

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF SCOTT

FIRST JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

**STATE'S SENTENCING
MEMORANDUM**

Austin James Herbst,

File No. 70-CR-20-15929

Defendant.
-----**INTRODUCTION**

On March 9, 2021, Defendant Austin James Herbst entered a guilty plea to the sole count in the complaint, Second Degree Intentional Murder, in violation of Minn. Stat. § 609.19, Subd. 1(1). The charge arose from an incident that took place at the residence of the Herbst family located at 347 Wagner Way in the City of Elko New Market, Scott County, Minnesota on July 6, 2013; where Defendant intentionally shot his father Gary Albert Herbst, the victim, in the back of the head with a .45 caliber pistol, while the victim was sleeping. The Court ordered a Presentence Investigation (PSI) to be completed before a sentencing hearing scheduled on June 4, 2021.

The facts in this case support a sentence of 367 months, which is the top of the box of the Minnesota Sentencing Guidelines.

FACTS

On July 6, 2013, Defendant was home with his mother, Connie Lou Herbst, and the victim, at their family home in Elko New Market. (T-9)¹ Defendant witnessed an

¹ "T" refers to the transcript from Defendant's plea hearing on March 9, 2021.

argument between the victim and his mother. (T-9, 17) Defendant was in his bedroom during the argument and did not come out, nor was he part of the argument. (T-21) The argument was about nothing in particular. (T-17) After the argument, Defendant's mother left the house and went to the library. (T-11, 17) Defendant knew she had left because he heard the door slam, the garage door open, and the car leave. (T-21) Defendant had no discussion with his mother before she left the residence. (T-21) Defendant had no discussion with the victim after his mother left the residence. (T-21) Defendant left his room to get a glass of milk, and observed the victim sleeping on the couch. (T-11, 17, 21) Defendant and the victim were alone in the house. (T-17)

Defendant saw a .45 caliber Sig Sauer handgun on the floor under the couch. (T-12, 17, 21) About 20-30 minutes after his mother had left the house, Defendant picked up the pistol, which he knew was loaded, pointed it at the victim's head and intentionally shot him in the back of his head. (T-13, 17-18, 19) The shot resulted in a mortal wound to the victim and Defendant knew he was dead. (T-14-15, 18) Defendant had no legal defense for his actions. (T-15) Defendant stated when he saw the gun "[he] was scared that [the victim] was going to kill my mom" when she came back. (T-22) After Defendant shot the victim in the head, he neither called 911 nor sought any medical intervention. (T-16) Defendant instead called his mother and asked her to come home. (T-22) That same day, with the help of his mother, Defendant put the victim's body in a car, drove to Wisconsin, and left the victim's body in the woods south of Barron, Wisconsin. (T-16, 18, 23) Defendant's mother assisted him in the dumping of the victim's body. (T-18, 22) When people asked about the victim's whereabouts, Defendant told them the victim had gone away. T-16.

Eight months later, after his paternal grandmother died, Defendant's uncle called about the estate. (T-23) Defendant's uncle asked his mother and him to file a missing person report to prove to the Wisconsin courts they had tried to find the victim, and remove his name from the estate. (T. 23-24) Prior to that time, no one had come looking for the victim. (T-24) Defendant and his mother told neighbors that the victim had packed his bags and left with someone they did not know. (T-24)

That was the last time anyone mentioned Victim Gary Albert Herbst until December 3, 2017, when a dog found a human skull and brought it home near Barron County, Wisconsin. The dog's owners called the Barron County Sheriff's Office and the resulting investigation and search of the area found human remains in the nearby woods. The hole located in the back of the skull indicated the death was from homicidal violence.

The bones were sent to the DNA Doe Project for forensic genealogy examination. In February 2020, the DNA Doe Project matched the remains to the victim, and the Wisconsin State Crime Lab confirmed the remains were indeed the victim. On February 28, 2020, investigators interviewed Connie Herbst and Defendant. During the interview, Defendant lied about what happened to the victim. He told the investigators that he last saw the victim get into a gray/silver pickup truck and leave the residence with a male with tattoos. Defendant said when his mother returned home, she found money was missing. Defendant stated he wasn't into "patricide."

Investigators subsequently searched the Herbst's former residence at 347 Wagner Way in Elko New Market and found a stain on the basement floor. A cadaver dog searched the house and alerted to two areas. A forensic search of the house found blood

spots and stains on the basement floor and walls, which were presumptively positive for human blood.

Detectives interviewed neighbors who stated they observed Connie Herbst and Defendant cleaning and scrubbing their basement floor late at night in 2013, and then backing up a pickup truck to their rear sliding glass door. The neighbors also recalled in August 2013, Connie Herbst had a garage sale and sold all of the victim's clothing and tools. Connie Herbst told the neighbors that the victim walked out on them. When interviewed by investigators, both Defendant and Connie Herbst denied any involvement in the death of the victim.

LEGAL ANALYSIS

I. COMMITMENT TO THE COMMISSIONER OF CORRECTIONS FOR TOP OF THE BOX GUIDELINES SENTENCE OF 367 MONTHS IS JUSTIFIED.

The Minnesota Sentencing Guidelines ranks Second Degree Intentional Murder a Severity Level 11 Offense. With Defendant's criminal history score of zero (0), the presumptive guidelines sentence is 306 months commitment to state imprisonment, with a range between 261 and 367 months.

A sentence within the range afforded by the Minnesota Sentencing Guidelines is presumed appropriate unless there are identifiable, "substantial and compelling circumstances" that distinguish a case and overcome the presumption in favor of the guidelines sentence. Minn. Sent. Guidelines 2.D.1. (2020). See also State v. Jackson, 749 N.W.2d 353, 360 (Minn. 2008). "Substantial and compelling circumstances" are factual circumstances that significantly distinguish a case, making it "different from a typical case." State v. Peake, 366 N.W.2d 299, 301 (Minn. 1985). A sentencing court

may exercise its discretion to depart from the guidelines “only if aggravating or mitigating circumstances are present.” State v. Best, 449 N.W.2d 426, 427 (Minn. 1989). A departure is an abuse of discretion if the court’s reasons are improper or insufficient and there is insufficient evidence in the record to justify the departure. Williams v. State, 361 N.W.2d 840, 844 (Minn. 1985). A top-of-the-box sentence is a presumptive sentence under the guidelines. State v. Jackson, 749 N.W.2d at 359 n. 2 (Minn. 2008). “A sentence within the range provided in the appropriate box on the sentencing guidelines grid is not a departure from the presumptive sentence.” State v. Delk, 781 N.W.2d 426, 428–29 (Minn. Ct. App. 2010), review denied (Minn. July 20, 2010). Therefore, a sentence of 367 months is not a departure from the guidelines.

While an aggravated sentencing departure is not sought, several of the same factors can be used to justify a top of the box sentence for Defendant, as follows:

- 1) Particular cruelty. The victim was Defendant’s father. The medical report determined that the victim died of a close contact wound to the head. Defendant executed his father. Defendant then threw away his father into the woods like yesterday’s trash. To murder anyone is a heinous and awful crime. It is made even worse to murder one’s own father. It demonstrates a total lack of respect for the law and the natural order. “Murder most foul, as in the best it is; but this most foul, strange and unnatural.” Shakespeare, *Hamlet*, Act 1, Scene 5. (Most foul because Claudius killed his brother while he slept in a sneaking way, and unnatural because he killed his brother, who he should love and not kill).
- 2) The victim was helpless, sleeping in his own house when Defendant murdered him. Courts have found that sleeping victims are particularly vulnerable for

purposes of imposing an aggravated sentence. See State v. Skinner, 450 N.W.2d 648, 654 (Minn. Ct. App. 1990).

3) Invasion of the zone of privacy. The victim was asleep in his own house when Defendant shot and killed him. An invasion of the victim's zone of privacy - the house and curtilage - is an aggravating factor that can be considered in deciding whether to depart. See, State v. Back, 341 N.W.2d 273 (Minn. 1983).

4) Defendant sought no medical attention for the victim but instead dumped his father's body in the woods as if it were garbage; left it to be scavenged by wild animals. There were no funeral services, no marker or memorial, and never an ounce of concern for his father's family.

5) Defendant conspired with his mother to conceal the crime from the knowledge of the world and the law. Defendant and his mother cleaned up the crime scene in the middle of the night. Defendant threw the murder weapon into a lake in Wisconsin. Defendant left the victim's family wondering about his fate for many years, continuously lied to the family, and lied to the police.

Defendant has no legal defense for killing his father. Defendant stated his parents argued that day, but what made that particular argument different or more dangerous from their previous arguments? Nothing apparently, because when asked about the argument at the plea hearing during the factual basis, Defendant stated it was about nothing in particular. The argument did not prompt Defendant to leave his room, speak to his father, speak to his mother before she left the residence, or call 911. Defendant said he only left his room to get a glass of milk.

What was the Defendant's motive, or explanation to mitigate his actions? At the plea hearing, Defendant stated that he saw the gun and used it to protect his mother. However, there are no facts to support that killing his father was necessary to protect his mother. His mother left the house and was in no imminent danger. His father was asleep. There was no need for immediate action. Defendant had numerous alternative solutions besides murder. If his parent's argument on that date were so egregious, Defendant could have called the police. Defendant could have taken the loaded pistol he claimed was located under the couch and hidden it. Defendant could have woken his father and talked to him. Defendant could have left the house to warn his mother. Nothing kept the Defendant in the home. Instead, Defendant simply made the choice to kill his father because Defendant had the opportunity. The pistol was there and loaded. His father was asleep and no confrontation was necessary. He didn't like his father as he stated in interviews with the police. His mother was not home to intervene or to witness it. He chose to murder his father as a matter of convenience to eliminate what he saw as a problem.

Many children dislike one or both of their parents but thankfully very few choose to murder them. There are no substantial and compelling reasons in this case that justify or excuse Defendant's actions; thus, a top of the box guidelines sentence is warranted.

II. THERE ARE NO SUBSTANTIAL AND COMPELLING MITIGATING CIRCUMSTANCES THAT WOULD JUSTIFY A DURATIONAL DEPARTURE FROM THE SENTENCING GUIDELINES.

It is anticipated that Defendant will ask for a downward durational departure from the sentencing guidelines, or for a lower end of the box sentence. Neither of those scenarios is appropriate for the intentional murder of his father. To be a basis for a

downward departure, a factor must tend to excuse or mitigate the offender's culpability for the offense; making the defendant's conduct significantly less serious than that typically involved. See State v. Wall, 343 N.W.2d 22, 25 (Minn. 1984); State v. Esparza, 367 N.W.2d 619, 621 (Minn. Ct. App. 1985); State v. Mattson, 376 N.W.2d 413, 415 (Minn. 1985); and State v. Nelson, 329 N.W.2d 827 (Minn. 1983). Durational departures must be supported by offense-related factors, not offender-related factors. State v. Behl, 573 N.W.2d 711, 713 (Minn. Ct. App. 1998), *review denied* (Minn. Mar. 19, 1998). Offender-related factors such as one's age or remorse bears on the defendant's amenability to probation, which is relevant only to a dispositional departure. State v. Bauerly, 520 N.W.2d 760, 762 (Minn. Ct. App. 1994). The facts of this particular offense do not excuse or mitigate Defendant's conduct.

In departing from the presumptive sentence, the Court may use the following non-exclusive list of mitigating factors:

- 1) Was the victim the aggressor in the incident;
- 2) Did the offender play a minor or passive role in the crime or participate under circumstances of coercion or duress;
- 3) Did the offender, because of physical or mental impairment, lack substantial capacity of judgment when the offense was committed;
- 4) Is the offender's presumptive sentence a commitment to the commissioner but not a mandatory minimum sentence, and either of the following exists:
 - (a) The current conviction offense is at a severity level I or II and the offender received all of his prior felony sentences during less than three separate court appearances; or
 - (b) The current conviction offense is a severity level III or IV and the offender received all of his prior felony sentences during one court appearance;
- 5) Other substantial grounds exist which tend to excuse or mitigate the offender's culpability, although not amounting to a defense; and
- 6) Alternate placement for offender with serious mental and persistent mental illness.

Minn. Sent Guidelines 2.D.3.a.

A review of the above factors illustrates that none of them are applicable to Defendant's circumstances. In fact, Defendant's conduct is more serious than normally associated with these offenses, and thus the crime that Defendant committed is not deserving of a mitigated departure. In the PSI, Defendant reiterated the same facts that he stated at the plea hearing. Defendant claimed to have suffered past abuse by the victim; and maintained that he shot the victim in the back of the head because he believed the victim was intent on killing his mother. However, there is no evidence of that assertion, other than Defendant's claims. Nonetheless, Defendant had myriad choices when confronted with this alleged threat by the victim, which included literally anything other than the choice he ultimately made.

- 1) The victim was not an aggressor in the incident. Indeed, the victim was asleep at the time his son shot him in the head and murdered him. The victim could not have been more helpless.
- 2) Defendant did not play a passive or minor role, but instead played the sole major role as the instigator of the crime and the executioner of his father. He chose to murder his father on the speculation that his father may do something to his mother in the future.
- 3) There is no evidence or showing that Defendant had an impairment or lacked substantial capacity of judgment when the offense was committed. Defendant admitted he knew what he was doing.

- 4) This is not a level I through level IV offense and Defendant received prior points from less than three offenses. This is a severity level 11 offense, and the exceptions for low level offenses do not apply.
- 5) There are no other substantial grounds that exist which tend to excuse or mitigate Defendant's culpability, although not amounting to a defense. Defendant's young age, lack of record, health or unlikeliness of recidivism cannot be used to support a departure. State v. Cermak, 350 N.W.2d 328 (Minn. 1984) (likelihood of re-offense); State v. Frey, 340 N.W.2d 346 (Minn. 1984) (health); State v. Bauerly, 520 N.W.2d 760 (Minn. Ct. App. 2002) (age and lack of record). Defendant's post-offense remorse cannot be used. State v. Back, 341 N.W.2d 273 (Minn. 1983); State v. Solberg, 869 N.W.2d 66 (Minn. Ct. App. 2015).
- 6) There is no basis for any alternate placement for Defendant, as he presents with no serious mental or persistent mental illness.

There are no substantial and compelling circumstances that would justify a downward durational departure from the sentencing guidelines, and thus a top of the box guidelines sentence is appropriate.

CONCLUSION

For all of the above reasons, the Court should commit Defendant to the Commissioner of Corrections for 367months.

Dated: June 1, 2021

Respectfully submitted,

/s/ Sarah Wendorf

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