota,

Case Type: Criminal
Court File No. 27-CR-21-7460

Plaintiff,

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

vs.

Kimberly Ann Potter,

Defendant.

TO: The Honorable Judge Chu, Judge of District Court, the above-named defendant and defendant's counsel, Earl Gray, 1st Bank Building, 332 Minnesota Street, Ste. W1610, St. Paul, MN 55101; Paul Engh, Ste. 2860, 150 South Fifth Street, Minneapolis, MN 55402.

INTRODUCTION

The State charged Defendant Kimberly Ann Potter with one count of first-degree manslaughter and one count of second-degree manslaughter arising from her shooting and killing Daunte Wright during a traffic stop. On October 1, 2021, the State noticed its intent to prove two *Blakely* factors: that Defendant's conduct caused a greater-than-normal danger to the safety of others; and that Defendant abused her position of authority as a law enforcement officer.¹ Defendant waived her right to a jury determination of the *Blakely* factors on the record at trial. On December 23, 2021, Defendant was convicted of both counts after a jury trial. The State now respectfully requests that the Court find facts supporting the existence of the two previously noticed factors based on the evidence presented at trial.

¹ The State had previously provided a copy of the *Blakely* notice to Defendant, through her counsel, on July 30, 2021, consistent with the Court's scheduling order.

ARGUMENT

I. DEFENDANT’S CONDUCT CAUSED A GREATER-THAN-NORMAL DANGER TO THE SAFETY OF OTHERS.

The defendant’s creation of a significant danger to others, beyond that normally associated with the offense, is an appropriate *Blakely* factor for the sentencing court to consider. *State v. Fleming*, 883 N.W.2d 709, 797 (Minn. 2016). This factor exists when the defendant’s conduct places a “large number of potential victims . . . in real and significant danger.” *Id.* It also exists when the defendant’s conduct places others at risk of “imminent personal peril.” *State v. Cook*, No. A11-1332, 2012 WL 3263760, at *11 (Minn. Ct. App. Aug. 13, 2012), *review denied* (Minn. Oct. 24, 2012).

In *Fleming*, the Minnesota Supreme Court affirmed the finding of the existence of this factor where the defendant’s firing a gun six times into a park filled with children created a “real and significant danger” to a large number of possible victims and presenting a “greater-than-normal danger to others.” 883 N.W.2d at 797. Likewise, in *State v. Omaha*, the Minnesota Court of Appeals affirmed the district court’s sentence based on the existence of this factor when the defendant fired numerous gunshots into two apartment buildings, “endangering others” who were present in the apartment. No. A20-1220, 2021 WL 2067320, at *6 (Minn. Ct. App. May 24, 2021), *review denied* (Minn. Aug. 10, 2021).

Brooklyn Center Police Officers like Defendant are discouraged from shooting people who are driving vehicles. Testimony of Commander Garret Flesland at 1:23:00 (Dec. 14, 2021).² They are trained that shooting at moving vehicles “involve[s] additional considerations and risks, and [is] rarely effective.” Trial Ex. 333. Officers are taught that if they shoot the driver of a vehicle,

² <https://www.youtube.com/watch?v=uq9IkIlan4Fo>. The State is not yet in possession of the trial transcript and cites herein to publicly available video recordings of the trial proceedings.

that driver could become incapacitated, which may cause the vehicle to strike something or somebody else. Testimony of Commander Flesland at 1:24:39-46³; Testimony of Major Mychal Johnson at 2:13:26-32 (Dec. 10, 2021).⁴ These are considerations – the “potential for injury to officers, suspects, and others” – that officers are required to keep in mind when determining what type of force, if any, to use. Trial Ex. 333; Testimony of Major Johnson at 1:56:24-31.⁵

Several witnesses explained that 63rd Avenue is a busy street. This heightened the likelihood that disabling the driver of a vehicle would injure others—and that is exactly what happened. After Defendant shot Mr. Wright, Mr. Wright’s vehicle traveled eastbound down the street and struck the Lundgren’s vehicle with enough force to deploy its airbags and cause it to spin around. Testimony of Patricia Lundgren at 47:47-49:40 (Dec. 9, 2021).⁶ The Lundgrens’ vehicle was severely damaged, and Mr. Kenneth Lundgren was disoriented, requiring assistance to get out of the vehicle. Trial Exs. 33-35; Testimony of Ms. Lundgren at 56:12-56:51.⁷ Since this crash, Mr. Lundgren, who was not in any way involved in Defendant’s initial traffic stop, has experienced a deterioration in his health. While he had some prior medical issues, he has experienced a dramatic decline in his cognitive abilities and balance relative to where they were before the crash, and he now requires ongoing hospice care. Testimony of Ms. Lundgren at 1:03:45-49;⁸ Testimony of Denise Wells at 1:14:30-1:15:15, 1:17:31-1:18:26, 1:20:04-1:20:36 (Dec. 9, 2021).⁹ These injuries are directly attributed to Defendant’s reckless conduct in shooting

³ *Id.*

⁴ https://www.youtube.com/watch?v=_wQ5mYvzPUk

⁵ *Id.*

⁶ <https://www.youtube.com/watch?v=bF9g-7PH4jg>

⁷ *Id.*

⁸ *Id.*

⁹ <https://www.youtube.com/watch?v=bF9g-7PH4jg>

Mr. Wright when he was behind the wheel of a vehicle – something she was discouraged from doing for this exact reason.

The destruction and injury wrought by Defendant’s recklessness was not limited only to Mr. Wright and the Lundgrens. Alayna Albrecht-Payton, the passenger in Mr. Wright’s vehicle for whom Defendant was supposedly so concerned, experienced great bodily harm as a direct result of Defendant’s actions. Ms. Albrecht-Payton was still in the passenger’s seat of Mr. Wright’s car when it crashed as a result of Defendant shooting and disabling Mr. Wright. When the vehicle crashed, it appears that Ms. Albrecht-Payton hit her head on the windshield causing it to crack. *See* Trial Ex. 166-167. Ms. Albrecht-Payton suffered a lacerated lip for which she had to receive stitches, lacerations to her ear that also required stitches, a concussion, and a broken jaw, which resulted in her jaw being wired shut for an extended period of time, required surgery, and has caused her daily pain and discomfort. Testimony of Alayna Albrecht-Payton at 20:10-23:26 (Dec. 9, 2021);¹⁰ Trial Exs. 30-31. These injuries constitute significant bodily harm. The injuries suffered by Ms. Albrecht-Payton and the Lundgrens clearly reflect the greater-than-normal danger to others that Defendant’s conduct caused. Though Defendant was trained to consider potential injury to others and the specific risks of disabling the driver of a vehicle, Defendant proceeded with actions that created enhanced risks of collateral injury, whether she planned to use her Taser or her Glock. Consequently, the “real and significant danger” of potential collateral injury was not only a risk that was present, that risk was, in fact, realized when the vehicle crashed on a public street and caused injury to others. *See Fleming*, 883 N.W.2d at 797.

Defendant also created a great risk of harm to Officer Luckey and her supervisor, then Sergeant Johnson, when she discharged her firearm. Defendant stood by the vehicle’s open driver’s

¹⁰ <https://www.youtube.com/watch?v=bF9g-7PH4jg>

side door while Major Johnson was positioned on the vehicle's passenger side, with both Mr. Wright and Ms. Albrecht-Payton in between them. Testimony of Major Johnson at 1:59:10-55.¹¹ Officer Luckey was also standing extremely close to Defendant, with part of his body positioned between Defendant and Mr. Wright at the moment Defendant fired the shot. Trial Ex. 12. Nevertheless, Defendant continued her course of action without and discharged a dangerous weapon at Mr. Wright. This action required her to shoot directly under Officer Luckey's arm (in fact, so close to his body that the discharged cartridge casing bounced off his face), and in the direction of Mr. Wright, Ms. Albrecht-Payton, and Major Johnson. *See* Trial Ex. 12; Testimony of Major Johnson at 1:59:10-55.¹² In doing so, Defendant created a risk that the bullet she fired would either go through her intended target and hit Ms. Albrecht-Payton or Major Johnson, or that Defendant's shot would miss Mr. Wright altogether and strike Officer Luckey or someone else on the public roadway. Indeed, Major Johnson agreed that by undertaking this course of action, Defendant could have shot him. Testimony of Major Johnson at 1:57:06-09.¹³ These facts establish that Defendant's conduct put not only Mr. Wright, Ms. Albrecht-Payton, and the public at a great risk of harm, but that she also placed her own partners in serious danger, contrary to the defense theory advanced at trial that she was trying to save them. Accordingly, the Court should find that the facts proven at trial establish that Defendant's conduct created a greater-than-normal danger to others who were present at the scene of the traffic stop and on the busy street.

II. DEFENDANT ABUSED HER POSITION OF AUTHORITY.

Minnesota courts have recognized that abusing a "position of trust and authority" may also be a *Blakely* factor. *State v. Lee*, 494 N.W.2d 475, 482 (Minn. 1992). This factor exists when the

¹¹ https://www.youtube.com/watch?v=_wQ5mYvzPUk

¹² https://www.youtube.com/watch?v=_wQ5mYvzPUk

¹³ *Id.*

defendant and the victim have 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. Ct. App. 2004). A “power imbalance” may exist even when the defendant has no preexisting relationship with the victim, which is why Minnesota courts have upheld upward sentencing departures 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).

In *State v. Bennett*, the Minnesota Court of Appeals concluded that this factor existed where the defendant shot a cab driver with whom he had no preexisting relationship. No. C9-96-2506, 1997 WL 526313, at *3 (Minn. Ct. App. Aug. 26, 1997). The court reasoned that the victim’s “occupation and duties as a cab driver” were sufficient to allow the defendant “to create and take advantage of a defined relationship with” the cab driver. *Id.* Once the defendant retained the cab driver for transportation services, the defendant “was in a position to dominate and control” the cab driver. *Id.* The defendant “had the authority to tell” the cab driver where to go and “to stop the cab at any point.” *Id.* This “position of control” allowed the defendant “to manipulate the circumstances and commit the crime,” and thus constituted an abuse of a “position of trust and commercial authority” over the victim. *Id.*

Defendant held a prominent position of trust and authority at the time of the offense. She was a licensed police officer in full uniform, who had stopped Mr. Wright’s vehicle and attempted to arrest Mr. Wright along with other officers. Defendant’s position of public trust and authority is reflected by the Brooklyn Center Police Department’s policies and the testimony presented at trial. Police officers have an “incredibly important role in society” through which they hold a “special social contract” with the public. Testimony of Commander Flesland at 54:16-46.¹⁴ “It’s a

¹⁴ <https://www.youtube.com/watch?v=uq9Ik1an4Fo>

special job.” *Id.* at 56:40-50.¹⁵ Their “fundamental duty is to serve the community,” and they accept “the badge of [their] office as a symbol of public faith, and . . . as a public trust to be held.” Trial Ex. 336.

Recognizing the importance of police officers to the community, the Brooklyn Center Police Department has imposed a strict framework for recruiting and hiring. Trial Ex. 349. The Department’s policies reflect the significance of the job and the authority that comes with it, recruiting and hiring “only those individuals who demonstrate a commitment to service and possess the traits and characteristics that reflect personal integrity and high ethical standards.” Trial Ex. 349. Officers are required to “apply common sense,” “make sound decisions,” and “use good judgment” to “make effective, logical decisions under pressure.” *Id.* And officers are expected to “recognize[] and respect[] the value of all human life and dignity” in the performance of their job duties. Trial Ex. 333. In using force, officers must “only use that amount of force that reasonably appears necessary” and must carefully balance all interests. *Id.* This is because “police officers are in a unique role” and hold a “special position,” of which they must be aware, in addition to their limitations, when performing their job duties. Testimony of Commander Flesland at 1:14:57-1:15:20.¹⁶ They must not betray the “public faith” and “public trust” vested in them.

As a police officer in full uniform, who had stopped and detained Mr. Wright, Defendant had a “defined relationship” of authority over Mr. Wright and was “in a position to dominate and control” him. *Bennett*, 1997 WL 526313, at *3. Defendant’s position authorized her to use *reasonable* force to restrain and arrest Mr. Wright, permitting Defendant to “manipulate the circumstances” of the incident. *Id.* Defendant had been trained extensively over her 26-year career

¹⁵ *Id.*

¹⁶ <https://www.youtube.com/watch?v=uq9IkIlan4Fo>

on the force options available to officers and when it might or might not be reasonable to use a particular force option. She received this training by virtue of her position – a position that authorizes her to use force (but only *reasonable* force) to accomplish a legal objective, such as making an arrest. It was exactly this authority and position that enabled Defendant to stop Mr. Wright's vehicle in the first place, which then led to a decision to arrest, and resulted in Defendant reaching for a weapon and, ultimately, committing the crimes for which she has been convicted.

In doing so, Defendant clearly failed to uphold her end of the special social contract between police officers and the community. Rather than using only reasonable force, Defendant blindly drew her duty handgun and fired a bullet through Mr. Wright's heart, killing him. As a result, Defendant abused the faith, trust, and authority that had been placed in her by virtue of her special position as a police officer. That alone makes Defendant's crime substantially more serious than similar conduct committed by a non-officer or civilian. Accordingly, the Court should conclude that the record supports a finding that Defendant abused her position of trust or authority.

CONCLUSION

For the reasons stated above, the State respectfully requests that the Court find that the facts proven at trial establish that Defendant's conduct created a greater-than-normal danger to the safety of others and that Defendant abused a position of trust or authority.

Dated: January 31, 2022

Respectfully submitted,

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