UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, v. INOCENTE ORLANDO MONTANO, Defendant	)	CRIMINAL NO. 12-10044-DPW

GOVERNMENT'S MEMORANDUM ADDRESSING THE DEFENDANT'S CLAIM THAT THE UNITED STATES HAS VIOLATED THE TERMS OF THE PLEA AGREEMENT

At the sentencing hearing on January 15, 2012, the Court instructed the United States to address the defendant's claim, made on the eve of the hearing,[1] that the government had violated the terms of its plea agreement with the defendant in two regards. First, the defendant asserts that the inclusion in the plea agreement of a provision permitting the government to seek an *upward adjustment* pursuant to USSG §3C1.1 were the defendant to obstruct justice after the date of the plea agreement precludes the government from seeking an *upward departure or variance* from the sentencing range suggested by the guidelines. Second, the defendant asserts that, if the United States encouraged individuals to submit letters to the Court, such as the letters submitted by the Center for Justice and Accountability, such encouragement would "arguably" be an attempt to undermine the plea agreement. As discussed below, the defendant's claims are without merit as a matter of fact and as a matter of law.

As discussed below, (1) the plain language of the plea agreement makes clear that the

[1] *See* Defendant's Response to the Government's Sentencing Memorandum and to Miscellaneous Submissions to the Court, Docket Entry 57 ("Defendant's Memo").

government did not breach the agreement; (2) though the Court need not look beyond the four corners of the plea agreement, a review of the course of the negotiations leading to the execution of the plea agreement makes clear that the parties at all times contemplated that the government would seek a sentence well above the GSR based on allegations that the defendant was responsible for a plethora of human rights abuses; and (c) assuming *arguendo* that a breach occurred, the Court, rather than order specific performance, should instead allow the defendant to withdraw his guilty plea and proceed to trial. The government will address each of these issues in turn.

As discussed more thoroughly below, the plea agreement unambiguously preserves both parties' right to seek a departure or a variance from the guideline range contemplated by Section 3 of the plea agreement.[2] Not only is the plea agreement silent on whether the parties can advocate for a departure or a variance, indicating there was no agreement on that issue, the plea agreement expressly states that (1) ["t]he Sentencing Guidelines are advisory, not mandatory and, as a result, the Court may impose a sentence up to and including the statutory maximum term of imprisonment,"; and (2) "[t]here is no agreement regarding disposition in this case." The plea agreement thus contains no agreement on the appropriateness *vel non* of a departure or variance. The sentence in the plea agreement upon which the defendant relies to argue the contrary – "Defendant expressly understands that, in addition to declining to recommend an acceptance-of-responsibility adjustment, the U.S. Attorney may seek an upward adjustment pursuant to USSG §3C1.1 if Defendant obstructs justice after the date of this Agreement" – cannot be read as a one-sided agreement by the government not to seek a departure based on uncharged conduct. The

[2]The instant plea agreement is Exhibit 1 hereto.

plain reading of that sentence is that government reserves the right to recommend an *upward adjustment* in the defendant's total offense level if the defendant engages in certain *post-plea* conduct; it would be unnatural and illogical to read it as a limitation on the government's right to seek a *departure or variance* from the guidelines range resulting from the stipulations in paragraph 3 based on the defendant's *pre-plea* conduct.

The defendant's claim that the government breached the plea agreement by encouraging members of the public to write letters to the Court is based on a faulty premise: the government had no hand in encouraging letter writing to the Court. *See* Declaration of AUSA John A. Capin ("Capin Declaration") at ¶¶ 2-3. The Capin Declaration is Exhibit 3 hereto.

I. Background

A. The Criminal Complaint

On August 22, 2011, the defendant was charged by criminal complaint with violation of 18 U.S.C. § 1546(a). Among the facts set forth in the complaint were allegations that the defendant served in the Armed Forces of El Salvador for 30 years and retired as a colonel. Complaint Aff. ¶ 9. The complaint alleged that Montano was a member of the military high command during the period of El Salvador's civil war and that, in 1989, he served as the Public Safety Vice-Minister. *Id*. at ¶¶ 9, 16. In addition, the complaint alleged that, on May 30, 2011:

> [A] Spanish court issued an indictment charging 20 former Salvadoran army officers with crimes against humanity and state terrorism for their role in the murders of six Jesuit priests, their housekeeper, and her sixteen year old daughter in1989. Montano is one of the former officers named in that indictment.

Id. at ¶ 11. Immediately after the filing of the criminal complaint the United States and the defendant commenced negotiations aimed at resolving this matter by plea to an information and,

to that end, jointly moved on several occasions to extend the Speedy Trial Act deadline for filing an information or indictment.

A. The Original Information and December 19, 2011 Plea Hearing

By agreement of the parties, the United States filed a two-count information on November 29, 2011 *(United States v. Inocente Orlando Montano*, Criminal Action No. 11-10389-DPW, Docket Entry 13 (hereinafter "Original Information"). The Information included allegations concerning the defendant's tenure as an officer in the military of El Salvador and allegations that troops under his command committed human rights abuses. As compared to the criminal complaint, the Original Information contained more specific allegations concerning human rights abuses reported to have been committed under the defendant's command. Specifically, the Original Information alleged the following:

> 2. Montano received military training and served as an officer in the military of El Salvador. He was a military officer during a civil war in El Salvador that spanned the period from 1979 through 1991.
>
> 3. Throughout the civil war, Montano held positions of authority within El Salvador's Armed Forces. While a colonel in El Salvador's Armed Forces, Montano served, from on or about June 1, 1989, until on or about March 2, 1992, in the military government as the Vice-Minister for Public Security.
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> 4. Several reports published by governmental and non-governmental organizations in the early 1990s documented human rights violations committed by the Salvadoran military during that country's civil war. Such violations include torture, arbitrary detention, extrajudicial killings, and disappearances.
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> 5. For example, in 1990, the Arms Control and Foreign Policy Caucus, a group made up of members of the United States Congress, published a report entitled "Barriers to Reform: A Profile of El Salvador's Military Leaders." That report alleges that

> human rights abuses were committed by troops directly under Montano's command.
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> 6. As another example, in 1993, the United Nations Commission on the Truth for El Salvador published a report entitled "From Madness to Hope: The 12 Year War in El Salvador" ("U.N. Truth Commission Report"). The U.N. Truth Commission Report found that there was substantial evidence that Montano colluded with other Salvadoran military officers to issue an order to murder a particular Jesuit priest at San Salvador's Central American University and to leave no witnesses. As described in the U.N. Truth Commission Report, the consequence of that order was the murder, on November 15, 1989, of six Jesuit priests, an employee of the priests, and the employee's daughter. The Report further found that there was evidence that Montano and others took steps to conceal the truth regarding said murders.
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> 7. In 1994, Montano retired from service as an officer of El Salvador's Armed Forces and at some point thereafter left El Salvador and came to the United States.

Original Information, ¶¶ 2-7.

The Original Information charged the defendant with violating 18 U.S.C. §§ 1546(a) and 1621(2) by making material false statements in response to the following questions:

> Have you EVER . . . served in, been a member of, assisted in, or participated in any military unit, paramilitary unit, police unit . . . ?
>
> Have you EVER been a member of, assisted in, or participated in any group, unit, or organization of any kind in which you or other persons used any type of weapon against any person or threatened to do so?
>
> Have you EVER received any type of military, paramilitary, or weapons training?

In a plea agreement dated December 19, 2011 ("Original Plea Agreement"), the defendant agreed to plead guilty to both counts of the Original Information. Original Plea Agreement, § 1.[3] Section 3 of the agreement set out the parties agreement with regard to the calculation of the U.S.

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[3]The original plea agreement is Exhibit 2 hereto.

Sentencing Guidelines. That section begins with the following language:

> The sentence to be imposed upon Defendant is within the discretion of the District Court ("Court"), subject to the statutory maximum penalties set forth above, and the provisions of the Sentencing Reform Act, and the United States Sentencing Guidelines promulgated thereunder. The Sentencing Guidelines are advisory, not mandatory and, as a result, the Court may impose a sentence up to and including the statutory maximum term of imprisonment and statutory maximum fine. In imposing the sentence, the Court must consult and take into account the Sentencing Guidelines, along with the other factors set forth in 18 U.S.C. §3553(a).

Id., § 3. The same section of the original plea agreement provided that the U.S. Attorney agreed "to recommend that the Court reduce by two levels Defendant's Adjusted Offense Level under USSG §3E1.1," but "specifically reserve[d] the right not to recommend a reduction under USSG §3E1.1" if any of several events occurred at any time between the defendant's execution of the agreement and sentencing. *Id.* That section of the Agreement concluded with the following sentence:

> Defendant expressly understands that, in addition to declining to recommend an acceptance-of-responsibility adjustment, the U.S. Attorney may seek an upward adjustment pursuant to USSG §3C1.1 if Defendant obstructs justice after the date of this Agreement.

Section 4 of the original plea agreement stated, in full, "There is no agreement regarding disposition in this case."

On December 19, 2011, the Court conducted a plea hearing at which the defendant expressed an intent to plead guilty to the Original Information. Transcript of 12/19/11 Plea Hearing at 11. With respect to the Sentencing Guidelines, the Court explained to the defendant that the Court is "not bound by what the parties agree to. I'll make my own determinations about

what the Sentencing Guidelines are." *Id.* at 10. The defendant, represented by counsel, stated that he understood. *Id.* The Court further explained that "the sentencing guidelines don't end the discussion about sentencing. I will have to make an evaluation of the application of certain statutory provisions with respect to sentencing, and it may result in a sentence that is higher than the guidelines or lower than the guidelines." *Id.* Again, the defendant stated that he understood. *Id.* Later during its colloquy with the defendant, the Court stated, "You're pleading guilty in the face of uncertainty about what I'm going to do because at this point I don't know all the relevant information to make a judgment about what the sentence should be in this case." *Id.*

After a lengthy colloquy with the Court, the defendant asked to adjourn the proceeding because he required additional time to consider whether to plead guilty. *Id.* at 16. Before adjourning the hearing, the Court commended to the parties its decision in *United States v. Boskic*:

> [T]he First Circuit decision is reported at 545 F.3d. 69. It involved false statements by an individual who . . . denied that he had been involved in . . . a paramilitary organization. In the sentencing, which was transcribed, there was a discussion about the impact, if at all, of the underlying allegations about involvement in human rights violations, and the parties may want to review that, you may want to review it with Mr. Montano before we get back together on that in which I indicated the way I would approach this kind of issue.

Id. at 18-19.

Before December 19, 2011, the date the parties executed the original plea agreement, the parties had discussed the government's intention to seek a sentence above the GSR based on Montano's history as a human rights violator. In fact, the defendant, in correspondence prior to the execution of the original plea agreement, acknowledged that he understood that allegations regarding the defendant's involvement in the Jesuit massacre were to be a significant aspect of

the government's position at sentencing and that the government would recommend a sentence "well in excess" of the GSR. In an e-mail message sent to the undersigned AUSA on November 23, 2011, defense counsel stated as follows:

> I'd like the appeal waiver removed. I can't agree to have Mr. Montano sign off on this under any circumstances. I have no way of knowing what information/evidence you intend to present at a sentencing hearing. If your presentation persuades the court to give Mr. Montano a sentence well in excess of the applicable GL range on the basis of arguably objectionable/irrelevant information, he should have the right to challenge that on appeal. With all due respect, I know the government's intent is to turn the sentencing hearing into a mini-trial on the subject of Mr. Montano's alleged involvement in the murders of the Jesuits in El Salvador.

November 23, 2011 e-mail message from Oscar Cruz to John Capin (Capin Declaration, Attachment A). In subsequent correspondence, the defendant acknowledged that, irrespective of the specific false statements to which the defendant admitted, the government would be able to "attempt to raise whatever points you'd like at sentencing to justify your recommendation." December 13, 2011 e-mail message from Oscar Cruz to John Capin (Capin Declaration, Attachment B). In pertinent part, the correspondence reads as follows:

> [The Information lists] three separate questions/responses from the TPS application(s) for each of the counts. One of those questions reads as follows: *Have you EVER been a member of, assisted in, or participated in any group, unit, or organization of any kind in which you or other persons used any type of weapon against any person or threatened to do so?* Mr. Montano admits that he gave false responses to the other two questions[4] listed related to his participation in the Salvadoran military but he cannot admit to the question I have highlighted.

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[4]Thus, in plea negotiations, the defendant admitted that he gave false responses to "the other two questions," to wit, whether he had "EVER . . . served in, been a member of, assisted in, or participated in any military unit, paramilitary unit, police unit [or had] *EVER received any type of military, paramilitary, or weapons training*." (emphasis supplied). It is therefore perplexing that the defendant now asserts that "Mr. Montano was adamant during plea negotiations that he would not agree to make any admission of guilt regarding that question [Have you EVER received any type of military, paramilitary, or weapons training?]." Defendant's Memo at 8.

> If he does, then the question becomes what specific acts did he participate in or order/condone in his capacity as a military leader? If he gives no specifics then you have carte blanche to argue that he has admitted to any number of atrocities including the execution of the Jesuit priests in 89. This is a huge problem and I think it can be easily resolved by having that particular question/response removed from the information and allowing him to plead to the remainder. *You can still attempt to raise whatever points you'd like at sentencing to justify your recommendation.*

Id. (emphasis supplied). At no time did the defendant suggest that any provision in the original plea agreement served to preclude the government from seeking a sentence above the GSR. On the contrary, as reflected in the Defendant's email quoted above, the defendant explicitly acknowledged, during negotiations, that even if he did not admit to membership in an organization "in which [he] or other persons used any type of weapon against any person or threatened to do so," the government could nonetheless "attempt to raise whatever points [it would] like at sentencing to justify [its] recommendation."

B. The 2012 Superseding Information

Ultimately, the defendant declined to plead guilty to the Original Information and, on February 8, 2012, the Grand Jury returned an indictment charging the defendant in several counts with violating 18 U.S.C. §§1546(a) and 1621 based on material false statements about the date on which the defendant entered the United States and about whether the defendant had ever "received any type of military, paramilitary, or weapons training." The denial that he received military, paramilitary, or weapons training was a statement the defendant had acknowledged was false in plea negotiations. *See* Capin Declaration, Attachment B. Shortly after the indictment was filed, the parties re-commenced plea discussions.

In the course of those negotiations, the government provided early discovery, including

inculpatory Jencks material relating to the defendant's false statements concerning his date of entry in to the United States. That material included testimony by the person who assisted the defendant in preparing his TPS applications. That person testified that she recognized the "date of entry" Montano had identified on his TPS applications was incorrect. She testified that she confronted the defendant with the false date and told him that if immigration authorities learned the truth he would be deported. The witness further testified that the defendant said he knew the date was not his true date of entry but needed to use that date because, otherwise, "he would not get TPS." The government pointed out to the defendant that the charges relating to the defendant's date of entry appeared indefensible and proposed that the defendant plead guilty to a superseding information charging violations of 18 U.S.C. §§1546(a) and 1621, based solely on the defendant's material false statements concerning date of entry. The government specifically stated its position that such a resolution would leave for sentencing questions regarding whether and to what extent the Court would impose an enhanced sentence based on evidence concerning the defendant's human rights violations in El Salvador.

The parties agreed that the defendant would plead guilty to a superseding information pursuant to a new plea agreement. In accordance with a plea agreement dated August 10, 2012 ("2012 plea agreement"), the United States filed a Superseding Information on September 11, 2012, which Superseding Information was attached to the 2012 plea agreement. Paragraphs two through seven of the Superseding Information set forth the same allegations, verbatim, concerning human rights abuses reported to have been committed under the defendant's command as an officer of the Salvadoran military as those set forth in paragraphs two through seven of the Original Information. *Cf.* Original Information (Criminal Action No. 11-10389-

DPW) and Superseding Information (Criminal Action No. 12-10044-DPW). In the 2012 plea agreement, the government agreed to dismiss the pending indictment. 2012 Plea Agreement, § 1. Otherwise, the 2012 plea agreement was identical to the original plea agreement in all respects discussed above at pp. 5-6 above, except for the calculation of the applicable Sentencing Guidelines, which varied from the original plea agreement because of the operation of the grouping guidelines.

At the plea hearing on September 11, 2012, the Court explained to the defendant that the "*Sentencing Guidelines* will be the beginning of my determination of what a proper sentence should be . . . [and] I will look at the *Guidelines*, I will look at the statutory provisions that tell me what I should be guided by in sentencing, and I will make my own determination about what the proper sentence should be." Tr. 9/11/12 at 13. The Court pointed out that "in the Plea Agreement the parties have specifically said that they have no agreement regarding what the actual disposition should be." *Id.* at 13-14. At the same hearing, the government informed the Court that the United States anticipated that the sentencing hearing would involve factual disputes that had "been the subject of many discussions between the parties" involving the government's intention "to prove with regard to Mr. Montano's motivation both to come to this country and to lie on these various forms that [he] was motivated by a desire to conceal human rights abuses he committed or participated in while in El Salvador and to, as it were, stay under the radar screen once he became aware while in this country that he was more likely to be removed if it came to the attention of the U.S. Government that he had done so." *Id.* at 24-25. The Court again directed the parties to its statement of reasons in *Boskic* "because there are a number of choices to be made with respect to the *Sentencing Guidelines* and I think make clear

what I think is relevant and driving in this kind of case. But intent is one thing, intent to violate, motive is another, and motive is something that I will consider here." *Id.* at 27.

C. Letters Submitted to the Court

As stated in the declaration submitted herewith, no employee or agent of U.S. Attorney's Office, including the undersigned AUSA, or any member of the prosecution team had any involvement whatsoever in requesting or encouraging the submission by any person or by the Center for Justice and Accountability of letters to the Court in connection with the sentencing in this action. *See* Capin Declaration at ¶¶ 2-3. Prior to the sentencing hearing, the undersigned AUSA received an inquiry from the Senior Legal Adviser to the Center for Justice concerning how that organization could submit letters to the Court. *Id.* The undersigned AUSA responded by stating that the U.S. Attorney's Office would play no role in transmitting letters to the Court and that members of the public were free to communicate with the Court directly. *Id.* Providing that information was the full extent of the conversation concerning the submission of letters to the Court. *Id.*

II. Argument

A. The Government Has Honored Its Obligations Under the Plea Agreement

It is well-established that plea agreements are to be interpreted under contract-law principles. *United States v. Garcia*, 954 F.2d 12, 17-18 (1st Cir. 1992). Courts "thus look to the express language of the agreement to identify both the nature of the government's promise and the defendant's reasonable understanding of this promise at the time of the entry of the guilty plea." *United States v. Trujillo*, 537 F.3d 1195, 1200 (10th Cir. 2008) (citation omitted).

As an initial matter, the defendant cannot claim that his "reasonable understanding" of the

government's promise at the time he entered the plea agreement was that the promise included an agreement not to seek a sentence above the GSR. The defendant made clear, in connection with the original plea agreement, that he understood the exact same provisions to permit the government "to present [evidence] at a sentencing hearing . . . [seeking to] persuade[] the court to give Mr. Montano a sentence well in excess of the applicable [Guideline] range." Capin Declaration, Attachment A. The defendant also understood that the same provisions permitted the government to focus its sentencing evidence on "Montano's alleged involvement in the murders of the Jesuits in El Salvador." *Id.* If his understanding required further elucidation, the Court provided it – twice – by referring the parties to its treatment in *Boskic* of the issues expected to be presented at sentencing in this case.

It is also well-established that a disputed provision of a plea agreement must be construed "according to the plain meaning of its terms." *United States v. Holbrook*, 368 F.3d 415, 428 (4th Cir. 1997). Here, the plain meaning of the plea agreement's provision that "[t]here is no agreement regarding disposition in this case" is that both parties have reserved the right to seek any lawful sentence. The plainness of this proposition is underscored by the agreement's silence on whether the parties are permitted to or prohibited from recommending a departure or a variance from the guideline range contemplated by the plea agreement.

That the plea agreement should not be read to waive the government's right to seek a departure or variance is further made clear by examination of the consideration given and received by each party to the agreement. The first section of the plea agreement makes manifest what consideration the defendant received in exchange for his agreement to plead guilty. The government agreed to supersede the indictment with an information that would permit the

defendant to admit solely that he lied about his date of entry into the United States. In essence, the agreement allowed the defendant to avoid potential self-incrimination by allowing him to avoid admitting that he had received training as a military officer. That admission, while perhaps not incriminating in and of itself, could serve as a link in a chain of evidence establishing that the defendant served in the military, commanded troops in the military, and had command authority over troops that committed violations of human rights. The ability to refrain from making such an admission is potentially valuable to the defendant not only in this jurisdiction but in others as well.

The first section of the plea agreement also reflects the consideration received by the government – avoidance of trial. However, absent the bargained-for right to advocate any legal sentence, the mere avoidance of trial on a thoroughly uncontroversial issue[5] is unreasonably meager consideration. Examination of the consideration exchanged by the parties makes clear that the plea agreement's statement that the parties reached "no agreement regarding disposition in this case" was itself consideration for the agreement because it plainly preserved each party's right to advocate any lawful sentence.

A "plain meaning" reading of the plea agreement's treatment of the advisory guidelines calculation makes clear that such treatment was limited to calculation of the offense level and any adjustment based on pre-plea conduct. The statement "the U.S. Attorney may seek an

[5]The only material false statement alleged in the superseding information was the defendant's statement on his TPS application about when he entered the United States. His actual entry date is established by documentary and testimonial evidence. Moreover, as shown in early Jencks materials the government provided the defendant, the person who prepared his TPS applications has testified that the defendant told her that he knew the date indicated on the TPS applications was not his true date of entry but that he needed to use that date because, otherwise, "he would not get TPS."

upward adjustment pursuant to USSG §3C1.1 if Defendant obstructs justice after the date of this Agreement," can only be read to clarify that future obstructive conduct which, as a matter of logic, cannot be specified in the agreement, may result in the government seeking an obstruction-of-justice enhancement. This provision thus seeks to capture a unique category of conduct: possible *future* conduct, as distinct from the pre-agreement conduct specified in the agreement. It is illogical to read this sentence as precluding the government from seeking a departure or variance, especially in light of the agreement's silence on that subject and clear statement that thee parties have "no agreement regarding disposition."

The defendant's argument that the obstruction-of-justice provision should be interpreted "to allow for an upward departure request by the government in only one circumstance, if Mr. Montano obstructs justice after the entry of his plea . . ." is fundamentally flawed for two primary reasons. First, the obstruction-of-justice provision, like the entirety of section 3 of the Agreement addresses the calculation of the offense level. It does not address departure grounds. Second, the defendant's proposed reading would only be reasonable if the following italicized words were added to the operative language: "the U.S. Attorney may seek an upward adjustment . . . if Defendant obstructs justice after the date of this Agreement *and may seek no departure or variance*."

Not only is the plea agreement silent on whether the parties can advocate for a departure or a variance, indicating there was no agreement on that issue, the plea agreement expressly states that ["t]he Sentencing Guidelines are advisory, not mandatory and, as a result, the Court may impose a sentence up to and including the statutory maximum term of imprisonment." This language, read in concert with the unequivocal statement, "There is no agreement regarding

disposition in this case," can only be understood to mean that the correspondence between the parties during negotiations correctly reflects the mutual understanding that the agreement permits each party to recommend any lawful sentence.

Cases addressing claims that the government breached a plea agreement where the only relevant agreement between the parties was the guidelines base offense level and adjustments to the offense level make clear that such an agreement does not bind the government to recommending a sentence within the GSR. *See, e.g., United States v. Rivera*, 2012WL617650 *4 (8th Cir. 2012) (unpublished). In *Rivera*, the court found that the district court had not erred in finding that no breach had occurred where the "parties only stipulated to Rivera's base-offense level and adjustment's to his offense level, recognizing that the court was not bound by the stipulations." *Id.* Here the plea agreement is even clearer than the agreement at issue in *Rivera* – the instant plea agreement expressly states that the "Court may impose a sentence up to and including the statutory maximum term of imprisonment." Similarly, the Court of Appeals for the Third Circuit found that the government had not breached its plea agreement by requesting an upward departure where the agreement "did not contain any express promise by the Government not to seek an upward departure in [the defendant's] criminal history category" where the agreement "merely advised [the defendant] that, based on facts known prior to the preparation of the [PSR], he should expect a Government recommendation within the Guidelines range. *United States v. Carson*, 337 Fed.Appx 257, 259 (3rd Cir. 2010) (unpublished) (internal quotation marks omitted). The court concluded that the government's request for an upward departure "was not inconsistent with the plea agreement or what Carson should have 'reasonably understood' in entering into that agreement." *Id.* (citation omitted); *accord United States v.*

Minch, 438 Fed.Appx 485, 490 (6th Cir. 2011) (unpublished) (no breach where government did not object to PSR's calculation but nonetheless argued for upward departure and/or variance: "[T]he Government did not breach the plea agreement by seeking an upward departure or variance. The plea agreement contained no provisions binding the Government to a sentence within the original guidelines range [and provided, similar to Montano's plea agreement] " that the Court shall make the final determination of the Guideline range that applies in this case, *and may impose a sentence within, above, or below the Guideline range, subject to the statutory maximum penalties* . . ." (emphasis in original)); *United States v. Boczkowski*, 378 Fed.Appx 126, 128 (3rd Cir. 2010) (unpublished) (no breach where government sought upward variance despite the plea agreement's limitation on the number of pornographic images involved in the offense).

On the other hand, the cases the defendant relies on to argue breach are inapposite because, unlike this case, they involve plea agreements in which the government stipulated to the GSR and agreed to recommend a sentence within the GSR. *See United States v. Munoz*, 408 F.3d. 222, 224 (5th Cir. 2005); *United States v. Rivera*, 375 F.3d. 290, 292 (3rd Cir. 2004). In *Munoz*, the government argued for a guidelines enhancement not contemplated by the plea agreement and, consequently, to a sentence above the stipulated GSR. *Id.* at 227-228. Understandably, the court concluded that the Government "crossed the line to breach by affirmatively advocating the application of the enhancement." *Id.* Similarly, in *Rivera*, despite an agreement between the parties regarding the total offense level, the government endorsed a higher offense level recommended by the PSR. *Rivera*, 375 F.3d. at 228. In this case, by contrast, the government does not endorse a guidelines calculation higher than that described in

the plea agreement.[6] However, as the plea discussions contemplated, the parties recognized that determining the base offense level and adjustments is only the beginning of the guidelines analysis – or sentencing analysis, for that matter.

B. The Negotiations Leading to the Execution of the Plea Agreement Make Clear That The Parties Understood that The Government Would Seek A Sentence Above The GSR Based on Allegations Of Human Rights Abuses By the Defendant

Although the Court need not stray beyond the four corners of the plea agreement to conclude that the government has honored its commitments under the agreement, the defendant's "reasonable understanding of [the government's] promise at the time of the entry of the guilty plea," *see Trujillo*, 537 F.3d at 1200, is informed by a review of the information provided to the defendant by the Court and the government and by the defendant's own expression of his understanding of the terms of an identical provision in an earlier plea agreement. The Court twice informed the defendant – as had the government – that the *Boskic* case provided a rubric for analyzing the issues expected to arise at sentencing. In plea discussions, the defendant acknowledged that he understood that the government would seek to prove facts involving human rights abuses, including the Jesuit massacre, and issues relating thereto in support of a sentence recommendation "well in excess" of the GSR and that, regardless of the specific false TPS statements to which the defendant pleaded guilty, the government would present the same evidence in support of an above-the-GSR sentence. The defendant has not – and cannot – identify any statement by the government supporting his freshly-minted claim that the United

[6]To the contrary, upon receiving the PSR, which applied the grouping Guideline in a manner more favorable to the defendant, the government stated that it would not press for the higher total offense level contemplated by the plea agreement, but would advocate for the lower level set forth in the PSR.

States unilaterally limited its option to seek a departure or variance. That is because at all times a central aspect of the plea discussions was both parties' acknowledgment that they would litigate their true factual disputes at sentencing. The plea agreement reflects that and reflects the parties' intention to preserve their respective rights to advocate for any lawful sentence.

C. If the Court Were to Find that the Government Had Breached the Plea Agreement, the Court Should Exercise Its Discretion to Permit the Defendant To Withdraw His Guilty Plea

In *Santobello v. New York,* 404 U.S. 257 (1971), the Supreme Court instructed that breach of a plea agreement may be remedied by either "specific performance of the agreement on the plea, in which case the petitioner should be resentenced by a different judge, or…the opportunity to withdraw [the] plea of guilty." *Id* at 263; and *see United States v. Canada*, 960 F.2d 263, 271 (1st Cir.1992). The choice of remedy rests with the court and not the defendant. *United States v. Kurkculer*, 918 F.2d 295, 299 (1st Cir.1990).

In the event the Court were to find a breach of the plea agreement in this case, the only appropriate remedy could be to allow the defendant the opportunity to withdraw his guilty plea and to set the matter for trial. This is so because, given the clear understanding of the parties that the government would move for a sentence well above the GSR, specific performance of the plea agreement *as the defendant would have the Court interpret the plea agreement* would be manifestly unfair. As the language of *Santobello* and *Canada* make clear – and as other courts have implicitly found – the remedy of permitting the defendant to withdraw his plea does not require that the case be transferred to another judge. *See, e.g., United States v. Murphy* 2007 WL 201159 *8 (D. Kansas 2007) (unpublished) (Allowing defendant to withdraw plea and setting case for trial because the "plea agreement was based in significant part on [an] unfulfillable

promise . . . [and] the only adequate remedy is to allow the defendant to withdraw his plea." (citation and internal quotation marks omitted)); and *United States v. Bennett*, 716 F. Supp. 1137, 1146-47 (N.D. Indiana) (allowing defendants to withdraw guilty pleas under Rule 32(d) where they were induced to plead guilty by a promise that could not be kept).

III. Conclusion

For the foregoing reasons, the Court should find that the government has not breached its plea agreement with the defendant. In the event the Court were to find that a breach occurred, the Court should allow the defendant to withdraw his guilty plea and proceed to trial.

Respectfully submitted,

CARMEN M. ORTIZ
United States Attorney

By: /s/ *John A. Capin*

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(617) 748-3100

CERTIFICATE OF SERVICE

I hereby certify that the above document was filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF)

By: /s/ *John A. Capin*

JOHN A. CAPIN
Assistant U.S. Attorney

EXHIBIT 1

PLEA AGREEMENT DATED AUGUST 10, 2012

U.S. Department of Justice

Carmen M. Ortiz
United States Attorney
District of Massachusetts

Main Reception: (617) 748-3100

John Joseph Moakley United States Courthouse
1 Courthouse Way
Suite 9200
Boston, Massachusetts 02210

August 10, 2012

FILED
In Open Court
USDC, Mass.
Date 9/11/12
By JARRETT LOVETT
Deputy Clerk

Oscar Cruz, Esq.
Office of the Federal Defender
51 Sleeper Street, 5th Floor
Boston, MA 02210

Re: U.S. v. Inocente Orlando Montano
Criminal No. 12-10044-DPW

Dear Attorney Cruz:

This letter sets forth the Agreement between the United States Attorney for the District of Massachusetts ("the U.S. Attorney") and your client, Inocente Orlando Montano ("Defendant"), in the above-referenced case. The Agreement is as follows:

1. Change of Plea

At the earliest practicable date, Defendant shall waive indictment and plead guilty to the Superseding Information attached to this Agreement charging him with three counts of immigration fraud, in violation of 18 U.S.C. §1546(a), and three counts of perjury, in violation of 18 U.S.C. §1621(2). Defendant expressly and unequivocally admits that he committed the crimes charged in the Superseding Information, did so knowingly and willfully, and is in fact guilty of those offenses. The U.S. Attorney agrees to dismiss the Indictment now pending in this action upon entry of judgment on the charges set forth in the Superseding Information.

2. Penalties

Defendant faces the following maximum penalties: (a) for each count charging a violation of 18 U.S.C. §1546(a), incarceration for a period of ten years; supervised release for a period of three years; a fine of $250,000; and a mandatory special assessment of $100; and (b) for each count charging a violation of 18 U.S.C. §1621(2), incarceration for a period of five years; supervised release for a period of three years; a fine of $250,000; and a mandatory special assessment of $100.

Defendant also recognizes that pleading guilty may have consequences with respect to his immigration status if he is not a citizen of the United States. Under federal law, a broad range of

crimes are removable offenses, including the offenses to which Defendant is pleading guilty. As more fully set forth in section 6 below, Defendant agrees and stipulates to accept a final judicial order of deportation or removal knowing that it will result in his amenability to immediate deportation or removal from the United States upon conviction and completion of any period of incarceration

3. Sentencing Guidelines

The sentence to be imposed upon Defendant is within the discretion of the District Court ("Court"), subject to the statutory maximum penalties set forth above, and the provisions of the Sentencing Reform Act, and the United States Sentencing Guidelines promulgated thereunder. The Sentencing Guidelines are advisory, not mandatory and, as a result, the Court may impose a sentence up to and including the statutory maximum term of imprisonment and statutory maximum fine. In imposing the sentence, the Court must consult and take into account the Sentencing Guidelines, along with the other factors set forth in 18 U.S.C. §3553(a).

The U.S. Attorney will take the position, with respect to the application of the United States Sentencing Guidelines, that:

(i) Defendant's Base Offense Level for each violation of 18 U.S.C. §1621(2) ("the perjury counts") is 14, pursuant to USSG §2J1.3(a).

(ii) Defendant's Base Offense Level for each violation of 18 U.S.C. §1546(a) ("the immigration fraud counts") is 8, pursuant to USSG §2L2.2(a).

(iii) None of the six counts of the Superseding Information is grouped together under USSG §3D1.2. Thus, under the guideline provisions governing the determination of the offense level on multiple counts, set forth at USSG §§3D1.1-4, each count constitutes a separate group.

(iv) Under USSG §3D1.3(b), the guideline that produces the highest offense level applies; thus the Base Offense Level for violation of 18 U.S.C. §1621(2) controls and the offense level applicable to each group of closely related counts is 14.

(v) Under USSG §3D1.4, the combined offense level is 18 because (a) the offense level applicable to the group with the highest offense level is 14; (b) the offense level is increased by 3 levels, pursuant to USSG §3D1.4 (a), because each of the three perjury counts is equally serious; and (c) the offense level is further increased by 1 level, pursuant to USSG §3D1.4(b), because each of the three immigration fraud counts is 5-8 levels less serious than the perjury counts.

Based on Defendant's prompt acceptance of personal responsibility for the offenses of conviction in this case, and information known to the U.S. Attorney at this time, the U.S. Attorney agrees to recommend that the Court reduce by three levels Defendant's Adjusted Offense Level under USSG §3E1.1.

The U.S. Attorney specifically reserves the right not to recommend a reduction under USSG §3E1.1 if, at any time between Defendant's execution of this Agreement and sentencing Defendant:

(a) Fails to admit a complete factual basis for the plea;

(b) Fails to truthfully admit his conduct in the offenses of conviction;

(c) Falsely denies, or frivolously contests, relevant conduct for which Defendant is accountable under USSG §1B1.3;

(d) Fails to provide truthful information about his financial status;

(e) Gives false or misleading testimony in any proceeding relating to the criminal conduct charged in this case and any relevant conduct for which Defendant is accountable under USSG §1B1.3;

(f) Engages in acts which form a basis for finding that Defendant has obstructed or impeded the administration of justice under USSG §3C1.1;

(g) Intentionally fails to appear in Court or violates any condition of release;

(h) Commits a crime;

(i) Transfers any asset protected under any provision of this Agreement; or

(j) Attempts to withdraw his guilty plea.

Defendant expressly understands that he may not withdraw his plea of guilty if, for any of the reasons listed above, the U.S. Attorney does not recommend that he receive a reduction in Offense Level for acceptance of responsibility.

Defendant expressly understands that, in addition to declining to recommend an acceptance-of-responsibility adjustment, the U.S. Attorney may seek an upward adjustment pursuant to USSG §3C1.1 if Defendant obstructs justice after the date of this Agreement.

4. Sentence Recommendation

There is no agreement regarding disposition in this case.

5. Payment of Mandatory Special Assessment

Defendant agrees to pay the mandatory special assessment to the Clerk of the Court on or before the date of sentencing, unless Defendant establishes to the satisfaction of the Court that Defendant is financially unable to do so.

6. Agreement Regarding Stipulated Judicial Order of Deportation or Removal

Defendant agrees he is not a citizen or national of the United States, and that he is a native of El Salvador and a citizen of El Salvador.

Defendant agrees that when he is convicted in the instant criminal proceeding, he will be convicted in this Court for the offenses of Fraud and Misuse of Visas, Permits and Other Documents, in violation of 18 U.S.C. § 1546(a), and Perjury, in violation of 18 U.S.C. § 1621(2).

Defendant understands and knowingly waives his right to a hearing before an Immigration Judge, or before any other authority under the Immigration and Nationality Act, on the question of his deportability or removability from the United States. Defendant further concedes the he is removable under 8 U.S.C. §1227(a)(1)(B) of the Immigration and Nationality Act. In this regard Defendant understands and knowingly waives his rights to examine the evidence against him, to present evidence on his own behalf, to cross-examine any witnesses presented by the government, in any administrative removal proceeding and to appeal from a determination of deportability or removability.

Defendant understands and knowingly waives his right to apply for any relief from deportability or removability from the United States that would otherwise be available to him. Defendant understands that if he is an alien lawfully admitted for permanent residence, acceptance of a final order of deportation or removal from the United States terminates that status.

Defendant understands that execution of an order of removal against him may have the legal consequence under the immigration laws of permanently barring him from reentering the United States.

Defendant agrees and stipulates to accept a final judicial order of deportation or removal knowing that it will result in his amenability to immediate deportation or removal from the United States upon conviction and completion of any period of incarceration. Defendant agrees that the order of deportation or removal be issued for his deportation to El Salvador, or to any other country as prescribed by the immigration laws and regulations of the United States of America. Further, Defendant understands that the issuance of a final judicial order of deportation or removal has no bearing on, and is independent of, any request that may be presented for his extradition, and that this Agreement contains no promises or representations regarding such. Although the defendant agrees to deportation to El Salvador, he reserves the right to contest any and all extradition requests made by any other country in the Courts of the United States.

Defendant knowingly waives any and all rights to appeal, or to move to reopen or reconsider, or to seek to vacate, or to otherwise seek any judicial or administrative review of, the order of deportation or removal or the right of the United States Department of Homeland Security ("DHS") to enforce such order. Defendant waives any right to and agrees he will not seek any judicial or administrative stay of execution of the order of removal or deportation. Defendant waives any right to seek release from the custody of DHS when DHS assumes such custody after conviction and his release from any period of incarceration and preparatory to arrangements for his deportation or removal from the United States. Defendant agrees he will in all ways cooperate with DHS officials in the surrendering of or applying for any travel documents, or in other formalities relating to his deportation or removal from the United States and preparations therefor.

7. Court Not Bound by Agreement

The sentencing recommendations made by the parties and their respective calculations under the Sentencing Guidelines are not binding upon the U.S. Probation Office or the Court. Within the maximum sentence which Defendant faces under the applicable law, the sentence to be imposed is within the sole discretion of the Court. Defendant's plea will be tendered pursuant to Fed. R. Crim. P. 11(c)(1)(B). Defendant may not withdraw his plea of guilty regardless of what sentence is imposed. Nor may Defendant withdraw his plea because the U.S. Probation Office or the Court declines to follow the Sentencing Guidelines calculations or recommendations of the parties. In the event that the Court declines to follow the Sentencing Guidelines calculations or recommendations of the U.S. Attorney, the U.S. Attorney reserves the right to defend the Court's calculations and sentence in any subsequent appeal or collateral challenge.

8. Civil Liability

By entering into this Agreement, the U.S. Attorney does not compromise any civil liability, including but not limited to any tax liability, which Defendant may have incurred or may incur as a result of his conduct and his plea of guilty to the charges specified in Paragraph 1 of this Agreement.

9. Rejection of Plea by Court

Should Defendant's guilty plea not be accepted by the Court for whatever reason, or later be withdrawn on motion of Defendant, this Agreement shall be null and void at the option of the U.S. Attorney.

10. Breach of Agreement

If the U.S. Attorney determines that Defendant has failed to comply with any provision of this Agreement, has violated any condition of his pretrial release, or has committed any crime following his execution of this Agreement, the U.S. Attorney may, at her sole option, be released from her commitments under this Agreement in their entirety by notifying Defendant, through counsel or otherwise, in writing. The U.S. Attorney may also pursue all remedies available to her

under the law, irrespective of whether she elects to be released from her commitments under this Agreement. Further, the U.S. Attorney may pursue any and all charges which have been, or are to be, dismissed pursuant to this Agreement. Defendant recognizes that no such breach by him of an obligation under this Agreement shall give rise to grounds for withdrawal of his guilty plea. Defendant understands that, should he breach any provision of this Agreement, the U.S. Attorney will have the right to use against Defendant before any grand jury, at any trial or hearing, or for sentencing purposes, any statements which may be made by Defendant, and any information, materials, documents or objects which may be provided by Defendant to the government subsequent to this Agreement without any limitation. In this regard, Defendant hereby waives any defense to any charges which Defendant might otherwise have based upon any statute of limitations, the constitutional protection against pre-indictment delay, or the Speedy Trial Act.

11. Who Is Bound By Agreement

This Agreement is limited to the U.S. Attorney for the District of Massachusetts, and cannot and does not bind the Attorney General of the United States or any other federal, state or local prosecutive authorities.

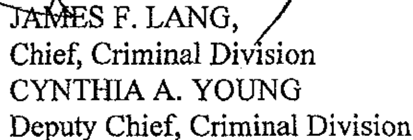
12. Complete Agreement

This letter contains the complete and only agreement between the parties relating to the disposition of this case. No promises, representations or agreements have been made other than those set forth in this letter. This Agreement supersedes prior understandings, if any, of the parties, whether written or oral. This Agreement can be modified or supplemented only in a written memorandum signed by the parties or on the record in court.

If this letter accurately reflects the agreement between the U.S. Attorney and Defendant, please have Defendant sign the Acknowledgment of Agreement below. Please also sign below as Witness. Return the original of this letter to Assistant U.S. Attorney John A. Capin.

Very truly yours,

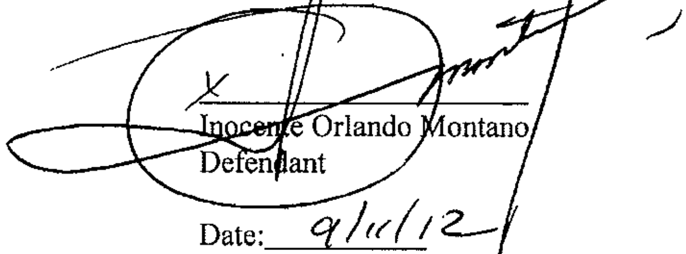
CARMEN M. ORTIZ
United States Attorney

By: 
JAMES F. LANG,
Chief, Criminal Division
CYNTHIA A. YOUNG
Deputy Chief, Criminal Division

2.23.11

ACKNOWLEDGMENT OF PLEA AGREEMENT

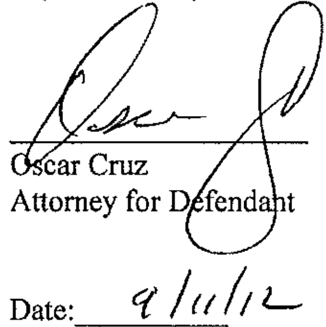
I have read this letter or I have had this letter read to me in my native language in its entirety and discussed it with my attorney. I hereby acknowledge that it fully sets forth my agreement with the United States Attorney's Office for the District of Massachusetts. I further state that no additional promises or representations have been made to me by any official of the United States in connection with this matter. I understand the crimes to which I have agreed to plead guilty, the maximum penalties for those offenses and Sentencing Guideline penalties potentially applicable to them. I am satisfied with the legal representation provided to me by my attorney. We have had sufficient time to meet and discuss my case. We have discussed the charges against me, possible defenses I might have, the terms of this Plea Agreement and whether I should go to trial. I am entering into this Agreement freely, voluntarily, and knowingly because I am guilty of the offenses to which I am pleading guilty and I believe this Agreement is in my best interest.



Inocente Orlando Montano
Defendant

Date: 9/11/12

I certify that Inocente Orlando Montano has read this Agreement or has had this Agreement read to him in his native language and that we have discussed its meaning. I believe he understands the Agreement and is entering into the Agreement freely, voluntarily and knowingly.



Oscar Cruz
Attorney for Defendant

Date: 9/11/12

2.23.11

EXHIBIT 2

PLEA AGREEMENT DATED DECEMBER 19, 2011

U.S. Department of Justice

Carmen M. Ortiz
United States Attorney
District of Massachusetts

Main Reception: (617) 748-3100

John Joseph Moakley United States Courthouse
1 Courthouse Way
Suite 9200
Boston, Massachusetts 02210

December 19, 2011

Oscar Cruz, Esq.
Office of the Federal Defender
51 Sleeper Street, 5th Floor
Boston, MA 02210

Re: U.S. v. Inocente Orlando Montano
Criminal No. 11-10389-mj-05193-JGD

Dear Attorney Cruz:

This letter sets forth the Agreement between the United States Attorney for the District of Massachusetts ("the U.S. Attorney") and your client, Inocente Orlando Montano ("Defendant"), in the above-referenced case. The Agreement is as follows:

1. Change of Plea

At the earliest practicable date, Defendant shall waive indictment and plead guilty to the Information attached to this Agreement charging him with one count of making false statements on an immigration application, in violation of 18 U.S.C. § 1546(a), and one count of perjury, in violation of 18 U.S.C. § 1621(2). Defendant expressly and unequivocally admits that he violated committed the crimes charged in the Information, did so knowingly and willfully, and is in fact guilty of those offenses.

2. Penalties

Defendant faces the following maximum penalties with respect to both counts of the Information: incarceration for a period of five years; supervised release for a period of three years; a fine of $250,000, and a mandatory special assessment of $100.

Defendant also recognizes that pleading guilty may have consequences with respect to his immigration status if he is not a citizen of the United States. Under federal law, a broad range of

crimes are removable offenses, including the offenses to which Defendant is pleading guilty. As more fully set forth in section 6 below, Defendant agrees and stipulates to accept a final judicial order of deportation or removal knowing that it will result in his amenability to immediate deportation or removal from the United States upon conviction and completion of any period of incarceration.

3. Sentencing Guidelines

The sentence to be imposed upon Defendant is within the discretion of the District Court ("Court"), subject to the statutory maximum penalties set forth above, and the provisions of the Sentencing Reform Act, and the United States Sentencing Guidelines promulgated thereunder. The Sentencing Guidelines are advisory, not mandatory and, as a result, the Court may impose a sentence up to and including the statutory maximum term of imprisonment and statutory maximum fine. In imposing the sentence, the Court must consult and take into account the Sentencing Guidelines, along with the other factors set forth in 18 U.S.C. §3553(a).

The parties agree with respect to the application of the United States Sentencing Guidelines that:

(i) Defendant's offenses should be grouped together pursuant to USSG §3D1.2(a);

(ii) With respect to count one, in accordance with USSG §2L2.2(a), Defendant's base offense level before any adjustments is 8;

(iii) With respect to count two, in accordance with USSG §2J1.3(a), Defendant's base offense level before any adjustments is 14;

(iv) Because USSG §3D1.3(b) provides that the offense level for the offenses is based on the most serious offense, count two controls, and the offense level before any adjustments is 14.

Based on Defendant's prompt acceptance of personal responsibility for the offenses of conviction in this case, and information known to the U.S. Attorney at this time, the U.S. Attorney agrees to recommend that the Court reduce by two levels Defendant's Adjusted Offense Level under USSG §3E1.1.

The U.S. Attorney specifically reserves the right not to recommend a reduction under USSG §3E1.1 if, at any time between Defendant's execution of this Agreement and sentencing Defendant:

(a) Fails to admit a complete factual basis for the plea;

(b) Fails to truthfully admit his conduct in the offenses of conviction;

(c) Falsely denies, or frivolously contests, relevant conduct for which Defendant is accountable under USSG §1B1.3;

(d) Fails to provide truthful information about his financial status;

(e) Gives false or misleading testimony in any proceeding relating to the criminal conduct charged in this case and any relevant conduct for which Defendant is accountable under USSG §1B1.3;

(f) Engages in acts which form a basis for finding that Defendant has obstructed or impeded the administration of justice under USSG §3C1.1;

(g) Intentionally fails to appear in Court or violates any condition of release;

(h) Commits a crime;

(i) Transfers any asset protected under any provision of this Agreement; or

(j) Attempts to withdraw his guilty plea.

Defendant expressly understands that he may not withdraw his plea of guilty if, for any of the reasons listed above, the U.S. Attorney does not recommend that he receive a reduction in Offense Level for acceptance of responsibility.

Defendant expressly understands that, in addition to declining to recommend an acceptance-of-responsibility adjustment, the U.S. Attorney may seek an upward adjustment pursuant to USSG §3C1.1 if Defendant obstructs justice after the date of this Agreement.

4. Sentence Recommendation

There is no agreement regarding disposition in this case.

5. Payment of Mandatory Special Assessment

Defendant agrees to pay the mandatory special assessment to the Clerk of the Court on or before the date of sentencing, unless Defendant establishes to the satisfaction of the Court that Defendant is financially unable to do so.

6. Plea Agreement Regarding Stipulated Judicial Order of Deportation or Removal

Defendant agrees he is not a citizen or national of the United States, and that he is a native of El Salvador and a citizen of El Salvador.

Defendant agrees that when he is convicted in the instant criminal proceeding, he will be

convicted in this Court for the offenses of Fraud and Misuse of Visas, Permits and Other Documents, in violation of 18 U.S.C. § 1546(a), and Perjury, in violation of 18 U.S.C. § 1621(2).

Defendant understands and knowingly waives his right to a hearing before an Immigration Judge or before any other authority under the Immigration and Nationality Act, on the question of his deportability or removability from the United States. Defendant further concedes the he is removable under 8 U.S.C. §1227(a)(1)(B) of the Immigration and Nationality Act. In this regard Defendant understands and knowingly waives his rights to examine the evidence against him, to present evidence on his own behalf, to cross-examine any witnesses presented by the government, in any administrative removal proceeding and to appeal from a determination of deportability or removability.

Defendant understands and knowingly waives his right to apply for any relief from deportability or removability from the United States that would otherwise be available to him. Defendant understands that if he is an alien lawfully admitted for permanent residence, acceptance of a final order of deportation or removal from the United States terminates that status.

Defendant understands that execution of an order of removal against him will have the legal consequence under the immigration laws of permanently barring him from reentering the United States.

Defendant agrees and stipulates to accept a final judicial order of deportation or removal knowing that it will result in his amenability to immediate deportation or removal from the United States upon conviction and completion of any period of incarceration. Defendant agrees that the order of deportation or removal be issued for his deportation to El Salvador, or to any other country as prescribed by the immigration laws and regulations of the United States of America. Further, Defendant understands that the issuance of a final judicial order of deportation or removal has no bearing on, and is independent of, any request that may be presented for his extradition, and that this Agreement contains no promises or representations regarding such.

Defendant knowingly waives any and all rights to appeal, or to move to reopen or reconsider, or to seek to vacate, or to otherwise seek any judicial or administrative review of, the order of deportation or removal or the right of the United States Department of Homeland Security ("DHS") to enforce such order. Defendant waives any right to and agrees he will not seek any judicial or administrative stay of execution of the order of removal or deportation. Defendant waives any right to seek release from the custody of DHS when DHS assumes such custody after conviction and his release from any period of incarceration and preparatory to arrangements for his deportation or removal from the United States. Defendant agrees he will in all ways cooperate with DHS officials in the surrendering of or applying for any travel documents, or in other formalities relating to his deportation or removal from the United States and preparations therefor.

7. Court Not Bound by Agreement

The sentencing recommendations made by the parties and their respective calculations under the Sentencing Guidelines are not binding upon the U.S. Probation Office or the Court. Within the maximum sentence which Defendant faces under the applicable law, the sentence to be imposed is within the sole discretion of the Court. Defendant's plea will be tendered pursuant to Fed. R. Crim. P. 11(c)(1)(B). Defendant may not withdraw his plea of guilty regardless of what sentence is imposed. Nor may Defendant withdraw his plea because the U.S. Probation Office or the Court declines to follow the Sentencing Guidelines calculations or recommendations of the parties. In the event that the Court declines to follow the Sentencing Guidelines calculations or recommendations of the U.S. Attorney, the U.S. Attorney reserves the right to defend the Court's calculations and sentence in any subsequent appeal or collateral challenge.

8. Civil Liability

By entering into this Agreement, the U.S. Attorney does not compromise any civil liability, including but not limited to any tax liability, which Defendant may have incurred or may incur as a result of his conduct and his plea of guilty to the charges specified in Paragraph 1 of this Agreement.

9. Rejection of Plea by Court

Should Defendant's guilty plea not be accepted by the Court for whatever reason, or later be withdrawn on motion of Defendant, this Agreement shall be null and void at the option of the U.S. Attorney.

10. Breach of Agreement

If the U.S. Attorney determines that Defendant has failed to comply with any provision of this Agreement, has violated any condition of his pretrial release, or has committed any crime following his execution of this Agreement, the U.S. Attorney may, at her sole option, be released from her commitments under this Agreement in their entirety by notifying Defendant, through counsel or otherwise, in writing. The U.S. Attorney may also pursue all remedies available to her under the law, irrespective of whether she elects to be released from her commitments under this Agreement. Further, the U.S. Attorney may pursue any and all charges which have been, or are to be, dismissed pursuant to this Agreement. Defendant recognizes that no such breach by him of an obligation under this Agreement shall give rise to grounds for withdrawal of his guilty plea. Defendant understands that, should he breach any provision of this Agreement, the U.S. Attorney will have the right to use against Defendant before any grand jury, at any trial or hearing, or for sentencing purposes, any statements which may be made by Defendant, and any information, materials, documents or objects which may be provided by Defendant to the government subsequent to this Agreement without any limitation. In this regard, Defendant hereby waives any defense to any charges which Defendant might otherwise have based upon any statute of limitations, the constitutional protection against pre-indictment delay, or the Speedy Trial Act.

11. Who Is Bound By Agreement

This Agreement is limited to the U.S. Attorney for the District of Massachusetts, and cannot and does not bind the Attorney General of the United States or any other federal, state or local prosecutive authorities.

12. Complete Agreement

This letter contains the complete and only agreement between the parties relating to the disposition of this case. No promises, representations or agreements have been made other than those set forth in this letter. This Agreement supersedes prior understandings, if any, of the parties, whether written or oral. This Agreement can be modified or supplemented only in a written memorandum signed by the parties or on the record in court.

If this letter accurately reflects the agreement between the U.S. Attorney and Defendant, please have Defendant sign the Acknowledgment of Agreement below. Please also sign below as Witness. Return the original of this letter to Assistant U.S. Attorney John A. Capin.

Very truly yours,

CARMEN M. ORTIZ
United States Attorney

By: ______________________
JAMES F. LANG
Chief, Criminal Division
JOHN T. McNEIL
Deputy Chief, Criminal Division

ACKNOWLEDGMENT OF PLEA AGREEMENT

I have read this letter or I have had this letter read to me in my native language in its entirety and discussed it with my attorney. I hereby acknowledge that it fully sets forth my agreement with the United States Attorney's Office for the District of Massachusetts. I further state that no additional promises or representations have been made to me by any official of the United States in connection with this matter. I understand the crimes to which I have agreed to plead guilty, the maximum penalties for those offenses and Sentencing Guideline penalties potentially applicable to them. I am satisfied with the legal representation provided to me by my attorney. We have had sufficient time to meet and discuss my case. We have discussed the charges against me, possible defenses I might have, the terms of this Plea Agreement and whether I should go to trial. I am

entering into this Agreement freely, voluntarily, and knowingly because I am guilty of the offenses to which I am pleading guilty and I believe this Agreement is in my best interest.

____
Inocente Orlando Montano
Defendant

Date:___________

I certify that Inocente Orlando Montano has read this Agreement or has had this Agreement read to him in his native language and that we have discussed its meaning. I believe he understands the Agreement and is entering into the Agreement freely, voluntarily and knowingly.

____
Oscar Cruz
Attorney for Defendant

Date:__________

EXHIBIT 3

DECLARATION OF AUSA JOHN A. CAPIN

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,

v.

INOCENTE ORLANDO MONTANO,

Defendant

CRIMINAL NO. 12-10044-DPW

DECLARATION OF AUSA JOHN A. CAPIN

I, John A. Capin, declare as follows:

1. I am an Assistant U.S. Attorney prosecuting the above-captioned case.

2. I am aware of letters submitted to the Court by various members of the public, including those submitted to the Court on January 4, 2013 by the Center for Justice and Accountability ("CJA").

3. In December 2012, I received a telephone call from CJA's Senior Legal Adviser, inquiring about how CJA could best submit to the Court letters in the possession of CJA. I informed the caller that the U.S. Attorney's Office had no role in that process, but that members of the public and CJA were free to communicate with the Court directly. The foregoing describes the full extent of my communications with CJA and any member of the public concerning the submission of letters to the Court in connection with this proceeding. To the best of my knowledge, information, and belief, no employee or agent of the U.S. Attorney's Office or member of the prosecution team has encouraged any person or entity to submit letters to the Court in connection with this action.

4. Attachment A to this declaration is a true and accurate copy of an e-mail I

received on November 23, 2011.

5. Attachment B to this declaration is a true and accurate copy of an e-mail I received on December 13, 2011.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Signed this 1st day of March 2013,

JOHN A. CAPIN
Assistant U.S. Attorney

ATTACHMENT A

EMAIL FROM OSCAR CRUZ TO JOHN CAPIN
DATED 11/23/2011

Capin, John (USAMA)

From: Oscar Cruz <Oscar_Cruz@fd.org>
Sent: Wednesday, November 23, 2011 9:59 AM
To: Capin, John (USAMA)
Subject: Re: Montano

Importance: High

John,

I have reviewed the draft agreement and have the following comments.
Regarding the section reviewing the terms of the stipulation to deportation, Mr. Montano agrees to be deported to El Salvador but NOT to removal to any other country. I just want to be clear on this point since we can word this agreement in whatever manner the parties deem appropriate.
As you know, this case is unique in that Spain has expressed an interest in requesting he be extradited to be prosecuted there. I just don't want anything in this agreement construed as consent on Mr. Montano's part to be removed to any country other than El Salvador.

The second thing is I'd like the appeal waiver removed. I can't agree to have Mr. Montano sign off on this under any circumstances. I have no way of knowing what information/evidence you intend to present at a sentencing hearing. If your presentation persuades the court to give Mr. Montano a sentence well in excess of the applicable GL range on the basis of arguably objectionable/irrelevant information, he should have the right to challenge that on appeal. With all due respect, I know the government's intent is to turn the sentencing hearing into a mini-trial on the subject of Mr. Montano's alleged involvement in the murders of the Jesuits in El Salvador.
I intend to object to the introduction of any information in that regard as irrelevant. There could be any number of reasons why he made false statements in the TPS applications and we don't concede that these accusations regarding those murders were among them. I'm not even comfortable with the language stating he won't appeal a sentence of 16 months or less. I think he should be given probation as a sentence. If he were any other defendant with no criminal history, that is what he would likely get. He has serious medical issues and any sentence of incarceration would be devastating.

Let me know if you can amend and remove the points I have mentioned.

Oscar Cruz, Jr.
Assistant Federal Defender
51 Sleeper Street, 5th Floor
Boston, MA 02210
office: (617) 223-8061
fax: (617) 223-8080

ATTACHMENT B

EMAIL FROM OSCAR CRUZ TO JOHN CAPIN
DATED 12/13/2011

Capin, John (USAMA)

From: Oscar Cruz <Oscar_Cruz@fd.org>
Sent: Tuesday, December 13, 2011 1:44 PM
To: Capin, John (USAMA)
Cc: Cabell, Donald (USAMA)
Subject: Montano case

Importance: High

Gentleman,

I tried to reach you both via telephone but was not able to. Left a VM with John. Let me preface my comments by apologizing in advance because I should have raised these points prior to your filing of the criminal information. I frankly did not look at it as closely as I should have and assumed certain things which was also a mistake. My hope is that we can work things out without too much debate. In my view, paragraphs 4, 5. and
6 of the criminal information contain facts that are mere surplusage and or not necessary. Mr. Montano is not admitting to any facts supposedly brought forth by the "reports" cited in paragraph 4, the Congressional report cited in paragraph 5, and the conclusions of the UN Truth Commission cited in paragraph 6. Mr. Montano can plead guilty to the charges listed without saying a word about the reports/documents referenced. I'd like for those paragraphs to be removed from the information. If not, I will make it clear on the record that Mr. Montano does not accept or admit to any of those points.

The second issue is more problematic and I am hoping we can come to some consensus before next week. You have listed three separate questions/responses from the TPS application(s) for each of the counts.
One of those questions reads as follows: Have you EVER been a member of, assisted in, or participated in any group, unit, or organization of any kind in which you or other persons used any type of weapon against any person or threatened to do so? Mr. Montano admits that he gave false responses to the other two questions listed related to his participation in the Salvadoran military but he cannot admit to the question I have highlighted. If he does, then the question becomes what specific acts did he participate in or order/condone in his capacity as a military leader?
If he gives no specifics then you have carte blanche to argue that he has admitted to any number of atrocities including the execution of the Jesuit priests in 89. This is a huge problem and I think it can be easily resolved by having that particular question/response removed from the information and allowing him to plead to the remainder. You can still attempt to raise whatever points you'd like at sentencing to justify your recommendation. Let me know if we can do this before next Monday.

Oscar Cruz, Jr.
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