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March 13, 2000

The Honorable Benson E. Legg
United States District Judge
United States District Court
for the District of Maryland
101 W. Lombard Street
Baltimore, Maryland 21201

Re: United States v. Defendant
Criminal No.

Dear Judge Legg:

Sentencing is scheduled for Monday, March 20, 2000 at 11:00 a.m. This letter sets forth the defendant's request for a downward departure on the basis that his case is outside the heartland because he returned to the United States seeking shelter from political persecution in El Salvador.

I. Background

In May 1995 Mr. Defendant was deported to his country of origin, El Salvador. Mr. Defendant returned to his family's home in the rural Western town of Santa Ana. See Attachment 1(Map of El Salvador). Subsequent to his deportation, Mr. Defendant fled El Salvador and returned to the United States because he and his family believed his life was in danger. His family received notice of death threats against Mr. Defendant prior to his return to El Salvador; the threats resumed upon his return. His life was in danger by virtue of his military service during El Salvador's civil war which lasted from 1981 until 1992. From 1982 - 1984, Mr. Defendant fought in the United States sponsored Salvadoran government army. See Attachment 2 (Certificates of Military Service). The death threats against Mr. Defendant were believed to be from the anti-government communist guerilla forces, the Farabundo Marti National Liberation Front ("FMLN").

The life threatening situation Mr. Defendant faced in El Salvador is described in letters from family from El Salvador, and by corroborating documentary evidence of human rights violations by anti-government groups in El Salvador perpetrated during the time leading up to and right after Mr. Defendant's deportation.

II. Legal Framework

Flight from persecution is an encouraged departure ground under either USSG §5K2.12 (Duress) or §5K2.11 (Lesser Harms). Under §5K2.12, a departure is warranted if “the defendant committed the offense because of . . . duress, under circumstances not amounting to a complete defense. . . .” Under §5K2.11, the Commission recognized that “[s]ometimes, a defendant may commit a crime in order to avoid a perceived greater harm.” Under *Koon v. United States*, 518 U.S. 81, 95 (1996), the sentencing court is authorized to depart on the basis of such “encouraged” factors so long as the Guideline does not already take them into account. Since USSG §2L1.2 takes neither duress nor lesser harms into account, this Court may depart.

Even if flight from persecution did not amount to duress or a lesser harm, this Court would have authority to depart as the departure basis would then be classified as an “unmentioned” factor. As such this Court “after considering the ‘structure and theory of both relevant individual guidelines and the Guidelines taken as a whole,’ [may] decide whether it is sufficient to take the case outside of the Guideline’s heartland.” *Id.* Since neither §2L1.2 nor the Guidelines as a whole consider in their structure or theory the effect flight from persecution would have on an offense, this court is authorized to depart.

This memorandum will address the following: (A) Synopsis of the history of El Salvador’s civil war, (B) Family accounts describing and documenting the death threats and environment of political persecution in El Salvador in 1995, and (C) Newspaper and other articles from 1992 through 1995 documenting instances of post-peace accord abuses by former guerrilla anti-government groups corroborating the family accounts.

III. Departure

A. El Salvador’s Civil War

From 1981 until 1992, El Salvador was steeped in a bloody civil war. The Farabundo Marti National Liberation Front (“FMLN”), a Marxist Communist backed party, launched an armed struggle against government forces on January 10, 1981. The FMLN conquered territory in eastern and northern El Salvador bringing the economy to a virtual standstill. The El Salvador military, financially backed by the United States, defensively responded, catapulting the country into an eleven year war which claimed the lives of 75,000 people. The United States contributed 665 million dollars to bolster El Salvador’s military, fearing a communist takeover. Mr. Defendant fought in the civil war for the government sponsored Army from 1982 through 1984. See Attachment 2.

In January 1992 the United Nations brokered a peace accord which provided for political reforms. The FMLN was recognized as a legitimate political party and now holds many seats in the country’s legislature. Nonetheless, many war time FMLN supporters disagreed with the tenants of the peace accord and instead of making peace, formed splinter groups which have continued to propagate violence against former members of El Salvador’s army. News reports describing the human rights abuses and further documenting the history of the civil war are excerpted below and

attached hereto.

B. Familial accounts of politically motivated death threats against Mr. Defendant

Mr. Defendant was a “Cabo,” or Corporal in El Salvador’s Army from 1982 -1984. When Mr. Defendant joined the army he was 18 years old. He followed the footsteps of his father, uncle and five cousins. In 1984 he left El Salvador in response to his mother’s desperate pleas; she feared he would be killed in the war. The bloody civil war took 75,000 lives at final tally.

Mr. Defendant was deported to El Salvador in 1995. The circumstances he faced there are documented in letters from family who lived with Mr. Defendant in May 1995. The family describes that as a former corporal in the military, former FMLN members issued death threats against Mr. Defendant. While Mr. Defendant was in El Salvador in 1995 he could not leave his family home alone; a family member had to escort him outside the family house at all times.

Mr. Defendant’s brother, PA, who lives in El Salvador, attested in an affidavit to the circumstances in El Salvador:

[M]y brother, Defendant, had to emigrate to the United States of America in 1995 because he was the victim of death threats, and at times has been physically hurt by unknown individuals; also, our family, during the time my brother was living in this country, has received anonymous letters and calls, wherein they threatened him and told him that his life was at risk, because he had been in the military national army. That is the reason why my brother had to leave the country urgently toward the United States of America.

See Attachment 3 (letter from brother). This document was notarized by an attorney in El Salvador on April 19, 1999, prior to undersigned counsel’s appointment in this case.

Mr. Defendant’s mother and father provided documentation by way of letter to undersigned counsel dated February 16, 2000:

I want to tell you that we are decent people and I want to tell you that these problems are due to politics and Defendant left (the country) because after he left the regime, he was harassed by the FML and that also happened to me [referring to father], they looked for me to kill me and I left for California in 1980 and I was exiled there until I got sick and I returned and then they deported D. and when he returned he couldn’t go out because they were looking for him to kill him and if he had to go out, we had to go out with him to be careful that nothing happened to him. he was a corporal in the military and that is why the FML doesn’t like him and that is why both of us have t continue to hide.

See Attachment 4 (letter from mother and father).

In addition, Mr. Defendant's sister, S., also provided documentation of the circumstances in El Salvador in her February 14, 2000 letter to undersigned counsel:

“[M]y brother, D, came here from El Salvador because the FMLN guerrilla was looking for him because of his previous connection to the Army and that is why he came, and when he returned again, the same thing happened, and that is why the family decided that it would be best for him to come here because it is different here, but he still has the same issues with the FMLN. To them, family doesn't matter, all they care about is bad, and a family member cares a lot for their own's safety and would prefer to have him alive and far away than dead. My brother is a good person and when he was here, we would escort him everywhere so that nothing would happen to him and that is why he ended up returning, because we were afraid that something would happen to him. I am glad I am able to help my brother in some way, because I love him very much.

See Attachment 5 (letter from sister, Sylvia Arevalo).

Family accounts describe the human rights abuses and continued atmosphere of violence in El Salvador which continued even after the civil war's end, as they directly affected Mr. Defendant. It was under these conditions that he left El Salvador and returned to the United States.

C. Corroborating News Accounts

United States and Latin American newspapers are rife with reports of brutal human rights abuses by anti-government guerillas which continued after the January 1992 peace accord. Below are excerpts from reports of abuses which continued after the January 1992 peace accord until 1995, when Mr. Defendant was deported. The reports substantiate (i) post-peace accord abuses by former FMLN members against former military personnel, (ii) the police force's inability to combat the crimes of human rights violations, and (iii) the reign of terror in western El Salvador, the locale of Mr. Defendant's hometown of Santa Ana. These reports corroborate the family accounts.

i. Consistent with the familial accounts, news reports document post-peace accord abuses perpetrated by former FMLN guerillas against former military personnel.

In March 1992, it was reported that notwithstanding the peace agreement, “both the government and rebels were continuing to murder and kidnap opponents, though at a slightly reduced rate, despite the peace treaty.” The article highlighted the “worrisome gap between the two realities—negotiations aimed at peace and the daily violations of human rights . . . [which are] persistent and grave.” See Attachment 6 (Tamayo, Juan O., “U.N. rights panel ends Salvador watch,” *Austin American Statesman*, 5 March 1992, p. A 32). Just months later, the United States Government publication *Daily Report: Latin America*, published in conjunction with the Foreign Broadcast Information Service (“FBIS”), reported a politically motivated death threat made by the FMLN against Ismael Garcia, Mayor of the town of Anamoros. See Attachment 7 (“Mayors Claim FMLN

Occupies Several Towns,” San Salvador, *El Diario de Hoy* in Spanish, 9 July 1992 (as reported in FBIS, *Daily Report: Latin America*, 13 July 1992, p.14).

On August 26, 1992, the *Daily Report: Latin America*, through the FBIS reported that “summary executions, the killing of Salvadoran citizens, are a daily occurrence.” For example, 1170 complaints of violations “of the right to life and individual safety and security” were filed in an 11 month period from mid-1991 through mid-1992. Of those complaints 167 were of summary executions or arbitrary killings -- 16 deaths a month. In some instances the Civil Defense patrols were blamed. The FMLN was blamed for 69 complaints of death threats and kidnappings between August 1991 and May 1992. See Attachment 8 (“ONUSAL Report of Rights Violations Viewed,” San Salvador, Radio Cadena YSKL in Spanish, 26 August 1992 (as reported in FBIS, *Daily Report: Latin America*, 27 August 1992, p.11).

An October 3, 1992 report documents confessions of a former FMLN member turned deserter that he had taken part in a host of ambushes of the Armed Forces. He revealed subversive plans of the terrorist FMLN members who were scheming to bury and hide weapons until after the UN observers left the country so that they could continue their unlawful attacks. See Attachment 9 (“Deserter: FMLN ‘To Continue’ Terrorist Acts,” San Salvador, *La Prensa Grafica* in Spanish, 3 October 1992 (as reported in FBIS, *Daily Report: Latin America*, 6 October 1992, p.7).

A June 1993 report from El Salvador documents the assassinations of military officers. There were eight documented assassinations between January 1993 and June 1993. The Minister of Defense accused the FMLN of responsibility. The report also documented that the FMLN was not relinquishing its weapons in accord with the peace agreement. See Attachment 10 (El Rescate Human Rights Department/Fundacion Flor de Izote, *Report from El Salvador*, June 7-14, 1993).

On May 7, 1994, the *Daily Report: Latin America*, reported on “improvement” in Human Rights as documented by the United Nations Observers for El Salvador (“Onusal.”) While noting some improvement, the UN Secretary general, director of Human Rights Division of Onusal revealed “that arbitrary executions and threats of arbitrary execution still represent the largest number of reports.” For example, between November 1993 and November 1994, 35 reports of arbitrary executions and 12 threats of arbitrary executions were reported. Onusal stated it did not “rule out political motives in some of these cases.” The UN secretary general reported that “the various organized groups of criminals who operate in the country comprise former Armed Forces members and former FMLN fighters. Referring to the violent actions carried out by these groups, he said that they possibly involve crimes resulting from ‘a settling of accounts’ with ‘private’ political components that could be a result of the war.” See Attachment 11 (“Onsual Reports Improvement in Human Rights,” San Salvador, *El Diario de Hoy* in Spanish, 7 May 1994 (as reported in (FBIS) *Daily Report: Latin America*, 10 May 1994, p.21).

On March 15, 1995, The Washington Post reported that “at a time when Salvadorans expected peace to bring normalcy back to their country, the gangs have made much of rural El Salvador more dangerous than during the war.” The gangs are described as “mostly former

combatants from both sides of the civil war.” In addition, “... the groups in El Salvador make no pretense of being politically motivated. They rob, kidnap, extort and settle old scores from the war with impunity.” See Attachment 12 (Rarah, Douglas, “Salvadorans Complain Postwar Crime Defeating Rebuilt Police Force,” The Washington Post, 15 March 1995, p.A24 (as reported on NEXIS database)).

These selected articles were chosen from a vast array of news reports. The existence of human rights abuses in El Salvador is clear; the family reports are further substantiated by the verified instances of general abuse and political persecution in El Salvador. Mr. Defendant’s life was in very certain danger if he remained in El Salvador.

ii. *The National Police in El Salvador are unable to combat crime therefore, like other Salvadorans, Mr. Defendant could not turn to them for protection.*

In an August 1992 report, the U.N. Observers for El Salvador, “Onsual,” found the government of El Salvador had not fulfilled its duty to provide security in response to complaints of summary execution and other violations pertaining to individual safety and security. See Attachment 8 (*supra*).

An example of difficulties faced by the national police is set out in a July 1992 report which explained that shortly after the peace accord, the FMLN occupied many cities and towns, forcing municipalities to shut down and forming their own “public security” office. See Attachment 7 (*supra*). If the national police can’t combat it’s cities being occupied, it surely can’t combat the daily wrath of human rights abuses committed upon its citizenry.

According to a November 1992 U.N. report prepared by an independent human rights expert, the government of El Salvador “has ‘not complied’ with the norms of international law which require the state to prevent, investigate and sanction human rights violations.” See Attachment 13 (“Human Rights Violations Continue, Says UN Report,” InterPress Service (PeaceNet), 27 November 1992 (as reported in *Central America Newspank*, Vol. 7, No. 21, p.3).

A May 1994 report from FBIS likewise underscores the lack of legal recourse for Salvadorans in Mr. Defendant’s position describing “the police’s inability to capture the culprits and the Judicial Branch’s inability to prosecute them still represent the basic reason for the high percentage of rights violations, particularly with the status of impunity.” See Attachment 11 (*supra*).

iii. *Many documented instances of violence occurred in Mr. Defendant’s hometown of Santa Ana, El Salvador*

Mr. Defendant was born and raised in Santa Ana, El Salvador in the western part of the country. See Attachment 1. Mr. Defendant continued to live with his family before and after the period when he fought in the army during the civil war, just before he left the country during the civil

war in 1984, and when he was deported in 1995. Mr. Defendant's family continues to live there today.

Violence in Western El Salvador, in which Santa Ana is located, was reported immediately after the January 1992 peace accord. An August 1992 article regarding an Onusal report stated that "[a]fter the peace agreement, the greatest number of arbitrary deaths and attacks on individuals were observed in the country's western and central areas." See Attachment 8 (*supra*). In September 1992 the Defense Ministry of El Salvador reported that the FMLN blocked roads in Western El Salvador. See Attachment 16 ("Pro-FMLN Groups Intercept Convoy, Block Roads," San Salvador, *El Mundo* in Spanish, 11 September 1992 (as reported in FBIS, *Daily Report: Latin America*, 14 September 1992, p. 19).

In an April 30, 1994 report in which the President promised to increase it's "war on crime," reference was made to the terror in the Santa Ana region, Mr. Defendant's hometown. The government reported that they were trying to combat the kidnappers who have "spread terror throughout the Santa Ana region." It was reported that "gangs of men dressed in olive green and armed with heavy weapons have set up various camps at the base of the Santa Ana volcano and continue to kidnap and extort money from farmers." See Attachment 14 ("President Vows to Intensify War against Crime," San Salvador, *El Diario de Hoy* in Spanish, 30 April 1994 (as reported in FBIS, *Daily Report: Latin America*, 4 May 1994, p. 12).

Similarly, a May 2, 1994 article reported that the city of Santa Ana was experiencing a rash of violence: "former rebels who use military weapons - such as M-16 and AK-47 rifles, as well as other weapons that were in vogue during the war - operate in the region. Because of this they doubt the police can do much to stop them for two reasons: First, because the PNC [National Civilian Police] does not have adequate equipment, and second, because a large part of the police is made up of former FMLN members." See Attachment 15 ("Coffee Growers Urge Army to Rid Santa Ana of Gangs," San Salvador, *El Diario de Hoy* in Spanish, 22 April 1994 (as reported in FBIS, *Daily Report: Latin America*, 2 May 1994, p. 27).

Mr. Defendant broke the law by re-entering the U.S. after he had been deported. However, he did so under the very real and imminent threat of death. Mr. Defendant faced the unenviable choice of remaining in El Salvador and risking his life, or returning the U.S. and risking his liberty. Returning to the U.S. was not a choice Mr. Defendant would have made but for the death threats and atmosphere of political killings in El Salvador. The instant crime was committed under an imperfect duress amounting to an encouraged departure ground under USSG §5K2.12. In addition, the commission of this crime was a "lesser evil," than being the victim of an executed death threat; it therefore is likewise a ground for departure under USSG §5K2.11.

Whether as an encouraged departure under either §§ 5K2.12 or 5K2.11, or an unmentioned factor, this case is outside the heartland of re-entry offenders. The heartland of re-entry offenders includes persons returning to the U.S. to continue a life within the drug trade, persons returning to earn better wages than in their country of origin, and persons returning to simply be reunited with

friends and family. Mr. Defendant left El Salvador and returned only because he was fearful for his life within the violent atmosphere of human rights violations in El Salvador. There are no published cases on this issue; this underscores the heartland does not include offenders fleeing human rights violations. We urge Your Honor to depart.

IV. Character References

Mr. Defendant is a well-respected, well-liked, hardworking man. While he was living in the United States, Mr. Defendant earned the respect of many of the citizens of Maryland, through his work as an auto mechanic and through his friendship. Attached are letters from many people who care about Mr. Defendant and wanted their voices to be heard at his sentencing on this matter: Wayne Mitchell, Esquire, See Attachment 17; Robert M. Wolcott, Deputy Administrator for Policy, U.S. Environmental Protection Agency, See Attachment 18; George Samayoa, M.D., D.C. Government Commission on Mental Health Services, See Attachment 19; and M & D Auto Body Service, one of Mr. Defendant's employers and many of their customers, See Attachments 20.

V. Accomplishments

Mr. Defendant has one prior conviction which occurred in 1987. While he was incarcerated, he took it upon himself to reflect on his crime, atone, and to better himself. The following are proof of his attempt to rebuild his life by virtue of studies in religion, automotive education, legal studies, and English improvement, and substance abuse treatment.

Mr. Defendant earned five certificates in bible study:

- See Attachment 21a (certificate for being "born again" and accepting Christ into his life);
- See Attachment 21b (completion of a bible course on the life of Jesus);
- See Attachment 21c (completion of a bible course on the life of Jesus);
- See Attachment 21d (certificate of bible course completion);
- See Attachment 21e (certificate for completion of the doctrines of salvation).

Mr. Defendant earned certificates for Automotive training:

- See Attachment 22a (certificate from the University of the District of Columbia Division of Continuing Education; 640 hours of instruction in Automotive Technology July 1992);
- See Attachment 22b (picture of graduating class; Mr. Defendant is in the back row, second from the left);
- See Attachment 23 (certificate of completion of the Auto Mechanics program July 1992).

Mr. Defendant earned certificates in legal studies and the English language, and a psychology/bible course.

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See Attachment 24 a-c (documentation of completion of the Street Law and Advanced Street Law programs in 1989, 1992 and 1994)

See Attachment 25 (certificate for completion of Spanish Catholic program-- Level II English 1990)

See Attachment 26 (certificate for outstanding participation in the Psychology/Bible Course 1993)

Mr. Defendant earned certificates for substance abuse treatment.

See Attachment 27 (certificate of 8 hours of instruction in Spanish Speaking Substance Abuse Program 1993)

See Attachment 28 a,b (certificates of completion of Unfoldment substance abuse treatment program August 1992, December 1992)

Mr. Defendant's life has been difficult. He fought in a horrific war for his country. He fled the country at the pleas of his family so that his life would be spared. In the United States he became involved in a serious criminal offense, the first in his life, and spent many years incarcerated. While incarcerated he did what he could to salvage his life, taking courses to better himself upon his release. When he was released he was returned to a country where he was "wanted" by guerilla forces, forces that the country's police have been unable to combat. After a short period, again, at his families urging, he returned to the United States. He lived here for some time, peacefully and otherwise lawfully, until he was found and charged in this case. He has been incarcerated since February 1999.

Thank you in advance for your consideration of this matter.

Very truly yours,

Kathryn Frey Balter
Assistant Federal Public Defender

KFB/pl

cc: Kathleen Gavin, AUSA
Blair Wise, USPO