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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

Plaintiff,

SENTENCING ORDER AND MEMORANDUM OPINION

vs.

DEREK MICHAEL CHAUVIN,

Defendant.

Court File No. 27-CR-20-12646

This matter is before the Court for sentencing after the jury returned guilty verdicts on April 20, 2021 on Count I, unintentional second-degree murder while committing a felony, Count II, third-degree murder, perpetrating an eminently dangerous act evincing a depraved mind, and Count III, second-degree manslaughter, culpable negligence creating an unreasonable risk.

Keith Ellison, Matthew Frank, Steven Schleicher, and Jerry Blackwell appeared for the State.

Eric Nelson and Amy Voss appeared for Defendant Derek Michael Chauvin who was also present.

SENTENCING ORDER

As to Count I, based on the verdict of the jury finding you guilty of unintentional second-degree murder while committing a felony under Minn. Stat. § 609.19 subd. 2(1), it is the judgment of the Court that you now stand convicted of that offense. Pursuant to Minn. Stat. § 609.04, Counts II and III remain unadjudicated as they are lesser offenses of Count I.

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As sentence for Count I:

1. The Court commits you to the custody of the Commissioner of Corrections for a period of 270 months. You are granted credit for 199 days already served.

2. Pay the mandatory surcharge of $78, to be paid from prison wages.

3. You are prohibited from possessing firearms, ammunition, or explosives for the remainder of your life.

4. Provide a DNA sample as required by law.

5. Register as a predatory offender as required by law.

6. The attached Memorandum Opinion is incorporated by reference.

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Peter A. Cahill
Judge of District Court

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MEMORANDUM OPINION

The Minnesota Sentencing Guidelines were promulgated "to establish rational and consistent sentencing standards that promote public safety, reduce sentencing disparity, and ensure that the sanctions imposed . . . are proportional to the severity of the . . . offense and the offender's criminal history." Minn. Sent. Guidelines 1.A; *see also State v. Hicks*, 864 N.W.2d 153, 156 (Minn. 2015) ("The Minnesota Sentencing Guidelines promote uniformity, proportionality, and predictability in sentencing."). The presumptive guidelines ranges are "deemed appropriate for the felonies covered by them." Minn. Sent. Guidelines 1.A.6.

In most cases, the maximum sentence a district court may impose is the top of the presumptive sentencing range because the sentencing guidelines mandate that district courts pronounce a sentence within the range on the sentencing guidelines grid. Minn. Sent. Guidelines 2.D.1. However, the Sentencing Guidelines recognize there are cases in which the guidelines sentence may not be appropriate and therefore allow district courts to depart from the presumptive sentence, although departing courts must articulate "substantial and compelling" circumstances justifying the departure. *Id.*; *see also State v. Barthman,* 938 N.W.2d 257, 267, 270 (Minn. 2020); *Hicks*, 864 N.W.2d at 156; *State v. Misquadace,* 644 N.W.2d 65, 69 (Minn. 2002). "Substantial and compelling circumstances are those demonstrating that 'the defendant's conduct in the offense of conviction was *significantly* more or less serious than that typically involved in the commission of the crime in question.'" *Barthman*, 938 N.W.2d at 270 (emphasis in original); *Tucker v. State*, 799 N.W.2d 583, 586 (Minn. 2011). When such factors are present, the judge "may depart from the presumptive disposition or duration provided in the Guidelines and stay or impose a sentence that is deemed to be more appropriate than the presumptive sentence." Minn. Sent. Guidelines 2.D.1. That includes exceeding the top end of

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the presumptive range when "there exist identifiable, substantial, and compelling circumstances." *Id.*; *State v. Rourke*, 773 N.W.2d 913, 919 (Minn. 2009).

For a defendant like Mr. Chauvin with zero criminal history points, the guidelines presumptive range for unintentional second-degree murder -- the most serious charge of which Mr. Chauvin was found guilty by the jury and on which he is being convicted and sentenced by this Court -- is 128 to 180 months, with the presumptive sentence being 150 months. Consideration of a sentence outside the presumptive guidelines range involves a two-stage process:

(1) In the first stage, either a jury or the district court must make a factual finding that there are one or more aggravating factors present in the commission of the crime apart from the prima facie elements of the charged crime.

(2) In the second stage, the district court is required to explain why the presence of any such aggravating factors creates a substantial and compelling reason to impose a sentence outside the presumptive guidelines range.

Rourke, 773 N.W.2d at 919-20.

As to the first stage, at the conclusion of the trial and after return of the jury's verdicts, Mr. Chauvin agreed to submit the issue of the existence of aggravated sentencing factors to this Court for decision. The State had urged the Court to find the existence of five aggravated sentencing factors in light of the evidence presented during the three-week trial between March 29 and April 15, 2021. In the Court's Verdict and Findings of Fact Regarding Aggravated Sentencing Factors (Dk #560), this Court found that the evidence at trial proved beyond a reasonable doubt the following four aggravated sentencing factors:[1]

(i) That Mr. Chauvin abused a position of trust and authority;

(ii) That Mr. Chauvin treated George Floyd with particular cruelty;

[1] This Court found that the fifth factor urged by the State, that George Floyd was particularly vulnerable, had not been proved beyond a reasonable doubt.

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(iii) That children were present during the commission of the offense; and

(iv) That Mr. Chauvin committed the crime as a group with the active participation of three other individuals, former Minneapolis Police Officers Thou Thao, Thomas Lane, and J. Alexander Kueng, who all actively participated with Mr. Chauvin in the crime in various ways.

The issue now before this Court on sentencing is the second stage: whether any of these four aggravated factors demonstrates that Mr. Chauvin's conduct in connection with the offense for which he has been convicted renders his conduct significantly more serious than that typically involved in the commission of such an offense, *Hicks*, 864 N.W.2d at 157 (Minn. 2015), *State v. Edwards*, 774 N.W.2d 596, 601-02 (Minn. 2009), and therefore supplies a "substantial and compelling reason" for imposing an aggravated sentence of more than the 180 month top-of-the-guidelines range. *Rourke*, 773 N.W.2d at 922.

Although this Court found the presence of four aggravating factors, the decision whether to depart durationally upward and impose an aggravated sentence remains within the Court's sound discretion. *See* Minn. Sent. Guideline 2.D.1 ("A departure is not controlled by the Guidelines, but rather, is an exercise of judicial discretion constrained by statute or case law."); *State v. Jackson*, 749 N.W.2d 353, 360 (Minn. 2008) (when a court "finds facts that support a departure from the presumptive sentence, the court may exercise discretion to depart but is not required to depart").

I. THE DISPOSITIONAL AND DURATIONAL DEPARTURES REQUESTED BY MR. CHAUVIN ARE NOT APPROPRIATE.

Mr. Chauvin seeks a probationary sentence (a dispositional departure from the presumptive prison sentence under the sentencing guidelines) or, alternatively, a downward durational departure from the presumptive guidelines range for a prison sentence. This Court concludes neither is appropriate in this case.

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A mitigated dispositional departure (*i.e.* probation) is not appropriate because there has been no persuasive showing that Mr. Chauvin is *particularly* amenable to probation, *see State v. Soto,* 855 N.W.2d 303, 308-12 (Minn. 2014), and *State v. Love*, 350 N.W.2d 359, 361 (Minn. 1984), and because a probationary sentence would be disproportionate and understate the severity of Mr. Chauvin's offense. *See Soto,* 855 N.W.2d at 310-13 (reversing trial court's dispositional departure to probation in first-degree criminal sexual conduct case as an abuse of discretion, rejecting arguments similar to those made by Mr. Chauvin here relying on age, lack of criminal history, and defendant's respectful attitude while in court as being far outweighed by other relevant considerations regarding the severity of the offense).

A "durational departure must be based on factors that reflect the seriousness of the offense, not the characteristics of the offender." *State v. Solberg,* 882 N.W.2d 618, 623 (Minn. 2016). "A downward durational departure is justified only if the defendant's conduct was significantly less serious than that typically involved in the commission of the offense." *Id.* at 624. A downward durational departure below the "bottom of the box" 128-month sentence is not appropriate in this case given this Court's finding of the presence of aggravated sentencing factors. Mr. Chauvin's continuing insistence that he believed "he was simply performing his lawful duty in assisting other officers in the arrest of George Floyd" and was acting "in good faith reliance [on] his own experience as a police officer and the training he had received," *see* Def. Sent. Mem. (June 2, 2021) at 11, was rejected by every supervisory and training officer of the Minneapolis Police Department who testified at trial[2] as well as by the jury.

[2] This includes MPD Chief Medaria Arradondo, MPD Sgts. David Pleoger and Jon Edwards, MPD Lt. Johnny Mercil, and MPD Commander Katie Blackwell.

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II. MR. CHAUVIN'S ABUSE OF A POSITION OF TRUST OR AUTHORITY IS A SUBSTANTIAL AND COMPELLING REASON FOR AN UPWARD DURATIONAL DEPARTURE UNDER THE CIRCUMSTANCES OF THIS CASE.

The Court of Appeals has held that this aggravating factor supplies a "substantial and compelling reason" for an upward departure where the defendant and victim are in a "relationship[] fraught with power imbalances that may make it difficult for a victim to protect himself" and the defendant abuses his or her position of trust or authority in committing the crime.[3] *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). That was the situation here.

Mr. Chauvin was employed as a licensed peace officer by the City of Minneapolis. As such, he "held a position of trust and authority with respect to the community and its members." Verdict and Findings of Fact Regarding Aggravated Sentencing Factors (Dk. #560) ¶ 1(b). The "trust placed in Defendant included trust that anyone arrested would be treated with respect and only with reasonable force and that medical needs would be addressed in a timely fashion." *Id.*

This Court has already concluded that:

(1) Mr. Chauvin "abused his position of authority" by using unreasonable force to hold "a handcuffed George Floyd in a prone position on the street"—"a position that Defendant knew from his training and experience carried with it a danger of

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[3] Mr. Chauvin argues that "abuse of a position of trust and authority" is not explicitly included among the aggravated sentencing factors enumerated in the Minnesota Sentencing Guidelines. Minn. Sent. Guidelines 2.D.3(b). However, the list of aggravating factors in the guidelines is expressly noted as nonexclusive, *id.*; *Barthman*, 938 N.W.2d at 270; *Hicks*, 864 N.W.2d at 157 (observing that Supreme Court has occasionally recognized new aggravating factors not included in the list in the guidelines), and courts have upheld the abuse of position of authority as an aggravating factor in sentencing a defendant. *See State v. Lee,* 494 N.W.2d 475, 482 (Minn. 1992); *State v. Carpenter*, 459 N.W.2d 121 (Minn. 1990); *State v. Cermak,* 344 N.W.2d 833, 839 (Minn. 1984).

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positional asphyxia"—for more than nine minutes and forty seconds, "an inordinate amount of time." *Id.* ¶ 1(c).

(2) "Defendant's placement of his knee on the back of George Floyd's neck was an egregious abuse of the authority to subdue and restrain because the prolonged use of this maneuver was employed after George Floyd had already been handcuffed and continued for more than four and a half minutes after Mr. Floyd had ceased talking and had become unresponsive." *Id.* ¶ 1(f).

(3) Mr. Chauvin "abused his position of trust and authority by not rendering aid, by declining two suggestions from one of his fellow officers to place George Floyd on his side, and by preventing bystanders, including an off-duty Minneapolis fire fighter, from assisting." *Id.* ¶ 1(d).

(4) That "failure to render aid became particularly abusive after Mr. Floyd had passed out, and was still being restrained in the prone position, with Mr. Chauvin continuing to kneel on the back of Mr. Floyd's neck with one knee and on his back with another knee, for more than two and a half minutes after one of his fellow officers announced he was unable to detect a pulse." *Id.*

Here, by virtue of his position as a police officer, Mr. Chauvin "was in a position to dominate and control" Mr. Floyd. *State v. Bennett*, 1997 WL 526313, at *3 (Minn. App. Aug. 26, 1997). That "position of control" not only allowed Mr. Chauvin to "manipulate the circumstances and commit the crime," *id.*, but also "ma[d]e it difficult" for Mr. Floyd "to protect himself" from Mr. Chauvin's and his co-defendant officers' conduct. *Rourke*, 681 N.W.2d at 41.

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Nevertheless, Mr. Chauvin has argued that this aggravating factor does not apply here because it typically applies only in cases involving "criminal sexual conduct, domestic abuse, or both, where the victim had a pre-existing relationship with the offender." Def. Mem. in Opp. to Upward Durational Sentencing Departure, at 7 (Apr. 30, 2021) (Def. *Blakely* Brief). But the Court of Appeals has made clear that this aggravating factor is not so limited. In *Rourke*, the defendant made the same basic argument: that "generally, the cases that have used the defendant's position of power as an aggravating factor" involved a particular type of pre-existing relationship between a victim and an "adult authority figure[]." *Rourke*, 681 N.W.2d at 40. The Court of Appeals rejected that argument, noting that it had "found no cases that limit the application of this factor" in that manner. *Id.* at 41. The Court of Appeals then clarified that the key question is whether the relationship between the victim and the defendant is one among the many "relationships fraught with power imbalances that may make it difficult for a victim to protect himself," not the existence of a pre-existing relationship or a particular type of offense. *Id.*

Other cases confirm that this aggravating factor is not limited only to cases in which "the victim had a pre-existing relationship with the offender." In *Bennett*, for example, the Court of Appeals held that this factor supported an upward departure where the defendant shot a cab driver with whom he had no pre-existing relationship. 1997 WL 526313, at *3.[4] Similarly, in *State v. House*, 1991 WL 42587, at *2 (Minn. App. Apr. 2, 1991), the Court of Appeals affirmed the application of this factor to a hospital worker "entrusted with the responsibility of protecting

[4] Although Mr. Chauvin attempts to distinguish *Bennett* on the ground that "it was far more similar to the employment relationship found in other cases . . . than the circumstances in this case," the key factors the Court of Appeals relied on in *Bennett* are present here: Mr. Chauvin "was in a position to dominate and control" Mr. Floyd, "had authority to tell" Mr. Floyd what to do, and used his "position of control" to "take advantage of a defined relationship" with Mr. Floyd and "manipulate the circumstances and commit the crime. 1997 WL 526313, at *3.

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hospital personnel, patients and visitors" and who used that position of trust to assault a victim with whom he had no ostensible prior relationship.

The case law likewise confirms that this aggravating factor is not limited to cases involving "criminal sexual conduct" or "domestic abuse." *Bennett* was a murder case in which there were no allegations that the defendant had committed criminal sexual conduct or domestic abuse. In *State v. Campbell*, 367 N.W.2d 454, 461 (Minn. 1985), the Supreme Court found sufficient evidence to support the trial court's conclusion that the defendant "violated a position of trust" in a murder case where the defendant was not accused of committing criminal sexual conduct or domestic abuse.

Mr. Chauvin also claims that there is "no case law in Minnesota, precedential or otherwise, in which a peace officer's position" has triggered the application of this aggravating factor. *Id.* While perhaps true, that observation is unsurprising precisely because successful prosecutions of police officers in Minnesota have been so rare; research has not disclosed any prior Minnesota cases in which a police officer was convicted of murder and the State sought an upward sentencing departure. It is also legally irrelevant. The Court of Appeals made clear in *Rourke* that it does not matter if "this particular aggravating factor has not routinely been applied" to cases involving a particular type of defendant or victim. 681 N.W.2d at 41. So long as the relationship between an officer and a victim qualifies as a "relationship[] fraught with power imbalances that may make it difficult for a victim to protect himself or herself," *Rourke* makes clear that this aggravating factor can apply. Mr. Chauvin does not suggest otherwise, and does not point to any case that forecloses the application of this factor here.[5] If anything, the case for

[5] There is a district court decision suggesting that a peace officer's position of trust and authority is an appropriate basis for an upward departure. In *State v. Arrington*, the district court concluded that the defendant abused the victim's trust because the defendant, who was not a police officer,

an enhancement is heightened, not reduced, when a defendant commits crimes while imbued with the authority of the State, as Mr. Chauvin did here.

III. MR. CHAUVIN'S TREATING GEORGE FLOYD WITH PARTICULAR CRUELTY IS A SUBSTANTIAL AND COMPELLING REASON FOR AN UPWARD DURATIONAL DEPARTURE UNDER THE CIRCUMSTANCES OF THIS CASE.

Mr. Chauvin's particularly cruel treatment of George Floyd is also a separate "[s]ubstantial and compelling" basis for an upward sentencing departure. *Hicks*, 864 N.W.2d at 157; *see* Minn. Stat. § 244.10 subd. 5a(a)(2) (noting that an aggravated sentence is appropriate if the "victim was treated with particular cruelty for which the offender should be held responsible"); Minn. Sent. Guidelines 2.D.3.b(2) (same); *Tucker,* 799 N.W.2d at 586 ("[P]articular cruelty involves the gratuitous infliction of pain and cruelty of a kind not usually associated with the commission of the offense in question."). Here, the cruelty of Mr. Chauvin's conduct was "of a kind not usually associated with the commission of the offense[s] in question." *State v. Schantzen*, 308 N.W.2d 484, 487 (Minn. 1981). Mr. Chauvin's "gratuitous infliction of pain," *Tucker*, 799 N.W.2d at 586, and "psychological" cruelty, *State v. Norton*, 328 N.W.2d 142, 146 (Minn. 1982), justify an upward sentencing departure.

This Court has already concluded that:

(1) "[i]t was particularly cruel to kill George Floyd slowly" by inhibiting "his ability to breathe when Mr. Floyd had already made it clear he was having trouble

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falsely told the victim that he was a police officer and used that claimed position to commit the crime. 2016 WL 102476, at *2 (Minn. App. Jan. 11, 2016). On appeal, the Court of Appeals declined to decide "whether abuse of trust is a proper aggravating factor here" because the district court had "relied upon numerous other factors that support[ed] the upward sentencing departure." *Id.* The Court of Appeals noted, however, that the primary arguments against applying the abuse-of-authority factor in that case were that "impersonating a police officer is a separate offense," and that the defendant "was not in a position of trust because he was not a police officer." *Id.* Nowhere did the Court of Appeals or the defendant suggest that the abuse-of-trust aggravating factor is inapplicable to someone who is actually a police officer.

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breathing." Verdict and Findings of Fact Regarding Aggravated Sentencing Factors (Dk #560) ¶ 2(b).

(2) The "prolonged use" of the prone position was "particularly egregious" because "George Floyd made it clear he was unable to breathe and expressed the view that he was dying as a result of the officers' restraint." *Id.* ¶ 1(c).

(3) Mr. Chauvin manifested his indifference to Mr. Floyd's pleas for his life and his medical distress by, among other things, "not rendering aid"; by "declining two suggestions from one of his fellow officers to place George Floyd on his side"; by "preventing bystanders, including an off-duty Minneapolis fire fighter, from assisting"; by failing to render aid even "after Mr. Floyd had passed out"; and by "continuing to kneel on the back of Mr. Floyd's neck . . . for more than two and a half minutes after one of his fellow officers announced he was unable to detect a pulse." *Id.* ¶ 1(d).

(4) The "slow death of George Floyd occurring over approximately six minutes of his positional asphyxia was particularly cruel in that Mr. Floyd was begging for his life and obviously terrified by the knowledge that he was likely to die but during which the Defendant objectively remained indifferent to Mr. Floyd's pleas." *Id.* ¶ 2(c).

(5) Restraining Mr. Floyd "in the prone position against the hard street surface by kneeling on the back of Mr. Floyd's neck with his other knee in Mr. Floyd's back, all the while holding his handcuffed arms in the fashion Defendant did for more than nine minutes," is "by itself a particularly cruel act." *Id.* ¶ 2(d).

(6) That the "prolonged nature of the asphyxiation" as manifested by the extensive video evidence presented during the trial was also "by itself particularly cruel." *Id.* ¶ 2(e).

These factual findings provide a "[s]ubstantial and compelling" basis for an aggravated sentencing departure, because they demonstrate that Mr. Chauvin's conduct "was significantly more . . . serious than that typically involved in the commission of the crime[s] in question." *Hicks*, 864 N.W.2d at 157. Here, Mr. Chauvin's actions inflicted "gratuitous . . . pain," *Tucker*, 799 N.W.2d at 586, by inhibiting George Floyd's "ability to breathe when Mr. Floyd had already made it clear he was having trouble breathing" and after he "expressed the view that he was dying as a result of the officers' restraint." And Mr. Chauvin's actions caused Mr. Floyd significant "psychological" distress, *Norton*, 328 N.W.2d at 146, because "Defendant objectively remained indifferent to Mr. Floyd's pleas" even as "Mr. Floyd was begging for his life and obviously terrified by the knowledge that he was likely to die."

Mr. Chauvin's prolonged restraint of Mr. Floyd was also much longer and more painful than the typical scenario in a second-degree or third-degree murder or second-degree manslaughter case. The "prolonged nature of the asphyxiation" makes this offense different in kind than, for example, a near-instantaneous death by gunshot, which is one typical scenario for this type of offense. *Cf. Tucker*, 799 N.W.2d at 587-588 (finding no particular cruelty in second-degree unintentional murder case where defendant "did not shoot [the victim] in a manner that gratuitously inflicted additional pain").

The conduct this Court has deemed particularly cruel also occurred over a longer period and was substantially more painful than a typical third-degree assault, the predicate felony offense for Mr. Chauvin's second-degree murder conviction. *See, e.g.*, *State v. Dorn*, 887

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N.W.2d 826, 831 (Minn. 2016) (holding that felony assault requires only that the defendant "intentionally apply force to another person without his consent"). Mr. Chauvin's conduct went beyond just inflicting "substantial bodily harm." Minn. Stat. § 609.223 subd. 1. It "kill[ed] George Floyd slowly"—over the course of almost ten minutes—by inhibiting "his ability to breathe when Mr. Floyd had already made it clear he was having trouble breathing." Indeed, Mr. Chauvin's continuation of the assault after Mr. Floyd was no longer conscious and no longer had a pulse—Mr. Chauvin "continu[ed] to kneel on the back of Mr. Floyd's neck . . . for more than two and a half minutes[6] after one of his fellow officers announced he was unable to detect a pulse"—plainly sets Mr. Chauvin's conduct apart from the typical case involving a felony assault that results in substantial bodily harm and death to the victim. *See State v. Smith*, 541 N.W.2d 584, 590 (Minn. 1996) (finding particular cruelty in robbery case in part because the defendant continued beating the victim after "he was knocked unconscious by the first blow").

Against the overwhelming weight of the evidence, Mr. Chauvin argues that his conduct was not particularly cruel because the "assault of Mr. Floyd occurred in the course of a very short time," and because – he contends -- his conduct "involved no threats or taunting." But this Court has already concluded that the assault occurred over "an inordinate amount of time," that the video evidence at trial coupled with the trial testimony of medical experts called by the State demonstrated that Mr. Chauvin's and his fellow officers' actions killed Mr. Floyd "slowly," and that the prolonged nature of the asphyxiation was by itself particularly cruel. Although Mr. Chauvin identifies no reason why particular cruelty necessarily requires "threats or taunting,"

[6] According to the State's expert pulmonologist Dr. Martin Tobin in his trial testimony, Mr. Floyd likely expired at 8:25:16 from his heart attack resulting from oxygen deprivation caused by the positional and mechanical asphyxia, after which Mr. Chauvin continued to maintain his position for almost an additional three and a half minutes.

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particularly where Mr. Chauvin "objectively remained indifferent" to the fact that "Mr. Floyd was begging for life" and was "obviously terrified by the knowledge that he was likely to die," the trial evidence demonstrated that Mr. Chauvin did taunt Mr. Floyd by responding dismissively to his pleas. The video evidence presented at trial captures Mr. Chauvin dismissively responding "uh huh" at least a couple times in response to Mr. Floyd's pleas, and also commenting, in response to his pleas "I can't breathe" that "[i]t takes a heck of a lot of oxygen to say things."

Mr. Chauvin also notes that the officers had called for an ambulance and upgraded the urgency of the request during the course of their restraint of Mr. Floyd. While true, that argument ignores the evidence that Mr. Chauvin disregarded two inquiries from Mr. Lane about rolling Mr. Floyd onto his side into the recovery position roughly halfway through the restraint period after he had concluded that Mr. Floyd had "passed out," ignored the information from Mr. Kueng that he was unable to detect a pulse at roughly 8:26 p.m., and ignored the repeated pleas from several of the onlookers, including Donald Williams and Genevieve Hansen, among others, over several minutes that Mr. Floyd was no longer breathing and had become nonresponsive. Rather than ending the restraint when it was obvious that Mr. Floyd not only was no longer offering any resistance but was in medical distress and starting CPR, Mr. Chauvin instead chose to continue to restrain Mr. Floyd as he had since Mr. Floyd was initially restrained prone on Chicago Avenue at 8:19:15 for several additional minutes until the EMS crew rolled Mr. Floyd onto a stretcher at 8:28:42.

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IV. THE PRESENCE OF CHILDREN AT THE SCENE DURING THE COMMISSION OF THE OFFENSE IS NOT BEING USED AS A SUBSTANTIAL AND COMPELLING REASON FOR AN UPWARD DURATIONAL DEPARTURE UNDER THE CIRCUMSTANCES OF THIS CASE.

In contrast to the first two aggravating factors discussed above, although this Court found that children were present during the commission of the offense, the Court concludes the presence of that factor does not, under all the facts and circumstances of this case, present a substantial and compelling reason for an upward durational departure. Minn. Stat. § 244.10 subd. 5(a)(13); Minn. Sent. Guidelines 2.D.3.b(13).

The State presented testimony at trial from three young women who were 17 at the time of the incident on May 25, 2020 (Darnella Frazier, Alyssa Funari, and Kaylynn Gilbert) and a girl who was 9 at the time (J.R.). Although all four were present on the sidewalk adjoining Chicago Avenue for portions of the nine minute and a half minute interlude in which Messrs. Chauvin, Lane, and Kueng restrained Mr. Floyd prone on Chicago Avenue while Mr. Thao maintained a watchful eye on the on-looking bystanders, none was a victim in the sense of being physically injured or threatened with injury so long as they remained on the sidewalk and did not physically engage or interfere with Mr. Chauvin and his co-defendant officers. None of them had been present when the officers were struggling with Mr. Floyd to get him into the squad car and only came upon the scene after he had already been subdued and was being restrained prone on the street. Mr. Chauvin is correct that these young women were free to leave the scene whenever they wished, were never coerced or forced by him or any of the other officers to remain a captive presence at the scene, and did not know any of the officers or Mr. Floyd, and that this weighs against using this factor as the basis for an aggravated departure. This case is very different from other cases involving children in which courts have found substantial and

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compelling reasons to depart upward.[7]

Although the State contends that all four of these young women were traumatized by witnessing this incident, the evidence at trial did not present any objective indicia of trauma. To the contrary, Ms. Frazier, who recorded several minutes of Mr. Floyd's restraint on her cellphone and subsequently posted that video to a social network site (Tr. Exh. 15), Ms. Funari, who also recorded several minutes of the restraint using Ms. Gilbert's cellphone (Tr. Exhs. 26-28), and J.R. are observed smiling and occasionally even laughing over the course of the several minutes they observed Messrs. Chauvin, Kueng, and Lane restraining Mr. Floyd prone on Chicago Avenue.[8] In other words, while the presence of children is an aggravated sentencing factor and a permissible ground for departure for purposes of the first stage analysis, under the second stage of the analysis, this Court does not find that specific facts in this case are so substantial and compelling to warrant an upward durational departure on this ground.

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[7] Those cases typically involve children being present indoors (homes or daycare centers) when a parent was the victim of a violent felony. *See, e.g., State v. Hart*, 477 N.W.2d 732 (Minn. App. 1991), *rev. denied* Minn. Jan. 16, 1992 (double upward departure affirmed in sexual assault case occurring in victim's home when her minor sons were present in their bedroom at time of assault); *State v. Profit*, 323 N.W.2d 34 (Minn. 1982) (approving assessment that committing criminal sexual assault in front of children at a daycare center is particularly outrageous).

[8] The initial subdual and restraint of George Floyd prone on the street occurs at 8:19:15 p.m. *See* Lane, Kueng, and Thao body-worn camera videos (BWC Video), Tr. Exhs. 47, 43, and 49. At just over three minutes into the restraint, Thao's BWC video captures Ms. Frazier and Ms. Funari, standing next to each other, looking at each other and smiling while recording the incident on their cellphones. *See* Tr. Exh. 49 at 8:22:25-:30. Shortly after that, Ms. Frazier and J.R. are observed smiling for several seconds after J.R. comes into view on Thao's BWC Video. *See* Tr. Exh. 49 at 8:22:33-:51. Ms. Frazier and J.R. are seen laughing as Donald Williams begins engaging in earnest with Messrs. Thao and Chauvin. *See* Tr. Exh. 49 at 8:23:50-8:24:00 & 8:24:25-:35 p.m. Finally, Ms. Frazier and J.R. are observed laughing out loud about a minute after the restraint had ended and Mr. Floyd had been loaded into the ambulance. *See* Tr. Exh. 49 at 8:29:30-:45.

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V. MR. CHAUVIN'S ACTIONS AS ONE OF A GROUP OF FOUR MINNEAPOLIS POLICE OFFICERS ACTIVELY PARTICIPATING IN THE RESTRAINT OF GEORGE FLOYD IS NOT BEING USED AS A SUBSTANTIAL AND COMPELLING REASON FOR AN UPWARD DURATIONAL DEPARTURE UNDER THE PARTICULAR CIRCUMSTANCES OF THIS CASE.

By statute in Minnesota, it is a ground for departure where "the 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) (emphasis added). The Sentencing Guidelines are similar but narrower: "The offender committed the crime as part of a group of three or more **offenders** who all actively participated in the crime." Minn. Sent. Guidelines 2.D.3.b(10) (emphasis added). This inconsistency was created by the Sentencing Guidelines 2012 amendments, replacing the word "persons" with "offenders." Although the statute has remained the same, it is also true that amendments to the Guidelines are effective unless the Legislature by law provides otherwise.[9]

The State seeks to explain the conflict between the statute and Sentencing Guidelines by stating that the Sentencing Guidelines change was merely "stylistic." That might be true if the words "persons" and "offenders" are synonyms. They are not. "Offenders" is clearly a subset of "persons" and both terms should be given their ordinary meanings.

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[9] "The commission shall meet as necessary for the purpose of modifying and improving the guidelines. Any modification which amends the Sentencing Guidelines grid, including severity levels and criminal history scores, or which would result in the reduction of any sentence or in the early release of any inmate, with the exception of a modification mandated or authorized by the legislature or relating to a crime created or amended by the legislature in the preceding session, shall be submitted to the legislature by January 15 of any year in which the commission wishes to make the change and shall be effective on August 1 of that year, unless the legislature by law provides otherwise. All other modifications shall take effect according to the procedural rules of the commission. On or before January 15 of each year, the commission shall submit a written report to the committees of the senate and the house of representatives with jurisdiction over criminal justice policy that identifies and explains all modifications made during the preceding 12 months and all proposed modifications that are being submitted to the legislature that year." Minn. Stat. § 244.09, subd. 11.

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Although this Court found the three other officers were actively involved in this incident, the Court made no finding that Officers Lane, Kueng, and Thao had the requisite knowledge and intent to be considered "offenders." Minn. Stat. § 244.10 subd. 5a(a)(10); *see* Minn. Sent. Guidelines 2.D.3.b(10). This is not to say that there must be a conviction before three other persons could be "offenders," only that it was not proven during the trial that Officers Lane, Kueng, and Thao could be labeled as such.

As this Court has already found two particularly serious bases for an aggravated durational departure, abuse of a position of trust and authority and particular cruelty, the Court need not wade into this morass of conflicting law on this issue and come to a definitive conclusion. In short, the Court bases its decision to depart without regard to this factor.

VI. THE APPROPRIATE PRISON SENTENCE IS 270 MONTHS.

When a sentencing trial court has found that one or more aggravated factors are present, the court may, in the exercise of its discretion if substantial and compelling circumstances warrant, impose a sentence that is up to "double the presumptive sentence length." *State v. Evans*, 311 N.W.2d 481, 483 (Minn. 1981). The existence of a single aggravating factor is sufficient to justify the imposition of a sentence "double the upper limit of the presumptive range." *Barthman*, 938 N.W.2d at 269, 275; *see also State v. Solberg*, 882 N.W.2d 618, 624 (Minn. 2016) ("[W]e have affirmed upward durational departures that were based on a single aggravating factor."); *State v. Gaines*, 408 N.W.2d 914, 918 (Minn. App. 1987) (finding double upward departure appropriate where only one aggravating factor applied). Here, the State is asking this Court to sentence Mr. Chauvin to 360 months, which represents a double upward durational departure from the 180 months at the "top of the box" of the presumptive guidelines range.

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Determining the appropriate length of any felony sentence is not a mathematical calculation. Nor should it be a reflexive doubling[10] of the presumptive sentence once aggravating factors are proven and found by the Court to be substantial and compelling. Each sentence should be an application of the law to the facts of the individual case without regard to sympathy, bias, passion, or public opinion. While every case is different and must be considered carefully and individually, examination of sentences imposed in similar cases is also relevant if the Court is to effectuate the Minnesota Sentencing Guidelines policy[11] of reducing sentencing disparity.

Attached to this memorandum is Minnesota Sentencing Guidelines Commission data from the last ten years[12] analyzing aggravated durational departures imposed throughout Minnesota for Murder in the Second Degree (Unintentional Killing during a Felony). The data shows that of all the sentences imposed, 67% were within the presumptive guidelines range. For a defendant with a criminal history score of zero, which is Mr. Chauvin's score, the guidelines sentence is, and has been since 2005, 150 months with a presumptive range of 128 months to 180 months. Any sentence within that range is not a departure.

For all cases where sentences were imposed, 20% of the sentences were aggravated durational departures and 13% were mitigated durational departures (*i.e.* departures imposing

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[10] An aggravated durational departure is generally limited to double the presumptive sentence. *State v. Evans,* 311 N. W.2d 481 (Minn. 1981). With the Guidelines applicable in this case, anything from 256 to 360 would be considered a "double departure" within the limitation imposed by *Evans*. *Jackson,* 749 N.W.2d at 360 (reaffirming the *Evans* rule despite the expansion of Guidelines ranges in 2005).

[11] "The purpose of the Sentencing Guidelines is to establish rational and consistent sentencing standards that promote public safety, reduce sentencing disparity, and ensure that the sanctions imposed for felony convictions are proportional to the severity of the conviction offense and the offender's criminal history." Minnesota Sentencing Guidelines 1.A.

[12] The data covers the years 2010 through 2019 because 2020 data is not yet available.

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less prison time than the sentencing guidelines range). The most common aggravated sentence has been 240 months, followed by 300 months. The average aggravated departure imposed on defendants with a zero criminal history score is 278.2 months.

Drilling deeper into the actual cases, there are only two cases where the defendant's criminal history score is zero, and both "abuse of a position of trust or authority" and "particular cruelty" were cited as aggravating factors. Unlike the instant case, however, those cases involved particularly vulnerable victims, specifically, three-year-old children.[13] The defendant in 27-CR-18-18213 was originally charged with Murder in the First Degree and pleaded guilty to Murder in the Second Degree (Unintentional Killing during a Felony) for an agreed-upon range of 300 to 420 months and was sentenced to 384 months. The defendant in 27-CR-15-25934 pleaded guilty to the charge with an agreed-upon sentence of 300 months. In both cases, the cruelty inflicted on the children was horrific, even more severe than the cruelty inflicted on Mr. Floyd.

Mr. Chauvin did not plead guilty, but he cannot be punished for exercising his constitutional right to a jury trial. Nevertheless, he must be held accountable for the death of Mr. Floyd and for doing so in a manner that was particularly cruel and an abuse of his authority. In consideration of all the facts presented at trial, this Court's experience, and the collective experience of the entire Court over the last ten years, the Court finds the appropriate prison sentence for Mr. Chauvin is 270 months.

[13] "Particularly vulnerable victim" was not cited explicitly in 27-CR-15-25934 but the case involved the horrific beating death of a three year-old victim who suffered multiple severe blunt trauma injuries.

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CONCLUSION

Part of the mission of the Minneapolis Police Department is to give citizens "voice and respect."[14] Here, Mr. Chauvin, rather than pursuing the MPD mission, treated Mr. Floyd without respect and denied him the dignity owed to all human beings and which he certainly would have extended to a friend or neighbor. In the Court's view, 270 months, which amounts to an additional ten years over the presumptive 150-month sentence, is the appropriate sentence.

PAC

[14] Minneapolis Police Department Policy and Procedure Manual, Preface p. 2.

MINNESOTA
SENTENCING GUIDELINES COMMISSION

Murder Second Degree, subd. 2(1): Sentenced 2010-2019

Minnesota Sentencing Guidelines Commission (MSGC) monitoring data are offender-based, meaning cases represent offenders rather than individual charges. Offenders sentenced within the same county in a one-month period are generally counted only once, based on their most serious offense. This data request was prepared by the research staff of MSGC in fulfillment of the Commission's statutory role as a clearinghouse and information center for information on sentencing practices. This is not a policy document. Nothing in this request should be construed as a statement of existing policy or recommendation of future policy on behalf of the Commission itself, or as an authoritative interpretation of the Minnesota Sentencing Guidelines, Minnesota statutes, or case law.

Information Requested: Sentencing information for Murder 2, 609.19.2(1).

Analysis:

- Sentenced 2010-2019
- Second-Degree Murder under Minn. Stat. § 609.19, subd. 2(1)
- Excludes attempts under Minn. Stat. § 609.17 and conspiracies under Minn. Stat. § 609.175
- Departure rates by Criminal History Score (CHS)

From 2010-2019, 204 offenders were sentenced for completed Second-Degree Murder under Minn. Stat. § 609.19, subd. 2(1). Three of the offenders received a mitigated dispositional departure. The durational departure rates by criminal history score are displayed in the table below.

Table 1: Durational Departure Rates for 2nd Degree Murder, subd. 2(1), Sentenced 2010-2019

Criminal History Score	Total Received Prison	Durational Departure		
		None	Aggravated	Mitigated
0	90	60 (67%)	18 (20%)	12 (13%)
1	30	23 (77%)	4 (13%)	3 (10%)
2	23	12 (52%)	9 (39%)	2 (9%)
3	17	11 (65%)	3 (18%)	3 (18%)
4	15	10 (67%)	3 (20%)	2 (13%)
5	11	9 (82%)	1 (9%)	1 (9%)
6+	15	11 (73%)	3 (20%)	1 (7%)
Total	201	136 (68%)	41 (20%)	24 (12%)

Four of the 201 offenders who received prison, also received a consecutive sentence. The following analysis focuses on non-consecutive prison terms. As shown in Figure 1, three offenders received the statutory maximum 480 months.

Figure 1: Pronounced Sentence Duration for 2nd Degree Murder, subd. 2(1), that Received an Aggravated Durational Departure, Sentenced 2010-2019

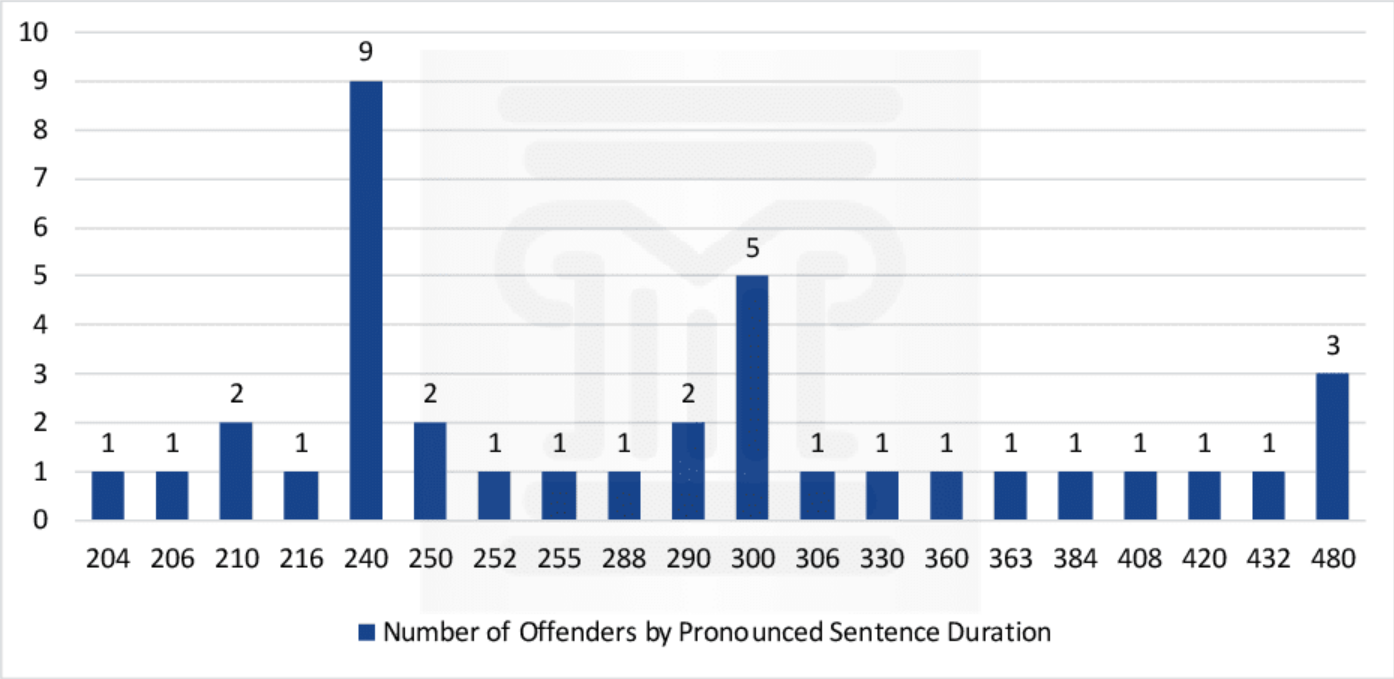

Table 2 displays the average pronounced prison term for aggravated durational departures by criminal history score. The following table excludes the four offenders who received a consecutive sentence. For example, 18 offenders at CHS0 received an aggravated durational departure and a non-consecutive prison term, the average of which was 278.2 months.

Table 2: Average Pronounced Prison Term for 2nd Degree Murder, subd. 2(1), Sentenced 2010-2019

Criminal History Score	Aggravated Durational Departure	
	Number	Months
0	18	278.2
1	3	364.7
2	8	287.5
3	2	246.0
4	3	333.3
5	1	288.0
6+	2	421.5
Total	37	297.9

	A	B	C	D	E	F	G	H	I	J	K
1	2ND DEGREE MURDER, SUBD. 2(1), THAT RECEIVED AN AGGRAVATED DURATIONAL DEPARTURE: SENTENCED 2010-2019										
2	Year Sentenced	County	Case Number	Total Criminal History Points	Criminal History Score	Presumptive Duration (months)	Pronounced Confinement (months)	Departure Reason 1	Departure Reason 2	Departure Reason 3	Departure Reason 4
3	2012	Hennepin	CR1115385	0.0	0	150.00	240.00	220 Crime more onerous than usual offense	710 Shows remorse/accepts responsibility	0	0
4	2017	Aitkin	CR161196	0.0	0	150.00	210.00	110 Victim is particularly vulnerable	240 Crime committed in vic home or zone of privacy	200 Position of authority over the victim or trust	0
5	2010	Big Stone	06CR10156	0.0	0	150.00	210.00	110 Victim is particularly vulnerable	240 Crime committed in vic home or zone of privacy	220 Crime more onerous than usual offense	0
6	2019	Dakota	HACR18910	0.0	0	150.00	300.00	0	0	0	0
7	2019	Hennepin	CR1823849	0.0	0	150.00	255.00	110 Victim is particularly vulnerable	0	0	0
8	2018	Hennepin	CR1811295	0.0	0	150.00	204.00	110 Victim is particularly vulnerable	120 Particular cruelty	0	0
9	2019	Hennepin	CR1818213	0.0	0	150.00	384.00	120 Particular cruelty	110 Victim is particularly vulnerable	200 Position of authority over the victim or trust	0
10	2015	Hennepin	CR1525934	0.0	0	150.00	300.00	220 Crime more onerous than usual offense	120 Particular cruelty	200 Position of authority over the victim or trust	0
11	2018	Hennepin	CR1621960	0.0	0	150.00	360.00	120 Particular cruelty	110 Victim is particularly vulnerable	0	0
12	2019	Hennepin	CR1717381	0.0	0	150.00	306.00	120 Particular cruelty	110 Victim is particularly vulnerable	0	0
13	2013	Norman	CR1358	0.0	0	150.00	240.00	225 Injury sustained by vic(s)/psychological impact	245 Crime committed in presence of children	110 Victim is particularly vulnerable	200 Position of authority over the victim or trust
14	2016	Ramsey	CR151070	0.0	0	150.00	300.00	120 Particular cruelty	225 Injury sustained by vic(s)/psychological impact	255 Fled scene/Failed to render aid	0
15	2013	Ramsey	CR131455	0.0	0	150.00	330.00	120 Particular cruelty	460 Vic recommendation/acquiescence/vic family	240 Crime committed in vic home or zone of privacy	220 Crime more onerous than usual offense
16	2019	Red Lake	CR18137	0.0	0	150.00	216.00	110 Victim is particularly vulnerable	200 Position of authority over the victim or trust	0	0
17	2014	Scott	CR1320740	0.0	0	150.00	240.00	240 Crime committed in vic home or zone of privacy	245 Crime committed in presence of children	0	0
18	2017	Stearns	CR147529	0.0	0	150.00	240.00	110 Victim is particularly vulnerable	200 Position of authority over the victim or trust	0	0
19	2016	Washington	CR144091	0.0	0	150.00	432.00	120 Particular cruelty	110 Victim is particularly vulnerable	0	0
20	2015	Yellow Medicine	CR15135	0.0	0	150.00	240.00	120 Particular cruelty	110 Victim is particularly vulnerable	0	0
21	2010	Beltrami	04CR10447	1.0	1	165.00	206.00	110 Victim is particularly vulnerable	200 Position of authority over the victim or trust	0	0
22	2010	Hennepin	27CR0932901	1.0	1	165.00	408.00	768 No available transcript/Dep info not avail/Retired Judge	0	0	0
23	2017	Hennepin	CR173946	1.0	1	165.00	480.00	120 Particular cruelty	110 Victim is particularly vulnerable	240 Crime committed in vic home or zone of privacy	0
24	2018	Hennepin	CR1710794	1.5	1	165.00	204.00	251 Committed crime as part of a grp of 3 or more	240 Crime committed in vic home or zone of privacy	0	0
25	2014	Ramsey	CR139183	2.0	2	180.00	240.00	120 Particular cruelty	110 Victim is particularly vulnerable	240 Crime committed in vic home or zone of privacy	200 Position of authority over the victim or trust
26	2019	Hennepin	CR1815483	2.0	2	180.00	250.00	120 Particular cruelty	0	0	0
27	2018	Hennepin	CR1725202	2.0	2	180.00	250.00	358 Dangerous offender statute	0	0	0
28	2017	Pine	CR15728	2.0	2	180.00	480.00	110 Victim is particularly vulnerable	120 Particular cruelty	0	0
29	2012	Renville	CR10445	2.0	2	180.00	240.00	120 Particular cruelty	110 Victim is particularly vulnerable	0	0
30	2019	St. Louis	DUCR1972	2.0	2	180.00	240.00	240 Crime committed in vic home or zone of privacy	450 Recommended by court services	0	0
31	2015	Wright	CR144840	2.0	2	180.00	240.00	120 Particular cruelty	0	0	0
32	2018	Washington	CR171965	2.5	2	180.00	300.00	110 Victim is particularly vulnerable	240 Crime committed in vic home or zone of privacy	200 Position of authority over the victim or trust	0
33	2019	Wilkin	CR18132	2.5	2	180.00	300.00	110 Victim is particularly vulnerable	245 Crime committed in presence of children	240 Crime committed in vic home or zone of privacy	0
34	2012	Hennepin	CR1213025	3.0	3	165.00	252.00	450 Recommended by court services	220 Crime more onerous than usual offense	0	0
35	2017	Beltrami	CR162097	3.0	3	195.00	396.00	120 Particular cruelty	245 Crime committed in presence of children	0	0
36	2019	Hennepin	CR1910503	3.0	3	195.00	240.00	120 Particular cruelty	225 Injury sustained by vic(s)/psychological impact	0	0
37	2012	Anoka	CR113045	4.0	4	210.00	420.00	120 Particular cruelty	0	0	0
38	2019	Dakota	HACR182046	4.0	4	210.00	290.00	110 Victim is particularly vulnerable	460 Vic recommendation/acquiescence/vic family	120 Particular cruelty	510 Prevent trauma to victim from testifying
39	2019	Hennepin	CR1730059	4.5	4	210.00	290.00	120 Particular cruelty	110 Victim is particularly vulnerable	0	0
40	2018	Hennepin	CR1718146	5.0	5	225.00	288.00	357 Career offender statute	358 Dangerous offender statute	0	0

	A	B	C	D	E	F	G	H	I	J	K
41	2014	St. Louis	DUCR142603	7.0	6	243.00	480.00	110 Victim is particularly vulnerable	120 Particular cruelty	245 Crime committed in presence of children	200 Position of authority over the victim or trust
42	2018	Anoka	CR173290	7.5	6	243.00	363.00	358 Dangerous offender statute	0	0	0
43	2017	Ramsey	CR166907	11.0	6	243.00	228.00	110 Victim is particularly vulnerable	251 Committed crime as part of a grp of 3 or more	357 Career offender statute	0