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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 MOTION TO
WITHDRAW GUILTY PLEA FED.
R. CRIM. P. RULE 11(d)(2)(A)
& (B); AMENDMENTS V AND
VI, U.S. CONSTITUTION**

I. MOTION

COMES NOW the defendant and moves to withdraw her guilty plea entered before the Court on December 12, 2013 in Missoula.

GROUNDS

In satisfaction of Rule 47(b) defendant submits this written motion on the following grounds:

- (A) In its oral plea agreement with the defendant the government agreed to dismiss Count I of her Indictment, the 1st degree murder count. Nevertheless in its sentencing papers the government has argued that defendant is in fact a 1st degree offender and should be sentenced as such. Accordingly defendant argues that the government has breached the plea agreement. *Santobello v. New York*, 404 U.S. 257 (1971) (failure of prosecution to keep promise requires either specific performance or permission to withdraw plea). Essentially the government is arguing that the court should reject the plea agreement by asking that defendant be sentenced as a 1st degree offender.

- (B) Even assuming the Court accepted the plea agreement and dismissed Count I there is no way defendant can now be sentenced fairly given that the government has asked the Court to vary upward to a life sentence based on premeditation. By making what should have been its closing argument to the jury in its sentencing papers the government has furnished a “fair and just reason” to support defendant’s request to withdraw her plea. *See* Rule 11 Fed. R. Crim. P., Rule 11(d)(2)(B). If defendant is going to be sentenced to life on the basis of the government’s argument that should be by jury verdict not irrelevant sentencing factors. *See Braxton v. United States*, 500 U.S. 344, 111 S.Ct. 1854 (1991) (absent stipulation to the greater offense defendant could not be sentenced as if he had an intent to kill); *also see United States v. Hanson*, 264 F.3d 988 (10th Cir. 2001) (error to departure upward on 2nd degree murder conviction based on premeditation since that is the element that distinguishes the two offenses).

- (C) Defendant renews her prosecutor misconduct motion and brief (Doc. #59 and #76) to reargue here that the government has unfairly used the onerous threat of the mandatory life sentence which attaches to Count I by taking the case to trial but before argument to the jury offering to

resolve the case under a plea agreement that would avoid any finding of premeditation only to turn around and argue premeditation as a sentencing factor to support the imposition of a life sentence.

- (D) Although the defense has deep respect for the Court the government's conduct in offering to resolve the case with no jury finding of premeditation only to argue premeditation as a sentencing factor has contaminated the entire sentencing process. By its sentencing papers and request for "variance" based on premeditation it is now clear that the government's offer to dismiss Count I was nothing but an empty promise and a way to avoid a possible manslaughter verdict, which violates due process and defendant's right to a jury determination of her guilt or innocence.

THE GOVERNMENT'S POSITION

The defense attempted to contact Mr. Baucus but he was unavailable for comment.

CONCLUSION

WHEREFORE, based on this motion and the brief that supports it defendant ought to be allowed to withdraw her guilty plea.

DATED March 25, 2014.

/s/ Michael Donahoe
MICHAEL DONAHOE
Senior Litigator

**CERTIFICATE OF SERVICE
L.R. 5.2(b)**

I hereby certify that on March 25, 2014, a copy of the foregoing document was served on the following persons by the following means:

 1 CM-ECF

 Mail

1. CLERK, UNITED STATES
 DISTRICT COURT

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