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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JORDAN LINN GRAHAM, Defendant.	CR 13-37-M-DWM **DEFENDANT'S SENTENCING MEMORANDUM**

I. INTRODUCTION

COMES NOW the defendant Jordan Linn Graham (Graham), through her undersigned counsel, and in conformity with the Court's scheduling order dated December 12, 2013 (Doc. #168) offers the following memorandum in aid of sentencing.

II. DEFENDANT'S OUTSTANDING OBJECTIONS THAT IMPACT THE GUIDELINE CALCULATIONS

(A) DENIAL OF ACCEPTANCE OF RESPONSIBILITY POINTS BECAUSE:

- **GRAHAM ALLEGEDLY OBSTRUCTED JUSTICE;**
- **SHE REJECTED THE GOVERNMENT'S PRETRIAL OFFER FOR A PLEA AGREEMENT;**
- **SHE WENT TO TRIAL FOR REASONS UNRELATED TO FACTUAL GUILT OR TO PRESERVE PRETRIAL ISSUES FOR FURTHER REVIEW.**

(1) *Introduction.*

The Presentence Report (PSR) concludes that Ms. Graham is not entitled to a downward adjustment for acceptance of responsibility under USSG §3E1.1. (PSR page 15, ¶¶42-44). This conclusion rests on three grounds: i) that Ms. Graham obstructed justice; ii) that she was offered a plea agreement for second degree murder within the pretrial plea agreement deadline but rejected it; and iii) that in any case Ms. Graham did not go to trial to assert and preserve issues unrelated to factual guilt. The last point and the first point are matters specifically addressed by the Application Notes to §3E1.1. (*See* USSG §3E1.1, App. n. 2 and n. 4, respectively).

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(B) DID GRAHAM OBSTRUCT JUSTICE UNDER USSG §3C1.1?

(1) *Contextual Background.*

Ms. Graham states and the evidence confirms that she pushed Mr. Johnson off the ledge on Sunday evening July 7, 2013. On Wednesday evening July 10, 2013 about 72 hours after Mr. Johnson's death Graham took family and friends to the Loop at Glacier Park where Mr. Johnson's body would be found the next day. The only reason Mr. Johnson's remains were not discovered on the evening of the 10th is because it got too dark to continue the search. However by July 11th efforts to recover Mr. Johnson's body were well underway.

On July 8, 2013 Graham told Kalispell Police Officer Chad Zimmerman that Mr. Johnson had left the area in an unfamiliar dark car, which was consistent with what Graham had been telling her friends and family. Graham likewise had meetings with Kalispell Police Detectives Corey Clark and Melissa Smith on July 10th where she repeated the same false story; and on Friday, July 12, 2013 Graham told Glacier Park Rangers Donna Adams and Steven Powers that Mr. Johnson was at the area of the Park known as "the Loop" because it was a place he wanted to see before he died. However, on July 16th, 2013 Graham told FBI Agent Smiedala in a recorded statement that she was on the ledge with Mr. Johnson and abruptly pushed him from it when Mr. Johnson made a grabbing motion toward her. Thus

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the question presented here is whether Graham's false statements warrant the 2 point upward adjustment for obstruction of justice.

(2) *To Impose The Obstruction Adjustment The False Statements Must Have Resulted In A Significant Hindrance To The Investigation Or To Defendant's Prosecution*.

The two level adjustment for obstruction is not warranted unless the false statement(s) served to significantly hinder the investigation or the defendant's prosecution. *United States v. Solano-Godines*, 120 F.3d 957, 963 (9th Cir. 1997); *United States v. Benitez*, 34 F.3d 1489, 1497 n. 6 (9th Cir 1994). *Also see, United States v. Shriver*, 967 F.2d 572, 575 (11th Cir. 1992) (following rule that false statements must significantly obstruct or impede the official investigation and collecting cases from the 1st, 6th, 7th and 10th Circuits).

Standing alone unsworn falsehoods do not furnish a basis for the obstruction adjustment. (*See* USSG §3C1.1, App. n. 5(B): listing "making false statements, not under oath, to law enforcement officers . . ." as an example of conduct that generally does not warrant application of the obstruction adjustment). Furthermore, because defendant's statements to the Kalispell police occurred prior to the start of the federal investigation there must also be proof that the conduct was "likely, to thwart the prosecution of the offense of conviction." (*See* App. n. 1, ¶2, USSG ¶3C1.1). *Cf. United States v. Luca*, 183 F.3d 1018, 1022 (9th Cir.

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1999) (the focus of the obstruction adjustment addresses the effect of the conduct rather than the level of the law enforcement obstructed). In fact the *Luca* interpretation was effectively codified by the Sentencing Commission through promulgation of Amendment 693 to USSG §3C1.1 in 2006, which added a new Application Note 1. The evidence fails to satisfy that "likely, to thwart" test. *United States v. O'Dell*, 204 F.3d 829, 836 (8th Cir. 2000) (government bears burden of proof on adjustment for obstruction of justice).

Consider for example a relevant portion of Detective Smith's trial testimony concerning the involvement of the Kalispell Police Department and its missing person investigation:

> Q Defense Counsel
> A Detective Melissa Diane Smith
>
> Q And when she exited the room at the conclusion of the interview, I guess after you went back and talked to Detective Clarke so you could dismiss her, were you satisfied that you had gotten the whole story?
>
> A I felt as if there were still some information missing. However, at the time, I was investigating a missing persons case, and I was treating it as such, so I didn't feel like keeping Ms. Graham for any further amount of time would be beneficial.
>
> Q So you do have boundaries? I mean, you have limitations and other cases you have to work on; is that what you're saying?

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A Not necessarily, no. That's -- I was just at the point where I didn't feel like keeping Ms. Graham and questioning her further would be beneficial.

Q All right. So you had exhausted it up to that point, and what was going to happen was going to happen. Maybe more would happen? Maybe it wouldn't?

A Correct.

Q Did you have any personal contact with Agent Smiedala before he arrived at the Kalispell Police Department?

A No, not prior to his arrival.

Q So that would have been six days hence. If this was the 10th that you talked to Jordan on the interview we just saw –

A Um-hmm.

Q – it was six days down the road, correct?

A That's correct, yes.

Q And was there any information that you provided to the United States government in the way of background that may have been funneled ultimately to Agent Smiedala?

A I did share my portion of the case report, my involvement and my interview with Ms. Graham, with Special Agent Steve Liss.

Q And – but you don't know what happened from there?

A I know the information was relayed. I can't recall exactly how.

Q It was relayed to Agent Liss, or are you talking about Agent Smiedala?

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A To both Agent Liss and Smiedala.

Q So at least your phase of the interview got to the FBI?

A That's correct.

Q Do you know if Detective Clarke's portion did or Zimmerman's did?

A I believe so, but I can't say for sure.

. . . .

Q Um-hmm. Now did you maintain some kind of pulse or stay connected to the investigation over the ensuing days here? And I'm talking about 11, 12, 13, up through 16 of July.

A I was aware of some of the investigation that was going on afterwards.

Q Did you know or did you learn, as part of that, that Mr. Johnson had been found at the bottom of the ravine?

A Yes, I had learned that.

Q And did you likewise know that Ms. Graham was involved in locating Mr. Johnson?

A Yes, I had heard that.

Q Did that surprise you?

A Somewhat.

Q How so?

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A *I, based on my interview with Ms. Graham, I believed she was being deceptive with me, and I would say that in a situation like this, I felt it was highly unusual that a person's wife would be the one to find them in such a remote location.*

Q So you actually took it, the information, that is, that Mr. Johnson had been found, and Ms. Graham was a party to that finding, as that she just lucked out and found him?

A I'm not -- are you asking if I thought she lucked out and found him?

Q Yes, ma'am.

A No, I didn't think she had lucked out.

Q All right. So is it safe to assume that when you found out that Mr. Johnson was at the bottom of the ravine and Jordan had essentially taken people to the body, that was something she knew when she was sitting in that room with you on July 10.

A That was the conclusion that I came up with, yes.

Q All right. And something that she had not revealed.

A That's correct.

Q So that, it may have been not exactly the way you conceived it, what her deception might have been when she was with you, but you felt sort of vindicated or right that she had disclosed this body and knew more than she had disclosed to you?

A Are you asking me if I thought she -- if I feel like she knew more than what she disclosed to me?

Q Yes, ma'am.

A Yes.

Q And so it fit. The disclosure came. What was it; the very next day, right?

A Yes, um-hmm.

(Trial trans. of Det. Melissa Smith, p. 119, lns. 2 through p. 120, line 20 and p. 122, ln. 10 through p. 124, line 5 (emphasis added))

As this testimony illustrates the Kalispell Police sensed on July 10th that defendant was not telling the whole story, as did Sergeant Zimmerman on July 8th. And more important when Detective Smith found out that Ms. Graham disclosed the location of Mr. Johnson's remains on July 11th her suspicions were heightened, not dispelled. Furthermore defendant's disclosure of the location of her husband's body led to discovery of the video-cam photo showing that defendant and her husband had entered the Park together on the evening of July 7th. A photo that FBI Agent Smiedala used to good effect by telling defendant during her interview that he "knew" that she was in the Park that night. To this extent this case resembles *Solano-Godines*, *supra*, which observed:

> Finally, Solano's story that he was Jose Armando Gonzalez and that he had been released from prison did not hinder the inspectors' investigation. To the contrary, this story seems to have prompted the inspectors to make some phone calls to the California Department of Corrections which confirmed that Jose Armando Gonzalez was still in prison and that Solano was lying about his identity. The inspectors

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> then confronted Solano with this information, and Solano confessed shortly thereafter.
>
> *Solano-Godines*, 120 F.3d at 964

Like the defendant in *Solano-Godines* all of the Kalispell officers who questioned defendant, at a minimum, had suspicions that defendant's story was incomplete or somewhat implausible. For example, like Detective Smith, Detective Corey Clarke continued his investigation despite defendant's statements to him, including the one described in paragraphs 18 and 19 of the PSR regarding the false e-mail which suggested that "Tony" had knowledge of what had happened to Mr. Johnson:

> Q Government counsel
> A Detective Corey Clarke
>
> Q And did you conduct some further investigation as part of trying to figure out what happened to Cody?
>
> A In regards to this e-mail, yes, I did.
>
> Q And what was that?
>
> A In speaking with Jordan at the time, obviously trying to find out as much as I could about where her husband may have been, I obviously wanted to find out who this carmantony is and why he would have information detailing this.

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Jordan had, I believe it was, either one or two persons who she thought may be, in fact, Tony S., and after consultation with Lindy, as well as her father, I believe there was a Tony Stallcup who was -- who knew Cody, was a car person with Cody, and obviously the initials, Tony Stallcup, Tony S., matched.

Q So you obtained this from that videotaped interview, the Tony Stallcup name.

A That is correct.

Q What did you do with that information?

A From speaking with Jordan and Lindy once again in the interview room, I was able to procure a phone number for Tony Stallcup as he is a -- I believe he worked at Applied Materials with Steve Rutledge.

Q Did you get a hold of him and talk to him on the phone?

A I did, and he also came in for an interview.

Q And based on those discussions with Tony Stallcup, did you continue to investigate him as somehow related, or did you determine he would not be investigated?

A In speaking with Tony, I determined he would not be investigated any further. He was very forthcoming. He wanted to do whatever he could. He was willing to do basically anything that we asked to ensure that, No. 1, Cody could be found, and, No. 2, obviously he stated he had nothing to do with it, had never had an e-mail by the name of carmantony. He told me – he showed me the e-mail address that he does have. I informed him that I would be subpoenaing records from Google and that we would find out where it came from if those were successful, if that subpoena was successful, and he said, you know, "Good. I hope you do, because it's not going to be

mine." I just felt fairly confident that he didn't have anything to do with it.

Q So you eliminated Tony Stallcup as a suspect.

A That is correct.

Q All right. But you continued your work in this investigation, right?

A Yes, I did.

Q And as I understand it, you actually did a trash pull.

A Yes.

Q What is a trash pull?

A When a person leaves your garbage can out at the street, as long as it's not on the -- within the property boundaries of your property, it's considered abandoned property. You would be surprised to find that if someone is going through your trash at that point, there's nothing wrong with it. If you keep it on your property, it's still yours.

But I – it just so happened I lived probably three blocks away from Jordan's residence, and I think –

Q July 11?

A July 11 was the date. I had had a little more input, thought about the case, and I was taking my dog for a walk up in the area. Came across a trash container that was out in the street, one of those black ones that kind of stands up tall like this that the garbage machine can come pick up. The lid was open, as I walked by, and I noticed some items that I thought were very strange items to be found in the trash. One in particular –

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Q Wait a minute. What address were you at?

A 62 – I can't recall exactly – was it Haven Drive?

Q Were you at Jordan's house?

A I was.

Q And is this where her folks live?

A No. This was at the duplex that she had shared with Cody.

(Trial trans. of Det. Corey Clarke, p. 10, ln. 8 through p. 13, line 4)

Bearing in mind that the focus of the obstruction adjustment "addresses the effect of the obstructive conduct rather than the level of law enforcement that was obstructed" (*see United States v. Luca*, 183 F.3d 1018, 1022 (9th Cir. 1999)) another exchange near the end of Detective Clarke's cross-examination is also significant:

Q Defense Counsel
A Detective Corey Clarke

Q Now when you went to collect the trash, did you know that Mr. Johnson's body had been discovered or what they suspected to be Mr. Johnson's body –

A No, I did not.

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Q – at that point in time?

So you were working on the strength of the information that you had collected in your interview and Detective Smith's interview and Sergeant Zimmerman's interview?

A That, and there was, I believe, if my timeline is correct – and this would have been just supposition coming from Ms. Blasdel, I believe.

Q All right. So other people you may have interviewed or spoke to?

A Yes.

Q But in any case, there was – you had some concerns as an investigator about the narrative that Jordan had given you, and we've seen that, that interview, that taped interview. So was your mindset connected to the collection of this trash?

A Can you say that differently?

Q Sure, I can do that.

In other words, you had apparently spoken to other people, correct?

A Correct.

Q You had talked to Jordan, correct?

A Correct.

Q And you were frank with her and told her, "You know, I'm not really understanding this. There is stuff not adding up here. You know, he's missing. You don't seem very concerned. Your emotion is not appropriate to the context," that sort of thing.

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A Yes.

Q So you had a lot of questions in your mind, right?

A I did.

Q And I guess that's what I'm asking. The questions in your mind, is that prompting the look in the trash?

A Yes.

Q All right. Fair enough.

(Trial trans. of Det. Corey Clarke, p. 33, ln. 23 through p. 42, line 17)

Defendant's false statements did not serve to thwart the Kalispell investigation as the Guideline Commentary to USSG §3C1.1 requires. Under that commentary any obstructive conduct that occurred prior to the start of the investigation of the instant offense of conviction must be of such a nature as "likely, to thwart the investigation or prosecution of the offense of conviction." (*See* USSG §3C1.1, App. n. 1, ¶2). Considering that Mr. Johnson's friends were reporting their concerns to the Kalispell Police (*see* PSR ¶17); together with the fact that defendant impeached her own false narrative by leading others to the location of Mr. Johnson's remains, defendant's obstructive conduct was neither likely to, nor did it in fact, "thwart" the government's homicide investigation.

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Moreover, "[W]ithout some nexus between the obstruction and the federal offense USSG §3C1.1 is inapplicable." *United States v. Jenkins*, 275 F.3d 283, 289 (3rd Cir. 2001), *citing and agreeing with* the Ninth Circuit's *Luca* decision that "the governing standard is the 'effect of the obstructive conduct' . . ." *Id*.

At trial Sergeant Zimmerman testified that although he was not inclined to consider defendant's story during defendant's July 8th interview as completely untrue, he did testify that "[t]here were signs that [defendant] was giving me *that were obvious* that not the entire story was true and she was very uncomfortable in telling it" (Trial trans. Sgt. Zimmerman, p. 42, lns. 23-25) (emphasis added). And as is typical of good law enforcement Sergeant Zimmerman gently but firmly appealed to defendant's conscience in order to remind her that she had an obligation to tell the truth.

> SERGEANT ZIMMERMAN: And if, in fact, he's not okay, then we need to investigate that properly. I'm getting some inconsistencies in what you're telling me with other information that I've already gathered, okay?
>
> MS. GRAHAM: Um-hmm.
>
> SERGEANT ZIMMERMAN: And I've spoke to a few people, and it's important that I know that you're telling me the truth on things, okay? And I've been doing this for a long, long time, and I'm really good at picking up on when people are telling me truth, telling me part truth, telling me not truth at all, okay?

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MS. GRAHAM: (Nodded head affirmatively.)

SERGEANT ZIMMERMAN: And I need for you to understand how important it is that you're honest with me, okay, because right now I'm getting the feeling that you're not being a hundred percent honest with me.

MS. GRAHAM: Okay. I'm telling you what I know. I mean –

SERGEANT ZIMMERMAN: Well, and I understand, I understand that, okay, but I think that there's more.

MS. GRAHAM: Like what?

SERGEANT ZIMMERMAN: That's what I need you to tell me.

MS. GRAHAM: I don't know anything more, any whereabouts or anything, where he would have gone. I don't -- I said where I thought, and that's what I think.

SERGEANT ZIMMERMAN: Okay.

(Trial trans. of Sgt. Zimmerman, p. 30, ln. 7 through p. 31, ln. 10)

Subsequent to Sergeant Zimmerman's interview on July 8th defendant did three things on July 10th that only served to reenforce Sergeant Zimmerman's impression that defendant knew more than she was telling. First, defendant contrived the e-mail, second she admitted to Detectives Clarke and Smith that she deceived Sergeant Zimmerman by failing to tell him about the quarrel with her husband; and third she visited the Loop with family and friends. All of these actions are equally important and warrant careful consideration but for slightly

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different reasons. The e-mail, which is quoted in ¶18 of the PSR states:

> Hello Jordan, My name in [*sic*] Tony. There is no bother in looking for Cody anymore. He is gone. I saw your post on twitter and thought I would email you. He had come with some buddies and met up with me on Sunday night in Columbia Falls. He was saying he needed to be with buddies for a bit and take them for a joy ride before they had to go. So he said bye to me and they took off in a black car for a ride. 3 of the other guys came back saying they had gone for a ride in the woods somewhere and Cody got out of the car and went for a little hike and they are positive he fell and he is dead Jordan. I don't know who the guys were but they took off. So call off the missing person report. Cody is gone for sure gone. Tony.
>
> PSR p. 7, ¶18

Defendant's fabrication of this e-mail and her disclosure of it to Detective Clarke is the emerging cry of defendant's conscience. Even allowing for the fact that the e-mail's apparent purpose was to "call off the missing persons report" the more important aspect for determining the obstruction adjustment is the disclosure that "they had gone for a ride in the woods somewhere and Cody got out of the car and went for a little hike and they are positive he fell and is dead Jordan." Confronted with this additional evidence Detective Clarke, like Sergeant Zimmerman, remained unconvinced that defendant was telling him the whole story, even for reasons that had little or nothing to do with the fake e-mail.

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First, Detective Clarke was able to establish that defendant had deceived Sergeant Zimmerman by failing to tell him that she and Mr. Johnson had argued. Second, it was concerning that the text that defendant had supposedly received from Mr. Johnson on the night of July 7th, stating he was joyriding with his buddies, had been erased from defendant's phone and probably from Mr. Johnson's phone as well. Moreover, Detective Clarke perceptively recognized that in the text that defendant said she received from Mr. Johnson he supposedly said that he was going on a "joyride" with his buddies, which closely tracked the language of the e-mail that defendant had faked and brought to Detective Clarke that day.[1]

Next without doing anything further investigatively Detective Clarke enlisted the aid of his fellow detective, Melissa Smith, to join in questioning the defendant. At that point the focus of the investigation shifted even before defendant left the police station:

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[1] At pages 40-41 of the July 10th interview Detective Clarke questioned use of the word "joyride" asking "Does it seem like a strange thing to say . . . [i]s that a term he uses, 'joyride'". (Trial trans. of Det. Melissa Smith, p. 40, ln. 24 through p. 41, ln. 3).

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DETECTIVE SMITH: Hey, Jordan. I'm Detective Smith, and I wanted to chat with you a little bit, too. I know you've been talking with Corey all morning and that you've given him a little bit more information than what you did Officer Zimmerman last night about what happened on Sunday with you and Cody.

MS. GRAHAM: Um-hmm.

DETECTIVE CLARKE: She had said that -- I don't want to interject.

DETECTIVE SMITH: No, no, that's fine.

DETECTIVE CLARKE: But she, she said that in speaking with -- well, go ahead and just tell her what -- how your interaction was with the officer, the first officer.

MS. GRAHAM: Well, he had kind of just told me that he didn't think that I was telling everything I knew or that, from previous information he had heard, that he didn't think that I told him what I knew. But I did tell him -- I didn't tell him about the fight. Cody always told me, when we got into a fight, "Don't go to anybody," so I was afraid to say about the fight just in case he was okay and he'd find out that I said anything. I didn't know what would happen.

DETECTIVE SMITH: Okay.

MS. GRAHAM: So I was scared to tell him that, that we did have a fight.

DETECTIVE SMITH: Okay.

MS. GRAHAM: And so I didn't.

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DETECTIVE SMITH: You know, before I start talking to you, because we're looking at a situation where there might be some foul play with Cody being missing, before I talk to you, I want to go ahead and advise you of your rights, okay? So I'm just going to read this, and listen. If you have any questions, then I'll answer them at the end, okay?

So you have the right to remain silent. Anything you say can and may be used against you in a court of law. You have the right to talk to a lawyer and have him or her present with you while you're being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

Do you understand each of these rights as I have explained them to you?

MS. GRAHAM: Yes.

DETECTIVE SMITH: Okay, Jordan. And having these rights in mind, do you wish to talk to me now?

MS. GRAHAM: Yes, I will.

DETECTIVE SMITH: Okay. So what I'll have you do is just sign here. You can read over it. Sign and then print your name underneath.

MS. GRAHAM: (Complied with request.)

DETECTIVE SMITH: Thank you.
It's about noon on the 10th.

(Trial trans. of Det. Melissa Smith, p. 60, ln. 9 through p. 62, ln. 17)

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Although intended to deflect suspicion away from her, defendant's sessions with Kalispell law enforcement had the opposite effect. Through a consistent series of conflicting disclosures, including two return visits to the Loop, the experienced Kalispell officers realized the possibility they had something more substantial than a missing person investigation on their hands. Stated otherwise, defendant's words and deeds immediately following the events at the Loop on July 7th were never "likely, to thwart the [upcoming federal homicide] investigation." *Cf. United States v. Yip*, 592 F.3d 1035, 1042 n. 4 (9th Cir. 2010) (noting that the addition of the "likely, to thwart" language in Application n. 1 to USSG §3C1.1 represents a substantive change to the Guideline). Thus by the time Agent Smiedala met with the defendant at the Kalispell Police Station on July 16th he was armed with the following facts:

- defendant had deceived Sergeant Zimmerman by failing to tell him that she had argued with her husband;

- not only had defendant brought a highly suspicious email to the police station with the preposterous expectation that the missing person's investigation might be called off, simple follow-up investigation by the Kalispell police showed both that the alleged sender "Tony" never sent the e-mail and that in fact the e-mail originated from a computer in defendant's parent's home;

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- that although defendant had consistently denied knowledge of Mr. Johnson's whereabouts she visited the scene of the crime twice over back-to-back days and on the second day led her brother to the exact location of Mr. Johnson's remains;

- that the video-cam stationed at the entrance of Glacier National Park conclusively showed that defendant was at the Park with her husband on the night of July 7th.

Defendant's confession to Agent Smiedala was ironically as much a clarification of her previous distorted statements to the Kalispell Police as it was an accurate admission of guilt. Yes, Mr. Johnson had gone for a ride, however not with others but with the defendant. And, after the ride there was a brief hike where defendant fell and died; and most important the Sunday evening trip to the Loop, and defendant's act of abruptly pushing Mr. Johnson off the ledge to his death, were contextually tied to a heated discussion where both defendant's and Mr. Johnson's emotions were running high. (*i.e.* defendant's argument with her husband that defendant revealed to Detective Clarke but concealed from Sergeant Zimmerman). In other words, the Kalispell police effectively served as a sort of midwife for defendant's inevitable confession. Agent Smiedala didn't even have to administer the polygraph exam requested by Agent Liss.

Defendant's false statements did not thwart the federal investigation by her interactions with the Kalispell police between July 8th and July 10th. They were an

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important catalyst in bringing the federal investigation to a sound and quick conclusion. Driven by guilt, shame and fear of punishment defendant no doubt sought to mislead the Kalispell police. However embedded within her false narrative were pieces of the truth that the defendant would ultimately reveal to Agent Smiedala in pursuit of catharsis. A point that is clearly addressed in the closing moments of defendant's confession to the FBI:

> SA Smiedala: Okay. I, I appreciate you coming in and being truthful with me. I know that, you know earlier when we talked you felt a little emotional and you cried a little bit, okay.
>
> Jordan Graham: Uh huh
>
> SA Smiedala: Um, and obviously that was, because I am assuming because of the situation
>
> Jordan Graham: Uh huh
>
> SA Smiedala: Is that correct?
>
> Jordan Graham: Yeah. I have been trying to hold everything in and not cry, so . . .
>
> SA Smiedala: Okay. And how do you feel now that you have gotten all of this off of your back?
>
> Jordan Graham: I feel a million times better that I don't have to just hold it in anymore.

(Transcript of First Interview by SA Smiedala of Jordan Graham at pages 18-19 (Doc. #59-1, Addendum pages 92-93))

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Courts and commentators alike have recognized this common phenomena. For example Wigmore notes that:

> . . . a guilty person is often ready and desirous to confess, as soon as he is detected and arrested. This psychological truth, well known to all criminal trial judges, seems to be ignored by some supreme courts. The nervous pressure of guilt is enormous; the load of the deed done is heavy; the fear of detection fills the consciousness; and when detection comes, the pressure is relieved; and the deep sense of relief makes confession a satisfaction. At that moment, he will tell all, and tell it truly.
>
> 3 J. Wigmore, Evidence § 824 at 524-525 (Chadbourn rev. 1970) (notes omitted)

Also see, People v. Anderson, 101 Cal.App.3d 563, 584 n. 3 (Cal. App. 2 Dist. 1980):

> The need to rid oneself of this burden of guilt is so overwhelming that criminals often provide unconscious clues which reveal themselves as the perpetrators of crime. *A criminal will feel compelled to talk about the crime, to return to the scene of the crime, to seek out the police to mislead them with false information, or to drop broad hints about his secret knowledge of the crime . . .*
>
> (emphasis added)

For these reasons defendant's objection to the obstruction of justice adjustment should be sustained.

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(C) WHETHER GRAHAM'S REJECTION OF A PRETRIAL PLEA AGREEMENT IS AN ADEQUATE REASON TO DENY AN ACCEPTANCE OF RESPONSIBILITY ADJUSTMENT.

(1) *Is Graham's Rejection Of The Government's Pretrial Offer For A Plea To 2nd Degree Murder Sufficient To Deny An Acceptance Of Responsibility Adjustment?*

Whether a defendant previously rejected a plea agreement for a charge which she was ultimately convicted of at trial or pled guilty to is not addressed in the guidelines. Plea agreements are generally discussed in the guidelines under USSG Chapter 6, Part B; but there is nothing in those Guidelines, or the acceptance of responsibility Guideline, which expressly states that defendant's failure to accept a pretrial plea agreement can serve *ipso facto* to deny a downward adjustment for acceptance. Yet since rejection of such an agreement could be considered cognate to the decision to go to trial, the following discussion proceeds on that assumption.

At paragraph 44 the PSR recites that defendant rejected a pretrial plea agreement to 2nd degree murder. Then it goes on to state that defendant accepted that same previously rejected plea agreement "at a late stage of her trial." For the reasons set forth below we urge the Court to reject this analysis.

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Although the docket in this case discloses that the parties engaged in pretrial plea discussions (Doc. #118) there is nothing of record that speaks to the nature of those negotiations. Thus the accuracy of PSR ¶44 is immediately called into question. Without confirming or denying ¶44's assertion, there is simply no evidence that what the government may or may not have offered before the trial as a "plea agreement" is the same "plea agreement" that defendant accepted at the conclusion of the evidence. Furthermore to resolve that fundamental issue would necessarily involve matters covered by Federal Rule of Evidence 410 and by extension the attorney-client privilege, which we hasten to add is fully operative during all stages of any proceeding, including the sentencing phase of this case. (*See* Fed. R. Evid., Rule 1101(c)).

Yet the more troubling aspect of ¶44 is its insinuation that defendant should be held accountable for not resolving the case by guilty plea sooner than she did. Although somewhat non-obvious this suggestion presupposes that the government's decision to offer a plea agreement at the close of the evidence was simply a benevolent gesture without regard for the government's assessment of the evidence presented. In other words, that the government had every confidence that the jury would convict for 1st degree murder and further that conviction would have undoubtedly withstood the rigors of direct appeal and perhaps *certiorari* to

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the United States Supreme Court. However even assuming without conceding that generosity proved to be the government's actual motive for defendant's oral plea agreement, it would be a mistake for the Court to consider that a worthy point in calculating defendant's Guideline range.

Defendant's admission that she acted with the extreme recklessness does not warrant the assumption that defendant would have inevitably been convicted by the jury of 1st degree murder. Granted, on the record as it stands the Court was prepared to instruct on 1st degree and defendant may have suffered a conviction for the greater offense with its consequent mandatory life sentence. *See United States v. LaFleur*, 971 F.2d 200 (9th Cir. 1991). However, it is equally clear that the record likewise justified jury instructions and vigorous argument that the defendant was only guilty of a lesser included offense, *e.g.* voluntary/involuntary manslaughter. Thus the parties' respective waivers of the opportunity to convince the jury that defendant was guilty of a greater or a lesser offense only serves to accentuate the importance of a correct guideline calculation in this case. In other words the elements of premeditation and/or mitigated homicide have been eliminated from the process of calculating the applicable Guideline by virtue of the parties plea agreement. *Cf. Alleyne v. United States*, 133 S.Ct. 2151, 2155 (2013) (facts that require mandatory minimum sentence are elements and must

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either be admitted or alleged and proved beyond a reasonable doubt); *and Braxton v. United States*, 500 U.S. 344 (1991) (Guidelines allow sentence to be that which applies to more serious offense when a stipulation establishes a greater offense).

It would be just as wrong to sentence the defendant on the assumption that the government would have secured a verdict for 1st degree murder, as it would for defendant to argue that she is guilty of a lesser crime and pled guilty only to remove the possibility of a 1st degree verdict and its mandatory life sentence. Such arguments would implicate privileged attorney-client communications and/or work product on both sides. Speculation on either party's motive for the plea agreement or what the verdict may have been have no place in the formulation of defendant's guideline range. *United States v. England*, 555 F.3d 616, 622 (7th Cir. 2009) (due process requires that sentencing determinations based on reliable evidence, not speculation or unfounded allegations). Hence such speculation should not be used to deny the defendant an acceptance of responsibility adjustment.

(D) DID DEFENDANT PRESERVE ANY PRETRIAL ISSUES THAT DID NOT RELATE TO HER FACTUAL GUILT.

In addition ¶44 also asserts that it does not appear that defendant went to trial to preserve issues that did not relate to her factual guilt or to challenge the applicability of the statute to her conduct. This is erroneous. Had the case been

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argued and an unfavorable verdict reached defendant had preserved several claims for review by the Ninth Circuit that either did not relate to her factual guilt and/or suggested that she could not be held accountable for 1st degree murder (*see e.g.* Docs. #59 and #76). Furthermore, during the course of the trial defendant carefully preserved her claim under Rule 29 Fed. R. Crim. P. that the evidence was insufficient to convict on the greater charge. We recognize that the Court overruled the point by indicating that it intended to instruct on 1st degree; but that does not alter the fact that sufficiency of the evidence is a constitutional claim in its own right and defendant was therefore entitled to secure the Court's ruling on that subject to preserve it for further review. Thus between her pretrial claims and the claims she preserved during trial defendant raised both issues unrelated to her factual guilt and a question regarding the applicability of the 1st degree murder statute to her conduct.

(E) CONCLUSIONS ON THE OBSTRUCTION AND ACCEPTANCE OF RESPONSIBILITY ISSUES.

(1) *The Government's Proof Does Not Show Obstruction and the Adjustment Ought to Be Denied.*

For the foregoing reasons defendant's objection to the obstruction adjustment ought to be sustained. Defendant's voluntary interviews with the Kalispell police served to advance not thwart the government's investigation and

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likewise the government's bringing of this prosecution.

(2) *Even If Defendant's Objection to Obstruction Is Not Sustained Defendant Should Nevertheless Be Awarded a 2 Point Acceptance of Responsibility Adjustment.*

Application Note 4 to USSG §3E1.1 allows that there may be extraordinary cases where both §3C1.1 and §3E1.1 may apply. If the Court denies defendant's obstruction adjustment objection the Court should consider this such an extraordinary case. To the extent Application Note 2 suggests that acceptance of responsibility must be demonstrated by pre-trial statements and conduct, defendant cites her statement to Agent Stacey Smiedala on July 16, 2013. *See* PSR ¶¶ 26-29. The content of that statement has been addressed at length in pretrial briefing and trial testimony.

III. DEFENDANT'S OTHER OBJECTIONS

Defendant's remaining objections are set forth in the Addendum to the PSR at pages 4 and 5. We relist them here with some additional argument in order to facilitate further discussion at the sentencing hearing. Most of these objections will not affect the calculation of defendant's Guideline range but they may impact the Court's overall sentencing discretion.

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(A) Defendant's Objection Number Three:

Paragraphs 31-36: The government and the defense submitted nearly four days of trial testimony and exhibits. The Facebook entries described in these paragraphs were not presented at trial probably because they do not relate to any issue in the case. They are irrelevant, cumulative, and prejudicial. Inclusion of these paragraphs in the PSR is unnecessary and strains even the exceptionally broad definition of relevant conduct, see USSG. §1B1.3.

(B) Defendant's Objection Number Four:

Paragraph 37: Defense counsel advised they do not believe restitution is warranted in this case and do not believe the National Park Service is a victim pursuant to 18 U.S.C. § 3663A or any other provision of law. There is no legal basis for the restitution requested. 18 U.S.C. §§3663 and 3663A limit the payment of restitution to the "victim" of the offense, or the victim's estate. The nearly $17,000 requested as restitution in a criminal case includes the cost of using a helicopter to recover the body, supplies and equipment, and overtime and hazard pay for National Park Service employees. None of these requested funds – payable to government entities and agencies – relate in any way to the victim of the offense or the victim's estate.

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(C) Defendant's Objection Number Five:

Paragraph 45: There is nothing inconsistent between Jordan's claim of an accident and an admission of extreme recklessness. This paragraph should be stricken. In a decision entitled *United States v. Paul*, 37 F.3d 496 (9th Cir. 1994) an issue arose concerning the mental state requirements for voluntary and involuntary manslaughter. In resolving this issue the Court set forth the following language in footnote 1:

> In *Quintero,* the court described "intent without malice" as "the defining characteristic of voluntary manslaughter." 21 F.3d at 890. Any suggestion in *Quintero* that intent to kill is a *necessary* element of voluntary manslaughter is dicta. While most voluntary manslaughter cases involve intent to kill, *it is possible that a defendant who killed unintentionally but recklessly with extreme disregard for human life* may have acted in the heat of passion with adequate provocation. *See Browner,* 889 F.2d at 552; Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 7.10, at 653 (2d ed. 1986). In such a case, the defendant would be guilty of voluntary manslaughter, not murder. Otherwise, a defendant who killed in the heat of passion with intent to kill would only be liable for voluntary manslaughter, whereas a defendant who killed in the heat of passion *without* intent to kill, but acted recklessly with extreme disregard for human life (*e.g.,* shoots at victim to frighten, not kill), would still be liable for murder.

United States v. Paul, 37 F.3d at 499 n. 1 (first emphasis added)

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We bring this brief discussion by the Panel in the *Paul* case to the Court's attention because it serves to highlight that acting recklessly but with extreme disregard for human life is classified as an "unintentional" killing, which reenforces the defendant's argument that Mr. Johnson's death was nevertheless an accident.

(D) Defendant's Objection Number Six:

Paragraphs 72-73: These paragraphs should be removed from the final PSR. As noted, Ms. Tesar was hired to provide pretrial mental health services. She did not perform a mental health evaluation. "Shallow" and "entitled" are not mental health diagnoses; and in any case Jordan was expected to talk about herself. Furthermore being shallow and entitled could apply to many, many American 22 year olds. Ms. Tesar's opinion regarding a psychological evaluation is both factually and legally irrelevant since she was neither requested to prepare an evaluation nor did she ever explain to Jordan that she was conducting an evaluation.

If it was the purpose of the pretrial condition to determine that an evaluation was necessary that point should have been disclosed to Ms. Graham before the condition was implemented. Ms. Graham has not raised the issue of competence and has not raised any mental status defense. Furthermore as a constitutional

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matter defendant maintains her Fifth Amendment rights in this context. *See Kansas v. Cheever,* 134 S. Ct. 596 (2013). Settled law makes clear that had defendant displayed indications of incompetence defense counsel would have been obliged to make the Court aware of that. *See e.g. United States v. Clark*, 617 F.2d 180, 186 n. 11 *and accompanying text* (9th Cir. 1980). Nor were there ever any indications that defendant should consider defending based on an insanity theory.

IV. THE GOVERNMENT'S OUTSTANDING OBJECTION REGARDING USSG 3B1.4

A. USSG § 3B1.4 does not apply.

USSG § 3B1.4 is infrequently applied in the Ninth Circuit and the cases in which it has been applied are on much different footing. The enhancement typically requires a degree of conscious and intentional exploitation of the minor's status as a minor in the commission of an offense. See, e.g., *United States v. Castro-Hernandez*, 258 F.3d 1057 (9th Cir. 2001); *United States v. Garcia*, 497 F.3d 964 (9th Cir. 2007); *United States v. Salcido-Corrales*, 249 F.3d 1151 (9th Cir. 2001); see also *United States v. Allen*, 341 F.3d 870 (9th Cir. 2003)(Neo-Nazi defendants recruited minors to harass minorities because minors less likely to suffer criminal consequences). Such a degree of conscious and intentional exploitation of M.R.'s minor status is not present here.

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There is no factual basis for the enhancement. Ms. Graham did not use her younger brother to assist in avoiding detection of, or apprehension for, her offense. Ms. Graham led a party to Glacier National Park and pointed out the location of Cody Johnson's body on July 11, 2013. Immediately following, Ms. Graham provided a written statement to Park Service Ranger Powers. The government points to a text message exchange between M.A.R. and Levi Blasdel. That exchange occurred four days after Ms. Graham disclosed the location of Mr. Johnson's body. Moreover, Levi Blasdel is not, to his apparent chagrin, a government agent. There is no indication that M.A.R.'s text message to Levi Bladel impacted the investigation in any way.

Most significantly, the statement Ms. Graham directed M.A.R. to provide – "[t]ell them it was the park rangers" that found the body – was not false. At most it was imprecise: she did not go down into the ravine and recover Mr. Johnson's body. In that sense, her understanding was that "park rangers" did locate the body. The statement can credibly be interpreted as an explanation that someone other than Ms. Graham physically recovered Mr. Johnson's body. The statement does not support the enhancement here.

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V. 18 U.S.C. §3353(a) FACTORS

The relevant sentencing factors are set forth in 18 U.S.C. §3553(a)(2), which we address briefly:

(1) ***Nature and Circumstances of the Offense***

The Court having seen the evidence and listened to the witnesses little would be gained by reviewing that again in any detail here. There are however some key points regarding the nature and circumstances of the offense worthy of emphasis.

The "nature" of something involves its essential character. Thus as used in §3553(a) consideration of the nature of the offense is intended to capture its substance or essence. By her guilty plea to second degree murder it has been conclusively established that the defendant committed an extremely reckless but nevertheless unintentional act. Granted, the difference between an extremely reckless act and an intentional one might be considered small; but to acquire a sense of the essence of defendant's conduct, which is the goal here, even small distinctions can make a big difference. Of course it would matter if defendant had acted intentionally because such a conclusion would impact just about every other §3553(a) factor and the Court's overall sentencing discretion.

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In a light most favorable to the government the evidence shows that after they married defendant had second thoughts. Both leading up to the wedding and soon thereafter defendant expressed reservations to her friend, Kim Martinez, that maybe marrying so young wasn't such a good idea. Defendant was then encouraged to talk with her husband about her feelings in order to clear the air. But even with encouragement defendant displayed a reluctance. Understandably she did not want to upset Mr. Johnson. The very thought of such a conversation so soon after a blessed event like a public wedding would give anyone pause. It's often said that to be known is to be loved, but to expose true feelings can likewise be a challenge. According to the evidence this was defendant's emotional condition on the night of July 7th and one that she had confided to her friend Kim Martinez in the days just before.

It is undisputed that Mr. Johnson drove his car to Glacier National Park that night as confirmed by the video-cam photo. (Gov. Ex. 88). Furthermore there is no evidence — and we stress none — that defendant somehow kidnaped Mr. Johnson or otherwise forced him to the Park that night. Also it is implausible to think that Mr. Johnson made his way down to the steep ledge at the bottom of the Loop under anything but his own power. So the setting is complete: i) an unpleasant subject up for discussion; ii) in a newly sealed intimate relationship;

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iii) in a very dangerous place. All the ingredients of a tragedy in the making. The quarrel ensues and/or simmers while the couple walks the dangerous trail. Mr. Johnson makes a physical gesture and defendant likewise reacts in a physical manner. Mr. Johnson falls to his death.

Complicating the case is the fact that defendant does not run for help or contact the authorities. In fact she does the opposite: she lies and conceals. But consider it this way: if in fact defendant intended to kill wouldn't it have been smarter to report the event right away? Although this question is rhetorical mulling it is revealing. Involving the authorities immediately not only would have displayed moral fiber it would have likely minimized or maybe even extinguished all the negative inferences that the government no doubt wants the Court to draw from defendant's post event behavior. However, defendant does provide an explanation:

SA Smiedala:	Okay, okay. Did you, did you tell anybody else what had happened between you and Cody to this day besides me?
Jordan Graham:	No, I have not.
SA Smiedala:	Okay. And you have been interviewed by the police at least multiple times, I don't know exactly how many times, okay, up to this point and you never told them this?

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Jordan Graham: No.

SA Smiedala: Why not?

Jordan Graham: I was afraid that they weren't going to give me a chance to explain things and they were just gonna kind of put me in hand cuffs and take me away right there and say that I had committed a crime or that I had planned this to kill somebody.

SA Smiedala: Okay. But did they tell you they were going to do that or did you just assume that?

Jordan Graham: No. That's just from my assumption. Things that I have . . . television

Transcript of SA Smiedala Interview, Doc. 59-1 at page 87

Fear. Fear of punishment. Fear of not being believed. Fear of facing the inevitable scorn and abusive condemnation that will surely follow. The fear of knowing you had done something terribly wrong and that everyone else will know it. This common human emotion moves many to behave irrationally, inconsistently and yes, even sometimes criminally. It was a crime for defendant not to report her actions with undue haste; but in the days immediately following defendant unconsciously broadcasts a series of clues that were obvious even to the untrained eye. Chief among them being that defendant discloses the location of her dead husband's remains in total contradiction to her previous false statements indicating no knowledge of his whereabouts. "*Grief teaches the steadiest minds to*

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waver." (Sophocles, *Antigone*). If defendant was a cold blooded killer she could have left Mr. Johnson at the bottom of that ravine. He would have likely never been found according to the evidence. This is the nature and these are the circumstances of the offense.

(2) ***History and Characteristics of the Defendant***.

Defendant is a shy, naive 22 year old woman. She was raised in a religious home and is a regular bible reading church goer. Jordan was not allowed to date until age 18. She met Mr. Johnson through friends. She loved his smile and sense of humor and gave him the gift of a special song on their wedding day. Defendant had good grades in school and she loves children. Defendant has no criminal history and does not use alcohol or drugs.

(3) ***Seriousness of the Offense***.

Defendant recognizes and concedes that the offense is by any measure serious. It involves a tragic event that defendant wrongly took flight from. She is worthy of punishment and the shame that will no doubt accompany her for the remainder of her life. Defendant has confided to the undersigned that a day does not go by that she doesn't think of her husband and what might have been. And finally the offense is serious because it involves the taking of a life and the consequent denial of Mr. Johnson's presence to others including, most

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importantly, Mr. Johnson's mother, Sherry.

(4) ***Deterrence and Protection of the Public***.

Defendant respectfully submits that the facts of this case are sufficiently unique such that the factor of general deterrence will not be advanced by the Court's sentence, except perhaps as encouragement for others to face facts and involve the authorities in situations where warranted. Insofar as protection of the public is concerned defendant submits that a sentence of 120 months imprisonment and 5 years of supervised release will satisfy that factor.

(5) ***Promotion of Respect for the Law***.

Defendant's respect for the law has been and will continue to be enhanced by this prosecution. Again, defendant is profoundly sorry that she did not come forward with the truth sooner.

(6) ***Need to Provide Defendant With Education, Training, Medical Care or Other Correctional Treatment.***

This factor does not appear relevant. *United States v. Tapia*, 665 F.3d 1059 (9th Cir. 2011) (it is plain error at sentencing to impose or lengthen a prison sentence to promote an offender's rehabilitation). That said defendant assures the Court that she will take advantage of any prison programs available to her.

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(7) ***The Applicable Guidelines***.

Assuming defendant's objection for the obstruction adjustment is sustained and that she is awarded 2 points for acceptance of responsibility the adjusted offense level is 36. At a criminal history category of I that yields a Guideline Range of 188-235 months. Moreover, no matter what the outcome of defendant's objections defendant prays for a sentence of imprisonment of 120 months with 5 years supervised release to follow.

VI. CONCLUSION

WHEREFORE, defendant prays the Court will consider this memorandum and use the things in it in aid of sentencing.

Respectfully Submitted March 18, 2014.

/s/ Michael Donahoe
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VII. CERTIFICATE OF SERVICE
L.R. 5.2(b)

I hereby certify that on March 18, 2014, a copy of the foregoing document was served on the following persons by the following means:

1 CM-ECF
2 Mail

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