

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

**Criminal Case No. 13-cr-00327-CMA**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.**

**1. STEVIE MARIE ANNE VIGIL,**

**Defendant.**

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**UNITED STATES' SENTENCING MEMORANDUM AND MOTION FOR AN UPWARD  
DEPARTURE AND/OR VARIANCE**

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The United States of America, by and through John F. Walsh, United States Attorney for the District of Colorado, and Richard A. Hosley, Assistant United States Attorney, and Mark D. Hurlbert, Special Assistant United States Attorney, hereby moves for an upward departure and/or variance in the above-entitled case and offers this memorandum in support of its request. The advisory Guideline range in this case is insufficient considering the nature and circumstances of the offense. The defendant purchased a firearm for, and provided it to, a dangerous, convicted felon. That felon promptly used the firearm to kill two innocent people and severely injure a law enforcement officer. A severe punishment is necessary to satisfy the statutory sentencing goals. The government requests a term of imprisonment of 72 months, followed by three years of supervised release.

## I. FACTUAL BACKGROUND

Most of the facts outlined below are derived from the Presentence Investigation Report [PSIR] in this case. While the defendant has objected to some of the facts on the grounds that they are not relevant to the Court's sentencing analysis, she has not disputed their accuracy. [See Doc. 35].

On March 6, 2013, the defendant, Stevie Marie Anne Vigil, purchased a Smith and Wesson, Model M&P9, 9 mm handgun from a gun store in Englewood, Colorado. Two days later, on March 8, 2013, Vigil gave that handgun to Evan Ebel, a convicted felon, in the parking lot of an apartment complex parking lot in Thornton, Colorado. Carissa Luna, a friend of Vigil's, was present for both the purchase of the firearm and Vigil's subsequent transfer of the firearm to Evan Ebel. Ebel had provided the money to Vigil for the purchase of the firearm. [PSIR §§ 7, 10].

Evan Ebel was a convicted felon and prohibited person. He had been previously convicted of multiple felony crimes including robbery and felony menacing in State of Colorado, Jefferson County District Court Case No. 2003CR3128, felony assault 2 – cause injury with a deadly weapon, in State of Colorado, Adams County District Court Case No. 2004CR3622, felony menacing – real/simulated weapon, in State of Colorado, Adams County District Court Case No. 2004CR3702, and assault 2 – in custody/guard, in State of Colorado, Fremont County District Court Case No. 2007CR105. Ebel was also a member of the 211 crew, a white supremacist prison gang. [PSIR §§ 8, 10].

Ebel was released from the custody of the Colorado Department of Corrections in January 2013 and was on parole when Vigil gave him the firearm. Vigil knew that Ebel was a convicted felon and had communicated with Ebel while he was in prison.

Vigil was also aware that Ebel was on parole. In fact, Vigil was present at Ebel's residence when Ebel's parole officer conducted a home visit on February 2, 2013. [PSIR § 9].

On March 14, 2013, Ebel cut off his electronic monitoring ankle bracelet and "jumped parole." Three days later, on March 17, 2013, Ebel used Vigil's firearm to murder Nathan Leon, a pizza delivery man. Ebel lured Leon to an intersection in Denver, Colorado, under the pretense of buying a pizza. When Leon arrived, Ebel, acting alone, forced Leon into the trunk of a car. At some point that evening, Ebel shot and killed Leon with the handgun provided by the defendant. Prior to the murder, Ebel forced Leon to read a statement into a recording device. The statement said:

"For twenty years we've been subject to your faddism not witness ours, you didn't give two shits about us or our families and you ensured that we were locked behind a door, to disrespect us at every opportunity, so why should we care about you and yours. In short you treated us inhumanely, and so we simply seek to do the same, we take conform in the knowledge that we leave your wives without husbands, and your children fatherless. You wanted to play the mad scientist, well they will be your Frankenstein."

[PSIR § 11].

Nathan Leon's body was later found in Golden, Colorado. He was 27-years-old when he was killed. Leon was a husband and the father of three daughters, a 6-year-old and two 4-year-old twins. Leon was murdered while he worked to make extra money for his young family.

On March 19, 2013, Ebel used Defendant Vigil's firearm to murder Thomas Clements at his home in Monument, Colorado. Clements was the Executive Director of

the Colorado Department of Corrections. Ebel rang the doorbell and shot and killed Clements when he answered the door. [PSIR § 12].

Like Leon, Clements was a husband and the father of daughters. His wife, Dr. Lisa Clements, is the Director of the Colorado Department of Human Services' Office of Behavioral Health. Clements's daughters, ages 28 and 23, are left to cope with the sudden and violent loss of their father.

After killing Clements, Ebel traveled from Colorado to Texas. On March 21, 2013, Ebel was stopped in Texas for a traffic violation. Ebel was the driver and sole occupant of the vehicle. As Sheriff Deputy James Boyd approached the car, Ebel shot Boyd in the head and face with the firearm provided by Vigil. The shooting was captured on video by the dashboard camera in Deputy Boyd's patrol vehicle. Unlike Leon and Clements, Boyd was able to survive his injuries. [PSIR § 13].

After shooting Deputy Boyd, Ebel fled the scene and left Boyd lying on the side of the highway. Ebel lead Texas law enforcement officers on a high speed chase and used Defendant Vigil's firearm to shoot at the pursuing officers. Ebel was eventually shot and killed by law enforcement. Defendant Vigil's Smith and Wesson, Model M&P9, 9 mm handgun was recovered from the scene. It was the only firearm in Ebel's possession. [PSIR § 13].

Defendant Vigil was interviewed by law enforcement agents on March 26, 2013 at the Colorado Bureau of Investigation (CBI) offices in Lakewood, Colorado. Vigil was accompanied by an attorney.<sup>1</sup> Vigil provided a handwritten letter to the agents and

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<sup>1</sup> Note – the attorney who accompanied Vigil to the interview is not the same counsel who represents her in the matter before this Court.

agreed to speak with them as well. Vigil admitted she purchased the firearm, but denied giving it to Evan Ebel. Vigil claimed she bought the gun for self-defense because she had been raped. She lied and told agents she received money to buy the firearm from her father.<sup>2</sup> Vigil said she left the gun in the trunk of Carissa Luna's car and it was later stolen. Vigil claimed she checked the trunk of the car and realized the gun was stolen after hearing news reports of Ebel's shootout in Texas. Vigil admitted she knew Ebel was a felon and had recently been in prison. Vigil said she was aware Ebel belonged to 211, but believed he was leaving the gang. [PSIR § 14].

Law enforcement officers located and interviewed Carissa Luna on the same day as Vigil's interview at CBI. Luna admitted she was present when Vigil bought the firearm. Luna also admitted that Vigil gave the gun to Ebel. Luna said Vigil stored the firearm in a closet at Luna's apartment after buying it on March 6, 2013. On March 8, Vigil retrieved the gun from the closet, put it in a plastic bag, and gave it to Ebel in the parking lot of the apartment complex. Luna also told the agents what occurred when Vigil heard the report of Ebel death in Texas. Luna said she and Vigil were together when they saw a news report on television about Ebel. Vigil exclaimed, "Oh shit, I bought Evan that gun." Luna said that Vigil was "freaking out" because the gun would be traced back to her. [PSIR § 15].

During her interview with law enforcement, Luna received several phone calls from Vigil. When Luna took a break to use the restroom, she spoke with Vigil on the phone. Vigil told Luna to lie to law enforcement. Vigil instructed Luna to tell the

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<sup>2</sup> Vigil later admitted that Evan Ebel provided the money used to purchase the firearm. [PSR ¶ 19].

investigators that Vigil's father had provided the money to buy the firearm. Vigil also told Luna to say that Vigil had left the firearm in the trunk of Luna's car. [PSIR § 15].

Vigil was arrested that day on state charges. Those charges were later dismissed after Vigil was indicted by a federal grand jury for the current offense. Vigil has since pleaded guilty to the sole count of the indictment. There was no plea agreement in this case.

## II. GUIDELINE DEPARTURE

### A. Probation's Guideline Calculation and Recommended Departure:

The U.S. Probation officer calculated the Guidelines as follows:

Base Offense Level: 14 (U.S.S.G. § 2K2.1).

Specific Offense Characteristics: None.

Victim Related Adjustments: None.

Adjustment for Role in the Offense: None.

Adjustment for Obstruction of Justice: +2.

Adjusted Offense Level: 16.

Acceptance of Responsibility: 0.

Total Offense Level: 16.<sup>3</sup>

Criminal History Category: I.

Guideline Range of Imprisonment: 21 – 27 months.

The probation officer has recommended an upward departure pursuant to

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<sup>3</sup> The defendant has objected to this calculation. [See Doc.35]. She does not dispute the Obstruction of Justice enhancement, but argues that she is entitled to the Acceptance of Responsibility reduction. [*d.*]. The government disagrees and contends this is not an extraordinary case that would warrant a reduction. The government will respond to the defendant's PSR objections in a separate document.

U.S.S.G. §§ 5K2.0 and 5K2.1, and/or an upward variance pursuant to the statutory sentencing factors. The government agrees that an upward departure and/or variance is warranted in this case, although the government believes the departure/variance should be even greater than that recommended by probation. The nature and circumstances of this offense are horrific, and the case is outside the heartland for the crime of conviction. The victim's deaths and the injuries of Deputy Boyd were a reasonably foreseeable consequence of the defendant's actions. She should be held accountable for her actions and the Court should impose a sentence above the current Guideline range.

**B. Bases for an Upward Departure:**

Generally speaking, “[b]efore a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline.” *Koon v. United States*, 518 U.S. 81, 98 (1996); see also U.S.S.G. § 1A1.1 editorial note, ch. 1, pt. A, introductory cmt. n.4(b) (“The Commission intends the sentencing courts to treat each guideline as carving out a ‘heartland,’ a set of typical cases embodying the conduct that each guideline describes.”). “[W]hether the particular case lie within the heartland of similar offenses is a threshold question that a district court must decide when determining whether to grant a departure under the Guidelines.” *United States v. Martinez-Barragan*, 545 F.3d 894, 900 (10th Cir. 2008).

Under U.S.S.G. §§ 5K2.0(a)(1)(A) and (2)(B), the Court may depart up from the advisory Guideline range if the Court finds, pursuant to 18 U.S.C. § 3553(b)(1), that there exists an aggravating circumstance that the Sentencing Commission has not

identified in the Guidelines, but is nevertheless relevant to determining the appropriate sentence.

U.S.S.G. § 5K2.1 allows the Court to depart upward when a death results from the defendant's conduct. It is not required that the death result from the defendant's specific crime of conviction in order to grant a departure. *United States v. Montgomery*, 550 F.3d 1229, 1235 (10th Cir. 2008). The "touchstone of the inquiry" is whether it was "reasonably foreseeable" that a death could result from the defendant's criminal conduct. *United States v. Fortier*, 242 F.3d 1224, 1232-33 (10th Cir. 2001), *superseded by statute on other grounds*, PROTECT Act of 2003, Pub.L. No. 108-21, 117 Stat. 650, 670-71.

In *United States v. Fortier*, the defendant pleaded guilty to conspiring to transport and transporting stolen firearms, making a false statement to the FBI, and misprision of a felony. These crimes were connected to the Oklahoma City federal building bombing. *Fortier*, 242 F.3d at 1226. The district court made an upward departure under § 5K2.1 for deaths in the Oklahoma City bombing, finding they were a reasonably foreseeable consequence of, although not directly caused by, the defendant's conduct. *Id.* The defendant argued on appeal that there was an insufficient nexus between the bombing and his admitted wrongdoing to permit an upward departure. *Id.*

The Tenth Circuit rejected that argument. The Court of Appeals found the proper inquiry is not whether the defendant directly caused the deaths, but instead it should ask if the deaths "resulted from" or were a "reasonably foreseeable" consequence of a defendant's conduct. *Id.* at 1232-33.

The Tenth Circuit elaborated further in *United States v. Montgomery*. In that case, the defendant's wife committed suicide by shooting herself with a firearm unlawfully possessed by the defendant, a convicted felon. *Montgomery*, 550 F.3d at 1230-31. The defendant was later charged and pleaded guilty to being a felon-in-possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). *Id.* The District Court made an upward departure under § 5K2.1 and found the case was outside the heartland of typical felon-in-possession cases. *Id.*, at 1231-32.

On appeal, the defendant argued the upward departure was improper because his wife's death did not result from the crime of conviction. *Id.* The defendant contended he could not be accountable for the death because he did not have "actual knowledge that his wife would commit suicide with one of the illegal firearms." *Id.* at 1236. Citing *Fortier*, the Tenth Circuit rejected the defendant's argument and upheld the sentence. *Id.* at 1235. The Court of Appeals held the defendant was responsible for his wife's death because his "unlawful possession of firearms was a 'link in the chain of events leading up to' his wife's suicide." *Id.*

The Tenth Circuit also noted that the defendant's reasoning was "at odds with other Tenth Circuit case law and the law in other circuits." *Id.*; see *United States v. Metzger*, 233 F.3d 1226, 1227-28 (10th Cir. 2000) (the relevant question was not whether the defendant "could have expected events to unfold in precisely the way they did." Instead, the Court examined whether it was reasonably foreseeable, given the inherently dangerous nature of a bank robbery, that a bystander might be seriously injured during the flight or apprehension of the perpetrator.); see also *United States v. Diaz*, 285 F.3d 92, 100-01 (1st Cir. 2002) (determining that defendant brandishing a

firearm at a crowd of bystanders, prompting police to shoot a plainclothes officer who refused to drop his weapon, was an indirect cause of the officer's death and within the scope of § 5K2.1, as “[u]nintended consequences are often the result of reckless behavior, and while [appellant] could not have anticipated the particular sequence of events, appellant should have foreseen the possibility of serious harm”); *United States v. Scheetz*, 293 F.3d 175, 189-92 (4th Cir. 2002) (affirming a § 5K2.1 departure and noting that although the armed defendant who accompanied codefendants to collect a debt was not a direct cause of an unrelated third party's death and perhaps “could not have anticipated the particular sequence of events,” he “should have foreseen the possibility of serious physical harm to another as a result of his actions”).

This case is certainly outside the heartland as contemplated by the Guidelines. The deaths and injury inflicted by this firearm are not accounted for within the advisory guideline calculation. Like in *Montgomery*, Defendant Vigil's actions were a link in the chain of events leading up to the deaths of Mr. Leon and Mr. Clements and the shooting of Deputy Boyd. The defendant bought a handgun for Evan Ebel, a dangerous convicted felon. The defendant had known Ebel for a long time. She had communicated with Ebel while he was in prison; she knew that Ebel was on parole; she had even been present when Ebel's parole officer conducted a visit. Two days after the purchase, after Vigil had sufficient time to contemplate the nature of her actions, she gave the gun to Ebel. Less than two weeks later, Evan Ebel used that gun to murder two people and injure another.

The defendant cannot hide from responsibility behind her claims of ignorance about Ebel's plan. When you give a handgun to a violent felon, it is reasonably

foreseeable the felon will use the gun for violent purposes. The Guideline range is insufficient and the Court should grant a significant upward departure to fully account for this crime.

### III. STATUTORY VARIANCE

#### A. Variances Generally.

“A departure occurs when a court reaches a sentence above or below the recommended Guidelines range through application of Chapters Four or Five of the Sentencing Guidelines. A variance occurs when a court enhances or detracts from the recommended range through application of [18 U.S.C.] § 3553(a) factors.” *United States v. Sells*, 541 F.3d 1227, 1238 n. 2 (10th Cir. 2008). While the U.S. Sentencing Guidelines represent “the starting point and the initial benchmark” in sentencing, they are only advisory. *Gall v. United States*, 552 U.S. 38, 49-50 (2007). This Court must ultimately craft a sentence that sufficiently accounts for the statutory sentencing factors and objectives outlined in § 3553(a). *Id.* at 49-50. Because each case is unique, the Court must make a particularized analysis of the nature and circumstances of the offense and the defendant’s history and characteristics. 18 U.S.C. § 3553(a)(1). The Court must then impose a sentence that sufficiently reflects the seriousness of the crime, promotes respect for the law, and provides just punishment. 18 U.S.C. § 3553(a)(2)(A). The sentence should adequately deter criminal conduct, protect the public, and provide any necessary education, training or treatment. 18 U.S.C. § 3553(a)(2)(A)-(D).

After determining the appropriate sentence, the Court should adequately explain its rationale to “allow for meaningful appellate review and to promote the perception of

fair sentencing.” *Gall*, 552 U.S. at 50. A District Court’s sentencing determination is afforded “considerable discretion.” *United States v. Smart*, 518 F.3d 800, 806-10 (10th Cir. 2008). An appellate court will not disturb or overturn a district court’s sentence so long as the judgment is not “arbitrary, capricious, whimsical, or manifestly unreasonable.” *United States v. Pugh*, 380 Fed. Appx. at 780 (quoting *United States v. Munoz–Nava*, 524 F.3d 1137, 1146 (10th Cir. 2008)). “A sentence is substantively reasonable when the length of the sentence reflects the gravity of the crime and the 3553(a) factors as applied to the case.” *United States v. Martinez-Barragan*, 545 F.3d 894, 905 (10th Cir. 2008). “[A]ll sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.” *Smart*, 518 F.3d at 806 (quoting *Gall*, 552 U.S. at 40). A variance above the advisory Guideline range, even a significant one, is reasonable so long as “the justification is sufficiently compelling to support the degree of the variance.” *Gall*, 552 U.S. at 50; *see also United States v. Spencer*, 387 Fed.Appx. 841, 845 (10th Cir. 2012) (unpublished); and *United States v. Pugh*, 380 Fed. Appx. 776 (10th Cir. 2010) (unpublished).

**B. Seriousness of Offense; Promote Respect for the Law; Provide Just Punishment.**

The analysis of the “nature and circumstances of the offense” requires more than a myopic view of the offense of conviction. *See United States v. Gantt*, 679 F.3d 1240, 1250 (10th Cir. 2012). Uncharged and even acquitted conduct may be considered for sentencing purposes and need only be proved by a preponderance of the evidence. *United States v. Magallanez*, 408 F.3d 672, 684 (10th Cir. 2005).

The nature and circumstances of Defendant Vigil's offense are particularly serious and warrant a significant upward variance from the advisory Guideline range. The defendant's crime is not simply a technical violation of federal firearms laws. The defendant gave Evan Ebel the weapon he needed to violently murder two people and injure another. Defendant Vigil provided the firearm willingly and then tried to cover her actions and evade responsibility by lying to law enforcement. She also attempted to obstruct the investigation by asking a witness to lie on her behalf. While the defendant claims to be "devastated" and remorseful for her actions, her attempts to obstruct justice indicate otherwise.

The currently calculated Guideline range is insufficient and does not fully reflect the seriousness of this offense or satisfy the statutory sentencing goals. A minor term of imprisonment will not promote respect for the law, or provide just punishment for this offense. While the Guideline may not properly account for this crime, the Court must consider the full nature and circumstances of this offense and sentence accordingly. As noted in the legislative history of 18 U.S.C. § 3553(a)(2)(A), "the sentence should reflect the gravity of the defendant's conduct. From the public's standpoint, the sentence should be of a type and length that will adequately reflect, among other things, the harm done or threatened by the offense, and the public interest in preventing a recurrence of the offense." S.Rep. No. 98-225, at 75-76 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3258-59.

**C. Afford Adequate Deterrence.**

The sentence must also afford adequate deterrence - both specific deterrence of future criminal conduct by this defendant and general deterrence as to others. 18

U.S.C. § 3553(a)(2)(B). “General deterrence ... is one of the key purposes of sentencing.” *United States v. Medearis*, 451 F.3d 918, 920–21 (8th Cir. 2006); see also *United States v. McQueen*, 727 F.3d 1144, 1158 (11th Cir. 2013); and S.Rep. No. 98–225, at 75–76, 1984 U.S.C.C.A.N. at 3259 (“to deter others from committing the offense” is one of the four purposes of sentencing).

This Court must send a significant message of deterrence that this type of offense will not be tolerated in the District of Colorado. Colorado, its people, and its institutions have been negatively affected by gun violence for long enough. The message from the District Court must be clear and unmistakable - persons who evade firearms laws and provide firearms to dangerous felons will receive significant punishment. And when that firearm is used to harm others, the punishment will be even more severe. A minor term of imprisonment will not satisfy this important sentencing objective.

#### **IV. CONCLUSION**

For the reasons stated above, the government asks the Court to grant a Guideline departure and/or statutory variance and sentence the defendant to a term of 72 months imprisonment. This sentence will not be greater than necessary to comply with the sentencing goals of 18 U.S.C. § 3553(a). To the contrary, a Guideline range sentence would be insufficiently low considering this offense.

Dated this 2nd day of January, 2014.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 2nd day of January, 2014, I electronically filed the foregoing **UNITED STATES' SENTENCING MEMORANDUM AND MOTION FOR AN UPWARD DEPARTURE AND/OR VARIANCE** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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and I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner (mail, hand deliver, etc.) indicated by the non-participant's name:

(None)

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