

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,

Plaintiff,

CR NO. 15-174 (LGS)

v.

JUAN MANUEL AVILA-MEZA,

Defendant.

**SENTENCING MEMORANDUM ON BEHALF OF DEFENDANT,
JUAN MANUEL AVILA MEZA**

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PRELIMINARY STATEMENT

We respectfully submit this memorandum and accompanying exhibits on behalf of Juan Manuel Avila-Meza (“Avila”/defendant) to assist the court in fashioning an appropriate sentence.

As will be discussed below, there are a number of considerations that mitigate the circumstances of Mr. Avila’s involvement, surrender, arrest and conviction in this matter. These include the fact that, as numerous letters and exhibits provided with this submission attest, Mr. Avila is a devoted father and professional who gave much to his community. Through this Memorandum, the court will be asked to place Mr. Avila’s offense in the context of his life’s journey to develop himself as a professional and to care for his family as best he could in a country that places many obstacles in the path of self preservation and whose government provides little for its citizens.

Under all the circumstances present in this unique case, it is submitted that a sentence well below the guideline range pursuant to §3553 will be sufficient but not greater than necessary to accomplish the goals of sentencing.

PROCEDURAL HISTORY

The Indictment

On March 18, 2015, a Three Count Indictment was filed naming Fabio Porfirio Lobo (“Lobo”). D.E.3. On June 29, 2016, the Indictment was superseded to include defendants Ludwig Criss Zelaya-Romero (“Zelaya”); Mario Guillermo Mejia-Vargas (“Mejia”); Carlos Jose Zevala-Velasquez (“Zevala”); Victor Oswaldo Lopez-Flores (“Lopez”); Jorge Alfredo Cruz Chavez (“Cruz”) and Avila. D.E.35. On March 20, 2017, the Indictment was superseded to included Carlos Alberto Valladares (“Valladares”). D.E.129.

Avila is charged in Counts One and Three of the Indictment.

Defendant’s Voluntary Surrender to U.S. Authorities

On June 30, 2016, upon learning of the U.S. investigation, defendant, a law enforcement officer, reported to his superior officer, Sub Com. Director Serrato Cruz, to the address the matter.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Thereafter, Avila agreed to surrendered to the United States government and answer to charges pending in the Southern District of New York without extradition. **Exhibit B** (Avila Waiver).

He was arraigned on July 12, 2016 in the Southern District of New York for charges set forth in Indictment S-1. D.E. 55.

The Plea Agreement and Plea

On March 30, 2018, the government offered defendant a plea to a lesser included offense set forth in Count One of the Indictment charging defendant with participating in a conspiracy to manufacture and distribute for importation 500 grams and more of cocaine from a date not disclosed in 2004 to a date not disclosed in June of 2014 in violation of 21 USC §963,952(a), 959(a), 959(c), 960(a)(1) and (3) and 960(b)(2)(B). Avila thus faces a mandatory minimum term of imprisonment of 5 years and a maximum term of imprisonment of 40 years.

The plea offer provides for a Guideline Base Offense Level of 38, because, as urged by the government, the offense involved more than 450 kilograms of cocaine; a 2 level upward adjustment for possession of a weapon; and a 3 level downward adjustment for defendant's full acceptance of responsibility. Thus, pursuant to the plea offer, the applicable adjusted Guideline Offense Level is 37.

The Pre-Sentence Investigation Report ("PSIR") and Objections

A draft PSIR was disclosed on June 12, 2018 and defendant's objections were served after an extension of time on September 24, 2018. Probation's position mirrored that of the government's plea offer hence a Base Offense Level of 38, adjusted to a Guideline Offense Level of 37.

Defendant's primary objections to the PSIR concern paragraphs 6-15 because they inaccurately overstate Avila's participation. Defendant also objects to the offense level computation regarding his role in the offense, as he was, in fact, a minor participant and thus should be entitled to receive a two-level downward adjustment. The result should be, therefore, a total offense level of 35 and a Criminal History Category of I resulting in a Guideline range of 168-210.

Finally, as a further objection to the PSIR, it is urged that consideration and application of a sentence outside of the Guideline range pursuant to §3553 factors is warranted.

STATEMENT OF FACTS

As to The Background of the Government Investigation

The discovery provided discloses that as far back as 2000, individuals were cooperating with the government, thus instigating investigations in Honduras with respect to narcotics trafficking and foreign corruption targeting individuals at many levels.

The investigation of the higher level defendants, such as Lobo, and others separately charged, led to a sting operation into police corruption in Honduras. As part of the sting, two government cooperators set up two meetings, one in San Pedro Sula, and a second in Tegucigalpa on June 25, 2014. The records of these meetings form the bases of the government's charges against this defendant and other members of the Honduran National Police referred to herein as the "HNP Defendants."

The thrust of the government's charges against Avila concern his alleged involvement in police protection of narcotics traffickers, specifically, Javier Rivera-Maradiaga ("Javier") and Devis Leonel Rivera-Maradiaga ("Devis") (collectively the "Maradiagas" and/or the "Cachiros,") two violent individuals whose drug trafficking organization was, and continues to be, an extensive drug trafficking organization which has, and continues to, terrorize Hondurans. The particular acts set forth in the Indictment that pertain to Avila were instigated by two government cooperators, Mexican nationals, Jose Santos Pena ("Santos-Pena") and Jose Santos Hernandez, ("Santos-Hernandez"). The Mexican nationals are a father and son team who, in cooperation with the United

States government (CS1 and CS2 respectively) were placed in various investigations by their controlling agents. Since their 2014 ventures on behalf of the government, they have, as per their testimony in another matter, *United States v Campo-Flores*, Cr. No. 15-765 (PAC), been discredited. **Exhibit C** at 415-416, 384-398¹

With respect to Avila, however, his involvement in the conspiracy came as a result of his work as an attorney and not, as portrayed by the government, as a result of his status as a police officer. Avila became a member of the HNP in 1994. On November 29, 1999, Avila was suspended from the police department, after his former wife, Miriam Gutierrez, was convicted of fiscal fraud by Honduran authorities. Avila fought to be reinstated and on September 20, 2011, after several lawsuits, he was successful. During his period of suspension, however, in or around 2002, he became a licensed attorney in Honduras.²

Avila's interaction with the primary targets of the government investigation, the Maradiagas, evolved over several years as follows.

(1) INTRODUCTION TO THE MARADIAGAS - Once in 2004 and once in early 2009

While in the HNP, during his suspension period, Avila met with an individual he knew from the police academy named Ruben Santos³ who also had worked in the HNP as a uniformed police officer with the rank of Inspector. Ruben Santos is a cousin to the Maradiagas.⁴ In 2004, Ruben Santos was suspended from the HNP, and sometime thereafter Avila received a call from Ruben Santos who asked him to accompany him to San Pedro Sula. Avila agreed and when they arrived

¹ Excerpts from transcript of proceedings in *Campo-Flores* are attached as **Exhibit C**.

² In addition to these careers, defendant owned and operated several business entities including a local bus company and used car dealership.

³ Upon information and belief, Ruben Santos has not been charged in this Indictment nor in any related Indictment.

⁴ Ruben Santos was a colleague and Officer's School classmate of Avila's. Ruben Santos often recommended Avila for legal work. In 2016, Ruben Santos was ousted from the HNP due to family connections to the Maradiagas. He then became involved in religious activities, and was ordained as a Pastor.

in San Pedro Sula, Ruben Santos met a man he identified to Avila as Javier Rivera-Maradiaga (“Javier”). When Ruben Santos got out of the car to speak to Javier, who was with another person, Avila remained in the car. Ruben Santos and Javier went together to eat something and sent food to Avila who remained in the car. At this time, approximately 15 years ago, Avila did not know exactly who Javier was, but assumed he was someone important. When they were done talking, Ruben Santos got back in the car and they returned to Tegucigalpa.

It was not until July, 2009 when Avila met Devis, Javier’s brother, for first time. Immediately prior to this meeting, Avila and three attorneys were called to Puerto Lempira to represent a group of police officers, (which included co-defendant Mejia-Vargas “Mejia,”) ⁵ who had been arrested for attempting to steal a 143 kilogram load of cocaine that they had been sent to seize by Comisionado Francisco Murillo Lopez, the HNP Criminal Investigations chief, (“Murillo.”) Apparently, Murillo learned of a shipment of narcotics through an informant and sent the officers from Tegucigalpa for the purpose of accomplishing the seizure. After seizing the load, however, the officers decided to steal it instead of turning it in. But they were thwarted by local cops assigned to that area, and the Tegucigalpa officers were thus arrested and placed in custody.

Avila was contacted by Juan Valerio, Mejia’s cousin who asked Avila to represent Mejia. Valerio told Avila that additional attorneys were needed to represent the other officers, eight in total, who were also charged. Ultimately, the representation of the officers was divided among the group of attorneys and Avila represented the lower-ranking cops.

While in Puerto Lempira Avila saw a black SUV which was being utilized by the chief of the HNP detachment in Lempira. ⁶ After an initial hearing Avila and the other attorneys flew back to Tegucigalpa. Avila had no further involvement in this case as he was never paid. The defendants, however, through other attorneys ultimately won their cases on appeal. *See Exhibit D* (Partial Avila Attorney Legal File, Mejia-Vargas).

⁵Avila and Mejia were classmates at the police academy.

⁶The significance of this vehicle is discussed below.

Approximately one month later, Ruben Santos, who, as stated earlier, was removed from the HNP in 2016 due to his relationship with the Maradiagas, asked Avila to accompany him to San Pedro Sula where he needed to pick up a vehicle. Upon arrival in San Pedro Sula, they proceeded to a restaurant in the La Lima area. Ruben Santos told Avila that Devis would be there and when they arrived, Devis was indeed there with 4 bodyguards. Avila and Ruben Santos went to Devis and they waited with him to obtain the vehicle that Ruben Santos was to pick up. While waiting and engaging in a social conversation, the topic of the arrest of the cops with the 143 kilos came up and Devis commented that in the past he had paid Mejia \$300,000 for protection.

When the vehicle that Ruben Santos was to pick up finally arrived, Avila noticed that it was the same black SUV he had observed in Punto Lempira, which Devis apparently had taken back from the police chief and was now giving to Ruben Santos. Also at this time, Devis gave money to Ruben Santos for the so-called "church" that Ruben Santos was involved in.⁷

(2) SECOND MEETING - Loan of a Vehicle (October 2009)

In October 2009, Avila was contacted by Ruben Santos, who asked Avila (who had a small business buying and selling cars), to lend a vehicle to him for use by Javier in the city of Choluteca. Avila agreed and Ruben Santos sent an acquaintance, Oscar Elvir, ("Elvir") to pick up the vehicle. Elvir advised Avila that he had instructions to meet Javier in Choluteca (Javier was to arrive by helicopter from San Pedro Sula) and drive him to appointments in that area. Elvir returned the vehicle to Avila the following day.

(3) THIRD MEETING - Real Estate Matter August 2013, across from airport, San Pedro Sula

In or about 2011, and as later revealed through discovery, the Maradiagas set up a "front" construction corporation in Colon known as INRIMAR to launder drug funds under the guise of

⁷As stated earlier, after being fired from HNP, Ruben Santos ostensibly became an Evangelical Pastor.

construction projects and the “Fondo Vial” project.⁸

On September 20, 2011, after Avila had successfully sued the HNP for his improper termination, Avila was reinstated to the HNP. **Exhibit E** (Avila reinstatement). He returned to work as an officer on December 13, 2011. While in the HNP, and as permitted, Avila continued with his work as an attorney and continued also with his various business ventures he had initiated while suspended.

In August of 2013, Avila acted as an intermediary in San Pedro Sula for the sale of a property worth approximately 5,000,000 Lempiras, approximately 2 square blocks in size. This property belonged to Teofilo Norberto Martel-Cruz (“Martel-Cruz”) and is located across from the airport in San Pedro Sula. Avila contacted Ruben Santos to elicit his help in offering this property to Devis, as he believed he was one of the few individuals who had enough funds to purchase such a property. Ruben Santos arranged a meeting for Devis to see the property. Avila and a driver, Jonathan Funes-Cuello (“Jonathan”) went to San Pedro Sula where they were told to go to a gas station in the La Lima area, to wait for Devis. After some time, Devis and a individual named Javier Hernandez (“Hernandez”)⁹ arrived in a black BMW SUV, followed by approximately 5 bodyguards in a Mitsubishi SUV. The three cars then convoyed to the property.

When they arrived at the property, they were met by a group of squatters who had settled on the land. When Devis saw this, he told Avila that he would only be interested in the property if Avila could evict the squatters. Devis then told Avila that once this was done, Avila should contact Devis’s financial administrator, Orlin Turcios (“Turcios”)¹⁰ and Devis gave Avila, Turcios’ cell

⁸This project is a part of the Secretaria de Transporte Vivienda, which is a part of Obra Publica, the governmental department that oversees repair work for the highway system.

⁹Avila later learned that Hernandez served as a “testaferro” (strawman) for Devis. It should be noted that Hernandez is a former Honduran diplomat who was assigned to New York, as the Consul General for Honduras. He was also the administrator of the Presidential Palace during the Michelotti presidency. Upon information and belief he has not been charged in any related indictment.

¹⁰Upon information and belief, Turcios has not been charged in any related Indictment.

phone number.

Avila returned to San Pedro Sula a few days later and filed a complaint to evict the squatters and after a number of court hearings, an arrangement for the eviction of the squatters was achieved. Accordingly, Avila went personally to pay the squatters 50,000 Lempiras and they agreed to leave within 20 days. Avila called the number he was given for Turcios and Turcios agreed to meet on the land once the squatters were out. On the appointed day, Avila returned to San Pedro Sula with the same driver, Jonathan. Turcios then arrived followed, some time later, by Devis, who came with Hernandez. Avila told both Turcios and Devis that the property was ready. They began to negotiate and eventually came to an agreement that payment for the property would consist of: (a) \$150,000.00 USD, (b) title to a house located in the Jardines del Valle neighborhood of San Pedro Sula and (c) titles to 2 armored cars (one Lexus and one Mitsubishi).

Devis ordered Javier Hernandez to have the property deed placed in his name, but Hernandez insisted on placing it in his wife's name, (Ana Antonia Taveras, a U.S. citizen). Hernandez gave Avila a copy of his spouse's United States passport. **Exhibit F** (property documents referencing Ana Taveras),

Devis also gave Avila the contact information for Devis's attorney, FNU Silvertrushe, ("Silvertrushe") in San Pedro Sula, who would handle the title transfer.¹¹ Avila then left the meeting and went to meet Silvertrushe in San Pedro Sula, but Silvertrushe demanded L/300,000, for the legal work and Avila considered this fee excessive. He thus decided to use another attorney, Maria de Jesus Palacios Venegas ("Palacios"), in Tegucigalpa, an attorney with whom he had done previous transactions. Avila returned to Tegucigalpa with Jonathan. The following morning, Avila met with Palacios, who agreed to charge L/100,000 and split this fee with Avila. The title/deed transfer was made and the following day, Avila returned to San Pedro Sula with the new title/deed. He filed same at the Instituto de Propiedades.

¹¹This property is not on the OFAC list and upon information and belief, has not been confiscated to date.

After completing the filing, Avila called Turcios to report that the transfer was complete and they agreed to meet at the property. When Avila arrived at the site with Jonathan, Devis was there operating a tractor. Turcios and Hernandez were also present. Devis instructed Turcios to pay Avila L/2,000,000 (½ of the cash part of the sales agreement). Turcios departed and returned an hour later with the cash for Avila. Avila and Jonathan then returned to Tegucigalpa with the cash and delivered same to the owner of the property, Martel-Cruz. Avila received a 15% commission for his efforts.

The following week Avila contacted Turcios to arrange the pick up of the two armored vehicles. Turcios instructed Avila to return to San Pedro Sula and Avila complied, again accompanied by Jonathan. He had been instructed to meet Devis at a Caterpillar Equipment dealership. When Avila arrived, Devis exited the dealership and told Avila and Jonathan to follow him to a nearby car lot. At the car lot, Avila was presented with the keys to an armored Lexus SUV, as well as the title (which was in the name of a third party). Avila thought that Devis had some degree of managerial role in the auto lot. Avila and Jonathan then convoyed both cars back to Tegucigalpa. Avila sold the Lexus through a friend of his (Gerardo Torres) to Wilkins Santiago Montalban for approx \$70,000 and gave the funds to Martel-Cruz. Again, Avila received a 15% commission from Martel-Cruz.

About 3 days later, Avila contacted Turcios to pick up the second vehicle, an armored Mistubishi located in San Pedro Sula. When Avila and Jonathan were on their way there, Turcios called to say that he had talked to Devis and that they had agreed to do the exchange on the following day. The next day, Turcios called Avila and told Avila to meet at the Galleria Mall in San Pedro Sula. With Jonathan, Avila met Turcios in front of the mall and followed Turcios to an auto body shop next door.¹² When they arrived at the auto body shop, Turcios, Avila and Jonathan went into the office. Devis arrived approximately 20 minutes later. Before Devis arrived, Turcios

¹² This was the same auto garage that would be the future meeting place in approximately May or June, 2014 during which Avila and others were introduced by Devis to “the Mexicans.” **Exhibit G** (photo).

told Avila that all cars on the lot (7 more or less) belonged to Devis. Turcios also told Avila that the Mitsubishi which was promised to be handed over, needed to be jump-started.¹³ Once the Mitsubishi was started, Avila and Jonathan convoyed back to Tegucigalpa.

The next step in the process was the transfer of the title for the house in Jardines del Valle, San Pedro Sula. At the time of the transfer, the value of the property was about \$200,000. There was a woman residing in the house who apparently was a girlfriend of Devis and Avila had to wait for her to vacate the property. Avila finally obtained possession of the property in October, 2013. The house was eventually sold in 2015 for \$180,000 to Jorge Aburgeri. Avila shared the proceeds of his commission to this sale with Ruben Santos, as Ruben Santos had assisted Avila with the initial approach to Devis as a potential buyer.

(4) FOURTH MEETING - Legal Team for Seized Properties September/October 2013, San Pedro Sula

In or around September 19, 2013, the Cachiros were placed on the OFAC list and the OFAC sanctions against them became public knowledge in Honduras. In or about September or October of 2013, Avila received a call from strawman Hernandez who told him that the Cachiros brothers were nervous about the OFAC seizures and they were looking for good attorneys in Tegucigalpa to oppose the seizures.¹⁴ Avila was asked to identify two experienced lawyers in Tegucigalpa to assist in fighting the seizures.

It was at that time, that Javier Hernandez introduced attorney Carlos Alberto Valladares-Zuniga ("Valladares") to Avila via telephone as the person to contact with respect to this request.¹⁵

¹³Avila believed that this lot belonged to Devis due to the way he ordered the employees around.

¹⁴The court with jurisdiction over the pending confiscation and seizure cases was in Tegucigalpa, thus they wanted attorneys from that city.

¹⁵Valladares is a co-defendant in this case and is from San Pedro Sula. At the time they met he told Avila that he was the attorney for the Maradiagas. Valladares also was a police officer in the HNP, but was removed on or about 2012. Valladares was also charged and convicted in Honduras for violation of a minor. He was fired from the HNP because he failed a polygraph regarding police ethics. He is pending sentencing before this court.

In or around November of 2013 or shortly before Christmas, Avila began to look for attorneys. The first attorney he called was Marlon Duarte (“Duarte”), who agreed to become involved. The second attorney was Dagoberto Aspra (“Aspra”).¹⁶

Sometime thereafter, but before Christmas in 2013, Avila and Duarte went to San Pedro Sula to a café to meet with Javier Hernandez, as previously agreed. Hernandez then told them to follow him to a meeting location which turned out to be a house in the Colonia Trejos section of San Pedro Sula. Although this house was a large 2 floor structure, it appeared that no one was living there, although there were guards at the door.

Hernandez, Duarte and Avila entered the house. Avila and Duarte waited in what appeared to be a living room area on the first floor. After a few minutes, someone asked for “Attorney Duarte” and then asked Duarte to go upstairs. Sometime later, Avila was also told to go upstairs but only to wait in a separate room. From his seat, Avila was able to see into the room in which Duarte and others were meeting, and recognized Javier to be one of those in the group. They met for about two hours after which Duarte and Avila returned to Tegucigalpa. During the ride back, Duarte told Avila that the Maradiagas wanted him to focus on the seizure of the Joya Grande Zoo. Duarte told Avila that Devis paid him \$50,000.00 USD and he gave \$20,000.00USD to Avila.

The following week Valladares called Avila and asked Avila to return to San Pedro Sula with attorney, Aspra. They agreed to meet in front of the La Galeria Mall. When they arrived, Avila saw Valladares for the first time and realized that he knew him from the HNP, as Valladares was a former HNP police officer who had been fired from HNP, but who also worked as an attorney.

After meeting at the mall, Avila and Aspra followed Valladares to Jardines del Valle subdivision where they went into a house.¹⁷ Upon entering the house with Valladares, Avila saw

¹⁶Upon information and belief, neither attorneys are charged in any related indictment.

¹⁷This house was in the same subdivision as the house provided by Devis as a partial payment for the property near the airport.

Devis, but before Devis began his conversation with Aspra and Avila, Devis gave Valladares something to do and Valladares left.

Devis, Aspra and Avila then met. Devis told Aspra that he wanted him to work on seizure issues concerning INRIMAR, the construction company of the Maradiagas.¹⁸ Aspra initially quoted Devis a fee of \$1,000,000.00 USD. Devis balked at that amount and they eventually agreed to a fee of \$300,000 USD.

Devis then called Turcios and instructed him to take \$50,000 USD to Aspra in the parking lot of a supermarket at the exit to Tegucigalpa. Avila and Aspra went to the supermarket lot and waited for Turcios, who arrived about 30 minutes later with \$50,000 USD in cash.

Avila and Aspra then drove back to Tegucigalpa and Aspra paid Avila \$20,000 USD as a commission for getting him into the case. The following week Hernandez again called Avila and asked him to bring Aspra back to San Pedro Sula. Avila and Aspra went to San Pedro Sula where they met with Hernandez at the property by the airport which Devis had just purchased. Aspra and Avila then rode with Hernandez to Tocoa, Colon, to the offices of INRIMAR. There Aspra met for approximately two hours with a clerical person going over financial records. Avila and Hernandez waited nearby while he did this. In or about October, 2013, while working with attorneys regarding the INRIMAR issue, Avila saw Devis for the last time.

(5) FIFTH MEETING - Real Estate Matter December 2013, Las Uvas, Tegucigalpa

In or about, December of 2013, Avila was contacted by a colleague to handle the sale of a property belonging to a family with the last name of "Rosa" in Tegucigalpa, a property that was obtained through an inheritance. This property in the Las Uvas area of Tegucigalpa was originally 176 square blocks in size, but over time all but 8.5 square blocks had been sold. Apparently, the record-keeping/deeds were not handled well, and the property lot did not have a valid deed. Avila was contacted by Attorney Ronald Venegas, who, with his wife, Maria de Jesus Palacios, a notary, worked for the Rosa family. Venegas told Avila that he wanted to sell the property for the family

¹⁸ INRIMAR was managed by Devis's financial administrator, Orlin Turcios.

and they were asking \$1,500,000.00 USD. The land also had tax problems and the family offered to place the “escritura” (deed) in Avila’s name as a sham donation in order to avoid the tax liabilities, a widely practiced procedure in Honduras, and Avila agreed. By the end of December, 2013, title was in Avila’s name. **Exhibit H** (Partial Avila Attorney Legal File).

Coincidentally, around this time, Javier Hernandez, Turcios and Devis were in Tegucigalpa and Hernandez made a social call to Avila. During the discussion, Avila told Hernandez that he had land to sell and they agreed to meet. Turcios and Javier Hernandez came to meet Avila with Devis at Puente La Uvas, where they followed Avila to the land.

After spending some time going over the land and adjacent area, Devis said that he was very interested. He offered to pay by transferring tractors and other heavy equipment worth L/50,000,000 lempiras (about \$2,000,000). Avila told Devis that he had attorneys as partners in the land and had to speak to them about the offer. No one was interested in the tractors and related equipment, but after about a month, Avila was in San Pedro Sula and sent a text to Hernandez about the property. Hernandez replied that Devis was still very interested in the Las Uvas property and said that Devis wanted to show Avila a property near San Pedro Sula as a possible trade.

Devis and Hernandez told Avila to meet someone at the exit to Cortez. There Avila followed them to a luxurious mansion on the beach in Omoa. Devis told Avila that the home was worth \$2,000,000.00 USD and said that he wanted to do a straight trade. Avila told him that he would take the proposal to his partners. Devis told Avila, however, that if he ever told anyone that Devis was the owner he would kill Avila. This was the first time that Avila was threatened with physical harm by Devis directly and it was alarming. As a result, Avila became concerned and did not follow through on the deal.

(6) SIXTH MEETING - Intervention With Team Attorneys

In January of 2014, Juan Orlando Hernandez took over as President of Honduras. Attorney Dagoberto Aspra was named to a high position in the Consejo Nacional Anti Corrupcion (“CNA”) and decided to divorce himself from Valladares and the group of attorneys. Aspra ignored all

attempts for anyone to meet with him and stopped taking their calls. Valladares called Avila and told him to pass on a warning to Aspra that he, Aspra, had better start taking their calls, because Devis was complaining that he took money and did no work. Valladares told Avila to tell Aspra to either answer the phone and give the money back or he would be killed. Once again, these mortal threats greatly concerned Avila.

Avila went to see Aspra at CNA and told him that Devis wanted his \$50,000USD back. Aspra agreed to repay \$30,000 (because he had given \$20,000 to Avila). Consequently, Avila owed the remaining \$20,000 USD to Devis that he received from Aspra as a commission. Avila was concerned about that and spoke to Valladares. Devis, through Valladares agreed to allow Avila to work off the \$20,000 by recovering money owed by Francisco Mejia, to Devis, in the amount of L/5,000,000 lempiras, as Francisco Mejia was balking about paying the amount owed. Avila met with Francisco Mejia and convinced him to pay what was owed and the funds were finally transferred to Devis.

After this matter, Avila was trusted by both Valladares and Devis and was approached for additional legal services.

(7) SEVENTH MEETING - Funds Owed by Sotravi to INRIMAR

Sometime in early 2014, after the Maradiagas were placed on the OFAC list, Valladares met with Avila and told him that a company by the name of Sotravi (a contractor for the Government of Honduras) owed money to the Maradiagas and their INRIMAR construction company for highway work performed under the "Fondo Vial."

The problem was that because INRIMAR had been frozen under the OFAC sanctions, a new entity was needed, through which the Maradiagas could recoup the money owed. Avila went to meet with an attorney friend, Oscar Ramirez ("Ramirez") about this. Ramirez knew Tony Hernandez ("Tony"), the brother of the President, as he and Tony had attended school together. Avila did not, however, know Tony. Ramirez arranged for a meeting with everyone at Denny's Restaurant, to ask for Tony's help. The meeting took place on February 4, 2014. Present were

Turcios, Ing. Perez, Devis, Avila and Ramirez. Tony had security guards and Devis had security guards as well.¹⁹ Tony was non-committal but said that he would talk to the people at Sotravi. In fact, however, he apparently did nothing.²⁰

At this point in time the total owed by the Honduran government to INRIMAR was L/24,000,000 for construction equipment and labor performed as part of the “Fondo Vial” project. Under continuing pressure from Valladares to recruit lawyers to recover this money for the Maradiagas. Avila and attorney Ramirez (in conjunction with other attorneys recruited by Ramirez) continued the attempt to recover these funds. The attorneys thought it best to prepare a “Pagare” (Promissary Note) for a “front” company, called “CC Construcciones” in order to get the money from the government. Eventually via the “pagare” the attorneys recouped L/\$21,000,000 in cash but L/\$3,000,000 remained outstanding. Devis was concerned about these outstanding funds.

Valladares began a series of calls to Avila and the others threatening that they must complete the services or there would be reprisals. Avila was concerned that Devis thought that the attorneys were not doing what he requested and Avila wanted to be done with the recovery process fearing that Devis would retaliate so he called Valladares to discuss the matter. When Avila met with Valladares, he told him that he did not want to look bad and incur any problems with Devis. He was extremely scared. Because of the threats and to keep Devis at ease, Avila gave him, through Valladares, the title to a property he, Avila, owned in La Ceiba, as security for his part of the work promised. **Exhibit I** (Deed/Title)²¹ Avila wanted no problems with Devis, as rumors of the

¹⁹ It should be noted that contrary to the government’s surmise that Avila attended the meeting for “security” reasons, Government Opposition to Defendant’s Discovery Motion, 1/13/17 at 8, D.E.98, he was actually present in his capacity as an attorney to discuss the parameters of the legal work requested and to determine whether he could earn a commission for having brought the attorneys together.

²⁰ A video tape and transcript of this meeting was supplied by the government in discovery which confirms the nature of the meeting. **Exhibit J** (Transcript and videotape of meeting with Tony Hernandez).

²¹ Interestingly, in 2017, after Avila’s arrest and incarceration in New York, Valladares returned the deed to this property to Avila, via private investigators during a visit by the investigators to Honduras. **Exhibit K** (Affidavit of Private Investigator Vance Stacy).

Maradiagas' violence were growing and actual acts of violence were publically attributed to them.

In or about May of 2014, Avila and Lopez Flores went to San Pedro Sula for a meeting that was called by Valladares. The purpose of the meeting was to discuss "business" which was not specified. When they had almost arrived, the meeting was cancelled.

(8) EIGHTH MEETING - The Meeting with the Mexican CIs, San Pedro Sula, (in or about) June 2014

In or about June of 2014, (while Avila was attending a promotional course at the HNP University in Tegucigalpa), Avila received a call from Valladares who told him that Devis wanted him to come to a meeting in San Pedro Sula. Valladares also told him to bring other police officers, as there was "something good to be gained." Avila was not particularly interested, but mentioned it to other HNP classmates (co-defendants Lopes-Flores and Mejia Vargas), who by then had also received a request to attend this meeting from co-defendant Chris Zelaya ("Zelaya"), a suspended HNP officer who was a close associate of Valladares.

Avila contacted Zelaya and told him that he was not interested in going to the meeting. Zelaya responded by telling Avila that if he did not comply with Devis's request, he would be putting himself and his family in a dangerous situation and would face harm. Avila was concerned and feared the consequences, so he ultimately agreed to attend the meeting in San Pedro Sula which took place at the garage, but was not recorded.

Present at this meeting were Avila, Zelaya, Lopez-Flores, Mejia-Vargas, Devis and the two Mexican nationals, Santos Pena and Santos Hernandez,²² government CS1 and CS2 respectively.²³ The Mexicans put \$6,000.00 on the table and told Avila, Zelaya, Lopez-Flores and Mejia-Vargas to split it for their expenses in attending the meeting. Accordingly, each took their share. During

²² As stated earlier, the Santos are a father and son team who, in cooperation with the United States government, were placed in various investigations by their controlling agents. They have, however, been discredited.

²³ Co-Defendant Zevala-Velasquez was not present at this meeting.

the course of this meeting, the two Mexican nationals discussed, in very vague terms, a “job” on the northern coast of Honduras for which they wished to recruit police. Avila felt this was strange in light of the fact that the police who were called to the meeting were actually assigned to Tegucigalpa, and therefore not in a position to engage in unauthorized travel outside their sector. Thus, he believed that they were certainly not in a position to engage in activity in the Northern Sector, even if they wished to do so.

The police were told that a second meeting would take place about which they would be notified. Accordingly, Avila and the other cops returned to Tegucigalpa.

(9) NINTH MEETING - The Meeting with the Mexican CIs, Tegucigalpa, June 25, 2014.

In or about the third week of June, 2014, Avila received a call from Valladares who told him that Devis wanted to meet again and that it would take place in Tegucigalpa. He told him that the meeting was scheduled for June 25, 2014 at a residence in Tegucigalpa. Valladares gave Avila the address and told Avila that he had to come with his service revolver and in uniform.²⁴ He also told him to bring a map of Honduras. When Avila arrived at the residence, the following individuals were also there: Lobo, Cruz-Chavez, Chris Zalaya, Lopez-Flores, Mejia Vargas, Zavala-Velasquez, (“Zevala”) and Valladares. This meeting was recorded and videotaped by the Mexican government informants. **Exhibit L** (Transcript of videotaped meeting in Tegucigalpa with government informants). Valladares does not appear on video, as he remained in another room at the residence.

Avila saw Zevala there for the first time and did not know why he was there. After Avila was arrested and incarcerated in New York, he learned that the person that Valladares expected at the meeting in Tegucigalpa was another person with the name “Zavala” (Josue Constantino Zavala Laines (sp?) “Constantino Zevala”). Valladares wanted Constantino Zevala ,because Constantino

²⁴ The significance of this directive cannot be understated. In essence, a government cooperator was ordering conduct that he knew would result in sentence enhancements after arrests. Avila’s conduct in obeying these orders was reasonable and did not violate any laws. As a police officer it was appropriate for him to carry a weapon. Further, the underlying coercive character of these directives should not be disregarded. The threat of harm to his family should he have deigned to disobey was implicit and top of mind.

Zevala, as an officer, was the head of the Gracias Lempiras “zona” where Tony Hernandez was a representative and he was close with Tony Hernandez.

After this meeting Avila again decided not to be involved in any more of the Maradiagas’ legal affairs. His efforts to stay away were met with numerous threats from Devis through Valladares. Avila began to receive non-stop calls from Valladares, which he refused to answer. About a week later, Zelaya contacted him to say that he had better answer Valladares’s calls, as it would be dangerous to ignore him. Avila continued to ignore the calls and even changed his vehicle as a security measure.

Avila and other co-defendants (all but Zelaya and Valladares) graduated from their promotional course at the HNP University about this time, and Avila received a prestigious posting as the Assistant to the Director of Operations (General Hector Ivan Mejia) at the Main HNP Headquarters in Tegucigalpa. **Exhibit M** (department promotions). This appointment provided an additional reason for distancing himself from Valladares and certainly from the Maradiagas.

Related Cases

There are several cases related to the within matter. All involve the prosecution of individuals charged as leaders and organizers of drug trafficking organizations such as Javier Rivera Maradiaga and Devis Leonel Rivera-Maradiaga. Other such individuals, Hector Emilio Fernandez Rosa (a/k/a “Don H”), Carlos Arnoldo Lobo, Jaime Rosenthal, Yani Rosenthal and Yankel Rosenthal Coella, as well as leaders and organizers of financial matters, all assisted in the Honduran and international criminal drug enterprises. Additional aspects of the investigation include charges of political corruption naming Senator Tony Hernandez, the brother of president Hernandez. Also related are charges against Andres Acosta Garcia.

Upon review of the related cases, it is clear that the charges brought against this defendant implicate conduct that is lesser in scope, duration and impact. The bulk of his involvement concerned matters within the purview of legal and business work. The subject Indictment concerns conduct that was essentially passive, inconsequential, inchoate, contrived and performed under

duress despite requests that he be permitted to withdraw. So, as the argument that follows will illuminate, while it is true that defendant is not innocent, he is also not guilty of crimes warranting a sentence to years behind bars.

LEGAL ARGUMENT

POINT I

STATUTORY FACTORS WARRANT CONSIDERATION OF A LESSER SENTENCE FROM THAT DICTATED BY A STRICT APPLICATION OF THE GUIDELINES

It is respectfully argued that serious consideration to significant departures or variances is due, based upon the various factors discussed at length herein. While Mr. Avila stands convicted of an offense warranting punishment, it has not been fairly characterized by the government, as Avila did not reach “an agreement to support the violent criminal activities . . . by providing security and sensitive law enforcement information.” D.E.98 (Government 1/13/17 Memorandum of Law in Opposition to Defendant’s Pre-trial Motions) at 3. Rather, it is respectfully submitted that the record will show that punishment in this instance is properly tempered by consideration of a sentence to the minimum mandatory applicable, because defendant’s participation was aberrant, limited and instigated by government confidential informants.

18 U.S.C. §3553 is now controlling for sentencing purposes. The factors of §3553 that warrant particular consideration in this matter include:

Factor 1. The nature and circumstances of the offense and the history and characteristics of the defendant.

A. The Nature and Circumstances of the Offense and Conviction

As stated above, Mr. Avila’s conduct was brought about as a result of a government sting which was permitted by the government to be staged by two Mexican cooperators—later discredited—who acted to ensnare criminal police activity on a high level, but instead duped a bunch of poorly compensated low level officers by promising them an opportunity to earn large amounts of money.

The minimal nature of Mr. Avila’s involvement is illustrated by the fact that out of more than

20,000 pages of documents provided in discovery the few items pertaining to him consist of some reports concerning statements made by defendant at the time of his arrest and the two videos of the rather innocuous meetings described in the pages above. One was of a meeting organized by the father and son team, and the second was of a meeting attended by several attorneys to discuss legal matters concerning properties owned by the Maradiagas.

That is all. He attended three meetings, two which were videotaped. Regarding the meeting at the house in Tegucigalpa, he was threatened into attending this meeting set up by discredited cooperators and he did so and was paid relatively well for his time and then he left—the epitome of a low-level participant enticed and cajoled into participation in an unfortunate situation. Again, defendant did not even wish to go, he was threatened. He was instructed to wear his uniform, which, in hindsight, was part of the cooperators' effort to provide a more compelling show for the secret recording that they had contrived. Thus, the circumscribed character of the offense is built into the highly constrained parameters of its commission.

Regarding the meeting at Denny's in Tegucigalpa, the government argues that Avila appeared at a meeting with a cooperating witness and a high level Honduran government official (Tony Hernandez) for the purpose of providing security. Government 1/13/17 Memorandum of Law in Opposition to Defendant's Pre-trial Motions at 8. Respectfully, this is a spin on the record that is belied by the video itself and the transcript of the meeting which reveals that what took place was a discussion concerning legal maneuvers. Defendant appears in plain clothes without a service weapon. There was indeed plenty of security, but many were employed by the cooperating witnesses who were filming the meeting. Somehow, images of the actual security detail did not make it into the video. **Exhibit J** (transcript and video of meeting with Tony Hernandez).

Given this record, and in consideration of the actual background of Avila's involvement and after an investigation and compilation of personal documents pertaining to defendant, it is urged

that the following factors have emerged as proper for §3553 consideration:

1. Affirmative, Voluntary and Unconditional Acceptance of Responsibility

In or about June, 2016, a Honduran commission was tasked with investigating police corruption (La Commision Especial (“LCE”). The LCE attempted to purge the Honduran National Police and, in fact, toward this objective, issued a report that identified several police officers as participants in corrupt activities. Avila, however, was not among those named. **Exhibit N** (Report of Committee).

[REDACTED]

[REDACTED]. He was thus detained and was transported to New York, where he arrived on July 11, 2016.

It is submitted that Avila’s immediate, voluntary and unequivocal communication to his superior officer concerning the matters under investigation constituted a super-acceptance of responsibility. Respectfully, this is a level of unprompted acceptance of responsibility that also warrants consideration of a variance pursuant to §3553. *See United States v. Sellers*, 661 F. App’x 733, 734 (2d Cir. 2016) (sentencing court heard oral argument about whether it should award any additional reduction for acceptance of responsibility as part of its 18 U.S.C. §3553(a) analysis). Granting a variance pursuant to §3553 and awarding a reduction for acceptance of responsibility pursuant to the Guidelines is firmly within a sentencing court’s discretion. *United States v. Wimble*, 387 F. App’x 63, 65 (2d Cir. 2010) (“To the extent the appellant suggests that a sentencing court may not consider the same factors—such as a defendant’s criminal conduct, his history and character, and other relevant circumstances—through the exercise of its discretion under §3553(a) that it considered elsewhere in the Guidelines calculation, we firmly disagree.”)

2. The Wrongful Instigation and Manipulation of Defendant's Conduct

Defendant was coerced into this matter by both the Maradiaga traffickers and the Mexican (Santos) cooperators, all of whom have manipulated the system. The Maradiagas are notorious for running a violent and comprehensive drug organization in Honduras. *E.g.*, **Exhibit O**. The recent admission in court by Devis Maradiaga that he and his brother had ordered the commission of 78 murders, **Exhibit P** (excerpt from transcript of testimony during *Fatico* hearing, *United States v. Lobo* of Leonel Devis Maradiaga at pages 10-12), reflects their violence. The attached articles as Exhibit O, highlight Avila's well-founded fears of the Maradiagas. These articles confirm their reputation for violence and extracting retribution whenever they merely sensed that others were not compliant. This mendacity was universally known across all strata of society in Honduras.

The Maradiagas acted with impunity, as their access to and influence of individuals, at the highest level of government was also understood. The fact that the Maradiagas, who, upon information and belief, have not fully divested themselves of their ill-gained assets, have been permitted to cooperate with regard to the apprehension of low level individuals such as Avila, obstructs the ability of individuals like Avila to set the record straight.

Defendant, as an attorney in Honduras, was always facing problematic situations in the practice of the law. Some level of participation in the interests of the Maradiagas real estate ventures was not uncommon. Unlike most attorneys in the United States, attorneys in Honduras work for little money and often involve themselves in other business interests or work that contributes to a steady income. The Maradiagas real estate matters constituted legal work that helped pay the bills. Avila also worked as a police officer and had other business interests including a bus company and a used car trade.

In addition to the economic imperatives, there were the physical threats. Avila came to fear the Maradiagas, because of the numerous threats against him as detailed above. Thus, as previously explained, but of great significance, *when he was directed to appear at the June 2014 meetings, including the meeting where he was directed to appear in uniform including his service weapon,*

Avila believed he had no choice but to comply.

Defendant is aware of the various nuances of manipulation that parsing the discussion of the government's outrageous conduct may yield. He respectfully asks that instead of deciding precisely how to characterize the government's conduct, it be recognized that he was deliberately and improperly caused to engage in conduct that has resulted in an exposure to a sentence that, if imposed without substantial correction, will be outside a proper application of the Guidelines as tempered by the court's appropriate consideration of the §3553 factors. In this regard:

A. Defendant Acted Under Coercion

It is submitted that the circumstances described in this record warrant a reduction based upon U.S.S.G. §5K2.12 or 18 U.S.C. §3553, or both. *United States v. Gaviria*, 804 F. Supp. 476, 480 (E.D.N.Y. 1992). U.S.S.G. §5K2.12 permits a downward departure when the defendant "committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense." The degree of coercion necessary to qualify a defendant for a downward departure is substantially less arduous than that needed for him to escape blame for the offense altogether. *See also*, Policy Statement to 5K2.12.

The threats from the Maradiagas (via Valladares) were credible and it is clear that a reasonable person in the defendant's position would have had reason to believe that not participating in the meeting could have led to harm to his or her family. *See United States v. Cotto*, 347 F.3d 441, 448 (2d Cir. 2003).

Defendant's conduct in reaction to the threat was also proportional. He attended a meeting in an effort to preserve the safety of his family. It was wrong for him to participate and not go to the police but, he kept his role limited. The proportionality of his conduct to the perceived threat is another element favoring application of this factor.

B. Entrapment into the commission of the offense

As detailed above, it is plain that the bulk of defendant's involvement was to provide legal and business services related to the acquisition and settling of real estate properties and other

business matters. When his services as counsel ended, because he was ending his relationship with the client, Avila was nevertheless then directed, under threat, to appear as a security person in police uniform.

This second meeting was a contrivance arranged by the Santos cooperators—and, as the record demonstrates, literally constituted the “aggressive encouragement of wrongdoing.” *United States v. Bala*, 236 F.3d 87, 92–93 (2d Cir. 2000)(quoting *United States v. Garza-Juarez*, 992 F.2d 896, 912 (9th Cir.1993)(additional citations omitted)). In a circumstance such as this, consideration of a downward departure is appropriate and, as the Second Circuit pointed out, “the policy statement in Section 5K2.12 can reasonably be read to authorize such a departure in appropriate cases.” *Bala* at 92.

C. Sentencing Manipulation, Entrapment and Questionable Government Practice

Sentencing manipulation occurs when “the Government engages in improper conduct that has the effect of increasing the defendant's sentence.” *United States v. Caban*, 173 F.3d 89, 93 n.1 (2d Cir.1999). The discussion of the record set forth above, briefly restated, demonstrates that defendant was threatened in no uncertain terms that there would be severe consequences if he did not do what the Maradiagas told him to do. He was told where to go, when to arrive and what to wear (his uniform with his service weapon). The people coordinating this meeting and its planned recording, the Santos father and son team, were skilled and savvy manipulators.

Thus, respectfully, defendant was entrapped/coerced/manipulated with respect to multiple elements of the alleged offense. These include:

a. *Quantity*

Every element of the operation that was disclosed and discussed at the second meeting was entirely outside the knowledge and control of Avila, who did not want to be present at all. This includes the type and quantity of the narcotics. A review of the transcript of this meeting, **Exhibit L**, demonstrates that all references to type and quantity of drugs were made by the Santosos as part

of their manipulation of the record.

b. *Jurisdiction and Venue*

Avila was further entrapped into committing a crime that invoked the laws of the United States and implicated the Southern District of New York. As per the transcript of the meeting, which took place in Tegucigalpa, it was not defendant, nor the other police officers in attendance who had knowledge that the subject of the meeting concerned drugs going to the United States. Rather, it was CI Jose Santos, the Mexican, who made such declarations as:

it is very difficult to attempt to cross into the United States right now.

* * *

the problem is that it has become very difficult to cross the border to the States. It has become very difficult since 2011. Everything changed since then. We have to struggle hard to get it in . . . All this merchandise is going to New York. So you can imagine if we don't bring it on time; the merchandise will sit there in Mexico, at the border, wasting a lot of time. So we have to hurry this up, because we have a crossing, through some tunnels we built. . . .

Exhibit L (excerpts of transcript of meeting dated June 25, 2014).

Again, all that Avila did was show up for a meeting he was threatened to attend where he stood by in uniform as directed, brought a map as directed, answered questions, then left as instructed.

c. *Appearance in Uniform (which included his weapon)*

First, it should be observed that at the meeting in San Pedro Sula, when defendant was not told what to wear and carry, he did not wear a uniform, nor did he bring his weapon. Knowing that the second meeting would be recorded, however, the savvy Santos cooperators had him wear his uniform and bring his weapon. They also instructed him to bring a map.

Defendant's attendance in uniform, including carrying his weapon, was unnecessary for the purpose of the meeting which turned out to be a discussion of logistics, thus the map. Respectfully, there can be no reasonable doubt that the Santos cooperators' instructions to bring a map, wear his uniform and bring his gun were gratuitous orders aimed solely at putting items, including another

weapon on display for the hidden camera.

i. *Lack of Firearm-Offense Nexus*

The actual reason for being instructed to include his service revolver when wearing his uniform to the second meeting, to expose defendant to additional culpability for the camera, results in a corollary realization—that there was, in fact, no nexus between the firearm and the criminal activity. In this regard, defendant attended a coordination meeting, there was no need for his security expertise or activity and there was no need for the weapon. There was thus “no advantage (actual or potential, real or contingent) relevant to the vicissitudes of drug trafficking.” *United States v. Alston*, 899 F.3d 135, 146 (2d Cir. 2018)(quoting *United States v. Snow*, 462 F.3d 55, 62 (2d Cir. 2006)).

5. But for Weapon Entrapment, Defendant Is Safety Valve Eligible

The ostensible ineligibility of this defendant for “Safety Valve” consideration is, respectfully, an unacceptable consequence of his appearance at the recorded meeting in full uniform as he was directed to do by individuals who threatened the safety of his family.

6. Limited Role in the Offense Charged

This court has discretion to incorporate a downward departure in addition to the mitigating role adjustment due to Avila’s lesser role in the offense that “overstate[s] defendant’s criminal culpability.” *United States v. Bruder*, 103 F. Supp. 2d 155, 180 (E.D.N.Y. 2000), *rev’d and vacated in part on other grounds, sub nom., United States v. Schwarz*, 283 F.3d 76 (2d Cir. 2002)(quoting *United States v. Stuart*, 22 F.3d 76, 83-84 (3d Cir.1994)). This circuit has upheld sentences that granted a four-point departure beyond the minimal role adjustment. *United States v. Restrepo*, 936 F.2d 661, 667 (2d Cir.1991); *United States v. Alba*, 933 F.2d 1117, 1121-22 (2d Cir.1991).

As the discussion of the record pertaining to Avila illustrates, his role in the vast conspiracy charged is limited to the discussions he had with Valladares and the 2 meetings which took place at the coercive behest of the government cooperators. Any act of criminality is contextual, supplied not by his conduct, but by the circumstances into which he was threatened to appear.

The June 25, 2014 meeting in Tegucigalpa was, in fact, his last interaction with the Maradiagas. In fact, the record shows that he had withdrawn from participation in the criminal enterprise prior to the meeting and attended not with *mens rea* but rather, *in timore*.

His withdrawal is corroborated by the fact that from the time of his coerced acts complained of by the government until the defendant's July 1, 2016 meeting with his superiors at the SERCA (NHP Intelligence Directorate) which resulted in his self-surrender to the government on July 5, 2016, no further criminal interactions were confirmed or alluded to by the government. On the contrary, it was during this time period that Avila was in consideration for promotion to Sub-Comisario/Captain.

Such limitation warrants §3553 consideration.

8. Overstatement of the Quantity of Drugs

There is no proof that defendant knew of the amount of drugs implicated during his attendance at the two meetings in San Pedro Sula and Tegucigalpa. There is nothing in the record attributing to him knowledge of quantity.

The meeting which took place in or about early June of 2014 in San Pedro Sula was not recorded, nor was any ROI or DEA 6 disclosed in discovery that could possibly confirm the substance of that meeting and the details discussed. The meeting which took place on or about June 25, 2014, was videotaped and a thorough review of the video and accompanying transcript does not quantify the narcotics in question. **Exhibit L.**

Thus as part of defendant's full acceptance of responsibility, he has stipulated to Guideline level 38 in good faith reliance upon the government's offer of proofs without challenge despite his lack of personal knowledge. It is clear, however, that the scenario which ensnared Avila was under the direction and control of cooperators who have absolutely no credibility. It is, therefore, appropriate to consider, for the purpose of arriving at a just sentence, that the drug amounts were, to a large degree, the product of the cooperators' creativity more than any other contributing element.

Under such a circumstance, for the purpose of sentencing, it should be recognized that assessing foreseeability of quantity with regard to a peripheral participant, such as Avila, is highly problematic and, respectfully, arguably impossible. The court would have to find that Avila was able to divine the fanciful machinations of the Santos cooperators as to quantity when producing their video meeting so as to attribute to him foreseeability of the quantity arbitrarily implicated. Such an attribution to Avila would call for a level of foreseeability that cannot be achieved.

Further, the record shows that Avila was not at the scene of any actual drug transactions, was not an individual privy to the arrangement of any of the transactions operative in the alleged scheme, and did not participate in any transactions. He also had no prior charges or allegations to assess him as knowledgeable of the operative factors. Again, he attended two meetings against his will, that is it— and it is his absence from mention in the tens of thousands of pages of evidence concerning this matter that is the most persuasive indicator of his (lack of) involvement.

The facts pertaining to Avila thus place this matter well within the judgment of the sentencing court in *United States v. Chalarca*, 95 F.3d 239 (2d Cir. 1996), where there was no evidence that quantity was discussed, defendant did not know the terms of the transaction, he never saw the drugs, nor did he have anything to do with the money to purchase the drugs, and no particular quantity of drugs was foreseeable to defendant in connection with the conspiracy of which he was a member. *Id.* at 242, 245.

9. Lack of Credibility of Cooperating Sources

The government informants responsible for bringing defendant before this court are the Santos father and son team. This duo attempted a similar snare with respect to Venezuelans charged in *United States v. Campo-Flores*, S.D.N.Y. Cr. No. 15-765 (PAC), but prior to the commencement of the *Campo-Flores* trial, the government learned, in or about April 2016, that father and son had committed serious crimes during the tenure of their cooperation, including, but not limited to, narcotics trafficking and use, and that they were both deceiving the government about this. **Exhibit C** (Transcript of Testimony of SA Zachariasiewicz, dated 9/9/2016 at 322).

In fact, pursuant to the testimony on September 9, 2016 during the trial in *Campo-Flores*, it was learned that **the Santos cooperators admitted to manipulation of evidence with respect to their use of cameras and other recording devices. Exhibit C.**

Upon learning of this conduct, the government terminated the Santos' license to act on behalf of the government, charged them both with criminal conduct and moved the court for their incarceration. Upon information and belief, they remain in prison to this day.

Of considerable, if not dispositive, import is the fact that the majority of the voluminous discovery which has been provided in this matter (almost all of which has nothing to do with Avila) was produced by the Santos cooperators. Yet, critically, despite defendant's demand for production, the government has not provided certain discovery concerning the Santos cooperators themselves and their activities. Defendant considers such materials to be *Brady* and *Giglio* material. Nevertheless, ignoring their demonstrated and pervasive lack of credibility, the government has relied on evidence gathered through the Santos cooperators to establish the quantities urged, the weapons utilized and defendant's general alleged role in this matter.

The breakdown of credibility is startling. It is submitted that evidence placed in the record under these circumstances for the purpose of challenging defendant's arguments that significant downward departures are warranted should be given no heed.

10. Prolonged Pre-trial Detention in Notably Poor Conditions

Until two months ago, defendant has been housed in New York City at the Metropolitan Correctional Center ("MCC"). He was then moved to the Metropolitan Detention Center ("MDC"). Consequently, he has already been incarcerated in a pre-trial detention facility for more than 2½ years and counting. It is, respectfully, highly significant that defendant has remained at MCC and MDC.

The hardship of prolonged pre-trial and pre-sentence detention, if sufficiently atypical may serve as a basis for downward departure and is appropriate for §3553 review. *See Koon v. United States*, 116 S. Ct. 2035 (1996). *See discussion in United States v. Sutton*, 973 F. Supp. 488, 491-494

(D.N.J. 1997). In *Sutton*, the court concluded that “[u]nusual pretrial confinement [in length] can properly be considered by the sentencing court.” While the court in *Sutton* decided not to depart, that case involved only a ten month period of pretrial detention. Avila, in contrast, has served 2 years and 8 months and is still counting. In *United States v. Carty*, 264 F.3d 191 (2d Cir.2001) (per curiam), the Second Circuit held “that pre-sentence confinement conditions may in appropriate cases be a permissible basis for downward departures.” *Id.* at 196.

As this court well knows, pre-sentence detention facilities are not intended to house inmates for extended periods of time. As a result, health care and mental, spiritual, educational, vocational, exercise and work programs are significantly limited in comparison to those available in post-sentence institutions. See *United States v. Hernandez-Santiago*, 92 F.3d 97, 101 n. 2 (2d Cir.1996) (wherein the district court granted a downward departure of three levels based on defendant's twenty-two months incarceration in a state facility, which was a “harsher incarceration”). Also, *United States v. Francis*, 129 F.Supp.2d 612, 616 (S.D.N.Y. 2001), citing *United States v. Sutton*, 973 F. Supp 488, 491-494 (D.N.J. 1997) with approval.

Added to the general inadequacy of pretrial prisons, the conditions at MCC an MDC are notoriously poor. Both are overcrowded, with unsanitary conditions, inadequate bathroom facilities, inadequate medical attention, limited recreation, poor ventilation and lack of outdoor exposure. Further, the separations imposed on the defendant has further caused hardship which impinged on defendant's availability for legal visits and housing. Such separation orders caused Avila to be placed in the SHU for reasons other than any disciplinary considerations for which SHU is intended. This is proper for §3553 consideration.

Accordingly, it is urged that an incarceration of nearly 3 years at pre-trial facilities is extraordinary and clearly warrants §3553 consideration. *Francis, supra* at 617.

11. Extended Incarceration as a Result of Immigration and Deportation Consequences

Defendant's status as a non-citizen of the United States has several deleterious consequences. First, it is likely that he will be detained for a period of time longer than any imposed by a court due

to deportation proceedings and expulsion subsequent to his completion of his prison term. Second, he will not be permitted to reenter the United States. Third, because defendant's alien status will cause a detainer to be served on him at the institution to which he will be remanded, he will be prevented from obtaining benefits that are given to citizen-inmates, such as participation in certain programs that afford early release and participation in a half-way house or attainment of house arrest status. It will also adversely impact opportunities for work at certain more desirable BOP worksites during the time of his confinement.

Not even the First Step Act which provides additional reduction in jail time for engagement in productive activities and thus "earned time credits" in addition to normal good time credit, can benefit this defendant, in that prisoners with immigration detainers are not eligible to obtain the full benefit by way of additional time in a halfway house, home confinement or supervised release at the end of their sentences.

Such impactful consequences are fairly and justly considered in this court's §3553 review.

B. History and Characteristics of the Defendant

1. Personal Background

Mr. Avila's life is a compelling story of someone who came from an impoverished background, worked as a child, served in the military and police department and worked his way through higher education and law school.

He built a successful and well-respected law firm and served his community in public office. He accomplished this, by all accounts, while genuinely caring about and helping individuals he encountered along the way. As per the attestations in the attached letters, Mr. Avila has held himself to high ethical standards throughout his life. He treats everyone he meets with respect and frequently helps others, from family and close friends to strangers in need. His assistance is often proactive, as he often anticipates and meets the needs of others before they even consider asking him for help.

He was born in Seguatepeque, Honduras to a lower middle class family. He attended high

school, worked and put himself through higher education and law school. Everyone knew him as a hard worker.

As his wife, Alicia Nallive, said in her letter to the court, “since his childhood years, he has always managed to stand out among the rest for being a hard worker; he sold fruits, juices and coffee with his grandfather so that he could buy his mother a present on holidays.” **Exhibit U.**”

While engaged in his personal endeavors, he continued to care for his mother, siblings and children.

2. Strong Community and Social Background

Defendant has a strong family and social background and he has professional acclaim. He is well loved and respected by his family members and has always assisted them in any endeavor as best he could. Prior to his arrest, he had been a positive influence in his community. Professionally, he attended to many individuals, poor and affluent, and represented all equally and with great respect for his role as their advocate. He volunteered in community social activities, and helped with donations whenever he was able.

That he is well liked and respected in the community is evidenced by the letters addressed to the court on his behalf. **Exhibit U.**

These characteristics warrant significant §3553 consideration.

3. Strong Family Ties and Support

Perhaps one of the most poignant aspects of Mr. Avila’s life is the caring relationship he has had with his children, and their respect for him as evidenced by their letters to the court. **Exhibit U.**

4. Avila’s Service with the Honduran National Police (“HNP”)

Avila became a police officer with the HNP in 1994 after a four year attendance in the police academy. At that time, he was married to Miriam Gutierrez who became involved in importation of certain goods and products to Honduras. In 1999, she was charged and convicted of fiscal fraud, which was, in essence, a tax offense. Because of this, however, on November 29, 1999, Avila was suspended from the HNP. He commenced a successful litigation against the department and

eventually was reinstated in 2011.²⁵ **Exhibit E.**

While in the HNP and until the date of his arrest, Avila was only able to rise one rank, from that of Sub-Inspector to Inspector, his position at the time of his surrender in 2016 . The rank of “Inspector ” would be the equivalent of a 1st Lieutenant in the United States.²⁶

The hierarchy of the rank system with the Honduran National Police and the ranks of the co-defendants in this matter are as follows:

GENERAL DIRECTOR
COMISIONADO GENERAL
COMISIONADO
SUB-COMISIANDO - Mejia-Vargas, Zevala-Velazquez
COMISARIO - Lopez-Flores
SUB-COMISARIO - Cris- Zelaya, Cruz Chavez
INSPECTOR - Valladares, Avila-Meza
SUB-INSPECTOR
ESCALA BASICA

Avila was assigned over the years to the following departments within the HNP:

Tegucigalpa, main HNP HQS;
Human Resources Division;
Directorate of Strategic Intelligence and Information;
Esquias sub-station as station commander;
HNP Police University (as student); and
Main HNP HQS as Assistant To Director of Operations.

His duties included general uniform patrols, enforcement of the Honduran Criminal Code, Community Policing, supervision of non-commissioned officers, and various administrative responsibilities while assigned to HNP HQS. During his relatively short time on the force, he received many awards and commendations. **Exhibit Q.** He always passed all departmental criminal background checks, **Exhibit R,** and integrity tests, including polygraphs. **Exhibit S.** Of relevance

²⁵ The conspiracy, as charged, is alleged to have continued from 2004 until 2014. In contrast, Avila was active in the HNP for only 2½ years.

²⁶At the time of Avila’s surrender to the government, he was due for a promotion to “Sub-Comisario,” the equivalent of Captain in the United States.

to the subject Indictment, Avila never served in any command in a coastal jurisdiction.

5. Avila's Career As a Member of the Honduran Bar

While suspended from the HNP, Avila studied to be an attorney and eventually graduated with a law degree from the Honduran National Autonomous University in 2002. He obtained a Masters in Business Law in 2008. He subsequently opened a law office in the Lomas de Guijaro sector of Tegucigalpa. **Exhibit T.** Defendant practiced in various areas of law, but specialized in commercial and real estate.

As letters from his clients confirm, he was a dedicated attorney. As an example, Angela Antonia Oliva Diaz, stated in her letter to the court that although he was in the police department, Avila assisted obtaining the release of a young man from prison, by referring his case to an attorney and then monitoring it to assure a satisfactory outcome. He charged little for his time due to the fact that his client was impoverished. **Exhibit U.**

A colleague, Carlos Jeronimo Calix Mejia, writes that Avila "was an excellent professional . . . with great dedication, . . ." He always evidenced "great respect for both parties." **Exhibit U**

In general, all correspondents, professional and lay, attest that he was a dedicated professional.

6. Avila's Other Business Ventures

In addition to practicing law, Avila was involved in the importation and resale of passenger vehicles in partnership with Jorge Mario Sierra of "Importaciones Sierra." **Exhibit V.** He also owned and operated several passenger bus lines in Tegucigalpa, owning 2-4 mid-size buses at different times during 2002-2011. **Exhibit V.**

7. Avila's Charitable Contributions.

Avila's generous nature has been evident throughout his life. He never forgot his roots and donated his time and money to improve the lives of others to various public service entities.

2. Post Arrest Rehabilitation and the Likelihood of Recidivism

Defendant has made the best of his time during the almost 3 years of pre-trial detention at the Metropolitan Correctional Center and at the Metropolitan Detention Center, by participating in as many programs as possible, including correspondence courses. **Exhibit X** (Certificates of Completion).

Mr. Avila is almost 49 years old. Recidivism is lessened by age, employment status, educational attainment and marital status, United States Sentencing Commission, "Recidivism Among Federal Offenders, A Comprehensive Overview," March 2016 (hereinafter "USSC RAFC"), attached as **Exhibit Y** at 5, all elements that favor Mr. Avila. Well-established studies, including the USSC RAFC, concur that the likelihood of recidivism is remote. As per the most recent version of the USSC RAFC, Mr. Avila, as a person with zero criminal history points, has a recidivism rate of (30.2%). USSC RAFC at 18. In less than a year, when he turns 50, his recidivism rate based on his age will be 21.7%. USSC RAFC at 23.

Factor 2. The need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.

As stated below with respect to Factor 4, a non-guideline sentence of the minimum mandatory would reflect the seriousness of the subject offense and is just punishment for a first time offender who has never been in the United States .

Factor 3. The sentences available to the court.

18 U.S.C. §3553 (a)(3) mandates a court to consider "the kinds of sentences available." In this case, available sentences include imprisonment, probation, house arrest and community service. It is urged that a minimum mandatory sentence would be appropriate. Such a sentence would take advantage of the wealth of knowledge and experience defendant has to offer to his community in Honduras.

Defendant's charitable activities long preceded his involvement in the criminal conduct that has caused him to be before this court. For example, he worked to obtain charity supply containers filled with necessities such as clothing and toys, through Cedar Creek Baptist Church in Gray, Tennessee. He also worked on adoption programs with an agency known as Living Hope, based in Pennsylvania. Living Hope was one of the non-profit, non-governmental organizations with which he worked. He worked with a church on securing donations of used ambulances to Honduras. He became the legal representative to several NGO's in Honduras. **Exhibit W.**

C. *Avila's Criminal History*

1. First Arrest and Aberrant Behavior

Defendant has no criminal history and this factor at age 49 is most important for §3553 consideration. The First Step Act broadens eligibility for mandatory minimums to individuals who even as many as four criminal history points. Consequently, the fact that this defendant has zero history points places him solidly within the reach of this important benefit notwithstanding how the presence of a weapon is customarily treated at sentencing. This is a case where ineligibility for Safety Valve consideration is inconsistent with the principles underlying the First Step Act. Here, there was absolutely no violence, just the presence of a weapon that Avila was routinely required to carry and that he was tricked into bringing to a meeting by unscrupulous cooperators with a self-serving agenda.

Prior to the meetings that he was lured to, Avila was, a law abiding and otherwise socially responsible individual operating in a challenging social environment.

Consideration of aberrant behavior by a sentencing court is permitted so as to permit the imposition of a non-Guideline sentence. *See, e.g., United States v. Campbell*, 161 F. App'x 37, 38 (2d Cir. 2005)

Factor 4. Affording adequate deterrence to criminal conduct and protecting the public from further crimes of the defendant.

Respectfully, from the nature of Mr. Avila's conduct it can fairly be concluded that he will never commit another criminal offense.

Factor 5. Pertinent Policy Statements - Providing defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Alternatives to Extended Period of Incarceration in Appropriate Cases is Strongly Encouraged

In 2015, the Commission issued a report entitled *Alternative Sentencing in the Federal Criminal Justice System* ("Alternative Sentencing Report") which examined the trends in alternative sentences. **Exhibit Z.** It is clear that the Sentencing Commission views alternative sentencing as a positive development that should be encouraged, a position bolstered by the passage of the First Step Act.

In the Alternate Sentencing Report, it was explained that alternative sentences for offenders guilty of more serious crimes (Zone D) have "increased marginally . . . from 11.0 percent in 2005 to 12.4 percent in 2014." Thus, 1 out of every 8 serious offenders are receiving alternate sentences. *Alternative Sentencing Report* at 17. And, almost 2/3 of the 12.4% received alternative sentences that did not include incarceration. *Id.* Avila, however, facing deportation, cannot claim this benefit.

This court is urged, however, to consider a reduced sentence that embodies the spirit of the reforms now being advocated and adopted.

In *Gall v. United States*, 552 U.S. 38,50 (2007), the Supreme court held that a sentencing district court "may not presume that the Guideline range is reasonable," but rather "must make an individualized assessment based on the facts presented.

In 2010, the Sentencing Guidelines were amended, in part, to increase a judge's ability to impose sentences that include alternatives to incarceration. In its official submission to Congress in furtherance of the proposed amendment, the United States Sentencing Commission explained:

The amendment is a result of the Commissions's continued multiyear study of alternatives to incarceration. The Commission initiated this

study in recognition of increased interest in alternatives to incarceration by all three branches of government and renewed public debate about the size of the federal prison population and the need for great availability of alternatives to incarceration for certain nonviolent first offenders.

Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary at 2-3 (April 30, 2010).

It is, therefore, fair to conclude that a minimum mandatory sentence would certainly not be inappropriate. Factoring in the considerations that:

- this is defendant's first offense;
- he is 49 years old;
- defendant's conduct has been exemplary for decades; and
- defendant was not seeking to commit criminal conduct, but had the

criminality thrust upon him by and respectfully, it becomes clear that Mr. Avila-Meza should be among those first-time offenders that are afforded the grace of a statutory minimum sentence.

Factor 6. The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

It should be noted that with respect to the co-defendants who were members of the HNP, the defendant is the lowest in rank among his HNP co-defendants.

18 U.S.C. § 3553(a)(6) instructs the court to impose a sentence that "avoids unwarranted disparities among defendants with similar records who have been found guilty of similar conduct.

The police co-defendants in this indictment have been sentenced as follows:

Ludwig Criss Zelaya-Romero	not sentenced
Mario Guillermo Mejia-Vargas	not sentenced
Carlos Jose Zevalla Velasquez	144 months
Victor Oswaldo Lopez Florez	60 months
Carlos Alberto Valladares-Zuniga	168 months

While his actions as were caught on camera are utterly indefensible, the circumstances of its commission reflects plainly that it was act of bad judgment that began and ended in the two

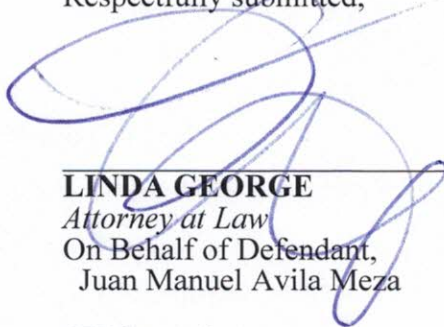
meetings that took place and was as a result of the actions of cooperating defendants and two informants who have now, little or no credibility.

The fleeting nature of the offense and the virtual guarantee that it will not recur fully dissolves the need for defendant's prolonged incarceration and provides the elements that justify such a sentence irrespective of the punishment

CONCLUSION

It is respectfully urged that in this unique case and for the reasons set forth herein, the court sentence Mr. Avila to the statutory minimum term in the discretion of the court.

Respectfully submitted,



LINDA GEORGE
Attorney at Law
On Behalf of Defendant,
Juan Manuel Avila Meza

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CERTIFICATION OF SERVICE

I, Linda George, do certify that on this date the within sentencing memorandum was filed (redacted) with the Clerk of the Court using the CM/ECF system which will automatically send copies to the following and in addition I have provided unredacted copies of same together with the video recording, as follows:

Hon. Lorna G. Schofield, U.S.D.J.
United States District Court for the
Southern District of New York
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New York, New York 10017

VIA HAND DELIVERY
(Courtesy Copy W VIDEO)

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Juan Manuel Avila Meza

S/Linda George

Dated: June 25, 2019