IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CRIMINAL NO. 09-1578 LH
v.	)	
	)	
LINDA DIAZ,	)	
	)	
Defendant.	)	

UNITED STATES' RESPONSE TO DEFENDANT'S SENTENCING MEMORANDUM IN SUPPORT OF REQUEST FOR PROBATION (DOC. 160)

The United States of America responds to the Defendant's Sentencing Memorandum in Support of Request for Probation (Doc. 160) as follows:

INTRODUCTION

In the brisk early morning hours of April 4, 2009, after spending the evening drinking parts of three beers and a shot of tequila, the defendant struck 31-year old Philip Espinoza with her car, killing him. The force of the impact flung Philip's body into the weeds alongside the highway. As Philip drew his last breaths, the defendant, who by her own admission "probably" had alcohol on her breath, had a choice: stay and render some semblance of aid to a dying man, or leave him behind and try to save herself. She drove on.

The defendant's guilt in this litigation was never seriously in question. By her own admission, she was behind the wheel and left the scene knowing full well that she had hit something. By that admission, the defendant conceded her guilt to the lesser-included offense of leaving the scene of the an accident causing great bodily harm or death. The jury, therefore, was merely called upon to determine if the defendant had left the scene after *knowingly* hitting a

human being. The jury's verdict ratified the overwhelming evidence, albeit circumstantial, that the defendant knew full well what she had done when she drove on. Her sentence should reflect the seriousness of that abominable conduct.

The defendant asks for the proverbial slap on the wrist by requesting that the Court impose probation in lieu of incarceration. Even the most liberal application of the 18 U.S.C. § 3553 factors counsels against such an unjust sentence. Instead, the United States respectfully requests a sentence of three years, the only sentence that is just and the only sentence that is worthy of the defendant's conduct.

FACTUAL BACKGROUND

On Sunday, April 5, 2009, at 8:47 a.m., the defendant, who was then the Lieutenant Governor of the Pojoaque Pueblo, telephoned tribal police Lieutenant Frank Rael on his cell phone and told him that she needed to talk because she had "done something very bad" and was "very worried." PSR at ¶6. In response to the defendant's call, Lt. Rael drove to the defendant's residence and met with her. Lt. Rael testified that, when he arrived, the defendant appeared distraught and had obviously been crying. *Id*.

The defendant's phone call came almost one full day after another momentous event on the Pojoaque Pueblo. The day before, at 11:51 a.m., the Pojoaque Tribal Police Department responded to a call of a deceased man found in a ditch located at mile post 181 off of US 84-285, an area within the exterior boundaries of the Pojoaque Pueblo Indian Reservation. PSR at ¶4. The decedent was later identified as 31-year old Philip Espinoza, a non-Indian from Chimayo, New Mexico. *Id*. The preliminary autopsy report concluded that Philip died from multiple blunt force trauma, injuries that are consistent with being struck by an automobile. *Id*. The pedestrian

accident investigation conducted by the Santa Fe Sheriff's Department corroborated the autopsy report's conclusion. That agency processed the scene and found laying near the victim evidence suggesting that he had in fact been struck by a car, including: (1) a right-side vehicle mirror; (2) a broken reflector; (3) a spring; (4) a piece of rubber; and (5) the victim's shoes and eyeglasses. PSR at ¶5.

At that point, the police knew that Philip was struck and killed by a person who left the scene of the accident. The hunt was on for the driver. The defendant's phone call was the first big break in the case. About an hour after Lt. Rael arrived at the defendant's house, other law enforcement officers began to filter in. One of them was Bureau of Indian Affairs Agent J.P. Montowine, the officer who would soon assume investigative responsibility for the case. Not long after he arrived, he observed the defendant's grey Mercury Marquis bearing license plate number KPF-983 parked under a metal carport. PSR at ¶7. Agent Montowine's observations of the defendant's vehicle shifted all suspicion to the defendant as the person who hit and killed Philip. Specifically, Agent Montowine observed that the defendant's car had a shattered right front windshield, a missing passenger-side mirror, and a dent on the front passenger side. *Id.* A search warrant on the car executed later that evening revealed human hair in the windshield. *Id.* Forensic scientist Kristin Radecki conducted DNA analysis on the hair and determined that it, to a reasonable degree of scientific certainty, matched the DNA of the victim. *Id.*

An accident reconstructionist then employed by the Santa Fe County Sheriff's Department, Dennis O'Brien, pieced together the last moments of Philip's life. According to Mr. O'Brien, Philip, who weighed 220 pounds and stood six feet and two inches, was struck from behind on the left calf, causing him to fly onto the windshield. PSR at ¶8. He then hit the

passenger-side mirror with his right hip and, at about the same time, struck the A-pilar with the back of his head, causing massive skull fracturing. *Id*. He then catapulted off the car into the weeds adjacent to the roadway. O'Brien testified that, assuming the defendant was driving the speed limit, the victim would have been in contact with the car for less than one-tenth of one second. *Id*. Despite this short period of time, the defendant, in her testimony, admitted that she saw *something* on her car, although, according to her, she did not know what that something was. *Id*.

As stated above, the only issue before the jury was whether or not the defendant in fact knew she had hit a person. The government presented overwhelming evidence that she did. The first, and most significant, piece of that puzzle was that the defendant had the motive to leave the scene of the accident because she had been drinking alcohol. To that end, the government meticulously detailed the defendant's whereabouts in the hours prior to the incident. Video surveillance from the Buffalo Thunder Casino showed the defendant arriving at the casino at approximately 10:15 p.m. on Friday, April 3, 2009. PSR at ¶9. She joined a group of people who were already present: her sister, Kathy Fierro; her distant cousin, Matthew Gutierrez; his girlfriend, Lisa Maestas; Stephanie Crosby; Kimberly Enriquez; and Leslie Bird. *Id*. The video captured Guiterrez purchasing the defendant a Corona beer within moments of her arrival. *Id*. Both Guiterrez and the defendant testified at trial that she did not finish the beer, although the video depicts her taking a large "swig" of just before they left, which was shortly before 11:00 p.m. *Id*.

From the Buffalo Thunder Casino, the defendant, Fierro, Guiterrez, and Maestas all left together in the defendant's vehicle, the 2000 Mercury Marquis, and drove to a nightclub in

Espanola, New Mexico, called the Club Tropicana. PSR at ¶10. According to the defendant, Guiterrez was driving at this point. *Id.* Once at the nightclub, two more Coronas were purchased for the defendant, although she claimed in her testimony that she finished neither. *Id.* She did admit, however, to drinking one shot of tequila at the Club Tropicana. *Id.* The group stayed until closing time and then left together in the defendant's vehicle sometime between 1:30 and 2:00 a.m. *Id.* According to Fierro, from the Club Tropicana they all went back to Gutierrez's house on the Pojoaque Pueblo. PSR at ¶11. On the way to his house, they stopped at Fierro's residence to pickup up six beers that were in her refrigerator. *Id.* The defendant denied having any beer at Gutierrez's house. *Id.*

A little before 4:30 a.m., the defendant and her sister, Kathy Fierro, left Gutierrez's house. PSR at ¶12. The defendant was driving her own vehicle. *Id.* Fierro testified that, while inside the vehicle, she did not observe any of the damage that Agent Montowine noted the following day. *Id.* The defendant dropped off her sister and proceeded to drive the approximate two miles to her home on a route that took her on US 84-285 past mile-marker 181. Then, about one-half mile from her house, that the defendant stuck and killed Philip. *Id.*

It is beyond dispute that the defendant was drinking prior to the accident. By her own admission, she had at least parts of three beers and a shot of tequila in the hours leading up to the incident. PSR at ¶18. And, during her testimony, she conceded that she "probably" had alcohol on her breath when she struck and killed Philip Espinoza. *Id.* Whether or not she was intoxicated at the time of the accident, the fact that she was drinking provided the motive - in fact, the *classic* motive - to leave the scene of the accident. If she did what the law required her to do - stay behind and summon help for a dying man laying in the weeds - then she inevitably

would have spoken to a law enforcement officer with alcohol on her breath. This unpleasant contingency could be avoided with the simple act of keeping her foot on the gas and going home. As evidenced by its verdict, the jury reasonably inferred that she left the scene to avoid speaking with law enforcement.

Aside from establishing the motive for leaving the scene of the accident - that she had been drinking - the government elicited additional evidence that established that the defendant knew that she hit a human being. This evidence came primarily in the form of the defendant's puzzling post-accident behavior that, on the whole, supports the fact of her knowledge that she hit a person. For instance, according to her testimony, she arrived home at approximately 4:30 a.m. after striking the victim. PSR at ¶13. While in a state of hysterics, her immediate reaction was to call her sister, Fierro, and ask her to drive to the scene and report what she observed. *Id.* Fierro did as requested. She testified that she and her teenage daughter, Karla Fierro, drove past the scene but did not observe anything out of the ordinary. *Id.* From there, the two went to the defendant's house to report their lack of findings. *Id.*

Based on the testimony, the jury could properly conclude that the defendant's request to her sister to embark on a middle-of-the-night reconnaissance mission is hardly consistent with a person who did not know what they had hit. Experience and common sense teach that such a radical request is not consistent with a person who did not believe they had hit a human being. If, on the other hand, the defendant believed she had hit a human being (or believed that there was a high probability that she had hit a human being), then the sense of urgency would be ratcheted up exponentially. Under those circumstances, priority one would be to gather

information about the evidence left behind notwithstanding the fact that it was the middle of the night.

It continues. The defendant's extreme emotional reaction to the events of April 4, 2009, also establish that she knew what she had done. When Fierro arrived at her sister's house after driving past the scene of the crime, she observed the defendant to be in a state of hysterics - she was crying and frantic. PSR at ¶14. Dovetailing with this testimony was that of the defendant's seventeen-year old niece, Karla Fierro. During her testimony, she stated that she had only once before witnessed the defendant in such a fragile emotional state: after her aunt (the defendant's sister) passed away. *Id*. The defendant's emotional state the morning of April 4 was more consistent with belief that she had struck a person as opposed to an animal or inanimate object. It certainly belied any notion that she had hit an animal, orange barrel, or sign. The infrequency in which her own family had witnessed the defendant in a similar emotional state permitted the jury to infer that it takes death, or an event with similar gravitas, to cause such a volatile reaction. Striking an inanimate object does not measure up to the standard the defendant has set for herself.

The fact that the defendant did not go back to the scene of the crime herself, but instead enlisted the help of trusted relatives to do her bidding, also permitted the jury to infer that she was conscious of her own guilt. To explain away this inconvenient fact, the defendant claimed that she was afraid to go back to the scene because she feared a witch my have been responsible for whatever had struck her car. PSR at ¶15. The jury heard evidence that permitted them to reject that the defendant actually believed this. Specifically, moments after striking and killing Philip at 4:30 a.m., the defendant sent her sister and teenage niece to the accident scene. A

rational jury could properly conclude that the defendant would not have done so if she believed supernatural forces were involved in the accident. *Id*. Doing so would have been placing her loved ones in the same danger that she claimed compelled her to flee that scene. Thus, the jury could properly conclude that the only logical explanation for dispatching her sister and niece to the scene was that she believed she had struck a human being. *Id*.

The defendant's peculiar post-accident behavior did not start and finish with a 4:30 a.m. phone call to her sister. Less that seven hours after the crash, she had a phone conversation with Gutierrez, the man whose home she had just left prior to striking and killing Philip. PSR at ¶16. Suspiciously, during this phone call, she did not mention to Guiterrez anything about the events that had unfolded less than seven hours beforehand. *Id*. Given that Fierro described those events as one of the most momentous in her family's history, and recognizing that the defendant had an almost unprecedented emotional breakdown as a result of what had occurred, a reasonable person would mention the event during the phone conversation with Guiterrez. *Id*. This is particularly true with the phone conversation occurring in such close temporal proximity to the accident. The defendant, as it turned out, did the opposite. She kept quiet about it. This permitted the jury to infer that, during the conversation with Gutierrez, the defendant still had not settled on a story.

The fatal blow to the defendant's protestations that she did not know she had hit a human being was delivered by her son, Jose Sarmiento. He testified that on the morning after the accident, just hours after the defendant struck and killed Philip, he visited the defendant at her home. PSR at ¶17. When he arrived, Sarmiento observed the damage to her vehicle, including the shattered windshield and missing passenger-side mirror. *Id*. During the direct examination conducted by defense counsel, Sarmiento stated that he and his mother discussed the possibility

that she hit a human being or an animal. *Id*. Sarmiento's testimony directly contradicted the defendant's version of events. *Id*. The defendant testified that it never once occurred to her that she hit a human being until the moment she watched the news report on Sunday morning, a full day after the conversation with Sarmiento. *Id*.

Moreover, the defendant's story that it was not until the news report on Sunday morning that it first occurred to her that she hit a person was simply not believable. All other witnesses who testified indicated that they had learned on Saturday that a person had been hit and killed on the Pojoaque Pueblo. The defendant, the Lt. Governor of the Pojoaque Pueblo, could offer no explanation at all as to why she did not know what everybody else did. PSR at ¶19. In fact, she admitted that on Saturday afternoon she drove past the spot of the accident and observed two police cars on scene. Thus, she knew, at a bare minimum, that some sort of investigation was taking place. This supported the government's theory that she knew immediately that she had hit a person, but could not alert authorities because she had been drinking. The jury could thus properly conclude that the defendant spent the day after the accident assembling a story that attempted to explain the delay in reporting the accident.

In addition, during the course of her testimony, the defendant could offer no explanation at all as to how she could not see a man of Philip's size in front of her as she drove. According to her, she was not tired (despite being up for 22 hours at the point of the collision), she was not drunk, she was not distracted, nothing was blocking her view out the window, and she was driving the speed limit. PSR at ¶20. Despite claiming to have every one of these advantages, the defendant, for reasons she could not explain during her testimony, did not see a pedestrian right in front of her who ended up on the windshield of her car. *Id*. Thus, the jury could properly

conclude that the defendant was being untruthful her testimony. If, as she claims, she was not drunk or distracted, then a reasonably attentive driver in her circumstance would have seen a man walking right in front of her.

ARGUMENT

I. Sentencing Guideline Analysis

Based on the offense conduct described above, the United States respectfully requests a sentence of three years incarceration. In fashioning a proper sentence, the starting point is U.S.S.G. § 2X5.1., which states as follows:

> If the offense is a felony for which no guideline expressly has been promulgated, apply the most analogous offense guideline. If there is not a sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553 shall control, except that any guideline and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline shall remain applicable.

With that in mind, the government first notes that no guideline has been expressly promulgated for the crime of knowingly leaving the scene of the accident resulting in death or great bodily injury. Under the facts and a circumstances of this offense, however, the most analogous guideline provision is for the crime of involuntary manslaughter. The crimes of involuntary manslaughter and leaving the scene of an accident resulting in death are closely aligned in that they both require a death to occur during the course and as a result of a defendant's driving, and neither require an intent to kill or harm.

Under U.S.S.G. § 2A1.4., the base level offense for involuntary manslaughter is contingent upon the driver's criminal culpability: if the driver was criminally negligent, the base level offense is 12; if the driver's conduct was reckless, the base level offense rises to 18; and, if the offense involved the reckless operation of a means of transportation, the base level offense

sits at 22. Under the facts and circumstances of this case, the defendant killed Philip while recklessly operating a means of transportation. Her recklessness is reflected in dual facts of her drinking prior to driving (whether she was legally intoxicated or not) and her admission that she had not slept for 22 hours prior to the incident. This combination of circumstances demonstrate that the defendant "was aware of the risk created by [her] conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would excercise in such a situation." U.S.S.G. § 2A1.4., application note 1. Thus, under § 2A1.4., the defendant's base level offense for the analogous offense of involuntary manslaughter is 22.

From that starting point of 22, an additional two points are added to the base level offense because the defendant obstructed justice during her testimony. *See* U.S.S.G. § 3C.1. (Obstructing or Impeding the Administration of Justice). Indeed, her continued denials that she knew she had hit a human being flew in the face of the overwhelming evidence that in fact she possessed such knowledge. With a base level offense of 24, and a criminal history category of I, the advisory guideline range for the analogous offense of involuntary manslaughter rests at 51-63 months, a full 15 months higher at the low-end than the sentence the government is requesting the Court to impose on the defendant. Of course, a lower sentence for the crime of knowingly leaving the scene of an accident resulting in death, as compared to involuntary manslaughter, is appropriate given the relative differences in the seriousness and culpability attached to each respective offense. The sentence requested by the United States, 36 months, takes into account those differences.

II. Section 3553(a) Analysis

If this Court determines that involuntary manslaughter is not sufficiently analogous to leaving the scene of an accident, then the provisions of 18 U.S.C. § 3553 control. U.S.S.G. § 2X5.1. Application of those factors to this case leads to the conclusion that a sentence of three-years is sufficient but not greater than necessary to achieve the objectives set forth in Section 3553(a).

a. *The Nature and Circumstances of the Offense, the Need for the Sentence Imposed to Reflect the Seriousness of the Offense, Promote Respect for the Law, and Provide Just Punishment*

Of all the various ways one can commit the crime of leaving the scene of an accident, the defendant's method stands apart in terms of criminal culpability. It does so based on what she did before she killed Philip, and what she did immediately afterward. The nature and circumstances of her conscious decisions uniquely qualify the defendant for the three-year sentence the United States seeks.

The defendant was 52-years old when she hit and killed Philip. As the then sitting Lt. Governor of the Pojoaque Pueblo, she was no ordinary citizen in her community. She enjoyed a position of prominence on the Pueblo and, because of that, was vested with a fiduciary responsibility to lead her constituents by example. Sadly, in the hours that bookended Philip's death, she comported herself in ways not becoming of anyone on the Pueblo, much less a leader of her stature. She drank alcohol - indeed, threw back a shot of tequila - then got behind the wheel of a car. She stayed up "partying" with friends until 4:30 a.m. She decided to drive without having a wink of sleep for 22 hours. And, according to her own son, she suspected that she may have hit a person but did nothing to help or investigate.

The defendant has repeatedly maintained that there is no evidence that she was intoxicated when she killed Philip. That much is true, primarily because by fleeing the defendant ensured that the record of her intoxication, or lack thereof, was permanently erased. But, whether or not she was intoxicated misses the sentencing point. But for her drinking, the crime would not have occurred. But for her drinking, the defendant would have almost certainly remained at the scene of the crime and discharged the responsibility expected of all drivers, respected leaders or otherwise. But she did not stop. By her own candid admission, she "probably" had alcohol on her breath when she killed Philip. Stopping the car would have inevitably resulted in the defendant being asked pointed questions by suspicions cops. With the smell of tequila on her breath, the defendant opted not to take that chance. She put her own self-interest ahead of Philip's life.

It is true, as the defendant points out, that Philip's fate was sealed the moment his skull shattered on the A-frame of her car. Even if the defendant had stopped to render aid, it is not likely Philip could have been saved. That does not minimize the gravity of the defendant's crime. From where she sat, she could not have known the severity of Philip's injury. She could not have known whether he was dead, dying, or could be saved. When she made the decision to flee, Philip was, from her point of view, a sacrifice. Whatever else she believed about the utility of summoning help for Philip, she believed that saving herself was more important. Her decision, stated bluntly, was the height of human cowardice.

Her cowardice did not diminish in the hours after Philip died. When she arrived home, her first instinct was to call her sister and dispatch her on a reconnaissance mission designed to see what evidence was left behind at the scene. The defendant, of course, could not do this

herself: it was not the damage to her car that prevented her from returning to the scene - she had another car at home - it was the alcohol on her breath. So, while secure inside her own home, the defendant's sister did the defendant's bidding. She scoured to scene, gathered facts, and reported back to the defendant. Meanwhile, the alcohol that "probably" was on the defendant's breath was irrevocably fading into the ether.

Both the pre-sentence report and the defendant note, correctly, that the defendant had no brushes with the law until she killed Philip. To whatever extent obeying the law is otherwise noteworthy, her lack of criminal history, at least under the sentencing guidelines, would not entitle her to a departure. *See* U.S.S.G. § 5K2.20(c)(1) ("The court may not depart downward pursuant to this policy statement if . . . the offense involved serious bodily injury or death."). The policy behind the § 5K2.20 exception is crystal clear: defendants who cause death are not entitled to a reduction of sentence no matter how aberrant their conduct. For the same reason, under 18 U.S.C. § 3553(a) the nature and circumstances of the offense should not be discounted simply because the defendant had not previously been arrested or convicted of a crime.

Given the defendant's heinous conduct, and the grave consequences of her actions, the sentence that the United States seeks will reflect the seriousness of the offense, promote respect for the law, and provide a just punishment for the offense.

b. *The Need for the Sentence Imposed to Provide Adequate Deterrence*

The defendant advances the novel argument that the facts and circumstances of this case provide no occasion for the Court to fashion a sentence that will afford adequate deterrence. To support this argument, the defendant echoes a theme woven in virtually all the pleadings she has filed, namely a claim that she is the only Native American to be prosecuted in federal court for

the assimilated crime of knowingly leaving the scene of an accident. From that jumping point, the defendant concludes that it is unlikely that another Native American will find herself in federal court for a similar offense, thus deterrence is not possible. Whether or not the defendant is the only Native American to be prosecuted in federal court under the state statute (and the government does not know whether she is or not), her argument misses the point.

For the defendant's argument to hold any water, a driver would have to know, at the moment she takes flight from an accident scene, whether or not she is subject to federal court jurisdiction for the assimilated crime of knowingly leaving the scene of an accident. Under the defendant's logic, a hypothetical driver who is not subject to federal court jurisdiction would not be deterred by any sentence this Court imposes upon the defendant because that hypothetical driver would know a similar sentence would not befall her. Conversely, the defendant suggests that a hypothetical driver who could divine, at the moment she takes flight, that she is subject to federal jurisdiction would not be deterred because such driver, in the defendant's view, is few and far between.

The argument crumbles, of course, because no driver can know, at the moment she takes flight, whether or not federal jurisdiction vests. Under the Section 1152 framework, federal jurisdiction exists only when two independent facts are true: (1) either the the defendant or victim is Native American, and the other is not; and (2) the defendant has not been previously punished in the tribal courts. Even in those rare occasions when a defendant would know whether her victim is Native American or not, she could not know, without benefit of a crystal ball, whether the tribe will prosecute her. In short, no driver can know, until long after the crime

is complete, whether the will find themselves in federal court. Therein lies the Achilles Heal of the defendant's argument.

Instead of embracing the legal fiction the defendant advances, this Court should take a more pragmatic approach to the issue of deterrence. Virtually every driver who leaves the scene of an accident in Indian country, for all they know at that moment, is potentially subject to federal court jurisdiction. All of them can be deterred by the sentence this Court issues to the defendant. Adequate deterrence, if it is to exist at all, must come from sentence that is commensurate with the crime. The sentence the government recommends strikes that proper balance.

c. *The Need to Avoid Unwarranted Sentencing Disparities Between Defendants Who Have Committed Similar Crimes*

Despite her egregious conduct, the defendant seeks a sentence of probation - the proverbial slap on the wrist. To give this defendant her requested sentence would indeed create an undue disparity between herself and others similarly situated. Indeed, if this Court were to sentence the defendant to only probation, the Section 3553(a) factors would cease to ensure uniformity between similarly situated defendants.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court impose a sentence of three years incarceration. Such a sentence is sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph two of Section 3553.

Respectfully submitted,

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/s/
Electronically filed on 10/29/2010
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I hereby certify that on October 29, 2010,
I filed the foregoing electronically through the CM/ECF system, which caused Counsel for the Defendant, to be served by Electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/
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