UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	
v.	**Criminal No. 12-10044-DPW**
INOCENTE ORLANDO MONTANO,	
Defendant	

DEFENDANT'S RESPONSE TO THE GOVERNMENT'S SENTENCING MEMORANDUM AND TO MISCELLANEOUS SUBMISSIONS TO THE COURT

Defendant Inocente Orlando Montano respectfully submits this memorandum in response to the government's January 8, 2013, "Memorandum in Support by USA at to Inocente Orlando Montano re [52] Motion for Leave to File *Sentencing Memorandum* in Excess of 20 Pages," D.E. 53, and to miscellaneous filings received by the Court in anticipation of a sentencing from various third parties. *See* D.E. 44, 47, 50 (and attachments 1-8). The defendant wishes to frame certain issues in advance of the sentencing hearing currently scheduled for January 15, 2013. The issues are: (1) whether the government's request for an upward departure or variance in the sentencing memorandum and its use of expert and other information in its support amounts to a violation of its commitments under the plea agreement executed in this case and (2) whether the various third party letters referenced above can be taken into consideration by the Court.

A. The Plea Agreement

Mr. Montano's federal criminal case officially began in August of 2011 and has morphed from a criminal complaint to a criminal information (No. 11-10389-DPW), to an 8-count indictment (No. 10044-DPW), and then to its current form, a superseding 6-count information

(No. 10044-DPW). During that time, the parties have negotiated at length over a variety of issues including the number and types of charges that would be brought against Mr. Montano. There was also extensive discussion concerning what alleged conduct would serve as the basis for the agreed upon charges. In its final form, the current superseding criminal information relates to three different immigration forms (I-821) which the defendant signed and submitted to the United States Department of Homeland Security ("DHS") in order to obtain the Temporary Protected Status ("TPS") benefit. The specific false statement(s) cited by the government for each of the three immigration forms is the same in each instance: the date of entry into the United States that Mr. Montano entered in each application (September 30, 2000). One charge of immigration fraud under 18 U.S.C. § 1546(a) and one charge of perjury (as these forms are affirmed as accurate under oath by the applicant's signature) under 18 U.S.C. § 1621(2) apply to each of the three statements (a total of six counts).

In a letter dated August 10, 2012, the government provided defense counsel with a draft plea agreement whose terms were ultimately accepted by Mr. Montano in anticipation of a plea. *See Exhibit A*, D.E. 42, Plea Agreement. The pertinent portions of the plea agreement begin in paragraph 1 where the government agrees to dismiss the 8-count indictment that it obtained against Mr. Montano in exchange for his plea of guilty to the 6-count superseding information. *Id.*, *See also Exhibit B,* Indictment No. 12-10044. This is of some moment because counts 4, 5, 7, and 8 of the original indictment related to another question on the "TPS" form that the government claimed Mr. Montano answered falsely in 2008 and 2010. These counts were eliminated and do not appear in the superseding information that Mr. Montano pled guilty to as result of the negotiations between the parties.

Next, in paragraph 3 of the agreement, the government states that the "U.S. Attorney" will take a particular position regarding application of the United States Sentencing Guidelines. This entails setting a particular base offense level ("BOL") (the offense level for the perjury counts, 14, controls as it is higher than the Visa Fraud BOL at 8), conducting an assessment of the grouping provisions under U.S.S.G. §§ 3D1.1-4, and adding in a resulting enhancement of the BOL to 18.[1] *See Exhibit A*. The plea agreement goes on to state the following at the end of this paragraph:

> "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."* Emphasis added.

The agreement fails to describe any other circumstances under which the government would reserve a right to seek an upward adjustment from the sentencing range produced by its offense level recitation. Finally, paragraph 4 of the agreement states that "There is no agreement regarding disposition in this case." *Id*.

B. The Government's Recommendation of 51 months Violates the Plea Agreement

In *Santobello v. New York*, 404 U.S. 257, 262 (1971), the Supreme Court held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." "[A] defendant must ultimately waive fundamental constitutional rights as a result of entering into any plea agreement." *United States v. Frazier*, 340 F.3d 5, 10 (1st Cir.2003). As the Court in *Frazier* explained:

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[1] Under the government's calculation in the plea agreement, the adjusted offense level of 18 would be reduced by 3 levels for acceptance of responsibility under USSG § 3E1.1 for a total offense level of 15. Although not specifically referenced in the plea agreement, the expectation of the parties was that the United States Probation Department would place Mr. Montano in a Criminal History Category ("CHC") I as he has no prior criminal record. At a total offense level of 15 and a CHC I, the applicable guidelines sentencing range ("GSR") is 18-24 months.

> Hence, "we hold prosecutors engaging in plea bargaining to the most meticulous standards of both promise and performance." *United States v. Riggs*, 287 F.3d 221, 224 (1st Cir.2002)(*quoting United States v. Velez Carrero*, 77 F.3d 11, 11 (1st Cir.1996)), and we are wary of government claims that the prosecution "technically" complied with the terms of the agreement when the net effect of the government's behavior undermines "the benefit of the bargain" upon which a defendant has relied." *Frazier*, supra at 10. Our case law prohibits "not only explicit repudiation of the government's assurances, but must in the interests of fairness be read to forbid end-runs around them." *United States v. Saxena*, 229 F.3d 1, 6 (1st Cir.2000); *United States v. Canada*, 960 F.2d 263, 269 (1st Cir.1992).
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> *Frazier*, supra at 10.

Santobello, supra, requires that the breach of a plea agreement be remedied by either "specific performance of the agreement on the plea, in which case the petitioner should be resentenced by a different judge, or…the opportunity to withdraw [the] plea of guilty." *Santobello*, 404 U.S. at 263. The choice of remedy rests with the court and not the defendant. *United States v. Kurkculer*, 918 F.2d 295, 299 (1st Cir.1990).

In its sentencing memorandum, the government comments on the offense level calculation cited in the Presentence Report ("PSR") and compares the result to the calculation it suggested in the plea agreement. *See Exhibit C*, Government's Sentencing Memorandum, pp. 22. It ultimately accepts the United States Probation Department's application of the grouping provisions which differs slightly from what the government proposed in the plea agreement and which produces a lower total offense level. *Id.*[2] The government goes on to argue for an upward departure and or variance from the applicable GSR to 51 months. This is done in stark violation of the terms upon which the government originally agreed.

Read as a whole, the plea agreement could reasonably be interpreted to allow for an upward departure request by the government in only one circumstance, if Mr. Montano obstructs

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[2] The PSR calculates a GSR of 15-21 months by reaching a total offense level of 14 and finding a CHC of I. *See* PSR ¶ 110. The defendant has offered an objection to the manner in which the grouping provisions are calculated in the PSR and suggests that an even lower GSR, 10-16 months, applies. *See* D.E. 49.

justice after the entry of his plea pursuant to USSG § 3C1.1. *See Exhibit A*. If the defendant does not obstruct justice as described, then a fair reading of the plea agreement suggests the following: the government has taken a particular position with regarding the offense level calculation, including all applicable enhancements, which, assuming a CHC I is applied, results in a GSR of 18-24 months. Further, the plea agreement provision which states that there "is no agreement regarding disposition in this case" can be read as an acknowledgement that a particular sentencing range applies (18-24 months) and that the parties will take differing positions as to what sentence, contemplating that specific range and no upward departures or variances outside of on obstruction of justice grounds, should apply.

In the case of *United States v. Munoz*, 408 F.3d 222 (5th Cir.2005), the defendant successfully argued on appeal that the government had breached the plea agreement entered into by the parties by advocating for an enhancement of the offense level calculation suggested by the United States Probation Department in the PSR that was not contemplated in the calculation the government explicitly proposed in the plea agreement. Specifically, the Probation Department suggested an abuse of trust enhancement and the court noted that by "not including an enhancement for an abuse of trust, the parties agreed that it was not an applicable guideline and that it should not be included in the guideline calculation." *United States v. Munoz*, 408 F.3d at 227. *See also, United States v. Rivera*, 357 F.3d 290 (3rd Cir.2004)(government found to have breached plea agreement in circumstances where it proposed a specific offense level calculation, contemplating specific enhancements, and then advocated for application of an additional enhancement proposed by the Probation Department at sentencing hearing). Despite the agreement, the government urged the Court to apply the enhancement and this was found to be inconsistent with the plea agreement. *Id.*

Similarly, in Mr. Montano's case, the government cited a particular offense level calculation that included every potential enhancement the government contemplated at the time it drafted the plea agreement. Moreover, it suggested in writing that an upward departure or variance was appropriate *only* in one particular circumstance involving potential obstruction of justice conduct. Arguing for a 51 month sentence pursuant to USSG §§ 4A1.3 and 5K2.0 was never referenced in the plea agreement yet the government is requesting that the Court apply these guidelines provisions in its sentencing memorandum. *See Exhibit C*, pp. 23-25. This is wholly inconsistent with the terms of the plea agreement as the government specifically reserved its right to pursue an upward departure or variance on obstruction of justice grounds but under no other circumstances.

Moreover, the government cannot suggest that its request for an upward departure under the guidelines cited or a variance under 18 U.S.C § 3553(a) is allowable under paragraph 4 of the plea agreement which states that there is "no agreement regarding disposition in this case." *See Exhibit A*. In *United States v. Rivera, supra*, the government included a similar provision in that plea agreement which stated: "except as otherwise provided in this agreement, [the United States] reserves its right to take any position with respect to the appropriate sentence to be imposed on Isaac [Rivera] by the sentencing judge". *United States v. Rivera*, 357 F.3d at 295. The government cited that provision in order to argue that their endorsement of a role enhancement at sentencing that was not cited in the plea agreement was appropriate. *Id.* The appellate court dismissed this argument and stated that because "the offense level was specifically stipulated to, whereas the government's right to advocate a role enhancement was not, the government's endorsement of an enhancement that would raise the Offense Level above the stipulated level contravened the plea agreement." *Id.* "Moreover, to the extent there is

ambiguity caused by the 'little bit of poor draftsmanship' conceded by the prosecutor, we must construe the agreement against the government as drafter." *Id.*

In Mr. Montano's case, the government did not specify that it had a right to advocate for an upward departure or variance in the plea agreement other than for obstruction of justice after the plea entered. *See Exhibit A*. The statement in paragraph 4 does not open the door to a request for 51 months under any of the specific guidelines provisions or statutes cited in the government's sentencing memorandum. The government's explicit statement that it would "take the position" that a specific offense level calculation applies in Mr. Montano's case resulting in a specific sentencing range (18-24 months) trumps this argument given the appellate court's comments in *Rivera*. Further, any ambiguity in the reading of the statement in paragraph 4 should be resolved in favor of the defendant, i.e. there is no agreement between the parties as to disposition given the parameters of the specific guidelines range (18-24 months) contemplated by the government's offense level calculation in the plea agreement.

In addition to breaching the agreement of the parties by requesting a 51 month sentence under grounds it did not explicitly cite, the government also violates the agreement by arguing that certain relevant conduct should be considered by the Court in favor of such a departure or variance upward. The plea negotiations in this case entailed a decision by the government to dismiss counts 4, 5, 7, and 8 of the original indictment. *See Exhibit B*. These counts referenced allegedly false responses by Mr. Montano in two different "TPS" applications to the same particular question. Mr. Montano answered "No" to the following question in both the 2008 and 2010 "TPS" forms: "Have you EVER received any type of military, paramilitary, or weapons training?" *Id., See also* Government's Sentencing Memorandum, *Exhibit C*, pp. 7.

Mr. Montano was adamant during plea negotiations that he would not agree to make any admission of guilt regarding that question as he was never a part of any "paramilitary" group. He felt the question was worded awkwardly and that a positive response as to any one of the three types of training suggested would be interpreted as a "Yes" response to all of them. The government agreed to dismiss those particular counts of the indictment in exchange for Mr. Montano's plea related to the remaining counts which squarely dealt with the date of entry into the United States and his responses on the "TPS" forms in that regard.

A plea agreement is a binding promise by the government and is an inducement for the guilty plea; a failure to support that promise is a breach of the plea agreement, whether done deliberately or not. *See Santobello v. New York*, 404 U.S. 257, 262 (1971); *see also, United States v. Saxena*, 229 F.3d 1, 6-8 (1st Cir.2000*), United States v. Kurkculer*, 918 F.2d 295, 302 (1st Cir. 1990). The defendant is cognizant of the fact that the Court can consider relevant conduct at sentencing and that there is very little limitation on the amount and type of information that can be presented to the Court at a sentencing hearing. *See* 18 U.S.C § 3661. However, this does not give the government free reign to explicitly undercut a plea agreement that it has entered into. *See United States v. Gonczy*, 357 F.3d 50 (1st Cir.2004) (The government has a duty to bring all facts relevant to sentencing to the judge's attention. This duty coexists with the government's duty to abide by a plea agreement).

It is clear that the government is purposely injecting references to the "military, paramilitary, and weapons training" responses in its sentencing memorandum to support a sentence beyond what it effectively proposed in the plea agreement, 18-24 months. What is even more disturbing is that this information was specifically referenced in plea negotiations and the government agreed to dismiss indictment counts based on that conduct to induce Mr. Montano to

plead guilty to the criminal information. The prosecutor's attempt to resurrect this information in the guise of "relevant conduct" is clearly inappropriate and is designed solely to prevent Mr. Montano from receiving the benefits of the bargain he struck with the government.

In the case of *United States v. Gonczy*, 357 F.3d 50 (1st Cir.2004), the First Circuit held that a prosecutor had breached a plea agreement by essentially undermining her own agreed upon recommendation. She did this by strenuously emphasizing the defendant's wrongdoing and his leadership role in the offense. The Court was careful to distinguish this information from the facts of the case or from facts related to the defendant's character which would have been appropriate for the prosecutor to touch on in her argument. *United States v. Gonczy*, 357 F.3d at 53. Ultimately, the Court found that the prosecutor had attempted to subtly sabotage her plea agreement recommendation by piling negative information on at the sentencing hearing and, effectively, pushing the sentencing judge toward a sentence above what she had requested.

In Mr. Montano's case, the prosecutor is doing exactly what *Gonczy* cautioned against in referencing the military training question responses that were the subject of bargaining during plea negotiations. *Id.* He is also substantially undermining the plea agreement by submitting an expert report from Professor Terry Lynn Karl and making it one hundred percent of the focus of his sentencing arguments while barely mentioning the substance of the violations in this case: immigration fraud and perjury. *See* D.E. 53, report, appendix, and Curriculum Vitae. This report paints a very grim picture of Mr. Montano as a war criminal of epic proportions during the Salvadoran civil war which effectively ended in 1992 with the signing of a peace agreement.[3] An evidentiary hearing will likely be required for the Court to sort through this extensive report, determine whether the sources of information utilized are reliable, and settle upon how much

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[3] Mr. Montano was never formally charged or investigated for any of the conduct attributed to him in Professor Karl's report in El Salvador.

consideration should be given to this information without jeopardizing Mr. Montano's rights to due process at sentencing.

Mr. Montano maintains that the government's submission of this highly inflammatory information violates the plea agreement as it is submitted in support of an upward departure or variance that is not contemplated in the agreement. The *Gonczy* case states that a prosecutor's overall conduct must be consistent with making a particular sentencing recommendation and not the reverse. *Gonczy*, 357 F.3d at 54. The initial recommendation in *Gonczy's* case was "undercut, if not eviscerated" by the government's various and heated arguments to the Court. *Id*. In Mr. Montano's case the government's misuse of what it terms "relevant conduct" as well as the voluminous information from Professor Karl serve only one purpose, to provide a prejudicial distraction from the facts underlying the offenses of convictions and to persuade the Court that a sentence well above what it suggested in the plea agreement, 18-24 months, is appropriate in this case. Even if the Court finds that the nature of this information does not preclude it from consideration at sentencing, assuming we are dealing with an 18-24 month range and the parties present dueling recommendations in that regard, it must determine how much and how far the government can press it without marginalizing the plea agreement. *See Gonczy* 357 F. 3d at 53-54; *Canada*, 960 F.2d at 268, 269.

C. The Various Letters forwarded to the Court are Not "Victim Impact Statements"

The Court is in receipt of a number of letters from third parties that are not "victims" of the offense conduct in this case. *See* D.E. 44, 47, 50. Mr. Montano would like for the Court to clarify what it will do with the information provided in these letters for purposes of sentencing. Although the information the Court can consider regarding the defendant's character and

background is very broad in scope under 18 U.S.C. § 3661, Mr. Montano notes that these individuals cannot be defined as "victims" of the immigration and perjury offenses in this case pursuant to either 18 U.S.C. § 3771 or U.S.S.G. Section 6A1.5. Further, the grouping provisions state at U.S.S.G. Section 3D1.2, note 2, that immigration offenses do not have identifiable "victims" but that they impose a societal harm contrary to the interests of the United States government. Lastly, the Court should inquire of the government if it submitted any of these letters on behalf of these individuals or encouraged them to do so directly. Any actions of this type would arguably be further attempts on the part of the government to undermine the plea agreement in this case and secure an upward departure or variance inappropriately.

Respectfully submitted,
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By His Attorney,

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Date: January 14, 2013

CERTIFICATE OF SERVICE

I, Oscar Cruz, Jr., hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on January 14, 2013.

*Oscar Cruz, Jr.,*_________________
Oscar Cruz, Jr.