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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

**CARLOS HUMBERTO ORANTES-
ARRIAGA,**

Defendant.

Case No. 3:90-cr-00354-MA-1

**MOTION AND MEMORANDUM FOR
SENTENCE REDUCTION OR, IN
THE ALTERNATIVE, VACATION OF
SENTENCE OR CONVICTION
PURSUANT TO 18 U.S.C. § 3582(c)(2)
AND 28 U.S.C. § 2241 AND § 2255**

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The defendant, Carlos Humberto Orantes-Arriaga, through counsel, Stephen R. Sady, moves the Court for an Order reducing his sentence under Amendment 505 of the Sentencing Guidelines and 18 U.S.C. § 3582(c) or, in the alternative, vacating his sentence or conviction under 28 U.S.C. §§ 2241 and 2255. This motion is based on the memorandum and exhibits establishing the manifest injustice of a sentence to life without parole tainted by violations of the government's constitutional obligations to provide exculpatory information to the defense, to refrain from presenting false testimony, and to assure that government actors have no involvement in coercive interrogation and torture.

Introduction

Twenty-six years ago, this Court imposed a sentence of life without parole on Carlos Humberto Orantes-Arriaga. At trial, federal agents affirmatively contradicted Mr. Orantes-Arriaga's testimony that United States agents' investigative activities in Mexico were related to his torture by Mexican police. During rebuttal closing argument, the prosecutor adopted the agents' testimony: "I can say based upon the statement of Neil Van Horn and Pat O'Connor from the Drug Enforcement Administration, we absolutely specifically and categorically deny these remarks or these charges, which are reckless and baseless." The Court, as well, concluded that Mr. Orantes-Arriaga made "spurious allegations that the government had in some way been involved with the Mexican authorities" when it imposed a two-level sentencing adjustment for obstruction of justice. When the Sentencing Commission promulgated Amendment 505, retroactively amending the Guidelines to reduce the computation of his offense level by four levels, this Court denied Mr. Orantes-Arriaga's motion to reduce his sentence based in part on the two-level obstruction enhancement that he received for his supposed perjury.

Now, for the first time, this Court has exculpatory documents establishing that, in fact, the federal agents' testimony was false. Six months before the Mexican federal police interrogated Mr. Orantes-Arriaga under torture, the Portland office of the Drug Enforcement Administration (DEA) sent a teletype dated March 27, 1990, to the American embassy and the DEA office in Mexico City requesting assistance in investigating Mr. Orantes-Arriaga. Thus, the DEA and Customs agents falsely testified at trial that they did not have "any involvement in the investigation of Carlos Orantes in Mexico during the year 1990." As reflected in the declarations of Mr. Orantes-Arriaga's previous defense attorneys, the government's false statements denying any involvement in the Mexican investigation played a critical role in their representation of Mr. Orantes-Arriaga and, accordingly, impacted the most basic choices that Mr. Orantes-Arriaga made over the course of his prosecution.

This Court has jurisdiction to address the fundamental defect in the proceedings in this case by revisiting the motion to reduce sentence under Amendment 505, as authorized by *United States v. Trujillo*, 713 F.3d 1003, 1006–07 (9th Cir. 2013), or, in the alternative, by addressing the manifest injustice of a sentence and a conviction tainted by false testimony of government agents related to Mr. Orantes-Arriaga's torture. Granting the motion to reduce under Amendment 505, providing a sentence of 360 months, is the most direct way to remedy the fundamental injustice that occurred in this case. In the alternative, the Court has authority under controlling Supreme Court and Ninth Circuit authority, to vacate the sentence or the underlying conviction based on the government's conduct.

Factual Background

The Federal Public Defender's office reviewed Mr. Orantes-Arriaga's case pursuant to standing orders authorizing the office to screen cases that may benefit from retroactive Amendment 782 to the Sentencing Guidelines or the 2014 clemency initiative. Although the facts of this case did not easily fit into those programs, the life sentence warranted further investigation. Counsel met with Mr. Orantes-Arriaga in USP Tucson on November 5, 2015. During that meeting, counsel learned for the first time of documents that appeared to contradict critical trial testimony by federal agents. Counsel then consulted with and reviewed the files of former appointed defense lawyers Phillip Margolin and Marc Sussman. The attorneys confirmed that Mr. Orantes-Arriaga's major focus during his proceedings was the federal government's involvement in his torture in Mexico, to the detriment of negotiated resolution of the charges against him. The following facts are derived from the record in this case as well as the declarations of Mr. Margolin and Mr. Sussman. The defense presented this information to the government on June 22, 2016. The government has confirmed the authenticity of the exculpatory documents.

A. The Defense At Trial Focused On The Torture Mr. Orantes-Arriaga Suffered At The Hands Of The Mexican Police.

Mr. Orantes-Arriaga was the lead defendant in a superseding indictment charging a drug trafficking conspiracy that occurred between January 19, 1986, and November 2, 1990, in Portland, Oregon, and other places. CR 152. Prior to trial, the government provided no discovery related to investigation of Mr. Orantes-Arriaga in Mexico and denied that such investigation occurred. At trial, the government presented evidence through recorded conversations with informants, bank records, the products of search warrants, the testimony of cooperating witnesses,

and his own statements that Mr. Orantes-Arriaga was a major drug dealer and that, with other conspirators, he had discussed retaliation against suspected informants.

1. Government Agents Contradicted And Derided Mr. Orantes-Arriaga's Testimony That Provided The Basis For His Defense.

After the government rested its case, Mr. Orantes-Arriaga took the stand and testified at length that he had been tortured and interrogated by the Mexican police. Exhibit A. The torture included beatings, forced stress positions, exercise to exhaustion, suffocation with a plastic bag, and electric shocks to his genitals. *Id.* at 3284-89. He asserted that the Mexican authorities' questions focused on individuals and locations related to activities in the United States, including forcing him to make a phone call to an associate in Seattle. *Id.* at 3290-93. He also testified that Mexican interrogators told him the "gringos" were involved and wanted him but not in his tortured condition. *Id.* at 3293-95. The Mexican interrogators indicated the DEA provided information leading to the arrest. *Id.* at 3296. He eventually bribed his way out of Mexican custody. *Id.* at 3303. In response to the prosecutor's questions regarding his involvement with heroin trafficking, he repeatedly invoked the Fifth Amendment in front of the jury. *Id.* at 3327, 3367-68, 3372-73, 3380-81. Mr. Orantes-Arriaga did not present substantive testimony against the allegations that he led a drug distribution conspiracy.

In the government's rebuttal case, DEA Special Agent Pat O'Connor testified unequivocally that the DEA was not involved in investigating Mr. Orantes-Arriaga in Mexico in 1990:

Q. [A]re you aware that during this trial, a question has been raised about the possible involvement of the DEA in the arrest of Carlos Orantes in Mexico, during 1990?

A. Yes. I am.

Q. Did the Portland office of the DEA have any involvement in the investigation of Carlos Orantes in Mexico during the year 1990?

A. No. They did not.

Exhibit B at 2. Agent O'Connor then testified that he had conducted an inquiry into whether there was any investigation in Mexico, which would have involved the embassy and the DEA attaché. *Id.* at 3-7. He testified that the "results were, there was no investigation by the DEA in Mexico regarding Mr. Orantes." *Id.* at 8. The government reinforced the DEA testimony with the sworn statements of Customs Service Special Agent Neil Van Horn, who denied Customs investigative involvement in Mexico:

Q: Was the United States Customs Service involved in any way in either the investigation or the arrest of Mr. Orantes in Mexico?

A: Absolutely not.

Exhibit C at 3.

While the fact that Mr. Orantes-Arriaga had suffered horrific torture was undisputed at trial,¹ the testifying agents derided his assertion that the torturers were Mexican state actors. For example, Agent Van Horn minimized the torture and treated Mexican authorities' involvement as unconfirmed.

Q: Other than the evidence produced during this trial, do you have any evidence at all that Mr. Orantes was, in fact, kidnapped by Mexican federal authorities?

¹ For example, taped conversations with an undercover customs agent referenced Mr. Orantes-Arriaga's hospitalization in Tijuana and the fact that he was urinating blood. Exhibit D at 2852, 2863-64.

A: No. No evidence at all. It could have been other narcotics traffickers or people posing as [federales], or people posing as Mexican police. It could have been the police. You have no way of knowing, unless you have someone there, I guess.

Exhibit C at 5.

2. *The Closing Arguments Centered On The Disputed Testimony.*

The entire defense closing argument constituted an attack on the integrity of the investigation, with a focus on Mr. Orantes-Arriaga's claims that the federal government had been involved in the Mexican investigation that led to his interrogation under torture. Exhibit E at 25-36. The penultimate words to the jury: "I ask that you say no more to a government that would be involved in kidnapping and torture of another human being." Exhibit E at 35-36.

In rebuttal, the government argued that Mr. Orantes-Arriaga had never denied committing the crimes. Exhibit F at 12. The prosecutor questioned Mr. Orantes-Arriaga's credibility, claiming we "are not even positive that the Mexican Federal Judicial Police actually arrested him." *Id.* The prosecutor then put the full weight of his office and the government behind the credibility of his agents' testimony:

Now, the ethics of our profession do not permit me to make any comments about Mr. Margolin's charges but I can say that based upon the statement of Neil Van Horn and Pat O'Connor from the Drug Enforcement Administration *we absolutely specifically and categorically deny these remarks or these charges, which are reckless and baseless.*

Id. (emphasis added). Although referencing ethical limitations on argument, the argument itself constituted vouching by placing the authority of the prosecutor – "we" – expressly behind the truth of the agents' denial of the defendant's claims. *United States v. Molina*, 934 F.2d 1440, 1444-45 (9th Cir. 1991) ("As a general rule, a prosecutor may not express . . . his belief in the credibility of

government witnesses.”); accord *United States v. Kerr*, 981 F.2d 1050, 1053 (9th Cir. 2002). In addition to directly adopting the now-debunked testimony, the prosecutor also pointed out the problem with the theory of defense – its lack of support in the jury instructions:

The claim that Orantes was taken into custody by the Federal Mexican Judicial Police and whatever happened to him, that is not a defense. There aren't going to be any instructions for you to consider by the Court. The man was a dealer years before that ever occurred. That is not a defense. It has nothing to do with guilt; it has nothing to do with innocence.

Exhibit F at 14-15

3. *The Government Agents' False Testimony Played An Aggravating Role At Sentencing.*

At sentencing, the Court calculated the base offense level at the highest available under the then-applicable Drug Quantity Table at Offense Level 42. The Court added two levels for possession of a firearm (U.S.S.G. § 2D1.1(b)(1)), four levels for the defendant's role as an organizer or leader of the offense (U.S.S.G. § 3B1.1), and two levels for obstruction of justice (U.S.S.G. § 3C1.1), for a total offense level of 50 – seven levels higher than the top of the Sentencing Table. Although the Probation Office had not suggested an enhancement for obstruction of justice, the government sought the enhancement based on Mr. Orantes-Arriaga's testimony. When applying the obstruction enhancement, this Court expressed deep displeasure with Mr. Orantes-Arriaga's testimony:

Mr. Orantes, I feel did commit untruthful testimony during the trial, particularly in putting the government to the extensive proof of negating his spurious allegations that the government had in some way been involved with the Mexican authorities. And, therefore, I am enhancing Mr. Orantes two levels.

Exhibit G at 166.

The Presentence Report applied Criminal History Category IV based on Mr. Orantes-Arriaga's two prior convictions, but there appears to have been an uncorrected error in that calculation. The superseding indictment alleged that the conspiracy ran from January 19, 1986, until 1990 and included the time of the illegal reentry conviction from an arrest on March 24, 1986. CR 152 at 3, ¶ 9 ("It was further part of the conspiracy for certain of the conspirators to illegally enter and reenter the United States."); *see* Sealed Exhibit M (Presentence Report) at 6-7 (DEA Agent Chown questioning Mr. Orantes-Arriaga in connection with his drug and illegal reentry arrest), and 24 ¶ 68 (assessing criminal history points for the illegal reentry conviction). Because it occurred after the "commencement of the instant offense" and was "part of the instant offense," the illegal entry conviction was not a "prior sentence" within the meaning of the criminal history guidelines and Application Note 1 to U.S.S.G. § 4A1.2(a)(1) and, therefore, should not have resulted in any criminal history points. Based on the single prior countable conviction, the corrected Criminal History Category would be II.

The Court imposed a sentence of life without parole. Without evidence that the federal agents' testimony was untruthful, and that the government had been involved with investigations in Mexico, the defense had no colorable basis for seeking a departure to avoid the then-mandatory guideline sentence of life without parole. The Ninth Circuit affirmed the conviction on direct appeal on July 20, 1993, and affirmed the denial of a § 2255 motion on December 16, 1998.

B. Information Produced Pursuant To the Freedom of Information Act Establishes The Government Agents' Testimony Was False Regarding Investigation In Mexico.

Teletypes obtained through the Freedom of Information Act establish that the DEA was in fact involved in investigating Mr. Orantes-Arriaga in Mexico during 1990 and demonstrate that

the DEA trial testimony contradicting Mr. Orantes-Arriaga was false. Specifically, the March 27, 1990, teletype explicitly references participation in the investigation by both the DEA and the Customs Service. Exhibit H.

The teletype was generated by the Portland office of the DEA. The addressees of the teletype include the American embassy in Guatemala City, Mexico City, and Bogotá, as well as the DEA's country offices in those nations. The teletype is to the attention of DEA "HQS," with instruction to "pass to" "MEXICO CITY CO." The first paragraph establishes that the Portland office of the DEA, along with Customs, "is conducting an investigation into the heroin trafficking activities of Guatemalan Carlos Humberto Orantes-Arriaga." The second paragraph states the need for pen register and telephone toll information, followed by the request in the third paragraph, "through the country offices themselves through their resident offices, to obtain subscriber information on the above listed telephone numbers." Teletypes dated February 20, 1990, and July 30, 1990, sought similar information from the Guatemala offices. Exhibit I and J.

The DEA Portland office's request for investigative assistance through federal actors in Mexico, who would have necessarily contacted Mexican counterparts with access to telephonic data, directly contradicts the government's testimony at trial. The exculpatory evidence prejudiced the defense in every aspect of the case.

1. Defense Knowledge Of The Teletypes Would Have Impacted The Trial And Sentencing.

The declarations of Phillip Margolin and Marc Sussman demonstrate the many ways in which knowledge of the teletypes would have altered the course of this case. Exhibits K and L. Some effects are easy to demonstrate: Mr. Orantes-Arriaga would not have had to testify in a

manner that was destroyed by the government's rebuttal case, and the obstruction of justice enhancement would not have been applied. Other effects are less tangible but no less real. Instead of concentrating on the case against him, Mr. Orantes-Arriaga – only recently the victim of cruel torture – was preoccupied by the injustice of his treatment in Mexico and his belief that there was some involvement of the “gringos” in his torture. Thus, Mr. Orantes-Arriaga viewed the trial as an opportunity to expose his torture in Mexico rather than an opportunity to rebut the evidence against him regarding drug trafficking.

As Mr. Margolin elaborates in detail, knowledge of the teletypes proving the federal government's involvement in Mr. Orantes-Arriaga's torture and interrogation would have impacted each phase of his representation. In summary, Mr. Margolin attests: “[I]f I possessed what I consider critical information that neither Mr. Orantes-Arriaga nor I had at the time of trial, . . . there would have been a good possibility that my former client's sentence would have been less than life without parole.” Exhibit K at 5.

First, Mr. Margolin's pretrial advocacy would have been completely different. The attorney would have used the documents to obtain more information in support of motions to suppress and to dismiss the indictment:

If I had learned of the communications attached to this declaration, I would have moved for discovery and initiated an investigation, using the teletypes as the starting point to obtain more information needed for trial preparation and for pretrial motions. Second, I would have researched and prepared motions to suppress all products of the detention and interrogation under the Due Process Clause as well as any other protections against the use of involuntary statements. Third, I would have researched and prepared motions to dismiss based on outrageous government conduct in violation of the Due Process Clause.

Exhibit K at 3.

Mr. Margolin also would have had a different approach to the question of whether to exercise full trial rights and greater leverage to negotiate a more favorable resolution:

[I]f my investigation showed potential government involvement – direct or inadvertent – in the Mexican torture, the government would likely have been far more willing to make an offer that would have been more likely to resolve the case, regardless of the ultimate merits of the motions I could file. On the client side, I believe Mr. Orantes-Arriaga would have been far more reasonable about how to resolve his case. My memory is not perfectly clear on this point, but I do recollect that he was very upset with the maltreatment he received and one reason he went to trial was to expose what happened to him. If I had been able to establish the basic facts, and if the government was not calling him a liar about the traumatic experiences he described, I believe Mr. Orantes-Arriaga's attitude about the trial and negotiations would have been very different.

Exhibit K at 3-4.

At trial, Mr. Margolin would not have been empty handed in the face of the government's devastating rebuttal:

[T]he teletypes would have provided powerful cross-examination of the rebuttal witnesses who claimed the DEA had no involvement in investigating Mr. Orantes-Arriaga in Mexico and that, therefore, Mr. Orantes-Arriaga was lying about his claims and unfairly maligning the federal officers. I would also have had a theme to develop some sympathy from jurors and a reason for them to distrust the government's case. . . . I would have had a much better opportunity to put the government case in a negative light and to argue to the jury for acquittal.

Exhibit K at 4.

Last, Mr. Margolin regarded the suppressed evidence as "critically important" to the result at sentencing:

Regarding sentencing, the teletypes would have been critically important. I believe Judge Marsh reacted strongly to what appeared at the time to be bold-faced lies that the government had to waste time rebutting. If I could have produced the teletypes, I do not believe that Mr. Orantes-Arriaga would have received the two-level enhancement for obstruction of justice. I also believe that we would have had a substantial argument that a downward departure would have been appropriate based on the torture Mr. Orantes-Arriaga had endured. The sentencing would have also

been different if I had been able to argue that, due to a *Brady* violation, Mr. Orantes-Arriaga had been cast in an unfairly negative light. If I had the teletypes there is a substantial likelihood that the result would not have been a sentence to life in prison without the possibility of parole.

Exhibit K at 4.

The declaration of counsel is unequivocal: with the teletypes, the case would have been fundamentally different. At each level of litigation, the Mexican torture became a primary motivator, both of Mr. Orantes-Arriaga's passionate desire to expose his suffering at the price of a longer sentence, and of this Court's concern at what was believed to be perjury that dishonored federal agents.

2. *The Government's Presentation Of False Testimony And Failure To Disclose Exculpatory Evidence Impacted The Initial Amendment 505 Proceedings.*

In 2006, the government provided redacted documents requested under the FOIA to Mr. Sussman, who was appointed to represent Mr. Orantes-Arriaga regarding the Amendment 505 motion to reduce sentence. As reflected in Mr. Sussman's declaration and attached documents, he possessed the teletypes when he represented Mr. Orantes-Arriaga in relation to the Amendment 505 motion. Exhibit L at 2. Mr. Sussman failed to recognize the importance of the documents in his possession, which prejudiced the Amendment 505 motion and the ability to reopen proceedings regarding the original judgment. Exhibit L at 2 ("I either did not review this document or did not understand its significance at the time.").

As a result of the failure to use the teletypes, Mr. Sussman could not explain to this Court that the original obstruction enhancement was unfounded. This Court, in reciting the Guidelines calculations, specifically referenced the obstruction enhancement in its opinion denying relief. CR

830. According to Mr. Sussman, recognizing the significance of the documents would have been “very important both because my advocacy on the retroactive amendment would have been different and because the documents would have provided me a basis for seeking further review of the legality of the original sentence and conviction.” Exhibit L at 2. The prejudice from the failure to use the documents was severe, both on the Amendment 505 motion and the ability to reopen the sentencing proceedings:

The failure to utilize these documents prejudiced Mr. Orantes-Arriaga in several ways. With the new information, I would have been able both to seek discovery, investigation, and litigation in the context of the motion to modify sentence, while at the same time forming a basis to seek a second or successive motion under 28 U.S.C. § 2255 asserting that the original sentence and conviction were unlawful. In the context of a motion to modify in which the government offered the alternatives of outright denial or a 400 month sentence, there is a substantial likelihood that I would have been able to negotiate an agreed modification of the sentence. If not, the conviction and aggravated sentence based on testimony of federal agents that was incorrect would have provided a strong basis for a new sentencing hearing, as well as a weaker basis for a challenge to the conviction. The basis for a new sentencing hearing would be especially significant because, not only would the obstruction enhancement no longer be available, but other mitigation through departure and variance would be available because the Guidelines were no longer mandatory after *Booker v. United States*, which was decided in 2005.

Exhibit L at 3.

With the information provided to counsel and not utilized, Mr. Orantes-Arriaga had no reason to think anything more could be done. Further, Mr. Orantes-Arriaga’s mental state kept the Court from learning of this information for many years, believing that he was in danger because he possessed proof that federal agents lied. The significance of the critical information surfaced only in November 2015 due to a serendipitous attorney visit in Tucson.

Legal Argument

Mr. Orantes-Arriaga's conviction and sentence were fundamentally tainted by the government's failure to disclose teletypes over which the government had exclusive control. The undisclosed evidence establishes that government agents provided false testimony about their involvement in the defendant's investigation in Mexico, and unfairly portrayed the defendant as a liar. The Court can grant relief because "§ 3582(c)(2) does not impose or result in a jurisdictional bar to a second motion" under Amendment 505. *Trujillo*, 713 F.3d at 1106. This Court should exercise its Amendment 505 authority to reduce the sentence of life without parole to remedy the violations of the Due Process Clause and the Sixth Amendment, which can also be remedied by a grant of the writ of habeas corpus.

A. The False Testimony By Government Agents Implicates A Wide Swath Of Fundamental Constitutional Rights.

The shocking reality that government agents falsely claimed they did not have any involvement in a Mexican investigation, when in fact they sought cooperation from Mexican actors through the United States Embassy in Mexico and the DEA's Mexico office, completely skewed the prosecution and defense of this case. As Mr. Margolin articulates, every aspect of representation – from discovery and investigation to plea negotiations to trial strategy to sentencing – would have been profoundly different if the true facts had been known. Under well-established Supreme Court authority, the government's conduct violated the Due Process Clause.

1. The Government's Failure To Produce Exculpatory Evidence Violated Brady In At Least Five Ways.

Most basically, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment,

irrespective of the good faith or bad faith of the prosecution.” *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). The evidence of federal agents’ involvement in investigation of Mr. Orantes-Arriaga in Mexico falls within five types of *Brady* violations.

First, the evidence would have been material to sentencing. It would have precluded the use of a harsher guidelines calculation that, under the then-mandatory guidelines, aggravated the offense level by two levels, by demonstrating that the obstruction enhancement was unwarranted. *See Cone v. Bell*, 556 U.S. 449, 473 (2009) (“Evidence that is material to guilt will often be material for sentencing purposes as well; the converse is not always true, however, as *Brady* itself demonstrates.”). The evidence also would have supported a request for a downward departure based on Mr. Orantes-Arriaga’s corporal suffering in relation to the investigation. The relevance of *Brady* to sentencing is illustrated by the *Brady* case itself. Mr. Brady took the stand and provided testimony relevant only to punishment without evidence in the state’s possession – the codefendant’s corroborating confession – that would have supported his testimony. 373 U.S. at 84. The direct analogy to *Brady* requires relief.

Second, the evidence would have impeached two major government witnesses. *United States v. Bagley*, 473 U.S. 667, 676 (1985) (“Impeachment evidence . . . falls within the *Brady* rule.”) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)). The testimony by a government agent that he had conducted a search and found no evidence of government involvement in the Mexican investigation would have been flatly contradicted by the teletype that proved the agent’s own DEA office had requested the investigation in Mexico. Instead, government agents testified unscathed by cross-examination. As in *United States v. Sedaghaty*, “the defense was empty handed

at trial precisely because the government did not disclose a substantial amount of relevant information.” 728 F.3d 885, 900 (9th Cir. 2013).

Third, the evidence would have undermined the reliability and integrity of the investigation. *Kyles v. Whitley*, 514 U.S. 419, 446-51 (1995) (holding that *Brady* covers evidence that impeaches the integrity of the investigation). “A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation.” *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986); see *Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) (*Brady* required a new trial given the potential for discrediting police methods); *United States v. Bagcho*, 151 F. Supp. 3d 60, 70-71 (D.D.C. 2015) (DEA’s suppression of evidence that another government agency deemed the informant a liar “undermine[d] the reliability of the government’s investigation and its sources” under *Brady*). The defense closing argument in the present case focused almost entirely on the integrity of the investigation leading to the indictment, but lacked the most compelling evidence favoring the theory of defense.

Fourth, the evidence was necessary to exercise of the constitutional right to testify in one’s own defense. *Rock v. Arkansas*, 483 U.S. 44, 49 (1987). This right has its roots in the Due Process Clause and the privilege against self-incrimination of the Fifth Amendment as well as the right to compulsory process of the Sixth Amendment. *United States v. Gillenwater*, 717 F.3d 1070, 1078 (9th Cir. 2013). The suppression of the teletypes deprived the defense of effective corroboration of Mr. Orantes-Arriaga’s testimony. The government was thus free to demolish Mr. Orantes-Arriaga’s testimony and to ridicule his claim that the federal government and the Mexican government were involved in his torture. This Court’s evaluation at sentencing that Mr. Orantes-

Arriaga's claims were "spurious" was undoubtedly the same conclusion reached by the jury. The false testimony of government agents reduced Mr. Orantes-Arriaga's exercise of the right to testify in his defense to a nullity and unfairly portrayed him as someone willing to stain federal agents for his own dishonorable purposes.

Fifth, the evidence was necessary to the exercise of the Sixth Amendment right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). Without the key information validating Mr. Orantes-Arriaga's claims, his attorney did not pursue discovery regarding federal agents' involvement in the Mexican investigation, move to suppress evidence from that investigation, or file a motion to dismiss for outrageous governmental misconduct. Most importantly in this unique case, counsel did not have information necessary to negotiate a fair plea agreement. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012) ("Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process."). As reflected in Mr. Margolin's declaration, Mr. Orantes-Arriaga's demand to be heard against the lies of the government trumped all reasonable possibility of resolution short of trial.

The *Brady* violation does not depend on bad faith. Due process is implicated whether the government suppresses evidence "either willfully or inadvertently." *Banks*, 540 U.S. at 691 (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). Here, the exculpatory evidence was in the possession of the DEA; the testifying agent claimed to have searched for exactly this type of communication; and the agent or close colleagues in the investigation appear to have been the authors of the communication. Although the *Brady* violation occurs "irrespective of the good or bad faith of the prosecution," 373 U.S. at 87, the present case suggests that the failure to disclose was reckless or worse. *See United States v. Chapman*, 524 F.3d 1073, 1085 (9th Cir. 2008)

(“reckless disregard for the prosecution’s constitutional obligations” provides a basis “to implement a remedy for violation of a recognized statutory or constitutional right; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and to deter future illegal conduct.”). The teletypes that were disclosed are only the tip of the iceberg because they indicate the likely existence of phone logs, memos, and other such writings that must have been generated leading up to and following the teletypes.

There is a reasonable probability that, had the evidence been disclosed, the result of the proceedings – trial or sentence – would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985). In the present case, the *Brady* violation permeated every aspect of the proceedings, as established in the declaration of Mr. Margolin. But the simplest demonstration of prejudice is the obstruction enhancement, which directly increased the offense level. Even under advisory guidelines after *Booker*, the guidelines calculations provide essential guidance for the ultimate imposition of sentence. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016) (“The Guidelines’ central role in sentencing means that an error related to the Guidelines can be particularly serious.”); *Peugh v. United States*, 133 S. Ct. 2072, 2080 (2013) (“[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.”) (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)). Although the guideline range without the obstruction enhancement would still be above the top of the guideline table, skewing the offense level upward critically impaired the opportunities for defense arguments for a lower sentence. The evidence of federal agents’ investigative efforts in Mexico “could reasonably be taken to put the whole case in such a different light as to undermine confidence” in the trial, sentencing, and the initial denial of the Amendment 505 motion. *Cone*, 556 U.S. at 470.

2. *Presentation Of False Testimony Violates Due Process.*

In addition to *Brady*, the false testimony of government agents violated the due process protections of *Napue v. Illinois*, 360 U.S. 264, 269 (1959), and *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). “To prevail on a claim based on *Mooney-Napue*, the petitioner must show that (1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) . . . the false testimony was material.” *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003) (citations omitted). Defendants “c[an]not waive the freestanding ethical and constitutional obligation of the prosecutor as a representative of the government to protect the integrity of the court and the criminal justice system.” *Sivak v. Hardison*, 658 F.3d 898, 909 (9th Cir. 2011) (quoting *N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1122 (9th Cir. 2001)). The presentation of testimony that the prosecution knew or should have known was false strikes at the core of our criminal justice system in which “[t]he ends in our system do *not* justify the means.” *Bowie*, 243 F.3d at 1124 (emphasis in original).

3. *The Government Impaired The Right To Litigate Pretrial Motions And Insulated Torture From Effective Judicial Review.*

The *Brady* and *Mooney/Napue* violations not only skewed the procedures in ways we know about, there are also unknown consequences because the concealment insulated the underlying conduct from full factual development and judicial review through discovery and pretrial motions. With the key document from the FOIA request, competent counsel would have investigated and sought discovery to elaborate the full account of the United States government’s investigative efforts in Mexico. Further, facts would have been developed that may have led to suppression of

evidence and other remedial measures. *See United States v. Barron*, 995 F. 2d 931, 934-36 (9th Cir. 1993) (*Brady* applies to pretrial motions).

The pretrial motions were especially important because the use of information derived from torture violates fundamental rights. *United States v. Karake*, 443 F. Supp. 2d 8, 51 (D.D.C. 2006) (the products of torture should be excluded on due process grounds as “[in]consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions”) (quoting *Brown v. Mississippi*, 297 U.S. 278, 286 (1936)). The products of torture must be excluded “because of the ‘strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.’” *Watkins v. Sowders*, 449 U.S. 341, 347 (1981) (quoting *Jackson v. Denno*, 378 U.S. 368, 385 (1964)). Repugnance for the use of products of torture is so profound as to have become part of international humanitarian law. *Siderman de Blake v. Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) (the prohibition against official torture has attained the force of a *jus cogens* norm); United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 15, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 V.N.T.S. 85.

Suppression is required for both the direct and indirect fruits of unlawful government actions, including investigative or strategic decisions made based on unlawfully obtained information. *Murray v. United States*, 487 U.S. 533, 536-37 (1988). Further, suppression or dismissal is an appropriate remedy in the exercise of the Court’s supervisory power over the government. *Chapman*, 524 F.3d at 1088; *United States v. Hernandez-Meza*, 720 F.3d 760, 769 (9th Cir. 2013) (remanding for determination whether Rule 16 violation was “deliberate” because,

“[i]f the government willfully withheld the certificate, then it should be precluded from introducing the document at any retrial of [the defendant], or perhaps even suffer a dismissal of the indictment with prejudice.”) (citing *United States v. Kojayan*, 8 F.3d 1315, 1325 (9th Cir. 1993)). And the Court would also need to consider whether the government’s suppression of exculpatory evidence, or involvement in the Mexican torture, or both, warranted dismissal under the Due Process Clause. *United States v. Black*, 233 F.3d 294, 302 (9th Cir. 2014); *United States v. McClelland*, 72 F.3d 717, 721 (9th Cir. 1995).

4. *The Government’s False Testimony Violated The Due Process Right To Be Sentenced Based Only On Reliable Facts.*

The original sentencing and the denial of the initial Amendment 505 motion were based on a false premise that Mr. Orantes-Arriaga obstructed justice by committing perjury. To comport with due process, sentencing must be conducted based on reliable and accurate information. *See United States v. Tucker*, 404 U.S. 443, 447 (1972) (sentencing discretion cannot be based on assumptions that are “materially untrue”) (quoting *Townsend v. Burke*, 334 U.S. 736, 741 (1948)); *United States v. Rachels*, 820 F.2d 325, 327 (9th Cir. 1987) (recognizing that Rule 32 “helps to implement the due process requirement that judges determine sentences only on the basis of accurate information”). The sentence must be vacated because the defense has established that the challenged information is “(1) false or unreliable, and (2) demonstrably made the basis for the sentence.” *Farrow v. United States*, 580 F.2d 1339, 1359 (9th Cir. 1978) (en banc). The Court’s exercise of its sentencing discretion based on errors of fact and law also qualifies as an abuse of discretion. *See United States v. Koon*, 518 U.S. 81, 100 (1996) (where an error of law occurs in the sentencing decision regarding the availability of departure, the court by definition also abuses

its discretion). After the initial sentencing, Marc Sussman establishes that, on the Amendment 505 motion, he failed to recognize the significance of the teletypes and, as a result, he did not promptly take available remedial actions such as pursuing a negotiated resolution, changing the focus of his advocacy under Amendment 505, and collaterally attacking the initial sentence and conviction.

B. The Court Has Jurisdiction To Remedy The Violations Of Fundamental Constitutional Rights In This Case.

This Court has jurisdiction to remedy the fundamental violation of basic constitutional criminal procedure in this case. As the Ninth Circuit recognized in *Trujillo*, the Court has the power to revisit the initial Amendment 505 motion armed with the true facts. The Court also has authority under the habeas corpus statutes to vacate the sentence or the conviction based on the pervasive constitutional violations.

1. The Court Has Jurisdiction To Grant The Amendment 505 Motion.

This Court has jurisdiction to reduce Mr. Orantes-Arriaga's sentence under the retroactive ameliorative Amendment 505 of the Sentencing Guidelines. 18 U.S.C. § 3582(c)(2) establishes no statute of limitations for sentence reduction motions based on retroactive amendments to the Sentencing Guidelines. In addition, there is no bar to raising a second such motion. In *Trujillo*, the Ninth Circuit held that "the district court had jurisdiction under § 3582(c) to entertain a second motion to reduce sentence." 713 F.3d at 1006-07. The defendant in *Trujillo* filed a second motion to reduce sentence thirteen years after the denial of the first Amendment 505 motion. *Id.* at 1005. In addition to holding that the district court had jurisdiction to consider the second motion, the Ninth Circuit in *Trujillo* instructed the district court on remand to fully consider the sentencing factors under 18 U.S.C. § 3553(a). 713 F.3d at 1008-09. Jurisdiction under *Trujillo* is especially

compelling because the Court's exercises of discretion at the initial sentencing and the initial Amendment 505 motion were based on both legal and factual errors.

This Court has jurisdiction to grant the requested relief simply based on revisiting the Amendment 505 motion. With the information now available, the Court is free to consider that, based on the four-level retroactive reduction in the offense level and elimination of the two-level obstruction enhancement, the offense level would now be 44 instead of 50, and that considering the profound effect of the new information, a downward departure or variance would be appropriate. The Court can also construe § 3582(c) to prohibit perpetuation of the constitutional violations underlying the original sentence and denial of the initial Amendment 505 motion. *See Nken v. Holder*, 556 U.S. 418, 426 (2009) (statutory interpretation turns on "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole") (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)); *Clark v. Martinez*, 543 U.S. 371, 381-82 (2005) (statutes should be interpreted to avoid serious constitutional problems). The government's suppression of information that controverts the factual basis for the original guideline computation requires a broad statutory interpretation that encompasses equitable remedial action to prevent the government from benefitting from its constitutional violations at the price of an unconstitutional life without parole sentence.

2. *The Court Has Jurisdiction To Grant The Writ Of Habeas Corpus To Vacate The Original Sentence Or, In The Alternative, The Underlying Conviction.*

This Court also has jurisdiction to address the unconstitutional sentence based on second-in-time motions under 28 U.S.C. §§ 2241 and 2255. The Court maintains habeas corpus jurisdiction based on the fundamental miscarriage of justice that would occur if Mr. Orantes-

Arriaga's life sentence were permitted to be served unchallenged despite the government's concealment of key evidence and exploitation of that advantage in obtaining the life sentence. At the time of Mr. Orantes-Arriaga's conviction, a petitioner could seek habeas corpus relief in a second petition where there was cause and prejudice for not raising the claim in the first petition or where the failure to entertain the petition would result in a fundamental miscarriage of justice. *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991). However, the Antiterrorism and Effective Death Penalty Act of 1996 limits second and successive petitions by imposing certain gatekeeping requirements in 28 U.S.C. § 2255(h) and establishes a one-year statute of limitations under 28 U.S.C. § 2255(f). In *United States v. Lopez*, the Ninth Circuit addressed the special problems that arise with *Brady* claims under the AEDPA. 577 F.3d 1053 (9th Cir. 2009).

The *Lopez* court first noted that the Supreme Court has not read the "second or successive" language literally, having considered second-in-time petitions where, for example, the competence of the defendant to be executed could not be considered earlier. 577 F.3d at 1061-62 (citing *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998)). The *Lopez* court cited the Supreme Court's three considerations for determining that a second-in-time petition asserting a previously unripe claim does not constitute a second or successive petition subject to the gatekeeping requirements of 28 U.S.C. § 2255(h): "(1) the implications for habeas practice of adopting a literal interpretation of 'second or successive,' (2) the purposes of AEDPA and (3) the Court's prior habeas corpus decisions, including those applying the abuse-of-the-writ doctrine." 577 F.3d at 1063 (citing *Panetti v. Quarterman*, 551 U.S. 930, 945-46 (2007)). Based on the reasoning of *Panetti*, the Ninth Circuit rejected the government's claim that all second-in-time petitions – including *Brady* claims – constitute second or successive petitions under the AEDPA because, "[g]iven the nature of *Brady*

claims, petitioners often may not be at fault for failing to raise the claim in their first habeas petition.” *Lopez*, 577 F.3d at 1064.

In *Lopez*, the Ninth Circuit recognized that pre-AEDPA rules allowed petitioners to raise *Brady* claims in a second-in-time petition so long as the claim would not constitute an abuse of the writ under pre-AEDPA rules. *Lopez*, 577 F.3d at 1064 (citing *Strickler*, 527 U.S. at 296). The *Lopez* court recognized the interests of finality reflected in the AEDPA, but concluded that “foreclosing all federal review of meritorious claims that petitioner could not have presented to a federal court any sooner” was “certainly not an AEDPA goal.” 577 F.3d at 1065. Although the *Lopez* court ultimately found that the *Brady* challenge to Ms. Lopez’s conviction lacked merit because the petitioner had failed to establish the materiality of the suppressed evidence, 577 F.3d at 1066, the Ninth Circuit left open the “question whether *Panetti* supports an exemption from § 2255(h)’s gatekeeping provisions for meritorious *Brady* claims that would have been reviewable under the pre-AEDPA prejudice standard.” *Lopez*, 577 F.3d at 1068. The Ninth Circuit also recognized the potential for review under the Due Process Clause for outrageous government conduct, but held that the requested remedy of dismissal of the indictment would be inappropriate given the lack of prejudice to the defense. *Lopez*, 577 F.3d at 1068-69 (citing *United States v. Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991), and *Kojayan*, 8 F.3d at 1324-25).

Since *Lopez*, the Supreme Court has explicitly recognized that the AEDPA incorporates pre-AEDPA equitable limitations on literal application of its restrictions. In *Holland v. Florida*, the Supreme Court held that the one-year statute of limitations under the AEDPA incorporated equitable tolling. 560 U.S. 631, 648-49 (2010). “The importance of the Great Writ, the only writ explicitly protected by the Constitution, Art. I, § 9, cl. 2, along with congressional efforts to

harmonize the new statute with prior law, counsels hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open." *Holland*, 560 U.S. at 649. This case presents exactly such a "strong equitable claim."

In keeping with *Holland* and the reasoning of *Lopez*, the Supreme Court held in *McQuiggin v. Perkins* that the miscarriage of justice exception, "to overcome various procedural defaults," survived the AEDPA. 133 S. Ct. 1924, 1931 (2013) (holding the actual innocence exception applied to the AEDPA's statute of limitations). In adopting the general equitable authority of the courts to do justice, the Supreme Court reiterated its reasoning in *Holland*: "[E]quitable principles have traditionally governed the substantive law of habeas corpus," *Holland* reminded, and affirmed that "we will not construe a statute to displace courts' traditional equitable authority absent the clearest command." *McQuiggin*, 133 S. Ct. at 1934; *see also Maples v. Thomas*, 132 S. Ct. 912, 927 (2012) (quoting *Dretke v. Haley*, 541 U.S. 386, 393 (2004)) (confirming that "fundamental fairness [remains] the central concern of the writ of habeas corpus" because the "cause and prejudice" requirement sufficiently protects interests of finality and comity); *Boumediene v. Bush*, 553 U.S. 723, 780 (quoting *Schlup v. Delo*, 513 U.S. 298, 319 (1995)) (Habeas "is, at its core, an equitable remedy."); 28 U.S.C. § 2243 (directing that, in habeas corpus cases, "[t]he court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.").

Applying the three *Lopez* factors and the direction to apply equitable principles with a focus on fundamental fairness, this Court should grant relief under the habeas corpus statutes. First, literal interpretation of the AEDPA's procedural limitations would work a manifest injustice, not only insulating governmental suppression of exculpatory evidence from judicial review, but

leaving on the record false testimony upon which this Court relied. The pervasive nature of the *Brady* violation rendered counsel not only ineffective but functionally useless to accomplish the basic purposes of representation. Further, the prosecutor's rebuttal argument expressly adopted the agents' testimony and denounced the defense in a manner that – with the true facts – would have been untenable. The Court expressly referenced the “spurious allegations” in Mr. Orantes-Arriaga's testimony to increase the calculation of his offense level. And the challenge is to a sentence to life in prison without parole, a uniquely harsh punishment the Supreme Court has said “shares some characteristics with death sentences that are shared by no other sentences.” *Graham v. Florida*, 560 U.S. 48, 69 (2010). The purposes of habeas review are well served by this Court reconsidering rulings that were made in reliance on false governmental testimony and considering anew the validity of the sentence and conviction.

Second, the purposes of the AEDPA are fully served by the grant of habeas corpus relief in this case. The application of habeas corpus relief here implicates none of the comity issues involved in reviewing a state court conviction. In fact, the Court could assert its ancillary jurisdiction given its reliance on false testimony and representations by the government during the course of these federal proceedings. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380 (1994) (recognizing the courts' ancillary jurisdiction to “enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees”). Because the government has yet to formally come clean, the interests in finality are minimal – the government has not volunteered exculpatory information, identified it to the Court, and acknowledged its error. *See Chapman*, 524 F.3d at 1088 (the government's “conduct and its failure to own up to its actions” supported dismissal of the indictment). And application of the AEDPA

should be especially limited because the offense, trial, and sentencing all preceded the enactment of the statute.

Third, this case would easily be reviewable under pre-AEDPA jurisdictional rulings on miscarriages of justice and cause-and-prejudice. The government had sole possession of the *Brady* material and never revealed it to the defense. The government benefited from its false testimony by avoiding further investigation and discovery, foreclosing pretrial litigation regarding the extent of DEA and Customs Service involvement in investigations that led to brutal torture, and precluding cross-examination at trial that would have corroborated Mr. Orantes-Arriaga's testimony while thoroughly impeaching the testifying agents. At the same time, suppressing the exculpatory evidence left the defense without the wherewithal to avoid trial and reach a reasonable resolution. Prior to the AEDPA, no procedural bar would insulate the government's unfair and prejudicial conduct from judicial review.

3. *By Granting The Sentence Reduction, The Court Would Impose A Sentence Sufficient But Not Greater Than Necessary To Accomplish The Purposes Of Sentencing.*

Mr. Orantes-Arriaga has served over 26 years of actual incarceration under extremely harsh conditions. As a Guatemalan unprotected by dominant prison organizations, Mr. Orantes-Arriaga has been the victim of assaults by other prisoners, most recently in 2009. A series of life-threatening assaults have exacerbated the psychological price of his Mexican torture. These severe attacks include:

- March 12, 2009, Coleman, Florida: stab and slash wounds to the right neck, jaw, cheek, shoulder, upper chest, belly, and head. Sealed Exhibit N.
- March 19, 1999, Atlanta, Georgia: stab wound to the right eye and concussion. Sealed Exhibit O.

- March 21, 1996, Lompoc, California: multiple stab wounds to left chest and back area with “his most severe and final stab wound to the left head and the weapon was left imbedded in his head,” with diagnosis of traumatic brain injury. Sealed Exhibit P.

Despite these traumatic incidents that have produced lasting physical and psychological effects, making him even more vulnerable, Mr. Orantes-Arriaga has participated in programming and has only thirteen relatively minor write-ups. Sealed Exhibit Q.

The Court should reduce the sentence originally imposed to a term of imprisonment of 360 months, which would constitute a sentence sufficient but not greater than necessary to achieve the purposes of sentencing under 18 U.S.C. § 3553(a). Mr. Orantes-Arriaga should be permitted to be released to his immigration detainer for removal from the United States to Guatemala to live out his life after 26 years in some of the most onerous prison conditions. With good time credits, he has served the equivalent of a 30 year sentence. The multiple stabbings he has endured – including one that sent him to the emergency room with the weapon still embedded in his skull – have left him physically and mentally impaired, which alone provides a basis for ameliorating his sentence. But perhaps the most aggravated form of his punishment is that he has spent decades in prison knowing that his prosecutors convinced the world he was a liar, when all his efforts at trial were to expose the brutal torture he experienced.

In the context of the fundamental constitutional violations that permeated the underlying proceedings that led to a true life sentence, this Court should avoid perpetuating the constitutional violations in the original proceedings by providing relief under Amendment 505 or through the writ of habeas corpus. The broad application of ameliorative sentencing discretion in the present case is especially appropriate given the uniquely extreme penalty of life without parole. Federal

life sentences are exceedingly rare in the post-*Booker* era. In 2013, life sentences were imposed in “less than one-third of one percent of all drug trafficking cases,” almost always when the criminal enterprise included murder, and usually (50 percent of the time), for offenders with significant criminal history falling within categories IV through VI. United States Sentencing Commission, *Life Sentences in the Federal System* 4, 8 (February 2015). Mr. Orantes-Arriaga does not fit within that framework. Although his present offenses were serious, Mr. Orantes-Arriaga had a single prior conviction before this conspiracy that places him in Criminal History Category II, and no threats of violence reached fruition. And under the pre-Guidelines system in effect at the outset of the conspiracy, Mr. Orantes-Arriaga would have been eligible for parole after ten years, with parole mandatory after 30 years. 18 U.S.C. §§ 4205(a) and 4206(d).

Related to the greater availability of below-guideline sentences post-*Booker* was a sharp decline in jury trials. Only 2.5 percent of defendants went to trial in drug trafficking cases in 2013, compared to 9 percent in 1995. Compare U.S.S.C., *Federal Sentencing Statistics 2013, Oregon*, at 6 with U.S.S.C., *Federal Sentencing Statistics 1995, Oregon*, at 6. Federal offenders who go to trial are likely to spend nearly three times as long in prison compared to offenders who plead guilty. Statistically speaking, Mr. Orantes-Arriaga would have been much more likely to reach a pretrial resolution if he were prosecuted today, with a corresponding likelihood of a much lower sentence. Further, former Attorney General Eric Holder has discouraged overly severe consequences for exercise of trial rights.

Which leads to the remedial role of this motion. We cannot know for sure exactly what would have occurred had the government come forward with the exculpatory information earlier. But we have an excellent idea from the declarations of defense counsel that a resolution would

have been much more likely and that a life sentence would have been unlikely. If Mr. Orantes-Arriaga had been able to benefit from acceptance of responsibility, the retroactive reduction in the base offense level and the negation of the obstruction adjustment would reduce the bottom of the guidelines range to 324 months at Criminal History Category II and total offense level 40.

Mr. Orantes-Arriaga has family in Guatemala and believes he could support himself there. Although he has some disciplinary write-ups, his prison record is remarkably good for someone with so much time in such hard places. The sentence to die in prison, in light of his suffering, the extended time already served, and the constitutional violations that permeated his case, constitutes a miscarriage of justice this Court should remedy with a sentence reduction to a term of 360 months in prison.

Conclusion

For the foregoing reason, the defense respectfully requests that the Court grant his motion to reduce the sentence to 360 months under Amendment 505, or, in the alternative, vacate his sentence and resentence him to a term of imprisonment of 360 months, or, in the second alternative, vacate the conviction, order full discovery, and hold a hearing to determine whether the indictment should be dismissed in the exercise of the Court's supervisory power or under the Due Process Clause.

Respectfully submitted this 3rd day of November, 2016.

/s/ Stephen R. Sady

Stephen R. Sady

/s/ Elizabeth G. Daily

Elizabeth G. Daily

Attorneys for Defendant