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April 19, 2001

Mr. Norman Lambert
United States Probation Officer
6500 Cherrywood Lane, Suite 100
Greenbelt, Maryland 20770

Re: *United States v. Cruz M-L*
Crim. No. AW-01-XXXX

Dear Mr. Lambert:

I have not had the chance to see my client at the detention center in Orange, Virginia, nor have I spoken to him since sending him a copy of the presentence report ("PSR") prepared by you. Therefore, I must reserve final comment on the PSR until I have spoken with my client. Preliminarily, I have no objections to your sentencing guideline computation or to the factual information contained in the report. However, at this time, there are various comments I do wish to make, as follows:

A. General Facts in Mitigation.

I thank you for your thorough report. Although you mention many facts of which I want the Court to be aware, I think it is important to stress certain facts generally in mitigation:

(1) M-L grew up in a very poor rural area of Honduras.

(2) His father died when he was only 1 ½ years old.

(3) He had to leave school when eight (8) years old in order to work the fields in order to help out his mother.

(4) He returned to this country after being deported in order to see his fiancé and make money to send his mother so she can buy medicine to help alleviate the effects of her cancer.

(5) Whenever in this country, he has steadily worked at legitimate jobs and supported his two children and fiancé.

(6) M-L now wishes to go home to Honduras to see his mother, although he is fearful she is not alive since he has not heard from her in six months.

B. Prior Criminal Record.

I also believe it is important to comment on M-L's prior criminal record.

As to his manslaughter conviction, the killing giving rise to this conviction occurred after M-L was attacked by a person armed with an ice-pick who attempted to rob him. This occurred very soon after another incident in New York in which M-L was the victim of a robbery. During the first incident, M-L was robbed at knife-point and stabbed in the arm. (You will recall that he showed you his scar during your interview of him.) When attacked in the later incident, M-L was stabbed in the neck. (He showed you the scar from this stabbing too.) However, he was able to wrest the ice-pick away from his assailant. He then turned the ice-pick on the assailant. Unfortunately, the assailant died as a result.

As to the drug conviction, this involved the sale of $20 of marijuana. M-L recognizes he was foolish to involve himself in this offense. However, he wants the Court to know that this was an isolated incident.

C. Grounds for Downward departure.

1. Atypically disparate treatment in prison.

As a result solely of M-L's deportable alien status, the sentence he will serve in this case will be served under conditions harsher than those faced by other federal inmates similarly situated but who are United States citizens. In particular, because he is an alien, M-L will not be able to serve any portion of his sentence in a minimum-security facility and he will not be able to serve any portion of his sentence in a half-way house or on home-monitoring.

This atypically disparate treatment of M-L is undeserved and grounds for a downward departure, as recognized by the Fourth Circuit. *See United States v. Debeir*, 186 F.3d 561, 569 (4th Cir. 1999). *Also see United States v. Smith*, 27 F.3d 649 (D.C. Cir. 1994).

Other Circuits have rejected harsher treatment due to alien status as a permissible basis for departure. *See e.g., United States v. Restrepo*, 999 F.2d 640 (2nd Cir. 1993); *United States v. Mendoza-Lopez*, 7 F.3d 1483, 1497 (10th Cir. 1993); *United States v. Nnanna*, 7 F.3d 420, 422 (5th Cir. 1993). However, these cases preceded the Supreme Court decision in *Koon v. United States*, 518 U.S. 81, 116 S.Ct. 2035 (1996), which made clear that federal courts cannot categorically proscribe a basis for departure unless the Sentencing Commission has done so. *Koon*, 518 U.S. at ___, 116 S.Ct. at 2050. *Also see Debeir*, 186 F.3d at 569; *United States v. Charry Cubillos*, 91 F.3d 1342, 1344-45 (9th Cir. 1996).

Pursuant to BOP Program Statement ("PS") 5100.07: "Security Designation and Custody Classification Manual," M-L will not be able to serve any portion of his sentence in a minimum security facility. *See* **Exhibit A**, portion of PS 5100.07[1] regarding Public Safety Factors ("PSF's") (A "Deportable Alien" . . . shall be housed in at least a Low security level institution, . . ."[2])

M-L also will not be eligible for placement in a Community Corrections Center ("CCC") or halfway house, pursuant to 18 U.S.C. § 3621(b), as the "penal or correctional facility" at which he could serve at least a portion of his sentence, or placement in a CCC or home confinement for the last 10% of his sentence, pursuant to 18 U.S.C. § 3624(c). This is because he will be an inmate "assigned a 'Deportable Alien' Public Safety Factor." *See* **Exhibit B**, portion of PS 7310.04.

If not for his deportable alien status, M-L would be able to serve a substantial portion of his sentence at a minimum security facility. Although M-L would not be eligible for minimum security placement at his initial place of confinement, he would be eligible for transfer to a minimum security facility after his first program review which, pursuant to PS 5100.07, occurs at approximately seven months after an inmate's arrival at an institution.

In order for a federal inmate to be eligible for minimum security placement, they must have no more than five security level points. At the time of an inmate's initial designation, their security level score is arrived at by assessing points for a variety of factors, including the type of any detainers, the severity of their current offense, the length of their current sentence, their most serious prior commitment, any history of escapes, any history of violence, and their precommitment status. *See* **Exhibit C**, copy of "Inmate Load and Security Designation Form - Male."

As inmates serve their sentence, they can reduce their security level score. Taken into account are their security level points (referred to as the "base score") and what are called "custody points." The security-level points are recomputed from before and "custody points" are assessed for a variety of factors such as percentage of time served, history of drug or alcohol abuse, mental/psychological stability, the type and number of incident reports while in BOP custody, the

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[1] I have full copies of PS 5100.07 and the other Program Statements referred to herein if you, counsel or the Court are interested in reviewing them. They were too voluminous to reproduce with this letter. In addition, these documents can also be found through the BOP's official web-site at *www.bop.gov*.

[2] The PSF will not apply to prevent minimum security designation if certain qualifications are met. These include: documented or verified history of stable employment in the U.S., verified five or more years of consecutive domicile in the U.S. immediately preceding current incarceration, and verified strong immediate family ties in U.S. The PSF will also not apply if the INS decides not to deport the alien inmate or if the BOP Regional Director waives the PSF. As a practical matter, none of these options are possible in the instant case.

frequency of any disciplinary reports, responsibility demonstrated while in BOP custody, and family/community ties. *See* **Exhibit D**, copy of "Custody Classification Form - Male."

In M-L's case, he initially will receive eight security level points, making him eligible for a Low security facility. *See* **Exhibit E**, completed "Inmate Load and Security Designation Form - Male," and **Exhibit F**, Security Designation Table (Males)."

After his initial program review, at which time he will have served seven months, M-L can reduce his security level score by three points (assuming he stays out of trouble and no mental health issues arise) by earning 27 custody points. *See* **Exhibit G**, completed "Custody Classification Form - Male." This would make him eligible for minimum security but for his alien status. *See* **Exhibit F**.

If M-L receives a sentence at the low-end of his sentencing range, or 46 months (and taking into account the fact that M-L will receive approximately six months in pre-trial custody credits) , this means that but for his alien status, he will have to serve his last 33 months in a more restrictive facility than is necessary.

It is likely too that if not for his alien status, M-L would be able to serve at least the last ten percent of his sentence (or roughly 4 ½ months, assuming a 46 month sentence) in a halfway house. According to Susan Allison, a research analyst with the BOP with whom I recently spoke, 75-76% of inmates are allowed to serve their last 10% in at least a halfway house. Generally, the inmates who cannot do so are those serving sentences for violent crimes (including sex crimes) or are deportable aliens.

This disparate treatment of aliens, which is certain to be repeated with M-L, will cause his conditions of confinement to be atypical of other federal inmates similarly situated. This is unfair and justifies a downward departure.[3]

2. Willingness to consent to administrative deportation.

Another reason to downward depart is that M-L is willing to stipulate to his administrative deportation by INS and thus save the INS resources which it might otherwise have to expend. This has been recognized as a valid basis for departure. *See e.g., United States v. Causor-Serrato*, 234 F.3d 384 (8th Cir. 2000); *United States v. Ramnath*, 958 F.Supp. 99 (E.D.N.Y. 1997).

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[3] Not all aliens will be in the same position as my client. Some will be ineligible for minimum security placement for reasons other than their alien status. *See e.g.*, *DeBeir*, 186 F.3d at 570 (". . . DeBeir's alien status was not the basis for his ineligibility for less restrictive confinement.")

According to the U.S. Sentencing Commission "1999 Sourcebook of Federal Statistics," district judges downward departed on this basis in 849 cases, or 8.8 percent of all downward departure decisions, during fiscal year 1999.

3. Uncredited time in INS custody.

Since M-L will not be credited by BOP for the forty-two days he was held in custody by INS before indictment and detention in the instant case, a further departure for this uncredited time is appropriate. *See United States v. Montez-Gaviria*, 163 F.3d 697, 702-03 (2nd Cir. 1998); *United States v. Ogbondah*, 16 F.3d 498 (2nd Cir. 1994).

Recently, in *United States v. Suazo-Martinez*, Crim. No. DKC-00-0371, another illegal reentry case, Judge Deborah K. Chasanow of this Court granted a similar departure.

D. Conclusion.

Based on the aforementioned factors, I believe a downward departure of six (6) levels is appropriate on the first two grounds stated above, followed by a low-end sentence and a forty-two day departure for uncredited time in INS custody.

Sincerely,

MICHAEL T. CITARAMANIS
Assistant Federal Public Defender

cc: James M. Trusty, AUSA