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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF ARIZONA

8 United States of America,
9
10 Plaintiff,

11 v.

12 Gilbert Lee Holmes,
13 Defendant.

CR-08-743-PHX-GMS

**GOVERNMENT'S REQUEST FOR
UPWARD DEPARTURE**

14 Pursuant to U.S.S.G. §§ 5K2.0, 5K2.8, and 4A1.3, the United States requests that the
15 court grant a seven-level upward departure at sentencing due to the aggravating circumstances
16 present in this case, the extreme conduct of Gilbert Lee Holmes (defendant), and the
17 underrepresentation of his criminal history, especially his tribal criminal history against the
18 woman he murdered, Audrey Sharpe (victim). This motion is more fully supported by the
19 attached Memorandum and Points of Authorities which are hereby incorporated by reference.

20 Respectfully submitted this 23rd day of June, 2009.

21 DIANE J. HUMETEWA
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 The United States requests that the court depart upward pursuant to U.S.S.G. §§ 5K2.0,
3 5K2.8, and 4A1.3 in that committing the murder of Audrey Sharpe was executed in an
4 aggravating fashion, and was substantially more extreme than that contemplated by the
5 sentencing guidelines for second-degree murder. Further, his criminal history is not adequately
6 represented by a Criminal History category I. He should qualify as a Criminal History II.

7 **I. Facts**

8 As set forth in the presentence report, on April 28, 2008, on the Colorado River Indian
9 Tribes reservation, defendant broke through the front window of the home of Audrey Sharpe to
10 get into her house. He had been drinking. The defendant then went into the bedroom of the
11 victim where he saw his three-year old daughter sleeping with Jason Sharp, the father of the
12 victim's nine- and 10- year old sons. Jason Sharp had been babysitting the victim's children
13 while she went out. The defendant began to beat Jason Sharp, and Jason Sharp fought back.

14 The victim, who was in the bathroom at the time, screamed for Jason Sharp to call the
15 police. Jason Sharp ran to a neighbor's house to call the police. Once Jason Sharp left, the
16 defendant attacked the victim, first in the bathroom, continuing in the hallway, and then in the
17 victim's bedroom. Initially, the defendant beat the victim numerous times about the head and
18 face with a four-foot closet rod. He then attempted to stab her with the rod until it shattered.
19 The defendant then stabbed the victim multiple times with a kitchen knife. Finally, the
20 defendant kicked the victim in the face splitting her face from her mouth to her cheekbone.

21 While the defendant beat and stabbed the victim in the bedroom, the victim's three-year
22 old daughter was in the same bedroom. The victim's 9 and 10-year-old sons were in their
23 bedroom listening to the beating. When the beating quieted, the 9-year-old son went out to
24 check on his mother while the 10-year-old hid under a blanket and sheet. The defendant was still
25 there and threw the 9-year-old boy on his mother's bloody body, saying "that's your whore
26 mother, that's what she gets." The 10-year old then came out of his room and saw his brother
27 covered in blood.

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2 The victim soon died from her injuries. The victim died from exsanguination due to
3 multiple stab and incised wounds. Blunt force injuries to the head were a significant
4 contributing factor in her death.

5 **II. Legal Analysis**

6 **A. U.S.S.G. § 5K2.0 and 5K2.8**

7 Under U.S.S.G. § 5K2.0, a district court may depart when "there exists an aggravating
8 or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration
9 by the Sentencing Commission in formulating the guidelines that should result in a sentence
10 different from that described." *Koon v. United States*, 518 U.S. 81, 92,(1996) (quoting 18
11 U.S.C. § 3553(b)).

12 Section 5K2.8. addresses extreme conduct. The Extreme Conduct Policy Statement
13 provides as follows:

14 If the defendant's conduct was unusually heinous, cruel, brutal, or degrading to
15 the victim, the court may increase the sentence above the guideline range to
16 reflect the nature of the conduct. Examples of extreme conduct include torture
17 of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

18 "Where ... a district court sets out findings justifying the magnitude of its decision to depart
19 and extent of departure from the Guidelines, and that explanation cannot be said to be
20 unreasonable, the sentence imposed must be affirmed." *United States v. Roston*, 168 F.3d
21 377, 378 (9th Cir.1999) (quoting *United States v. Sablan*, 114 F.3d 913, 919 (9th Cir.1997)
22 (en banc)). "A district court's decision to depart from the Guidelines ... will in most cases be
23 due substantial deference, for it embodies the traditional exercise of discretion by a
24 sentencing court." *Koon*, 518 U.S. at 93-94; see U.S.S.G. § 5K2.8 (noting that "gratuitous
25 infliction of injury" is an example of extreme conduct).

26 In the case at hand, bludgeoning the victim's face with a closet rod to her mouth area
27 was grotesque. Choosing to get a kitchen knife and then stab her repeatedly was even more
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1 alarming. Finally, throwing a child onto his mother's dying bloody body and calling her a
2 "whore" who "deserved it" defies any sort of reasoning. "Gratuitous infliction of injury" is
3 an appropriate but also sanitary description for this defendant's actions. Defendant Holmes
4 must be held responsible for the gruesome nature of her murder. Defendant's brutal killing
5 of the mother of one of his children is the most horrific, senseless, and bloody, and violent
6 way to murder a person. Exposing three children to such violence is shocking. Certainly this
7 case presents the quintessential reason for an upward departure; if these facts do not meet the
8 definition of "unusually heinous, cruel, brutal," the undersigned prosecutor is not sure what
9 case would.

10 Further, courts have affirmed cases with displays of far less violence. For example,
11 the imposition of a seven-level upward departure from the Sentencing Guidelines range
12 under the "extreme conduct" provision was not abuse of discretion when defendant was
13 convicted of second-degree murder for killing his wife for no apparent reason while on their
14 honeymoon cruise. *United States v. Roston*, 986 F.2d 1287, 1293 (9th Cir. 1993). The
15 district court found that circumstances of death were unusually cruel where the wife was
16 severely beaten and strangled before her body was thrown overboard, and she never regained
17 consciousness before drowning. *Id.*

18 This case presents at least a similar if not a more gruesome set of facts. Here the
19 stabbings into the mouth that continued on until the closet rod splintered. This did not stop
20 the defendant, who found another weapon, a knife, and stabbed her repeatedly. As if the
21 manner of her death were not enough, he compounds the brutality by exposing children to his
22 handiwork. And true to his nature, because merely exposing three children to their mother's
23 murder was not enough, he tosses one child onto her bloody body. The defendant has shown
24 no remorse and no redeeming conduct. The situation in the case at hand is much more
25 aggravated than in reported case above where an upward departures was granted.

1 **B. U.S.S.G. §4A1.3**

2 The guidelines provide a mechanism to account for a defendant’s seriously under
3 represented criminal history in U.S.S.G. §4A1.3: “[i]f reliable information indicates that the
4 defendant’s criminal history category substantially under-represents the seriousness of the
5 defendant’s criminal history or the likelihood that the defendant will commit other crimes, an
6 upward departure may be warranted.” Tribal police responded to at least nine calls from
7 Audrey Sharpe in response to defendant’s conduct against her (ex: threatening to break her
8 windows if she did not let him in in 8/21/05), or his suspected conduct against her (ex:
9 punctured tires the day after Christmas on 12/26/07). *See* PSR, pages 7-14. Further, he
10 already attempted to stab her in January 2004, and assaulted her in August 2003, April 2004,
11 and July 2005. No amount of probation, jail time, or fine mattered to this defendant –he was
12 determined to harass, assault, and otherwise provoke this victim. In viewing his criminal
13 history, a pattern of domestic violence emerges. Audrey Sharpe was clearly the target of his
14 drunken rage over the years, and nothing was going to stop him from tormenting her –until
15 he finally killed her.

16
17 **III. Recommendation for Upward Departure**

18 Defendant pleaded guilty and signed a plea agreement stipulating to a range of 25-35
19 years (300-420 months). This range contemplates a motion for upward departure, because
20 the guideline range for Second-Degree Murder is 168-210 months, or Level 35. Therefore,
21 if defendant is going to be considered a Criminal History I, the government recommends a
22 seven-level departure from Level 35 to Level 42. Level 42 provides a sentencing range
23 contemplated by the plea of 360 months - life. If the defendant is categorized as a Criminal
24 History II as recommended by the PSR and the government, then the government
25 recommends a six-level departure from Level 35 to Level 41, which provides a sentencing
26 range of 360 months - life.

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1 **IV. Conclusion**

2 All murders are awful, but this defendant committed a most horrific crime when he
3 bludgeoned Audrey Sharpe to death, then stabbed her, then threw her child onto her body.
4 For all the foregoing reasons, the court should grant the government's motion for upward
5 departure.

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8 Respectfully submitted this 23rd day of June, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd of June, 2009, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Jane McClellan
Attorney for Defendant Holmes

By: S/Jennifer E. Green