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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-0364**

James Artey Scott, petitioner,  
Appellant,

vs.

State of Minnesota,  
Respondent.

**Filed Marche 18, 2008  
Affirmed  
Lansing, Judge**

Hennepin County District Court  
File No. 98011174

James A. Scott, 970 Pickett Street North, Bayport, MN 55003 (pro se appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul,  
MN 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Assistant County  
Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Considered and decided by Lansing, Presiding Judge; Ross, Judge; and Johnson,  
Judge.

## UNPUBLISHED OPINION

LANSING, Judge

The district court denied James Scott's third request for postconviction relief. Because Scott's upward sentencing departure was supported by substantial and compelling circumstances in the record and Scott previously raised the same *Blakely* claim, we affirm.

### FACTS

James A. Scott was convicted of second-degree unintentional murder for his role in the 1998 death of his girlfriend's daughter. His conviction was affirmed on appeal. *State v. Scott*, No. C8-99-1880 (Minn. App. Nov. 14, 2000), *review denied* (Minn. Jan. 16, 2001). The facts of this case are fully presented in that opinion.

In August 2005, the district court denied Scott's first petition for postconviction relief on the basis that *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), does not apply retroactively. Scott did not appeal that decision. In August 2006, the district court denied Scott's second petition for postconviction relief in which Scott claimed that he received ineffective assistance of counsel. The district court reasoned that Scott's request was untimely and barred by the *Knaffla* rule because Scott had previously obtained review in a direct appeal and had also filed a prior petition for postconviction relief. Scott did not appeal his second petition for postconviction relief.

This appeal is based on Scott's third request for postconviction relief. In December 2006, Scott moved to correct his sentence. In his motion he argued that his sentence was improper under *Blakely* and that his sentencing departure was not supported

by substantial and compelling circumstances in the record. The district court denied his request, reasoning that the motion was *Knaffla*-barred and that *Blakely* does not apply retroactively. Scott now appeals.

## D E C I S I O N

Under the *Knaffla* rule, when a direct appeal has been taken, all claims that were raised or could have been raised will not be considered in a petition for postconviction relief. *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). Two exceptions to the *Knaffla* rule permit review when (1) the interests of justice require review or (2) a claim is so novel that the legal basis for the appeal was not available on direct appeal. *Perry v. State*, 731 N.W.2d 143, 146 (Minn. 2007); *see also* Minn. Stat. § 590.01, subd. 4 (2006) (codifying similar requirements in 2005 amendment).

Scott argues that the *Knaffla* rule cannot be applied to sentencing arguments. In general, “courts are empowered ‘at any time’ to correct sentences not authorized by law.” *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) (quoting Minn. R. Crim. P. 27.03, subd. 9). But courts are not required to repeatedly consider the same claim. When a sentencing claim is “essentially the same” as a previously-raised claim, the *Knaffla* rule bars subsequent motions for correction of sentences. *Powers v. State*, 731 N.W.2d 499, 501 (Minn. 2007).

Because Scott’s first request for postconviction relief made the same *Blakely* argument that Scott raises in this appeal, the district court properly concluded that this argument is *Knaffla*-barred. Scott’s second sentencing argument, however, may not be

“essentially the same” as his previously raised claim. We therefore address it on the merits.

A sentencing departure must be justified by substantial and compelling circumstances in the record. *State v. Losh*, 721 N.W.2d 886, 895 (Minn. 2006). An upward departure cannot be based on conduct that constitutes an element of the crime. *State v. Herrmann*, 479 N.W.2d 724, 729-30 (Minn. App. 1992), *review denied* (Minn. Mar. 19, 1992). Furthermore, an upward departure should not be based on facts that “were already taken into account by the legislature in determining the degree of seriousness of the offense.” *Taylor v. State*, 670 N.W.2d 584, 589 (Minn. 2003).

In Scott’s sentencing hearing, the district court gave two reasons for imposing the upward departure: the particular vulnerability of the victim and the particular cruelty of Scott’s conduct. Both reasons can support an upward departure under the sentencing guidelines. Minn. Sent. Guidelines II.D.2.b.(1)-(2). Scott, however, argues that his sentencing departure was not supported by substantial and compelling circumstances in the record because his upward departure was based on facts used to establish that he was guilty of the offense itself.

Contrary to Scott’s argument, neither the victim’s vulnerability nor the particular cruelty of the acts constitutes an element of the offense. *See* Minn. Stat. § 609.19, subd. 2 (1996) (defining second-degree unintentional murder). Unlike in *Herrmann*, the state did not need to prove the fact used for departure in order to obtain the conviction. *See* 479 N.W.2d at 729-30 (holding that great bodily harm could not be both element of offense and reason for upward departure). Instead, vulnerability and cruelty were merely

causal factors in the victim's death. *See State v. Rodriguez*, 505 N.W.2d 373, 377-78 (Minn. App. 1993) (holding that vulnerability can support an upward departure even though vulnerability caused victim's death), *review denied* (Minn. Oct. 19, 1993). Unlike in *Taylor*, the statute is not tied to the victim's age—which correlates closely with vulnerability. *See* 670 N.W.2d at 589 (discussing criminal-sexual-conduct statute when victim is under age 13).

Furthermore, the record supports the district court's determination that the victim was vulnerable and that Scott acted with particular cruelty. The victim in this case was a 22-month-old child who died while in Scott's care, and, at the time of death, the child had an extensive pattern of bruising on his chest and abdomen. *See State v. Udstuen*, 345 N.W.2d 766, 768 (Minn. 1984) (affirming upward departure under similar circumstances). The district court therefore properly denied Scott's motion to correct his sentence.

**Affirmed.**