EXHIBIT A

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

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:_____

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 B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	CRIMINAL NUMBER: 12-CR-10044
	)	
	)	Violations:
v.	)	18 U.S.C. § 1546(a)
	)	Fraud and Misuse of Visas,
	)	Permits and Other Documents
INOCENTE ORLANDO MONTANO	)	18 U.S.C. § 1621(2)
	)	Perjury

INDICTMENT

The Grand Jury charges that:

I. BACKGROUND

At all times relevant to this Indictment:

1. The defendant, Inocente Orlando Montano ("Montano"), was a citizen of El Salvador.

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.

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.

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.

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 U.N. Truth Commission Report further found that there was evidence that Montano and others took steps to conceal the truth regarding said murders.

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.

8. In or about 2002, Montano was present in the United States and, on several occasions thereafter, applied for and received Temporary Protected Status ("TPS"), a benefit the United States government extends to certain foreign nationals, permitting them to remain in the United States if unable to safely return to their home country because of ongoing armed conflict, the temporary effects of an environmental disaster, or other extraordinary and temporary conditions. To be eligible for TPS, a foreign national must submit to the Department of Homeland Security (and previously to the Immigration and Naturalization Service) a Form I-821,

Application for Temporary Protected Status. The Form I-821 calls for information necessary to determine whether the applicant is eligible for TPS. Information necessary to determine eligibility for TPS included the date on which Montano entered the United States. To be eligible for TPS, Montano must have entered on or before February 13, 2001. To be eligible for TPS, Montano also must have continuously resided in the United States since March 9, 2001. In fact, Montano entered the United States on or about July 2, 2001.

COUNT ONE
18 U.S.C. § 1546(a)
Fraud and Misuse of Visas,
Permits and Other Documents

The Grand Jury re-alleges and incorporates by reference paragraphs 1-8 of this Indictment and charges that, on or about August 24, 2007, in the District of Massachusetts, the defendant,

INOCENTE ORLANDO MONTANO,

did knowingly make under oath, and did knowingly subscribe as true under penalty of perjury under 28 U.S.C. § 1746, a false statement with respect to a material fact in an application and document required by the immigration laws and regulations prescribed thereunder, and did knowingly present such application and document, which contained a false statement and which failed to contain any reasonable basis in law or fact. Specifically the defendant did knowingly prepare, sign, and present a Form I-821, Application for Temporary Protected Status, knowing it contained a false statement, to wit, that the defendant entered the United States on September 30, 2000, which statement the defendant then and there knew was false, in that he had, in fact, entered the United States on or about July 2, 2001.

All in violation of Title 18, United States Code, Section 1546(a).

COUNT TWO
18 U.S.C. § 1621(2)
Perjury

The Grand Jury re-alleges and incorporates by reference paragraphs 1-8 of this Indictment and further charges that, on or about August 24, 2007, in the District of Massachusetts, the defendant,

INOCENTE ORLANDO MONTANO,

in a declaration, certificate, verification, and statement under the penalty of perjury as permitted under 28 U.S.C. § 1746, did willfully subscribe as true material matters which he did not then and there believe to be true, that is to say:

At the time and on the date stated above, on a Form I-821, Application for Temporary Protected Status, the defendant responded to a question asking for the date when he entered the United States by indicating that he entered on September 30, 2000, which statement the defendant then and there knew was false, in that he had, in fact, entered the United States on or about July 2, 2001.

The Defendant signed said Form I-821 and certified under penalty of perjury under the laws of the United States of America that the answers he provided on said Form I-821 were true and correct.

All in violation of Title 18, United States Code, Section 1621(2).

COUNT THREE
18 U.S.C. § 1546(a)
Fraud and Misuse of Visas,
Permits and Other Documents

The Grand Jury re-alleges and incorporates by reference paragraphs 1-8 of this Indictment and charges that, on or about November 10, 2008, in the District of Massachusetts and elsewhere, the defendant,

INOCENTE ORLANDO MONTANO,

did knowingly make under oath, and did knowingly subscribe as true under penalty of perjury under 28 U.S.C. § 1746, a false statement with respect to a material fact in an application and document required by the immigration laws and regulations prescribed thereunder, and did knowingly present such application and document, which contained a false statement and which failed to contain any reasonable basis in law or fact. Specifically the defendant did knowingly prepare, sign, and present a Form I-821, Application for Temporary Protected Status, knowing it contained a false statement, to wit, that the defendant entered the United States on September 30, 2000, which statement the defendant then and there knew was false, in that he had, in fact, entered the United States on or about July 2, 2001.

All in violation of Title 18, United States Code, Section 1546(a).

COUNT FOUR
18 U.S.C. § 1546(a)
Fraud and Misuse of Visas,
Permits and Other Documents

The Grand Jury re-alleges and incorporates by reference paragraphs 1-8 of this Indictment and further charges that, on or about November 10, 2008, in the District of Massachusetts, the defendant,

INOCENTE ORLANDO MONTANO,

did knowingly make under oath, and did knowingly subscribe as true under penalty of perjury under 28 U.S.C. § 1746, a false statement with respect to a material fact in an application and document required by the immigration laws and regulations prescribed thereunder, and did knowingly present such application and document, which contained a false statement and which failed to contain any reasonable basis in law or fact. Specifically the defendant did knowingly prepare, sign, and present a Form I-821, Application for Temporary Protected Status, knowing it contained a false statement, to wit, the defendant responded to the following question by putting an "X" in the box indicating that the answer was "No."

Have you EVER received any type of military, paramilitary, or weapons training?

As the defendant then and there well knew, his response to the question above was false, in that he received military training and weapons training as a member of the military of El Salvador.

All in violation of Title 18, United States Code, Section 1546(a).

COUNT FIVE
18 U.S.C. § 1621(2)
Perjury

The Grand Jury re-alleges and incorporates by reference paragraphs 1-8 of this Indictment and further charges that, on or about November 10, 2008, in the District of Massachusetts, the defendant,

INOCENTE ORLANDO MONTANO,

in a declaration, certificate, verification, and statement under the penalty of perjury as permitted under 28 U.S.C. § 1746, did willfully subscribe as true material matters which he did not then and there believe to be true, that is to say:

At the time and on the date stated above, on a Form I-821, Application for Temporary Protected Status, the defendant responded to a question asking for the date when he entered the United States by indicating that he entered on September 30, 2000, which statement the defendant then and there knew was false, in that he had, in fact, entered the United States on or about July 2, 2001.

In addition, at the time and on the date stated above, on a Form I-821, Application for Temporary Protected Status, the defendant responded to the following question by putting an "X" in the box indicating that the answer was "No."

Have you EVER received any type of military, paramilitary, or weapons training?

As the defendant then and there well knew, his response to the question above was false, in that he received military training and weapons training as a member of the military of El Salvador.

The Defendant signed said Form I-821 and certified under penalty of perjury under the laws of the United States of America that the answers he provided on said Form I-821 were true and correct.

All in violation of Title 18, United States Code, Section 1621(2).

COUNT SIX
18 U.S.C. § 1546(a)
Fraud and Misuse of Visas,
Permits and Other Documents

The Grand Jury re-alleges and incorporates by reference paragraphs 1-8 of this Indictment and charges that, on or about August 27, 2010, in the District of Massachusetts and elsewhere, the defendant,

INOCENTE ORLANDO MONTANO,

did knowingly make under oath, and did knowingly subscribe as true under penalty of perjury under 28 U.S.C. § 1746, a false statement with respect to a material fact in an application and document required by the immigration laws and regulations prescribed thereunder, and did knowingly present such application and document, which contained a false statement and which failed to contain any reasonable basis in law or fact. Specifically the defendant did knowingly prepare, sign, and present a Form I-821, Application for Temporary Protected Status, knowing it contained a false statement, to wit, that the defendant entered the United States on September 30, 2000, which statement the defendant then and there knew was false, in that he had, in fact, entered the United States on or about July 2, 2001.

All in violation of Title 18, United States Code, Section 1546(a).

COUNT SEVEN
18 U.S.C. § 1546(a)
Fraud and Misuse of Visas,
Permits and Other Documents

The Grand Jury re-alleges and incorporates by reference paragraphs 1-8 of this Indictment and further charges that, on or about August 27, 2010, in the District of Massachusetts, the defendant,

INOCENTE ORLANDO MONTANO,

did knowingly make under oath, and did knowingly subscribe as true under penalty of perjury under 28 U.S.C. § 1746, a false statement with respect to a material fact in an application and document required by the immigration laws and regulations prescribed thereunder, and did knowingly present such application and document, which contained a false statement and which failed to contain any reasonable basis in law or fact. Specifically the defendant did knowingly prepare, sign, and present a Form I-821, Application for Temporary Protected Status, knowing it contained a false statement, to wit, the defendant responded to the following question by putting an "X" in the box indicating that the answer was "No."

Have you EVER received any type of military, paramilitary, or weapons training?

As the defendant then and there well knew, his response to the question above was false, in that he received military training and weapons training as a member of the military of El Salvador

All in violation of Title 18, United States Code, Section 1546(a).

COUNT EIGHT
18 U.S.C. § 1621(2)
Perjury

The Grand Jury re-alleges and incorporates by reference paragraphs 1-8 of this Indictment and further charges that, on or about August 27, 2010, in the District of Massachusetts, the defendant,

INOCENTE ORLANDO MONTANO,

in a declaration, certificate, verification, and statement under the penalty of perjury as permitted under 28 U.S.C. § 1746, did willfully subscribe as true material matters which he did not then and there believe to be true, that is to say:

At the time and on the date stated above, on a Form I-821, Application for Temporary Protected Status, the defendant responded to a question asking for the date when he entered the United States by indicating that he entered on September 30, 2000, which statement the defendant then and there knew was false, in that he had, in fact, entered the United States on or about July 2, 2001.

In addition, at the time and on the date stated above, on a Form I-821, Application for Temporary Protected Status, the defendant responded to the following question by putting an "X" in the box indicating that the answer was "No."

Have you EVER received any type of military, paramilitary, or weapons training?

As the defendant then and there well knew, his response to the question above was false, in that he received military training and weapons training as a member of the military of El Salvador.

The Defendant signed said Form I-821 and certified under penalty of perjury under the

laws of the United States of America that the answers he provided on said Form I-821 were true and correct.

All in violation of Title 18, United States Code, Section 1621(2).

A TRUE BILL

FOREPERSON OF THE GRAND JURY

JOHN A. CAPIN
DONALD L. CABELL
ASSISTANT UNITED STATES ATTORNEYS

Returned into the District Court by the Grand Jurors and filed.

DEPUTY CLERK 2/8/2012 @ 2:42pm

DISTRICT OF MASSACHUSETTS
DATE AND TIME: 2/8/2012 @ 2:42 pm

EXHIBIT C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

GOVERNMENT'S SENTENCING MEMORANDUM

On September 11, 2012, the defendant, Inocente Orlando Montano, pleaded guilty to all counts of a Superseding Information, which charged Fraud and Misuse of Visas, in violation of 18 U.S.C. § 1546(a) (Counts 1, 3, 5) and Perjury, in violation of 18 U.S.C. § 1621(2) (Counts 2, 4, 6). The United States of America submits this memorandum in support of its recommendation that the Court impose a sentence of incarceration for a period of 51 months, which, as discussed below, is a reasonable sentence based on both a departure from the Sentencing Guidelines, under USSG §§ 5K2.0 and 4A1.3, and a variance under 18 U.S.C. § 3553(a). An enhanced sentence is warranted by the defendant's lengthy history as an officer in the Salvadoran military who commanded troops and security forces that engaged in widespread violations of human rights. It is further warranted by the weight of the evidence that the defendant traveled to the United States and lied about his past in part to avoid potential prosecution for the murder of six Jesuit priests, their housekeeper, and the housekeeper's daughter, one of the most notorious human rights crimes in that country's history, commonly referred to as the Jesuit massacre. The United States anticipates that the defendant will challenge, at least in part, the factual basis for the government's request for a departure and variance, which may necessitate an evidentiary hearing.

In support of its position, the government submits the Expert Report of Professor Terry Lynn Karl, Stanford University (Exhibit 1), which, along with its appendices, is incorporated herein by reference. The government respectfully proposes that, in the event of an evidentiary hearing, the Court treat Professor Karl's report as her direct testimony, subject to cross-examination by the defendant.

I. Introduction

The government recommends a sentence of 51 months' imprisonment which, as discussed below, at 23-29, is warranted as a departure under USSG §§ 5K2.0 and 4A1.3. It is also warranted as a non-Guidelines variance because it would serve the interests expressed in 18 U.S.C. § 3553(a). The government is mindful of this Court's concern that a criminal prosecution predicated on perjury and immigration fraud not become a vehicle for punishing more grievous offenses. *See United States v. Boskic*, Crim. Action No. 04-10298-DPW, aff'd, 2008 WL 4648362 (1st Cir. Oct. 22, 2008), Transcript of Sentencing Hearing ("Sent. Tr.") at 16 *et seq.*[1] However, the defendant's record as a human rights violator and his involvement in the Jesuit massacre are relevant to determining the defendant's real offense conduct because his decision to lie in order to come to the United States was motivated, at least in part, by a desire to distance himself from the potential of prosecution for his actions in El Salvador. The facts underlying the defendant's conduct in El Salvador thus are relevant to both the Guidelines calculus and the factors this Court must consider under 18 U.S.C. § 3553(a).

The most salient § 3553(a) factors here are "the nature and circumstances of the offense

[1]The *Boskic* sentencing transcript is Exhibit 2 hereto.

and the history and characteristics of the defendant;" and "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, . . . to provide just punishment for the offense; . . . [and] to afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(1) and (2)(A) and (D). The government will address these factors in turn.

The government will then present (1) a brief description of the offenses of conviction, along with a discussion of the defendant's conduct as an officer in the armed forces of El Salvador, which constitutes relevant conduct and provides evidence that defendant traveled to the United States and committed the offenses of conviction at least in part to evade prosecution in El Salvador; (2) the government's position on the calculation of the advisory GSR, including the government's request for an upward departure and variance; and (3) proposed findings of fact and conclusions of law relevant to the government's sentencing recommendation.

A. Nature and Circumstances of the Offense

Not all perjury and immigration fraud crimes are equally serious. Unlike many defendants who commit such crimes in order to travel to or remain in the United States, Colonel Montano did not come to this country to escape poverty or oppression or to seek economic or civic advantages. To the contrary, in El Salvador, he spent his 30-year career as an elite member of the El Salvador Armed Forces ("ESAF") officer corps – "a caste or privileged class inside the military." Expert Report of Professor Terry Lynn Karl ("Karl Report") at 6.

In addition, Colonel Montano traveled to the United States from El Salvador at a time when events in that country and elsewhere in Latin America made it more likely than at any previous time that high level military officers, including Colonel Montano, would be prosecuted for their role in the Jesuit massacre. As discussed below, at 12-18, such events included repeal of

laws granting military officers immunity from prosecution for human right abuses, high-profile prosecutions of former high-ranking military officers throughout Latin America, and legal and political developments in El Salvador, including persistent calls for prosecution of the military leaders responsible for the Jesuit massacre, including Colonel Montano. Thus, evidence demonstrates that the nature and circumstances of the defendant's offenses include his motivation to relocate to the United States, at least in part, due to a desire to distance himself from Salvadoran authorities.

B. History and Characteristics of the Defendant

Colonel Montano occupied key command positions at a time when the ESAF was engaged in "a campaign of indiscriminate mass murder aimed largely at civilians." Karl Report at 7, 38-44. During the Salvadoran civil war, 1979-1992, the ESAF engaged in "massacres, extrajudicial killing, forced disappearances, torture, sexual abuse, arbitrary deprivation of liberty and other acts . . . committed against defenseless civilians far from conflict," and resulting in civilian deaths "estimated at between 75,000 and 85,000." *Id.* at 7-8.

During the civil war, the defendant quickly rose to the highest echelon of the ESAF. *See id.* at 39-44. The defendant's military history is discussed below, at pp. 20-21. In the positions he held, he commanded troops responsible for death squad activities and numerous other human rights abuses. *Id.* at 38-39. Tracing the defendant's career through several command positions, Professor Karl documents 1169 human rights violations committed by units or troops under Colonel Montano's command, including 65 extrajudicial killings, 51 disappearances and 520 cases of torture, which she makes clear is only a partial accounting; "[t]he actual number is significantly greater." *Id.* at 6. Colonel Montano's appointment as Vice Minister of Defense for

Public Security, which put him in charge of El Salvador's principal security forces, "coincided with a strong resurgence in extrajudicial killings, torture, deaths in custody, and urban terror campaigns" aimed at prominent civilians and civilian groups. *Id.* at 16-18.

C. Need for the Sentence Imposed to Reflect the Seriousness of the Offense and Promote Respect for the Law, to Provide Just Punishment for the Offense

Perjury and immigration fraud are serious offenses. In this case, Colonel Montano's crimes are aggravated by the fact that they were committed, at least in part, to avoid potential prosecution for crimes committed in his home country. They are further aggravated by the fact that the defendant lied repeatedly over the course of nearly a decade to shield his military background from scrutiny by authorities in this country. If the sentence is to reflect the seriousness of the defendant's crimes, promote respect for the law, and provide a just punishment, this Court should take into account the defendant's motivation and the duration of his criminal conduct.

D. Deterrence of Criminal Conduct

Finally, a substantial sentence will serve the interests of general deterrence. As this Court explained in the case of another human rights violator who fled to the United States to avoid prosecution overseas, the United States, which has long been a refuge for the persecuted, should deter those who participated in the persecution of others from seeking haven here. *United States v. Lopes*, Crim. Action No. 07-10437-MLW, Sent. Tr. at 3-4.[2] Noting that efforts have increased internationally "to end the culture of impunity, to investigate, prosecute, and more appropriately punish those who abuse human rights," the Court stated:

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[2]Excerpts of the *Lopes* sentencing transcript are attached hereto as Exhibit 3.

> [T]his increasing attention to investigating, prosecuting, and punishing abuses of human rights also creates increased incentives for larger numbers of people to flee their accusers. In this . . . sentence that I'm imposing on you, it is important to try to send the message that those being investigated and accused of violating human rights should resist the understandable temptation to act illegally to come and stay in the United States. The United States is an attractive place. That's why people lawfully and unlawfully, in large numbers, want to come here. Historically, at least, there's been considerable economic opportunity, there's liberty, there's the opportunity for comfort and happiness. But it's very important that this sentence do its best to send the message that the United States will not be a safe or cost-free haven for those who are alleged to have abused human rights.

Lopes, Sent Tr. at 75.

II. Offenses of Conviction and Relevant Conduct

A. Offenses of Conviction

The offenses of conviction, based on uncontested facts, are described in detail in the PSR at ¶¶ 12-13. In short, on numerous occasions between 2002 and 2010, the defendant applied for and received Temporary Protective Status ("TPS"), a benefit available to foreign nationals who satisfy certain eligibility criteria. In the case of each of the defendant's TPS applications, one such criterion was that the defendant entered the United States no later than February 13, 2001. Montano entered the country after that date, on July 2, 2001, and was thus ineligible for TPS. With the intent to deceive and with full knowledge that disclosure of his actual entry date would disqualify him from TPS, Montano attested, under penalty of perjury, that he in fact entered the United States on September 30, 2000. The dates on which Montano submitted false TPS forms include those specified in the Superseding Information, *i.e.,* August 24, 2007, November 10, 2008, and August 27, 2010.

B. Other Relevant False Statements by Defendant on TPS Applications

As set forth in the PSR at ¶¶ 14-19, the 2008 and 2010 versions of the TPS Application included, in the "Eligibility Standards" section of the form, the questions set forth below and instructed the applicant to fully explain any affirmative response.

> 2q. Have you EVER . . . served in, been a member of, assisted in, or participated in any military unit, paramilitary unit, police unit, self-defense unit, vigilante unit, rebel group, guerrilla group, militia or insurgent organization?
>
> 2r. 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?
>
> 2t. Have you EVER received any type of military, paramilitary, or weapons training?

(emphasis in original). On his 2008 and 2010 TPS Applications, Colonel Montano answered "no" to each of these questions. Because the defendant was an officer of the Salvadoran military for 30 years, truthful answers would have called for affirmative responses.

The defendant also answered "no" to the question on the 2007, 2008, and 2010 versions of the TPS Application, asking whether he had "ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group or political opinion." PSR ¶ 17. As discussed below, at pp. 20-21, the defendant's actions as a military commander throughout El Salvador's 1979-1992 civil war included conduct that constituted, *inter alia*, participation in the persecution of others on account of membership in a particular social group or political opinion.

The defendant's falsehoods were material to the adjudication of his TPS Applications. The Department of Homeland Security (and its predecessor, the INS) had in place, since the

1990s, a "persecutor bar" that made aliens who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion, ineligible for immigration benefits. Complaint Affidavit, ¶ 7, *United States v. Montano*, Case No. 11-05193-JGD (Docket Entry 1). Application of the persecutor bar generally disqualified officers of the Salvadoran military who served during the Salvadoran civil war, among others, from receiving TPS. *Id.* The defendant served in ESAF for more than 30 years, reaching the rank of colonel and ultimately holding, as the regime's Vice-Minister for Public Security, one of the top three positions in the ESAF during the Salvadoran civil war in El Salvador. Karl Report at 16. Through much of his career as an officer, he had command authority over troops that committed widespread human rights violations. *Id.* at 38-45. Indeed, an expert report commissioned by the bi-partisan 1990 Arms Control and Foreign Policy Caucus of the United States Congress – "Barriers to Reform: A Profile of El Salvador's Military Leaders" – specifically named Colonel Montano as a commander whose troops had committed human rights abuses. Karl Report at 13. Also in 1993, the Inter-American Commission on Human Rights ("IACHR"), called for the investigation and prosecution of those responsible for the Jesuit massacre and ultimately found that credible evidence implicated Montano in the those murders. *Id.* at 34-35.

The defendant made admissions to Department of Homeland Security ("DHS") agents that, viewed in light of Colonel Montano's sophistication, demonstrate an awareness of the TPS questions concerning military service and an intent to conceal the truth. *See* DHS Reports of Investigation, Exhibit 4 hereto.[3] For example, although a truthful answer to the question –

[3]The attached DHS reports bear Bates Nos. USA 212-217 and USA 248-51.

formulated in the disjunctive – whether Colonel Montano had ever "served in, been a member of, assisted in, or participated in any military unit, paramilitary unit, police unit, self-defense unit, vigilante unit, rebel group, guerrilla group, militia or insurgent organization" would have been "yes," the defendant claimed that he answered no because he had not served in most of the organizations the question lists. Exhibit 4, USA-215. With regard to the question whether he had ever " been a member of . . . 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," Colonel Montano stated that his membership in the armed forces did not call for an affirmative response to the question. *Id.*, USA-216. In a subsequent interview, four days later, a DHS agent pointed out to the defendant his negative answer to the question whether he had ever received any type of military training. *Id.*, USA-251. In response, the defendant stated, "That was a lie." *Id.* He later reiterated, "Yes, that wasn't a truthful statement. I did receive military training." *Id.* The defendant also told the interviewing agent that he had reviewed and signed each TPS application. *Id.* At no point did the defendant assert that he had not read each of these questions before submitting his several TPS Applications.[4]

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[4]Months after the defendant's arrest, his niece, Claudia Rivas, claimed that she prepared the defendant's 2007, 2008, and 2010 TPS applications and that she never discussed any of the questions about military service with the defendant. (Rivas acknowledged that the defendant admitted to her that he knew that his original TPS application misrepresented the date he entered the United States and told her he needed to use that date because, otherwise, "he would not get TPS."). Montano's discussion with agents of his reason for responding as he did to the question whether he had "served in, been a member of, assisted in, or participated in any military unit, paramilitary unit, police unit, self-defense unit, vigilante unit, rebel group, guerrilla group, militia or insurgent organization" belies Rivas' suggestion that Montano may not have seen the questions concerning military service. Rivas' account is further discredited by her admission that she wanted the defendant to receive the TPS benefit and would have filled out the applications in a manner that ensured that, regardless of the truth.

Montano's explanation that he answered "no" to the question asking if he had served in a military unit because the question also asked if he had served in a paramilitary unit, police unit, self-defense unit, vigilante unit, rebel group, guerrilla group, militia ***or*** insurgent organization is not plausible. In addition to the defendant's admission that he reviewed each TPS application before submitting it, common sense dictates that a man who graduated third in his class from the military academy[5] and rose to Montano's level of authority in the Salvadoran military and government must have read the forms he signed. This is especially true in light of his admitted awareness of the TPS deadline for arrival in the United States and his knowledge that, if he had not lied about his arrival date, he would have been denied TPS. Moreover, his willingness to lie about that eligibility criterion suggests he would be willing to lie about other criteria.

C. Additional Information Relevant to Sentencing

It is a well-settled and "longstanding principle that sentencing courts have discretion to consider various kinds of information." *United States v. Watts*, 519 U.S. 148, 151 (1997) (citing 18 U.S.C. § 3661). The mandate, as expressed in 18 U.S.C. § 3661, is broad: "No limitation shall be placed on the information concerning the background, character, and conduct of the person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661. The Sentencing Guidelines have adopted this language as well: "In determining the sentence to impose within the guideline range, or whether a departure from the Guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." USSG § 1B1.4 (citing 18 U.S.C. § 3661).

[5]Karl Report at 15, n. 60.

Section 6A1.3 instructs, with regard to the admissibility standard at a sentencing hearing, that "the parties shall be given an adequate opportunity to present information to the court regarding [any disputed] factor." USSG § 6A1.3(a). "[T]he court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support the probable accuracy." *Id.* In the commentary to USSG § 6A1.3, the Sentencing Commission notes several kinds of information that are admissible at a sentencing hearing, including acquitted conduct (citing *United States v. Watts*, 519 U.S. 148 (1997)), conduct that may be subject to subsequent prosecution (citing *Witte v. United States*, 511 U.S. 738 (1995)), and reliable hearsay (citing *United States v. Petty*, 982 F.2nd 1365 (9th Cir. 1993); *United States v. Sciarrino*, 884 F.2nd 95 (3d Cir. 1989)). USSG § 6A1.3 Commentary. The touchstone of admissibility is reliability.

This case is "outside the heartland" of a typical false statements case because the false statements for which the defendant stands convicted, as well as related false statements he made to conceal his history as a human rights violator, are intricately intertwined with the reasons he left El Salvador. *See* USSG ch. 1, pt. A, 4(b) (Policy Statement) and § 5K2.0; *Koon v. United States*, 518 U.S. 81, 93-94 (1996) (discussing "heartland" generally); *United States v. Black,* 78 F.3d 1, 6 (1st Cir 1996) (affirming upward departure because aggravating circumstances in perjury case were of a kind, or to a degree, not adequately considered by the guidelines.)*; United States v. Levario-Quiroz*, 161 F.3d 903, 906 (5th Cir. 1996) (discussing propriety, where defendant committed murder in Mexico and fled to the United States, of departing from the Guidelines and the utility of applying analogous Guideline provisions when assessing extraordinary foreign criminal conduct beyond the scope of USSG §1B1.3); and *Boskic*, Sent. Tr.

at 7.

1. Evidence that the Defendant Was Motivated to Flee Potential Prosecution for the Jesuit Massacre

In October 1989, the person most central to peace talks aimed at ending the then-decade-long Salvadoran civil war was Father Ignacio Ellacuria, Rector of the Catholic Universidad Centroamericana ("UCA") in San Salvador. Karl Report at 13, 16. A central objective of the peace talks was the removal of the *Tandona*, the privileged and nearly all-powerful military class to which the defendant belonged, from command of the ESAF. *Id.*[6] It was against that backdrop that the Jesuit massacre – the murder by ESAF troops of Father Ellacuria and seven others – was carried out on November 16, 1989. *Id.* at 13-24

In 1993 the United Nations Commission on the Truth for El Salvador, *From Madness to Hope: The 12 Year War in El Salvador* (March 1993), specifically named Colonel Montano and several others as "part of the small core group of elite officers, one of whom gave the official order to "kill Ellacuría and leave no witnesses" on November 15, 1989." Karl Report at 23 and n. 102. Also in 1993, the U.N. mandated Ad Hoc Commission, which was composed of three highly respected Salvadorans and charged with reviewing the human rights and professional records of military officers, called for the removal of virtually the entire military command, including Colonel Montano. *Id.* at 5, 29-30. On the heels of the Truth Commission's naming of actual perpetrators of the Jesuit massacre, the Salvadoran government enacted the Law of General Amnesty. *Id.* at 29-30.

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[6]The 1990 Congressional report, "Barriers to Reform," singled out 12 commanding officers from the *Tandona*, including Vice Minister Montano for their human rights abuses. Karl Report at 13 and n. 42

The Law of General Amnesty was the subject of legal challenges before the IACHR during the late 1990s, on the grounds that it violated El Salvador's treaty obligations under the American Convention and the Geneva Accords. *Id.* at 34-35. In several rulings in 1999, the IACHR declared the General Amnesty Law illegal. *Id.* at 34 and n. 147. On December 22, 1999, the IACHR Report on the Massacre of the Jesuits in El Salvador specifically named the defendant and strongly recommended that El Salvador "adjust its domestic legislation to the American Convention and thereby render null and void the General Amnesty Law." *Id.* In so doing, the IACHR found that credible evidence implicated Vice Minister Montano in the Jesuit massacre. *Id.* at 35. The IACHR recommended that the government of El Salvador conduct an "expeditious, effective investigation" and "prosecute and punish those who were involved." *Id.* This coincided with Colonel Montano's loss of his post as Military Attaché in Mexico (September 1999), "which he had been given to gild his forced resignation from the ESAF." *Id.* at 35. As Professor Karl observes, "This meant that any explicit protection from the reformed Salvadoran military was also likely to be over." *Id.*

Professor Karl describes in detail historical facts and developments in El Salvador and elsewhere in the 1990s and thereafter that demonstrate a great likelihood that Colonel Montano was motivated, at least in part, to abandon El Salvador in 2001 for fear that he was vulnerable to prosecution for his role in the Jesuit massacre. Karl Report at 30-38. Those developments included the trials of high military officials and the erosion of "self-amnesty" for such officials elsewhere in Latin America. *Id.* at 30-34. In what Professor Karl refers to as the "justice cascade," numerous former military officers were subjected to trial for human rights abuses, with the number of trials rising sharply in the 1990s. *Id.* at 30-31 and Figure 1. This phenomenon

"came to a peak exactly in the period when Colonel Montano left his country in mid-2001 [with d]omestic trials held inside Latin American countries [as] the most significant factor in this peak period." *Id.* at 30.

A singular development during this period began with the arrest of Chilean General Pinochet in 1998. *Id.* at 31. Ultimately returned to Chile – where Colonel Montano had received training early in his military career – Pinochet was stripped of his immunity and, on March 9, 2001, ordered to stand trial for human rights crimes he committed while in power. *Id.* The media in El Salvador covered these developments widely. *Id.* at 32. The newspaper most widely read by military officers called the Pinochet trial an "international lynching." *Id.* at n. 35. Colonel Montano was himself an outspoken critic of the Pinochet prosecution. *Id.* at n. 37.

Elsewhere in Latin America, other former top military leaders similarly situated to the defendant were put on trial after amnesty laws in their countries were struck down by domestic courts. *Id.* at n. 35. This included, for example, a 1999 case against a prominent Argentine officer who had taught death squad organization and techniques to Salvadorans and a case against the former leading general in Honduras after that country nullified its amnesty law. *Id.* at 32. On June 9, 2001 – four weeks prior to the defendant's departure from El Salvador – a top military officer in Guatemala was convicted of the "extrajudicial execution" of Bishop Gerardi, in a case with striking parallels to the Jesuit massacre, and sentenced to 30 years in prison. *Id.* at 33.

Political and legal developments in El Salvador during the year leading up to the defendant's departure from El Salvador made prosecution of the Jesuit case appear more likely. On March 12, 2000, the FMLN, the opposition party to the military-allied ARENA Party, won a

legislative majority – "exactly the type of political change that had foretold the collapse of self-amnesties in Chile, Argentina, Honduras and Guatemala." *Id.* at 35. Calls for prosecution mounted. Two weeks after the election, the Rector of the UCA petitioned the attorney general to reopen the Jesuit case. *Id.* In another example of publicized support for reopening the case, on April 9, 2000, for example, the Archbishop of San Salvador publicly called for prosecution with "no exception." *Id.* and n. 151.

These developments were followed by a series of court decisions in El Salvador, which served to keep the Jesuit case alive. *Id.* at 36-37. On September 26, 2000, the Constitutional Chambers of the Supreme Court ruled that the General Amnesty Law could not be applied to human rights violations committed by public officials while in office. *Id.* The court further ruled that allegations of human rights violations would be reviewed on a case-by-case basis. *Id.* at 37. In December 2000, a criminal Court of First Instance ruled that the statute of limitations for murder had run out in the Jesuit case, but reserved *amparo*, an extraordinary type of relief, as a potential means of further action, thus once again leaving the door open for prosecution. *Id.*

Thus, the evidence amply supports Professor Karl's conclusion that:

> When Colonel Montano left El Salvador in 2001, events in Latin America, in general, and in El Salvador, in particular, made it more likely than at any previous time that high level military officers, including Montano, would be prosecuted for their role in the Jesuit massacre. Such events included legal challenges to impunity in El Salvador and elsewhere and unprecedented prosecutions for human rights abuses of high-ranking military officers throughout Latin America.

Karl Report at 1, 30.

Based on his position as Vice Minister of Defense for Public Security, the defendant had

abundant reason to believe that he would likely be a target of any potential prosecution for the Jesuit massacre. Years earlier, in 1993, the U.N. sponsored Truth Commission had concluded that Montano was part of the small core group of elite officers who, the day before the Jesuit massacre, had held a series of meetings that culminated in the order to kill Father Ellacuria. As the Truth Commission Report describes, based on witness interviews:

> After the [last] meeting, the officers stayed in the room talking in groups. One of these groups consisted of Colonel Réne Emilio Ponce [the ESAF Chief of Staff and leader of the *Tandona*], General Juan Rafael Bustillo, Colonel Francisco Elena Fuentes, Colonel Juan Orlando Zepeda and *Colonel Inocente Orlando Montano*. Colonel Ponce called over Colonel Guillermo Alfredo Benavides and, in front of the four other officers, ordered him to eliminate Father Ellacuría and to leave no witnesses.

Karl Report at 23-24 (emphasis supplied).

Indeed, in the days leading up to the 1989 Jesuit massacre, while Father Ellacuria was playing a pivotal role in peace negotiations, security forces under Colonel Montano's authority "became a center of state terror aimed at blocking a negotiated settlement to the conflict." *Id.* at 17. Those forces targeted civilian non-combatant groups that supported peace. *Id.* at 17-18. At the same time, the ESAF engaged in a propaganda campaign to portrary the Jesuits as terrorists and supporters of the FMLN. *Id.* at 19. The defendant himself was an active participant in preparing the ground for the massacre by publicly discrediting the Jesuits. *Id.* at 19-20 (*e.g.*, describing Father Ellacuria as a person "fully identified with subversive movements," which, as Professor Karl notes, was an especially dangerous accusation in El Salvador at that time). Likewise, after the massacre, the defendant took part in a disinformation campaign, publicly insisting that the FMLN, and not the ESAF, had murdered the Jesuits. *Id.* at 25-29. As the Ad

Hoc Commission noted, the security forces under Vice Minister Montano responsible for investigating the Jesuit massacre failed to do so. *Id.* at 29. The Commission found that the defendant "never ordered nor initiated, in any immediate way, a deep investigation of the deeds of the security forces" and described his conduct as "absolutely incompatible with any ethical and moral code as well as with his responsibilities in the High Command and in the Executive Government." *Id.* In 1993, the U.N. Truth Commission Report named Vice Minister Montano as one of the main figures pressuring lower level officers not to disclose orders from above to the Salvadoran court officially charged with investigating the crime. Karl Report at 27-28. He was also one of the few members of the High Command who refused to cooperate with or be interviewed by the investigative judge. *Id.* at 25-29.

It is clear that Colonel Montano, having been identified as among those at the heart of the conspiracy to carry out the Jesuit massacre, was acutely aware that his counterparts in other Latin American dictatorships had been stripped of the immunity from prosecution they had long enjoyed. Cases such as that of General Pinochet, Argentine officers responsible for that country's "dirty war," and the Guatemalan officers responsible for the murder of Bishop Gerardi were common knowledge, especially among Latin American military officers. The defendant's own words during the year leading to his departure made clear that he was concerned about, and personally affected by, these cases and about the persistent calls for justice in the Jesuit case. In March 2000, the defendant publicly decried the prosecutions of General Pinochet, Guatemalan officers, and actions by Jesuits as "dark forces that, in my opinion, are not convenient for sustaining peace." Karl Report at 37. When the Jesuit case was first reopened in March 2000, the defendant held a press conference to reject the claim that he was the indirect author ("autor

mediato") of the massacre; to accuse the Jesuits of "raking up the past;" and to label the renewal of the legal action as "orchestrated by the left" and an "international leftist plan." *Id.* at 37. At that same press conference, the defendant complained that the accusation against him was "affecting his family and friends." *Id.* at 30 n. 131. In another public statement, in December 2000, the defendant stated that, by pursuing justice for the murdered Jesuits, "the left-wing will not rest in its attempt to gain power." *Id.* at 38.

The most natural inference supported by the timing of the defendant's relocation to the United States, along with contemporaneous statements he made, is that he was motivated at least in part by a desire to distance himself from the jurisdiction where he could be tried for his alleged role the Jesuit massacre. The defendant arrived in the United States on July 2, 2001. The Jesuit case had been reopened one year earlier. General Pinochet was ordered to stand trial in March 2001, *id.* at 31; Guatemalan officers responsible for the murder of Bishop Gerardi were convicted of extrajudicial execution in June 2001, four weeks before the defendant departed El Salvador. *Id.* at 33. Viewed in light of the defendant's description, in March 2000, of the Chilean and Guatemalan cases as "dark forces . . . not convenient for sustaining peace," the trial of Pinochet and conviction of the Guatemalan officers were highly likely to cause the defendant concern for his future situation. As explained by Professor Karl, the parallels between the defendant's career and that of his Guatemalan cohorts are striking; given the intertwinement of the Salvadoran and Guatemalan military, it is highly likely that the prosecution of the Guatemalan officers factored into the defendant's decision to depart his home country. *See id.* at 32-34.

Thus, while the defendant's decision to depart El Salvador for the United States may have been motivated by more than one factor, it is certainly more likely than not that it was motivated

by concern that he might be put on trial for the Jesuit massacre.

2. Evidence that the Defendant Intentionally Lied in 2007, 2008, and 2010 to Conceal His Military Service

The evidence further demonstrates that is highly likely that the defendant lied in his 2007, 2008, and 2010 TPS applications to conceal his past as a top military leader in El Salvador. Numerous events between 2002 and 2009 put Colonel Montano on notice that disclosure of his military background on his TPS applications would make him vulnerable to civil and criminal prosecution and deportation. These events include, in 2002, the $54.6 million tort judgment against two of Montano's former commanders, both previous Ministers of Defense in the ESAF living in the United States, for torture. *See Romagoza Arce et al. v. Garcia and Vides Casanova*, 434 F.3d 1354 (11th Cir. 2007). One of the defendants had been Colonel Montano's commander from 1979-1983; the other had been his commander from 1983-1989 and had appointed the defendant to several command positions. Karl Report at 45. In 2005, another of the defendant's former commanders, former Vice Minister of Defense Carranza, was found liable for torture and extrajudicial killing in a case that resulted in a $6 million judgment against him. *Chavez v. Carranza*, 413 F. Supp. 2d 891 (W.D. Tenn. 2005). Carranza was a direct supervisor of all intelligence and security units and worked in the same compound with the defendant. Karl Report at 45. Not surprising, these cases were covered extensively in the Salvadoran and U.S. media. *Id.* at 46. In 2007, a Salvadoran officer was arrested and later deported to El Salvador based on immigration violations. *Id.* at 46. His arrest and deportation were accompanied by statements by DHS officials that the United States would not provide refuge to those "seeking to escape a violent criminal past." *Id.* at 46. These statements were also quoted in El Salvador's

Spanish language press. *Id.*

Closer to home, in the District of Massachusetts, in both *Boskic* and *Lopes,* in 2006 and 2009, respectively, this Court enhanced the sentences of criminal defendants convicted of immigration and immigration-related offenses based in part on the fact that the defendants were motivated to lie to immigration officials in order to evade possible prosecution in their home countries. Both of those cases were covered by the Massachusetts media.

3. The Defendant's Career As A Human Rights Violator

The chronology of events and the defendant's statements make it more likely than not that Colonel Montano's lies were motivated by a desire to conceal his role as a member of the "inner circle" of the Salvadoran military during periods of brutal human rights violations. The defendant's career as a human rights violator is relevant both to application of the Guidelines and to consideration of the § 3553(a) factors.

During the Salvadoran civil war, the ESAF engaged in "massacres, extrajudicial killing, forced disappearances, torture, sexual abuse, arbitrary deprivation of liberty and other acts . . . committed against defenseless civilians far from conflict," and resulting in civilian deaths "estimated at between 75,000 and 85,000," Karl Report at 7-8. During the civil war, the defendant's rise to the highest echelon of the ESAF was meteoric. *See id.* at 39-44.

Tracing the defendant's career through several command positions, Professor Karl documents 1169 human rights violations committed by units or troops under Colonel Montano's command, including 65 extrajudicial killings, 51 disappearances and 520 cases of torture. Karl Report at 6 and *see* Appendix II thereto. This is only a partial accounting; "[t]he actual number is significantly greater." *Id.* Human rights violations committed by a prestigious rapid reaction

battalion the defendant commanded included "scorched earth" campaigns in which troops "killed hundreds of civilians, torched villages, burned crops, and chased thousands of peasants into the mountains." *Id.* at 41. By May 1994, then-Lt. Colonel Montano commanded a detachment at the Armed Forces Engineering School, which "served as a center for death squad members from the armed forces." *Id.* at 43. The practices of "torture, extrajudicial killings, and disappearances" continued at the Engineering School under the defendant's directorship. *Id.* and *see* Appendix II to Karl Report.

On June 1, 1989, Colonel Montano began his final and most powerful military position as Vice Minister of Defense for Public Security, where he had operational authority for the three principal security forces (National Police, Treasury Police and National Guard). *Id.* at 14, 44.[7] During the defendant's tenure as Vice Minister, those security forces committed 498 documented episodes of torture, 23 documented extrajudicial killings, and 47 documented disappearances, and hundreds of other human rights violations. *Id.* at 44 and Appendix II.

The defendant's appointment as Vice Minister of Defense for Public Security – a position in which he had great authority over El Salvador's principal security forces – "coincided with a strong resurgence of extrajudicial killings, torture, deaths in custody, and urban terror campaigns by the security forces aimed at blocking prospects for a negotiated settlement to the conflict." Karl Report at 16. These "campaigns of state terror" were aimed at prominent civilians and civilian groups, such as human rights organizations and labor unions. *Id.* at 17-18.

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[7] *Tandona* officers were involved with death squads operating principally out of the security forces (National Guard, Treasury Police, National Police, and the Engineering School, among others). Karl Report at 12. The defendant was among the *Tandona* leaders identified in U.S. declassified documents as involved in death squad activity. *Id.* at 12 and n. 41.

III. Guidelines Calculation and Appropriateness of Upward Departure

It is well established that this Court must calculate the advisory Guidelines range, including a determination of the appropriateness of downward or upward departures under the Guidelines, before it proceeds to consider the other sentencing factors set forth in 18 U.S.C. § 3553(a). *United States v. Wallace*, 461 F.3d 15, 32 (1st Cir. 2006). In this section, the government describes the Guidelines calculation set forth in the plea agreement as well as the slightly lower calculation – with which the government, upon reflection, agrees – in the PSR. The government also sets forth its argument for a one-offense-level departure to a level that better represents the defendant's real offense conduct, as well as a horizontal departure to better reflect the defendant's criminal history.

A. Offense Level Calculation

In the plea agreement the government took the position that the total offense level is 15, which is calculated as follows: USSG § 2J1.3(a), which applies to the perjury counts of conviction, sets the controlling base offense level at 14; that base offense level is increased by four levels by operation of the grouping rules, USSG §§ 3D1.1 *et seq.*, yielding an adjusted offense level of 18; and the adjusted offense level is reduced by three levels for acceptance of responsibility, under USSG §3 E1.1. The agreement contains no provision concerning the calculation of criminal history or appropriateness of departures or variances.

The U.S. Probation Office's calculation of the offense level differs from that of the government in that it increases the base offense level by three, as opposed to four, levels under the grouping rules. In the government's view, the Probation Office's application of the grouping rules is the more sensible of the two alternatives and, therefore, the government will not press for

a four-level increase. In the government's view, therefore, the defendant's total offense level, without any departure, is 14.

B. An Upward Departure to Offense Level 15 Pursuant to §5K2.0 Is Warranted

Here, as in *Boskic*, the specific offense characteristics contemplated by the Guidelines for the offenses of conviction do not capture the real offense conduct: the defendant's migration to the United States and nearly decade-long pattern of prevarication designed to shield his military background from scrutiny by authorities in this country. Moreover, as in *Boskic*, the defendant fled his own country, at least in part, to avoid potential prosecution for human rights abuses committed there. Of course, Boskic was a foot soldier, while Colonel Montano was an officer with tremendous power. In *Boskic*, this Court found that the statute criminalizing travel to avoid prosecution, 18 U.S.C. § 1073, provided a better way "of calibrating the seriousness of culpability of the offense."[8] Sent. Tr. at 51. As the Court found in *Boskic*, so with Colonel Montano. In *Boskic*, the Court concluded as follows:

> I look at the offense of conviction. It doesn't begin to capture the horrific events, but I cannot thereby transform this into a manslaughter case. That's the upside. The downside is that I can't say that this is a mere immigration violation without other dimensions to it. One aspect of the defendant's choice to come here, I believe, was to make it more difficult to be prosecuted where the crimes took place. It's not the only reason, but one. So that's why I look to [Section] 1073, understanding that it's not precisely on point, but it gives me a way of calibrating the seriousness of culpability of the offense.

[8]In *Boskic*, as here, the defendant had not been charged with a crime before he left his home country. Section 1073 applies regardless of whether formal charges are pending before the defendant flees. *United States v. Frank*, 864 F.2d 992, 1007 (3rd Cir. 1988) (citing cases). "Congress did not intend section 1073 to apply only to flight to avoid formally pending . . . charges." *Id.* If a defendant can be prosecuted for his actions and flees, the requirements of § 1073 are met. *Id.*

Id.

"The practice of relying on analogous provisions of the Sentencing Guidelines when calculating the proper extent of a departure is well established." *United States v. Fuller*, 426 F.3d 556, 564 (2nd Cir. 2005); *United States v. Kikumura*, 918 F.2d 1084, 1112 (3rd Cir. 1990). ("analogy to the guidelines is also a useful tool for determining what offense level a defendant's conduct most closely approximates."). While the First Circuit has eschewed the mechanical application of this approach, *see United States v. Ocasio*, 914 F.2d 330, 332 (1st Cir. 1990), it has recognized the approach as sound. *Id.*; *see also United States v. Amirault*, 224 F.3d 9, 12 (1st Cir. 2000) ("A sentencing court is free to make suitable comparisons and draw plausible analogies in considering whether to depart from the guideline sentencing range.").

Applying § 1073 as the appropriate analog in assessing a departure yields a total offense level of 15, which is only one level higher than set forth in the PSR. The applicable Guideline, § 2J1.6 (Failure to Appear by Defendant), calls for a base offense level of 6 and a nine-level increase, pursuant to § 2J1.6(2)(A), because the offense from which the defendant fled is "punishable by death or imprisonment for a term of 15 years or more."[9]

More recently, in *Lopes*, this Court (Wolf, C.J.) imposed a sentence of 36 months – more than twice the high end of the GSR for the offense of conviction – on a defendant who pleaded guilty to immigration fraud and false statements in connection with visa and asylum application forms where evidence showed that the defendant fled Cape Verde to avoid criminal prosecution

[9]Under the Salvadoran penal code in effect prior to the defendant's departure and since, as shown by relevant portions of the code obtained from the Library of Congress, premeditated murder is punishable by a minimum of 20 years in prison. If the Court deems it necessary, Professor Karl will provide testimony to this effect.

for assaulting prisoners in his custody. *Lopes*, Sent. Tr. at 3-4. The Court based the sentence on a departure under § 5K2.0 and found that the sentence was also justified under 18 U.S.C. § 3553(a). *Id.* at 68. The Court noted that the offense was not of the type considered by the Sentencing Commission when formulating the Guidelines, and that it differed in ways that permitted a sentence much higher than the GSR for the offenses of conviction. *Id.* While explicitly refraining from making any judgment regarding the soundness of the Cape Verdean charges, the Court noted that those charges provided an explanation for the defendant's lies on his immigration applications. *Id.* at 70-71. The Court concluded by noting that the defendant's lies injured the integrity of the asylum process and impeded its ability to help those truly in need. Finally, the Court emphasized that an enhanced sentence was intended "to send the message that those being investigated and accused of violating human rights should resist the understandable temptation to act illegally to come and stay in the United States [and that] the United States will not be a safe or cost-free haven for those who are alleged to have abused human rights to others around the world who might consider fleeing human rights abuse charges in their own countries to seek refuge in the United States." *Id.* at 75. The Court's rationale in *Lopes* applies with equal force to this case.

C. An Upward Departure Under § 4A1.3 Is Also Warranted Because The Defendant's CHC Substantially Under-represents the Seriousness of His Criminal History

This Court should also depart horizontally to the highest criminal history category because the defendant's criminal history category substantially – indeed, grossly– under-represents the seriousness of the defendant's criminal history. *See* USSG § 4A1.3(a)(1). The PSR, at ¶ 56, places the defendant in CHC I because he has never been convicted of a crime.

That Colonel Montano has never been convicted of a crime is unsurprising given that he spent his 30-year military career in El Salvador in positions of authority within a dictatorial regime. However, "in an appropriate case, a criminal history departure can be based upon dissimilar conduct that was neither charged nor the subject of a conviction." *United States v. Brewster*, 127 F.3d 22, 27 (1st Cir. 1997). This Court can depart both horizontally across the sentencing table (by increasing the defendant's criminal history), as well as vertically (by increasing the offense level) in a case where the guideline sentencing range does not adequately reflect the defendant's past criminal history and conduct. *United States v. Doe*, 18 F.3d 41, 49-50 (1st Cir. 1994).

Again, *Boskic* provides a useful guide. In *Boskic*, the Court analyzed and departed upwards in an immigration fraud case where, as here, the defendant fled to the United States based on allegations that he committed overseas human rights violations. In so doing, the Court took care to distinguish analytically between the determination of the appropriate offense level and determination of the defendant's criminal history. With regard to the latter, the Court concluded as follows:

> Finally, I look to the defendant's criminal history. ... I don't have to [look at other U.S. criminal activities] Because to fairly capture the defendant's involvement in the murders at Branjevo farm, I think we can move to the highest criminal history as an analog. And that then sets me in a Guideline range by analogy of 51 to 63 months. I chose the high end of the Guideline range because this seems to me to be the proper place to calibrate culpability under United States law for this kind of crime committed by a person with the criminal background of this defendant. This is precisely the kind of case that the remedial opinion in *Booker*, I think, makes clear doesn't properly get captured by the Guidelines themselves, although the Guidelines provide a mechanism for perspective on them. This, it seems to me, as a United States Court and with these kinds of United States violations is a reasonable sentence to impose. And for those reasons ... I choose a sentence outside of the specific

Guideline ranges themselves.

Sent. Tr. at 51-52.

Departures of this type are well supported in the case law. In *United States v. Hardy*, 99 F.3d 1242 (1st Cir. 1996), for example, the court, citing the defendant's "ten-year history of grievous antisocial behavior" and some offense-related attributes, found that a full horizontal departure from Level 18, CHC III (33-41 months), to Level 18, CHC VI (57-71 months), was needed to reflect to reflect the defendant's history and offense conduct. *Id.* at 1245. (Pursuant to USSG § 4A1.3 and USSG § 5K2.0, the court also applied a vertical departure, from Level 18, CHC VI (57-71 months), to Level 24, CHC VI (100-125 months), and imposed a 120 month sentence. *Id.*)

In *United States v. Chapman*, 241 F.3d 57 (1st Cir. 2001), the defendant was convicted of bank fraud and, after adjustments for amount of loss, more than minimal planning, and acceptance of responsibility, was assigned an offense level of nine. The defendant had an extremely long and serious criminal history and was categorized as a CHC VI. However, his record was so egregious that he had been assigned 36 criminal history points, well beyond the 13 points needed to place him in CHC VI. Consequently, the court departed vertically until it reached an appropriate sentence.

Similarly, in *United States v. Doe*, 18 F.3d 41 (1st Cir. 1994), the court departed upward from level 12, CHC IV (21 - 27 months), to Level 19, CHC VI (63 - 78 months). The court imposed what it considered an appropriate sentence by finding that the criminal history as reflected in CHC VI was too low at the adjusted offense level, and it did not adequately reflect the defendant's "egregious, serious criminal history." *Id.* at 49. The Court of Appeals for the

First Circuit affirmed the district court's decision to depart vertically to 72 months; the departure and sentence were reasonable. *Id.*

Colonel Montano's criminal history category substantially under-represents the seriousness of the defendant's criminal history. This Court's observation in *Boskic* that a defendant's involvement "in what is fairly characterized as a massacre can only properly be expressed in terms of [the highest level,] criminal history category VI," applies with equal force here. Sent. Tr. at 37-38. The particulars of the two cases of course differ, but not in a manner that suggests Colonel Montano should be in anything but the highest criminal history category. Boskic was a foot soldier who admitted to involvement in the killing of hundreds of civilians in a single day. Montano commanded troops that tortured and murdered thousands over the course of more than a decade. He spent most of that decade commanding forces linked to massive violations of human rights and, in certain instances, constituting death squads. Whereas Boskic had a colorable claim that he acted under duress, Colonel Montano was at all times a member of the military elite and, ultimately – and at the time of Jesuit massacre – a member of the highest echelon of the ESAF. Indeed, even at its highest level, the Guidelines' criminal history metric does not adequately capture the gravity of the defendant's unadjudicated criminal history during the last decade of his military career.

As this Court noted in *Boskic*, "the Guidelines themselves are in this context a procrustean bed on which to attempt to tailor some meaningful sentence . . . [b]ut the Guidelines provide some basic way . . . to address the issues here by means of imperfect analogy." *Boskic*, Sent. Tr. at 47. So too in this case. The real offense conduct in this case is not adequately captured in the Guidelines for the offenses of conviction, nor are they adequately provided for

within the Sentencing Guidelines' computation structure. As described above, as with other instances of overseas violators seeking refuge in the United States, this case is outside of the heartland of the perjury and immigration fraud Guidelines. For all the reasons discussed above, this Court should impose the sentence urged by the United States.

V. Proposed Findings of Fact and Conclusions of Law

In accordance with the Court's Amended Procedural Order (Docket Entry 43), the United States submits the following proposed findings of fact and conclusions of law relevant to the government's motion for a departure from the applicable guideline range and/or for a non-Guideline sentence.

A. Proposed Findings of Fact

The government submits that the evidence supports a finding of the following facts based on a fair preponderance of the evidence:

1. The Defendant's Service in the ESAF

(a) The defendant served in the El Salvador Armed Forces ("ESAF") for more than 30 years, reaching the rank of colonel. PSR ¶12.

(b) The defendant occupied several high-level command positions within the ESAF during the 1979-1992 civil war fought between the ESAF and the FMLN. Karl Report at 7, 38-44.

(c) On June 1, 1989, the defendant assumed the position of Vice Minister of Defense for Public Security, one of the highest and most important ESAF and government leadership positions. Karl Report at 14, 44. In that position, the defendant was part of the ESAF's inner circle and had operational authority for the three principal security forces, the National Police,

Treasury Police, and National Guard. *Id.*

(d) The defendant occupied the position of Vice Minister of Defense for Public Security until 1992. Karl Report at 15.

2. Human Rights Violations Committed by the ESAF Forces Under the Defendant's Command

(a) During each of the commands the defendant held during the 1979-1992 civil war in El Salvador, the defendant commanded troops that committed numerous documented violations of human rights, including torture, extrajudicial killings, and forced disappearances. Karl Report at 6, 38-39.

(b) The defendant's appointment as Vice Minister of Defense for Public Security "coincided with a strong resurgence of extrajudicial killings, torture, deaths in custody, and urban terror campaigns by the security forces aimed at blocking prospects for a negotiated settlement to the conflict." Karl Report at 16. These "campaigns of state terror" were aimed at prominent civilians and civilian groups, such as human rights organizations and labor unions. Karl Report at 17-18.

(c) During the defendant's tenure as Vice Minister, security forces he commanded committed numerous documented violations of human rights, including torture, extrajudicial killings, and forced disappearances. Karl Report at 44 and Appendix II.

3. The Jesuit Massacre and the Defendant's Decision to Leave El Salvador and Travel to the United States

(a) In 1989, Father Ignacio Ellacuria, Rector of the Catholic Universidad Centroamericana ("UCA") in San Salvador, was a leader of an effort to bring about a peace agreement to end the Salvadoran civil war. Karl Report at 13, 16.

(b) As Vice Minister of Defense for Public Security, the defendant publicly criticized Jesuit priests associated with the UCA, claiming they were allied with the FMLN. Karl Report at 19-20.

(c) On November 16, 1989, Father Ellacuria, five other Jesuit priests, their housekeeper and the housekeeper's 15-year old daughter were murdered. This crime is commonly known in El Salvador and elsewhere as "the Jesuit massacre." Karl Report at 13-24.

(d) In 1993 the U.N. Truth Commission on El Salvador found that there was substantial evidence that the defendant was part of the small core group of elite officers, one of whom gave the official order to kill Ellacuría and leave no witnesses. Karl Report at 23 and n. 102. Also in 1993, the U.N. mandated Ad Hoc Commission, which was composed of three highly respected Salvadorans and charged with reviewing the human rights and professional records of military officers, called for the removal of virtually the entire military command, including Colonel Montano. Karl Report at 5, 29-30.

(e) The U.N. Truth Commission Report named the defendant as one of two top officials who covered up the high command's role in the crime by pressuring lower-level soldiers not to mention orders from above in their testimony to the Salvadoran Court officially charged with investigating the crime. Karl Report at 27-28.

(f) When Colonel Montano left El Salvador in 2001, events in Latin America, in general, and in El Salvador, in particular, made it appear more likely than at any previous time that high level military officers, including Montano, would be prosecuted for their role in the Jesuit massacre. Such events included legal challenges to impunity in El Salvador and elsewhere and unprecedented prosecutions for human rights abuses of high-ranking military officers

throughout Latin America. Karl Report at 1, 30.

(g) The defendant left El Salvador in 2001 and traveled to the United States, at least in part, to distance himself from authorities that could prosecute him for his alleged role in the Jesuit massacre.

(h) On each of his TPS Application, the defendant lied about the date on which he entered the United States because he knew that if he stated the actual date on which he entered, he would be deemed ineligible for TPS. PSR ¶ 12.

4. The Defendant's Concealment of His Military Service

(a) The defendant was aware that the 2008 and 2010 TPS applications he signed and submitted to DHS asked, in various ways, whether the defendant had served in the military. *See* PSR, ¶ 14.

(b) The defendant knowingly gave false answers to questions about his military background on his 2008 and 2010 TPS applications. *See* PSR, ¶¶ 14-16; and Exhibit 4 to Government's Sentencing Memorandum (DHS reports bear Bates Nos. USA 212-217 and USA 248-51.)

(c) Before 2008, the defendant was aware of civil and criminal actions in the United States involving others alleged to have committed human rights abuses while serving in the military overseas. *See* PSR, ¶¶ 17-18 and 58-67.

(d) The defendant gave false answers to the questions about his military background on his 2008 and 2010 TPS applications in order to conceal his military background from the United States government because he believed that inquiry into his conduct as an officer of the ESAF could result in the denial of TPS.

B. Proposed Conclusions of Law

The government proposes that, based on the weight of the evidence, the Court rule as follows:

1. As correctly stated in the Presentence Report, the total offense level for the violations by the defendant of 18 U.S.C. §§ 1546(a) (Fraud and Misuse of Visas) and § 1621(2) (Perjury) is 14. *See* PSR at ¶ 51.

2. An upward departure is warranted under USSG § 5K2.0(a)(1)(B) because there exist in this case aggravating circumstances of a kind and to a degree not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines and such aggravating circumstances justify a significantly higher sentence. These circumstances include the defendant's decision to come to the United States to avoid prosecution for his alleged role in the Jesuit massacre and false statements he made subsequently to shield his military background from scrutiny by U.S. authorities.

3. Title 18 U.S.C. § 1073 is the appropriate analog in assessing a departure because the defendant fled El Salvador in part to avoid prosecution for his alleged role in the Jesuit massacre. Because the offense from which the defendant fled is punishable by imprisonment for a term of 15 years or more, the total analogous offense level is 15. *See* USSG § 2J1.6(2)(A).

4. Based on the defendant's history and conduct as an officer in the ESAF, his criminal history category is properly increased to CHC VI under USSG § 4A1.3(a)(1) (upward departure may be warranted in case involving egregious, serious criminal record in which even the guideline range for a Category VI criminal history is not adequate to reflect the seriousness of

the defendant's criminal history); *United States v. Ocasio*, 914 F.2d 330, 334 (1st Cir. 1990) (defendant's past criminal history, not otherwise adequately accounted for, could afford a suitable basis for departure).

5. To achieve the goals of sentencing described at 18 U.S.C. § 3553(a), a variance above the guidelines range for the offenses of conviction is also warranted. *See United States v. Rodriguez*, 527 F.3d 221, 228 (1st Cir. 2008) (sentencing court must consider all § 3553 (a) factors). The factors in this case that militate in favor of a higher sentence include "the nature and circumstances of the offense and the history and characteristics of the defendant;" and "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, . . . to provide just punishment for the offense; . . . [and] to afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(1) and (2)(A) and (D).

6. For the foregoing reasons, a sentence of imprisonment for a period of 51 months is reasonable.

Respectfully submitted,

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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*

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