

**STATE OF MINNESOTA****DISTRICT COURT**

Scott County

Judicial District: First  
Court File Number: 70-CR-20-15929  
Case Type: CriminalState of Minnesota,  
Plaintiff**DEFENDANT'S SENTENCING  
MEMORANDUM**

vs.

Austin James Herbst,  
Defendant**INTRODUCTION**

Defendant Austin James Herbst pled guilty to Second Degree Intentional Murder. The offense occurred on July 6, 2013, in Elko New Market, Scott County, Minnesota, in the residence of Austin Herbst and the victim. Connie Lee Herbst, he mother of Austin Herbst and the wife of the victim, also resided there. The victim was the father of Austin Herbst, Gary Albert Herbst.

District courts have long been given the discretion to tailor sentencing plans for each individual defendant. The Court need not crouch within the box of mandatory sentencing guidelines. Ultimately, this Court is asked to protect the community with its common sense and wisdom and impose a sentence that is sufficient but not more than necessary to accomplish the goals of sentencing. The purposes of sentencing are “to prevent future unlawful conduct by defendants and establish reasonable consequences for their unlawful conduct.” *State v. Friberg*, 435 N.W.2d 509, 516 (Minn. 1989).

The court must still incapacitate offenders, deter those offenders' future misconduct, and make an example to others. At the same time, the court should plan for each individual offender's eventual release to a future community. More than just punishing the offender, this court should attempt to prevent each defendant from becoming a re-offender.

The facts in this case support a downward durational departure from presumptive sentence of 261 – 367 month prison commit.

**FACTS**Offense/Feelings towards victim:

Over the course of two years, when he was ages 16-18, Austin Herbst heard his father make several death threats to his mother. He heard his father tell his mother, “If you don’t watch out you will get what’s coming to you.” Additionally, he heard his father tell his mother, “It’s an attitude like that that will get you killed.” Austin recalls his mother was scared and because of this fear, she tried to avoid things escalating in fights and stopped fighting back. When she had fights with his father, she would just apologize and stay quiet to try and avoid making him more upset.

Austin stated, “To this day I believe he was going to kill her that night. If I would have stood aside my mom would be dead. I knew what I did, and why I did it, and to this day I am confident that my decisions were justified. I had tried every other course of action and what happened was the final option. I didn’t do this for selfish reasons. I am a very antiviolence person. I did it because I love my mom and I was so scared for her life. The implied threat was so strong, and I truly thought she was in danger. I wish it could have ended with them splitting up, but with the control and abuse that would have never happened. He would have never let her go. She threatened to leave before, and he told her that if she leaves, he will come and find her.”

Austin Herbst recalled that on the night of the offense, “My mom and dad got into an argument and she got fed up and went to the library. I was in my bedroom and heard my dad go into his bedroom and mess around with something. I walked out of my room and noticed something was put under the couch. I looked and I saw a gun was there. I hadn’t seen that gun since I was a little kid. When I did see it as a kid, it was to inform me what it was, and it had no clip, and the safety was on. That night was the second time in my life I had ever seen that gun. The gun was loaded and ready to fire and right by my

father. I had never seen that before. The gun was right underneath him and I grabbed it as he was dozing off. I shot from behind.”

The following year or two after the murder Austin stated, “My mom was worried about my wellbeing. But I know my mom wouldn’t be alive if I hadn’t done what I did. She was a caring person and always tried to help people. She was just the nicest person, and I was proud of having her as a mom.” Austin went on to state, “After my dad was gone our relationship was better. We would actually go and do things. Our constant worry went away. We were able to experience life for the first time. I took my mom out for breakfast and that was the first time for her. We became more social and friendly with our neighbors and would go out on walks without the fear that he was watching us. My mom was able to talk with her family again. You could tell her trauma was still strong however, because she would always ask me permission to leave the house. I always just told her I don’t care you don’t have to ask me.”

Austin explained his feelings after him and his mother’s arrest and stated, “I feel horrible because this is the last thing I wanted for my mom. I did what I did to free her from a prison and now I put her back in one. I wanted to confess and get my side of things out. I am really hoping she gets a reduced sentence. It wasn’t her fault. She was just trying to protect me, and I was trying to protect her.”

### **Background/ Relationship with mom**

Austin grew up and lived in New Market with his mother and father until the age of 20. At that time, he moved into a townhome with his mother in New Prague and resided there until the time of his arrest. Austin’s parents Connie and Gary Herbst had been married for over 30 years. Connie, Austin’s mother was in the food industry for the majority of her work life, including jobs as a cook and a food manager. Austin reports that she had no criminal history or chemical health concerns. Austin stated that

his mother lived in constant fear and “never wanted to do anything” due to his father’s control over her. He stated growing up his mother suffered from “miniature chest strokes” due to stress. He stated that his mother was, and still is, his best friend. He stated, “I can trust her unconditionally and we were really close growing up”.

Austin recalls, “My mother was not allowed to have any friends at all when I was growing up. She wasn’t allowed to speak to her family. He didn’t even let her go to her mother’s funeral. My mother wanted to bring me to her mother’s funeral and my dad told her that if we did go, he would call the cops on my mom for kidnapping. He also told her that if she decided to go to the funeral alone, he would plant drugs on her and would call the cops.”

Austin had witnessed the abuse against his mother for the entirety of his life. Austin recalls one major episode of abuse that he witnessed when he was 11 years old. He stated, “My parents were arguing one night, and my mother got out of bed and ran into my room. My dad chased her into my bedroom, and he began punching and hitting her in the face and chest. He was just “wailing on her”. He stated he was screaming at his dad to stop and eventually his dad did stop when he thought she had enough. He recalls that his mother slept in his room that night and when she went into work the next day she was covered in bruises and told her coworkers she fell. Austin stated, “my mother always had bruises that I noticed as a kid.” Austin stated he called the cops on one occasion his father was physically abusing his mother. When the cops got there his mother answered the door and sent them away. He was frustrated that they didn’t even come inside to check on things.

Austin stated, “my dad was always showing that he wanted to hurt something. He was constantly throwing and breaking things. My mother would make a meal and he would pick it up and shatter it on the floor.” Austin recalls, “One time my dad had bad heart burn and was upset we couldn’t

fix it. If we walked past him without saying anything he would yell at us and call us bastards and throw things at us.”

Austin always wanted to be able to protect his mother but felt helpless against his father as a child. Austin stated, “later in life, once I was big enough to step in between my dad and mom, I got more protective over her.” When Austin was 16 years old, he stated, “When my dad would scream and yell in my mom’s face and I could tell it would escalate, I would physically stand in between them as a way of saying you are not going to touch my mom again.”

### **Austin’s father and Austin’s childhood abuse**

Austin stated that his father was a machinist for most of his work life. He stated that he knows his father has a criminal history including drug charges, sexual assault charges, and assault charges. He stated his father would drink and in the last year of his life he suspected that his father was using drugs. He stated that his father had mood swings, was volatile, angry, and would lash out on Austin and his mother more often than usual. He stated his dad would get drunk and him or his mother would do the smallest thing, and he would throw things, scream, and start hitting them.

Austin stated, “One time when I was around the age of 6 or 7, I went into the basement when he was with a friend and he was angry at me for interrupting and put out his cigarette on me.” “Around the age of 8 or 9, I bothered him by going into the basement and he grabbed me by the neck, and he threw me up the stairs resulting in an injured back.”

Austin stated, “He would hit me and punch me in the chest and shoulders up until I was around 15 years old. When I got to be larger, and after I had taken self-defense lessons, I began to stand in between him and my mother in an attempt to protect her. This is also when the verbal and mental abuse became much worse. He would constantly tell me I’m worthless, that I wasn’t going to be anything. I was not allowed to have friends or leave the house. I made some friends during school hours, but I was

not allowed to be in any extra curricular activities, sports, or see anybody outside of school. At around age 16, I began to sneak out to be social and see friends from school.

Austin recalls other punishments he received while growing up. He stated, “If I did anything he would threaten locking me in my room for weeks. About 3 or 4 times growing up, he locked me in my room for a week or two. When I was around age 15 or 16, he locked me in my room for a week. I was only able to leave to use the bathroom and my mother would deliver me food.”

### **The Effect of Post-Traumatic Stress**

While Austin is responsible for his behavior which caused the victim’s death, it important to understand the context in which his actions took place. While there is no formal diagnosis for Post-Traumatic Stress Disorder (PTSD), Austin does have a significant trauma history and has endorsed several PTSD symptoms such as flashbacks, hypervigilance, constant fear, mood instability, and problems with childhood memory. There is an abundant amount of emerging research that explains the effect that PTSD has on individuals. Symptoms of PTSD in people with significant trauma histories “*tend to be obscured by their other cognitive, affective, social, and physical problems*”<sup>1</sup>

One of the main problems is how it fundamentally impacts their response to threats. The two main continuums which individuals with PTSD experience while assessing threats are the hyper-arousal and dissociative continuums. It is likely that Austin experiences, as least in part, hypervigilance which is associated with the hyper-arousal continuum. Hypervigilance begins at the initial state of threat, where the alarm reaction is initiated:

*“The alarm reaction is characterized by a large increase in activity of the sympathetic nervous system, resulting in increased heart rate, blood pressure, respiration, a release of stored sugar, an increase in muscle tone, a sense of hypervigilance, and turning out of all noncritical information. All of these actions prepare the body for defense- to fight with or run away from*

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<sup>1</sup> Van der Kolk, Bessel, (p. 297)

*the perceived or sensed threat. If the threat materializes, a full fight or flight response must be activated”<sup>2</sup>*

This hyperactivity puts people with PTSD in “*a constant fear state*”<sup>3</sup> which has neurocognitive effects that initiate responses in the brain when perceiving external threats. In fact, “*when amygdala activation in response to sensory stimuli reminiscent of a trauma causes the misinterpretation of the innocuous stimulus as a threat, this precipitates inappropriate fight/flight/freeze responses.*”<sup>4</sup> (See Graphic Below)<sup>5</sup>



<i>Adaptive</i>	REST	VIGILANCE	FREEZE	FLIGHT	FIGHT
<i>Hyperarousal</i>	REST	VIGILANCE	RESISTANCE	DEFIANCE	AGGRESSION
<i>Dissociative</i>	REST	AVOIDANCE	COMPLIANCE	DISSOCIATION	FAINTING
<i>Regulating</i>	NEOCORTEX	CORTEX	LIMBIC	MIDBRAIN	BRAINSTEM
<i>Cognition</i>	ABSTRACT	CONCRETE	EMOTIONAL	REACTIVE	REFLEXIVE
<b>AROUSAL</b>	<b>CALM</b>	<b>ALERT</b>	<b>ALARM</b>	<b>FEAR</b>	<b>TERROR</b>

Having the threat of a loaded gun in close proximity to you would be traumatizing for anyone, let alone an individual such as Austin Herbst who grew up with severe physical violence in his home. While the effect of trauma on Austin Herbst’s decision making is not a mitigating defense for his actions, it is a substantial and compelling circumstance that must be considered when fashioning an appropriate sentence for Austin in this matter.

<sup>2</sup> Perry, Bruce. (1995). Childhood Trauma, the neurobiology of adaption, the ‘use-dependent’ development of the brain: How states become traits. *Infant Mental Health Journal*, 16, (4). (p. 277)

<sup>3</sup> *Id* 20 (p. 278)

<sup>4</sup> *Van der Kolk, Bessel*, (p. 305)

<sup>5</sup> *Perry, Bruce* (p. 277)

## Minnesota Sentencing Guidelines Departure Data

Data from the Minnesota Sentencing Guidelines Commission (MSGC) was requested for Departure Rates between 2012-2106 for Second-Degree Intentional Murder, not premeditated, under (609.19.1(1)). Of the 145 defendants who were sentenced, 17 (12%) received a mitigated durational departure.<sup>6</sup>

**Table 1: Second-Degree Intentional Murder - Sentenced 2012-2016**

Criminal History Score	Total Sentenced	Durational Departure (prison only)		
		None	Aggravated	Mitigated
Total	145	103 (71%)	25 (17%)	17 (12%)

In addition, a case list was developed by the Sentencing Guidelines which details the case information for those 17 individuals who received a durational departure.<sup>7</sup> The most common reasons cited for mitigated durational departures were: shows remorse/accepts responsibility (8 cases, 47%) and mitigate or excuse culpability - not amount to a defense (3 cases, 18%). Other mitigating factors used by the Court were: Cooperated with Law Enforcement, Amenable to Probation, Sentence Appropriate/Just, and Lacked Substantial Capacity for Judgement.

The data obtained from the Minnesota Sentencing Guidelines Commission contains several examples in which defendants received mitigated sentences despite committing fairly serious conduct.<sup>8</sup>

<sup>6</sup> Attachment A: MSGC Data Report

<sup>7</sup> Attachment A: MSGC Case List

<sup>8</sup> Attachment A: MSGC Case Notes

A review of these seventeen cases indicates several themes present among the defendant's conduct such as: having intentionality, using violence with weapons and other forms of force, and playing a prominent role in the incident. Despite this, all of these individuals received mitigated downward durational departures.

One case in particular where the defendant received a durational departure seems to be significantly worse than Austin Herbst's case, is Hennepin County case *State v. Chaboyea (CR-11-14645)*, Mr. Chaboyea was charged with Murder in the Second-Degree Crime Committed For Benefit of a Gang (Intentional) and Murder in the Second Degree (Intentional). Witnesses provided information that Mr. Chaboyea pulled out a shotgun after an argument broke out between his gang the Native Mob and the victim's gang called Gangster Disciples. Witnesses said they saw Mr. Chaboyea use the shotgun and fire at the victim as the victim tried to run from the scene. Another witness who is an associate of defendant (but not present at the scene) told police that defendant admitted to shooting the victim with a shotgun on several occasions since the shooting.

Mr. Chaboyea had a criminal history score of five, which made the presumptive duration that he was facing to be 406 months. He was sentenced to 240 months, which is 59% of the presumptive sentence he was facing under the Minnesota Sentencing Guidelines. Mitigating Factors noted were 1) Cooperation with Law Enforcement and 2) Accepts Responsibility.

A review of the sentences which all 17 individuals in the data set received revealed that the percentage of the presumptive sentence which their sentence reflected was a range of 41% - 85% of the presumptive sentence, which an average of 65%. The totality of this data seems to indicate that Mr. Herbst's conduct was less onerous than the typical second-degree murder case in this dataset *in which a durational departure was granted* and even in these serious cases Courts have granted substantial reductions in sentences.

**Research on Battered Women and Children**

**Source:** Journal of Family Violence, Vol. 16, No. 2, 2001 Parenting in Battered Women: The Effects of Domestic Violence on Women and Their Children Alytia A. Levendosky 1,3 and Sandra A. Graham-Bermann

**Quote:** In addition to these effects on women, an increasing number of studies now document the devastating effects on children of growing up in a family with domestic violence. In general, children who witness domestic violence exhibit problems in their social and emotional adjustment (e.g., Hughes, 1988; Hughes and Graham-Bermann, 1998; Sternberg et al., 1993). Researchers have documented increased levels of internalizing and externalizing behavior and decreased social competence (Jaffe et al., 1986), lower self-esteem (Hughes and Barad, 1983; Kolbo, 1996), increased behavior problems and psychopathology (Fantuzzo et al., 1991; Holden and Ritchie, 1991; Kolbo, 1996), increased fear and worry (Graham-Bermann, 1996), P1: Vendor/GHS P2: FMN Journal of Family Violence [jofv] PP089-298363 March 15, 2001 10:8 Style file version Nov. 19th, 1999 Effects of Domestic Violence 173 increased depression and aggression (McCloskey et al., 1995), and PTSD (Graham-Bermann and Levendosky, 1998; Lehmann, 1997; Rossman, 1994) in children of battered women

**Source:** MENTAL AND PHYSICAL HEALTH EFFECTS OF INTIMATE PARTNER VIOLENCE ON WOMEN AND CHILDREN Psychiatric Clinics of North America - Volume 20, Issue 2 (June 1997) - Copyright © 1997 W. B. Saunders Company Anger, Aggression, and Violence MENTAL AND PHYSICAL HEALTH EFFECTS OF INTIMATE PARTNER VIOLENCE ON WOMEN AND CHILDREN Jacquelyn C. Campbell PhD, RN, FAAN Linda A. Lewandowski PhD, RN

**Quote:**

Children of Battered Women and Trauma Children who experience the battering of their mother often fit the description of traumatized children. Researchers have suggested that post-traumatic stress is a useful framework within which to view the behavior of the children of battered women as well as their mothers, but there have been no empirical studies to date that have documented the prevalence of PTSD in this group. [120] The recognition that children actually experience post-traumatic stress reactions is a relatively recent one [135] [148] and did not receive formal diagnostic recognition until 1987 with the publication of the DSM-III-R. Experiencing and witnessing violence both have been recognized as stressors of the magnitude to produce PTSD symptoms in children. [52] [112] Sluzi [121] noted that "violence becomes traumatic when the victim does not have the ability to consent or dissent, which, in turn, is linked with the universal experience of helplessness and hopelessness engendered by victimization" (p 179)--an apt description of the experience of many children of battered women. McClosky et al [102] found that many of the children of battered women in their sample of 365 children ages 6 to 12 years had observed their mothers being choked, threatened with a weapon, or threatened with death in other ways and noted that these children were "living under the shadow of a lethal threat" and "had been exposed to levels of violence as extreme as those described in Pynoos's studies [110] [112] of traumatized children" (p 1256). Experiencing abusive violence in the home thus would interfere with the child's developing sense of security and belief in a safe, just world. [19]

**Children's Responses to Traumatic Events** A number of behaviors and signs have been noted to characterize children's responses to traumatic events in general such as thought suppression, sleep problems, exaggerated startle responses, developmental regressions, deliberate avoidances, panic, irritability, psychophysiologic disturbances, hypervigilance, and fear of recurrence. [57] [111] [130] [131] Other responses Terr [130] [131] highlights as being of particular importance in traumatized children are (1) strongly visualized or otherwise repeatedly perceived memories (may include hallucinations); (2) repetitive play or behavioral enactments of the trauma (which may lead to behavior

dangerous to the child or others, e.g., "identification with the aggressor" [111] ); (3) trauma-specific fears as well as fears of mundane things such as the dark or certain animals; and (4) changed attitudes about people, life, and the future. The psychic numbing that often is seen in adults after traumatic events may not be seen in children, instead, children may withdraw into uncustomary behavior patterns. [57] [130] Traumatized children often are unable to see a future for themselves. [130] After a traumatic event, the individual may have a changed world view--the world is no longer seen as a safe place, adults are no longer seen as competent protectors, events are no longer predictable or controllable. [91] [98] In an effort to decrease their sense of helplessness and restore a feeling of control and predictability, many trauma victims, adult and children alike, blame themselves for what happened, and this results in feelings of shame [126] and guilt, a lowered self-confidence, and a lowered perception of selfcompetence. [90] [91]

Effects of Domestic Violence on the Children Although early studies of the children of battered women suggested a host of problems, including impairment in cognition, developmental delays, and decreased empathy, these studies generally were uncontrolled and conducted in shelters, reflecting the situational stressors of a crisis period, a strange setting, and future uncertainty as well as long-term effects of family violence. [74] [141] Later controlled studies indicated cognitive and emotional responses, such as higher levels of internalizing (anxiety, social withdrawal, depression), fewer interests and social activities; preoccupation with physical aggression, withdrawal and suicidal ideation; behavioral problems (externalizing behaviors [aggressiveness, hyperactivity, conduct problems], reduced social competence, school problems, truancy, bullying, excessive screaming, clinging behaviors, speech disorders); and physical symptoms (headaches, bed wetting, disturbed sleeping, failure to thrive, vomiting, and diarrhea). [6] [76] [78] [79] [82] [89]

In addition, these somewhat younger children described three components to their experience. [51] The first was "living with violence," which included themes of witnessing the violence, fear,

vigilance, powerlessness, and coping. The second component was "living in transition" and included expressions of relief, pleasure, and protectiveness. The third component, "living with mom" (without their abusive fathers), included expressions of sadness, protectiveness, uncertainty, acceptance of violence as a "normal" way of coping with interpersonal conflict, and coping strategies. The children also exhibited a pervasive sadness that seemed to permeate their experiences and did not feel that they could talk to their mothers about their sadness because it would upset their mothers.

**Source:** <https://www.unicef.org/media/files/BehindClosedDoors.pdf>

**Quote:**

There is significant risk of ever-increasing harm to the child's physical, emotional and social development. Infants and small children who are exposed to violence in the home experience so much added emotional stress that it can harm the development of their brains and impair cognitive and sensory growth.<sup>13</sup> Behaviour changes can include excessive irritability, sleep problems, emotional distress, fear of being alone, immature behaviour, and problems with toilet training and language development.<sup>14</sup> At an early age, a child's brain is becoming 'hard-wired' for later physical and emotional functioning. Exposure to domestic violence threatens that development. As they grow, children who are exposed to violence may continue to show signs of problems. Primary-school-age children may have more trouble with school work, and show poor concentration and focus. They tend not to do as well in school. In one study, forty per cent had lower reading abilities than children from non-violent homes.<sup>15</sup> Personality and behavioural problems among children exposed to violence in the home can take the forms of psychosomatic illnesses, depression, suicidal tendencies, and bed-wetting.<sup>16</sup> Later in life, these children are at

greater risk for substance abuse, juvenile pregnancy and criminal behaviour than those raised in homes without violence.<sup>17</sup> Some studies suggest social development is also damaged. Some children lose the ability to feel empathy for others. Others feel socially isolated, unable to make friends as easily due to social discomfort or confusion over what is acceptable. Many studies have noted that children from violent homes exhibit signs of more aggressive behaviour, such as bullying, and are up to three times more likely to be involved in fighting.<sup>18</sup> One Australian study showed that up to 40 per cent of chronically violent teenagers have been exposed to extreme domestic violence.<sup>19</sup>

There is a strong likelihood that this will become a continuing cycle of violence for the next generation. The single best predictor of children becoming either perpetrators or victims of domestic violence later in life is whether or not they grow up in a home where there is domestic violence. Studies from various countries support the findings that rates of abuse are higher among women whose husbands were abused as children or who saw their mothers being abused.<sup>20</sup> Many children who are present during acts of domestic violence try to help. One study showed that in 15 per cent of the cases when children were present, they tried to prevent the violence, and 6 per cent tried to get outside help. Another 10 per cent actively tried to protect the victim or make the violence stop.<sup>22</sup>

## **ARGUMENT**

### **I. A DOWNWARD DISPOSITIONAL DEPARTURE IS JUSTIFIED**

The Minnesota Sentencing Guidelines ranks Second Degree Intentional Murder a Severity Level 11 Offense. Austin Herbst has a criminal history score of zero (0). The presumptive guidelines sentence is 306 months, with a range between 261 and 367 months.

Austin Herbst does not request a dispositional departure that would impose a probationary sentence. Rather he requests a downward *durational* departure, for a sentence less than the guidelines range.

One of the mitigating factors that may be used as a reason for a departure is “*Other substantial grounds exist that tend to excuse or mitigate the offender’s culpability, although not amounting to a defense.*” Minn. Sent. Guidelines 2.D.3.a(5). In this case, such “*other substantial grounds*” do exist and do justify a downward durational departure.

In its Sentencing Memorandum, the State reiterates that Austin Herbst had no legal justification or legal excuse for killing his father. There is no dispute on this. Considerable time was spent in the plea hearing for Austin Herbst to make sure he was giving up any claim to have been acting in defense of another; that he could have taken other actions to protect his mother; that he should have protected his mother in a different way. Though Austin Herbst was acting in a way he thought was the only practical way to protect his mother, he acknowledged that what he did had no legal justification, no legal excuse, no legal defense. He stated clearly and several times that he was giving up any claim to the defense of defense of another.

Austin Herbst is not now claiming he had a legal defense for his actions, but the Sentencing Guidelines provide that his belief that he was acting to protect his mother may be considered a mitigating factor and may be used as the basis for a downward durational departure.

The State’s Sentencing Memorandum attributes the actions of Austin Herbst to a “dislike” of his father and then cites “Hamlet” to justify a sentence at the extreme top of the sentencing range. To attribute Austin Herbst’s actions to a mere “dislike” of his father trivializes the bullying and abuse he experienced first-hand from his father and the abuse and threats and manipulation he saw his mother suffer at his hands. To use “Hamlet” in support of the harshest sentence in the presumptive range is particularly inapposite. Hamlet’s father was beloved of Hamlet, because of his noble nature and how he treated Hamlet’s mother and Hamlet himself. Hamlet’s uncle Claudius killed his brother to usurp his throne, for personal gain, for money and power. Austin Herbst’s father was not Hamlet’s father, a good, righteous, loving king and father. He was a cruel, dangerous bully to his wife and son. Austin

Herbst acted for no personal gain. And his father treated Austin's mother and himself with contempt and cruelty. He displayed no noble, no admirable, no loving nature. This does not justify Austin Herbst's actions, but a just sentence in this case must consider Austin Herbst's actions in light of the situation he confronted.

### CONCLUSION

Austin Herbst is not a monster nor is he evil. He is a young man with human failings. The factors that are brought to criminal sentencing call for the principled consideration of the offense and the offender, of retribution and rehabilitation. In this case, the result is a complex and intricate picture. He made a terrible decision which he thought was the only way to protect his mother. He did not act for personal gain or for revenge. Because of a variety of factors, he is a low risk to reoffend, as indicated in the pre-sentence investigation.

Austin Herbst asks that the Court to consider that he has no significant criminal history and that he seeks to find a ray of hope that someday he will have served his sentence. He does not request a probationary sentence but does request a downward dispositional departure.

Date: 6/3/21

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/s/ David R. Dierenfield

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