Multiple Documents

Part	Description
1	Main Document
2	Exhibit Exhibits 1-4
3	Exhibit Exhibits 5-9
4	Exhibit Exhibits 10-14

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, - vs - MICHAEL RAY AQUINO, Defendant.	Criminal No. 05-0719 (WHW)

SENTENCING MEMORANDUM OF DEFENDANT MICHAEL RAY AQUINO

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INTRODUCTION[1]

Defendant Michael Ray Aquino ("MRA") pleaded guilty to a one-count superseding information charging him with the unlawful retention of two government documents relating to the national defense of the United States, in violation of 18 U.S.C. §§ 793(e) and 2. PSR ¶ 2. MRA fully accepts responsibility for having violated the law by retaining government documents he should not have possessed, and understands that he will be punished for his conduct. The government and the Probation Office, however, seek to have the Court impose an even more severe sentence based upon three categories of conduct which are not properly considered by the Court.

First, the government seeks to punish MRA because of his political views, i.e., because he personally opposed the fraudulent administration of Philippines President Gloria M. Arroyo. It is undoubtedly against the law to retain U.S. government documents. That crime, however, is not a more serious offense because it was related to the defendant's political views.

Second, the Probation Office has included in the final Presentence Investigation Report ("PSR") reams of information that is unrelated to MRA, allegations of misconduct in the Philippines that are politically motivated, unsubstantiated, and irrelevant, and a sentencing guidelines analysis that is fundamentally flawed

[1] Counsel will be filing a separate non-legal memorandum prior to sentencing summarizing the many letters submitted on MRA's behalf and discussing MRA's personal background.

and internally inconsistent. MRA has the right to hold the government to its burden of proving these allegations by a preponderance of the evidence, and to be afforded the resources necessary to defend against such allegations. Accordingly, if the Court intends to take such allegations into consideration in imposing sentence, MRA's sentencing must be adjourned until he has been afforded a full and fair opportunity -- including the resources and discovery needed -- to oppose the government.

Third, the government asks the Court to depart upward, and impose the statutory maximum sentence, based upon its claim that MRA's conduct could have harmed the Nation's security. The government's argument in this regard ignores the fact that, in drafting Subpart 3 of Section 2M of the Sentencing Guidelines, the Sentencing Commission expressly presumed that the offense to which MRA pleaded guilty actually harms national security, and encouraged only a downward departure where -- as here -- the harm caused was less than that in a heartland case. The defense has a right to oppose the government's request for an upward departure, and to argue for a downward departure, with the assistance of an expert who is qualified -- and who is provided the discovery necessary -- to assess the government's claims and the issues before the Court. Accordingly, if the Court intends to take such allegations into consideration in imposing sentence, MRA's sentencing must be adjourned until he has been afforded a full and fair opportunity to develop his sentencing defense in this regard, as well.

I. BACKGROUND

MRA arrived in the United States in 2001, on a tourist visa, and was followed by his wife, Fatima, and their 5-year old son, Raphael Ray. Political turmoil had erupted in the Philippines following the ouster of Joseph Estrada as the President of the Philippines in January of that year. Supporters of the newly installed President, Gloria M. Arroyo ("GMA" or "Arroyo"), sought to arrest those officials who had worked in the Philippines National Police ("PNP") and the Presidential Anti-Organized Crime Task Force ("PAOCTF") while Estrada was president, believing that such measures would secure GMA's presidential position.

Arroyo's administration sought to harm MRA by falsely implicating him and others in various crimes, including the alleged kidnapping and murder of two persons ("Dacer & Corbito") in the Philippines. MRA, who had left the Philippines, chose not to return when it became clear that he would be the subject of politically motivated prosecutions. It is generally recognized that the persecution and killing of political opponent is endemic to the Arroyo Administration. See Exhibit 12 (Economist articles reporting that "[p]olitical murder has become worryingly routine" under the Arroyo Administration).

Following his family's arrival in the United States in 2001, MRA set out to start his life anew by enrolling in Phillips Beth Israel School of Nursing in New York City. Relying on the emotional and financial support of friends and family, as well as

partial scholarships that he earned, MRA successfully completed his schooling over the course of two years, and passed his nursing exams in July 2004.

Like most immigrants, MRA retained an intense interest in events taking place in his homeland. In particular, MRA was opposed to the continued rule of Gloria Arroyo, and personally desired that her unlawful conduct would be made public so that her administration would come to an end. He also maintained personal relationships with those family, friends, and colleagues left behind, many of whom shared his political views.

MRA, who had previously applied both for an extension to his tourist visa and for a student visa, received notice in March 2004 that both applications were denied because, unbeknownst to him, his passport had been canceled in August 2001 by officials in the Philippines, notwithstanding a 2005 expiration date. He appealed the denial and sought to rectify the premature cancellation of his passport. In fact, his passport had been arbitrarily canceled by the Arroyo administration in violation of Philippine law and, consequently, was reinstated in September 2004.

While his appeal of the visa denials was pending, MRA interviewed with, and received a job offer from, the New York Eye & Ear Hospital ("NYEEH"). NYEEH then sponsored MRA and applied for an employment visa on his behalf. This employment visa was approved in December 2004, but not immediately issued. MRA then

applied for a temporary employment visa so that he could work legally in the United States pending the issuance of a full visa.

On March 7, 2005, MRA appeared at the U.S. Citizenship and Immigration Services ("USCIS") offices at 26 Federal Plaza in New York City, for his interview for the temporary employment authorization card. When he arrived, MRA was detained by Immigration and Customs Enforcement ("ICE") agents on the basis that he was alleged to have been implicated in various crimes in the Philippines.

Fatima Aquino, desperately seeking help in locating the facility where MRA was being detained, called Leandro Aragoncillo ("LA"), with whom she was acquainted and who, she understood, worked for the U.S. government. LA learned that MRA had been taken to the Passaic County Jail. The following day, at MRA's court appearance, LA spoke to the ICE agents investigating the matter and asked that MRA be treated fairly because of his law-enforcement background. On March 28, 2005, MRA was released on bail.

MRA first spoke to Aragoncillo in the Spring of 2002, having been introduced by a mutual friend, JV Ejercito, the son of former Philippines President Joseph Estrada, as someone who could help if MRA had problems adjusting in the United States. MRA again spoke to LA around Christmas when they exchanged holiday greetings and LA asked to meet for lunch in New York. On December 26, 2002, LA came to New York with two neighbors and had lunch with the Aquinos and other family. MRA did not see LA again until March 8, 2005, when

LA appeared in the immigration courtroom at the request of Fatima Aquino.

In the interim, MRA and LA spoke on the telephone on January 1, 2005, when MRA called to extend New Year's wishes to him. At that time, LA told MRA that he was training at the FBI, and asked whether he could introduce him to Philippine Senator Panfilo M. Lacson ("SPML" or "Lacson"), a personal friend, former superior, mentor, and father figure to MRA. LA told MRA that two men who had been convicted in the Philippines of killing U.S. Colonel James Rowe in the late 1980s, were scheduled to be released. LA hoped Lacson could assist the United States in preventing their release. The next day, January 2, 2005, MRA sent an email to SPML introducing LA and conveying information about the Philippines that LA had shared orally during their conversation.

Between January 2, 2005 and March 8, 2005, LA sent several emails to Senator Lacson containing U.S. government documents, copying MRA. Attached to some of these unsolicited emails were copies of U.S. government documents that LA apparently had retrieved from FBI databases he was able to access because of his government employment. Portions of the information contained in these documents was already public knowledge in the Philippines. For example, the January 31, 2005 document identified in MRA's guilty plea colloquy addressed discontent within the Philippines military and the desire of some to overthrow President Arroyo, information that was widely reported in the Philippine newspapers

and on-line in numerous articles on January 13, 17, and 28, 2005. See Exhibit 1. Similarly, the February 22, 2005 document addressed alleged terror threats in the Philippines, information that was announced by the United States via travel advisories, see Exhibit 2, and reported in Philippine newspapers and on-line in multiple articles on February 19, 2005. See Exhibit 3.

The documents attached to LA's emails did not contain any classification markings, which LA had removed. Nevertheless, MRA understood that these were U.S. government documents and that he was not authorized to possess them. MRA did not transmit the documents at issue to another individual. Rather, MRA's offense was that he retained documents he was not authorized to possess, and his Rule 11 guilty plea colloquy was limited to questions establishing a factual basis for that offense. See Exhibit 4.

Why was MRA interested in the information provided by Aragoncillo? Most certainly it was not because of the national defense information content. Rather, MRA -- although having moved to the United States to start a new life with his family -- remained intensely interested in the political situation in his homeland, in the same way that most immigrants to this country retain an interest in the countries they have left behind. MRA was opposed to President Arroyo, who many in the Philippines believe usurped the presidency by way of fraud, and who has ever since persecuted her opposition in general, and MRA in particular. Although MRA read the documents he stands convicted of having

unlawfully retained, he never had the intent to injure the United States, a fact the government does not dispute, nor did he retain the information for the purpose of harming the United States. In fact, the government struggles mightily to articulate any actual harm caused to national security by MRA's conduct.

Indeed, during this exact same time frame, MRA met with the FBI in Norfolk, Virginia, namely Special Agent John Harley, in order to help the FBI capture Khadafi Janjalani, who was the leader of the Abu Sayyaf Group, a Philippines-based terrorist group with links to al Qaeda. See Exhibit 5. Until he was killed on September 4, 2006, Janjalani was on the FBI's "Most Wanted Terrorists" list, and information leading to his capture carried a financial reward. See Exhibit 6. MRA provided the FBI with information based upon contacts he had established while he, himself, was attempting to capture Janjalani when he was with the PNP. Thus, although he admittedly was interested in the reward, his efforts and assistance, requested by the U.S. government, preceded the establishment of the reward.

The facts set forth above are not an excuse but, rather, an explanation for why MRA acted as he did. Although MRA recognizes that he must be punished for his actions, his sentence should be mitigated by the fact that the information in question was, to some extent, already publicly available, did not cause demonstrable harm to the United States, and was not retained for the purpose of harming the United States. In addition, MRA played at most a minor

role in the offense relative to Aragoncillo, an admitted traitor who knowingly and willfully devised and executed a scheme to betray the United States that lasted from at least early 2000 until his arrest in September 2005. The notion advanced by the government that Aquino "recruited" Aragoncillo, and not vice versa, is preposterous. Indeed, LA's betrayal of the United States began on July 27, 2000, see Exhibit 7 (LA Rule 11 Tr. at 40-41), almost a year before MRA arrived in the United States. As discussed below, MRA's role in offense conduct was far more limited both temporally and substantively than LA's, and his knowledge of LA's broader scheme was nonexistent.

II. APPLICATION OF THE UNITED STATES SENTENCING GUIDELINES

1) Applicable Chapter Two Guideline

Appendix A of the Sentencing Guidelines provides that violations of 18 U.S.C. § 793(e) are punishable under either U.S.S.G. § 2M3.2 -- base offense level of 30 -- or U.S.S.G. § 2M3.3 -- base offense level of 24. The Court must decide which of the two guidelines applies.

Defense counsel firmly objected to the Probation Office's choice of U.S.S.G. § 2M3.2 in the draft PSR. The Probation Office added to the final PSR a more-detailed explanation of its guideline analysis from which even the government has distanced itself. See Gov't Sentencing Mem. at 60. Nevertheless, the government argues that the more severe guideline applies for flawed reasons of its own, specifically, because MRA -- it is asserted -- engaged in

"gathering" national defense information, and not simply "retention" of national defense information. See id. at 60-67.

A. The Government's Choice-of-Guideline Analysis

The government has erred by encouraging the Court to consider conduct beyond offense-of-conviction conduct in choosing between the two potentially applicable Chapter Two guidelines:

> First, Section 1B1.1 directs the court to "[d]etermine, pursuant to § 1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction."
>
> Second, Section 1B1.2(a) defines "offense of conviction" as "the offense conduct charged in the count of the ... information of which the defendant was convicted." See United States v. Pressler, 256 F.3d 144, 157 n.7 (3d Cir. 2001) (concluding that the phrase "offense of conviction" "includes only the facts underlying the specific criminal offense for which the defendant was convicted," a narrower class than relevant conduct).
>
> Third, where, as here, more than one Chapter Two guideline is referenced in the Statutory Index contained in Appendix A, the commentary to Section 1B1.2 directs that "the court will determine which of the referenced guideline sections is most appropriate for the offense

> conduct charged in the count of which the defendant was convicted." U.S.S.G. § 1B1.2, comment. (n.1).

Thus, the Guidelines clearly provide that only the conduct charged in the count of conviction -- the count to which the defendant actually pleaded guilty -- can inform the Court's choice of the applicable Chapter Two guideline. See United States v. Sromalski, 318 F.3d 748, 750 (7th Cir. 2003) ("When more than one guideline potentially covers an offense defined in a single statute, the district court must select the most appropriate guideline based upon the nature of the conduct charged in the count for which the defendant was convicted.") (emphasis added) (citing U.S.S.G. § 1B1.2 cmt. (n.1); United States v. Principe, 203 F.3d 849, 851 (5th Cir. 2000)); United States v. Dion, 32 F.3d 1147, 1148-49 (7th Cir. 1997) (same); United States v. Jennings, 991 F.2d 725, 733 (11th Cir. 1993) (same).

Applying these binding instructions correctly, the Court's choice of Chapter Two guideline is limited to a consideration of the offense conduct actually charged in the Superseding Information, which constitutes the entirety of the "offense conduct ... of which the defendant was convicted." Here, the Superseding Information charged that MRA:

> having unauthorized possession of, access to, and control over documents writing and notes relating to the national defense of the United States ... did knowingly and willfully retain and fail to deliver such documents, writings, and notes to an officer

> and employee of the United States entitled to receive them, [in violation of 18 U.S.C. § 793(e)].

See Exhibit 8 (Superseding Information) (emphasis added). Contrary to the government's suggestion, the Superseding Information did not charge MRA with gathering national defense information and, hence, the defendant was not convicted of such conduct.

Indeed, Section 793(e), the statute which MRA admitted violating, does not even encompass "gathering" national defense information. Rather, that statute covers only unlawful transmission (which the government does not allege), and retention (which MRA admits). Specifically, Section 793(e) provides in relevant part as follows:

> Whoever having unauthorized possession of, access to, or control over any document ... relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it [is subject to a punishment not to exceed 10 years in prison].

Thus, by its plain terms, Section 793(e) does not even encompass the "gathering" of national defense or classified information. Other statutes do, but MRA did not plead guilty to them. See 18 U.S.C. §§ 793(a)-(c) (separately criminalizing the gathering of national defense information).

Indeed, as the Court providently placed on the record at MRA's guilty plea hearing, the government expressly promised in the parties' plea agreement that it would not pursue any possible charges against MRA for "gathering" national defense or classified information, in return for his guilty plea to the single charge of unlawful retention. See Exhibit 4 (MRA Rule 11 Tr. at 8-9). The word "gather" was used exactly one time at MRA's Rule 11 hearing, and for the limited purpose of clarifying that MRA had not pleaded guilty to, and would not later be prosecuted for, the separate offense of "gathering" information. Thus, the government itself clearly distinguished between the conduct to which MRA pleaded guilty (retention) and that which was outside the scope of his guilty plea (gathering). Hence, it is quite clear that MRA was not convicted of "gathering" national defense information as the government now claims.

The fact that MRA did not plead guilty to "gathering" national defense information is critical because it is the sole premise for the government's flawed choice of U.S.S.G. § 2M3.2. The government is simply wrong that such non-offense-of-conviction conduct can support the selection of U.S.S.G. § 2M3.2. The only Chapter Two guideline applicable to the offense of conviction is U.S.S.G. § 2M3.3.

B. The PSR's Choice-of-Guideline Analysis

Unlike the government, the Probation Office effectively concedes that the Court is required to choose U.S.S.G. § 2M3.3 in

the first instance. However, it recommends application of the more severe guideline, Section 2M3.2, by relying upon a cross-reference in Section 2M3.3, commentary note 2, which provides:

> If the defendant was convicted of 18 U.S.C. § 793(d) or (e) for the willful transmission or communication of intangible information with reason to believe that it could be used to the injury of the United States or the advantage of a foreign nation, apply 2M3.2

PSR ¶ 247 (emphasis added). The draft PSR offered no explanation as to why this cross-reference was applied. Such an explanation was necessary because, as the government concedes, the defendant did not plead guilty to, and hence "was [not] convicted of 18 U.S.C. § 793(d) or (e) for the willful transmission or communication of intangible information."

In its addendum to the final PSR, the Probation Office candidly admits that its application of the cross-reference was not premised upon offense-of-conviction conduct but, rather, the entirety of "relevant conduct" alleged by the government, including conduct outside the scope of the parties' plea agreement and the defendant's guilty plea. See PSR, Addendum at 95 ("Thus, we took into consideration the entire scope of Aquino's activities, as described in the charging information, as well as those delineated in the original indictment."). The U.S. Sentencing Commission, however, made clear in the language of the cross-reference that the only conduct "relevant" to a determination of the cross-reference's applicability is offense-of-conviction conduct.

Inasmuch as even the government does not argue that "the defendant was convicted ... for the willful transmission or communication of intangible information," the question for the Court's determination is this:

> May the Court consider non-offense-of-conviction conduct in determining whether to apply the cross-reference contained in the commentary to Section 2M3.3?

The general rule is that relevant conduct may be considered in determining whether a commentary cross-reference applies. See U.S.S.G. § 1B1.2 comment. (n.2). The general rule does not apply, however, where -- as here -- the plain language of the guideline provision makes clear that the scope of conduct relevant to the applicability of the cross reference is limited to offense-of-conviction conduct. Specifically, the commentary to U.S.S.G. § 1B1.1 states that the term "'Offense' means the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context."[2]

The cross-reference contained in Section 2M3.3 plainly specifies a different meaning. As quoted above, the plain language of the cross-reference limits the Court's analysis to conduct of which "the defendant was convicted." See United States v. Norris,

[2] The Probation Office hypothesizes that this definition only applies to Chapter Three adjustments. See PSR, Addendum at 97. There is no basis for this novel theory; the definitions contained in Chapter One apply to the entire Guidelines Manual. See U.S.S.G. § 1B1.1, comment. (n.1) ("The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement.").

159 F.3d 926, 929 (5th Cir. 1998) ("Just as in the case of interpreting a statute, when interpreting a provision of the ... guidelines our starting point is the text of that provision."); United States v. O'Callaghan, 106 F.3d 1221, 1223 (5th Cir. 1997) ("In interpreting the Sentencing Guidelines, this court conducts a plain-meaning approach."). Even though a court may consider "relevant conduct" for certain purposes in calculating a defendant's sentencing exposure under the Sentencing Guidelines, a defendant does not become "convicted" of that conduct; rather, a defendant is only "convicted" of the conduct charged in the government's charging instrument and admitted at a Rule 11 hearing. Because the cross-reference in Section 2M3.3 expressly limits the Court to that conduct for which "the defendant was convicted," Section 1B1.3 "relevant conduct" may not be considered in determining whether the cross-reference to U.S.S.G. § 2M3.2 applies. See United States v. Pojilenko, 416 F.3d 243, 248 (3d Cir. 2005) (holding that relevant conduct cannot be considered in applying adjustments if the provision at issue "otherwise specifies" that the conduct the Court may consider is limited to the offense of conviction). See also United States v. Hargrove, __ F.3d __, 2007 WL 547745, at *3 (4th Cir. 2007) ("[F]or purposes of [U.S.S.G.] § 3E1.1, 'offense' is not synonymous with 'relevant conduct,'" citing definition of "offense" contained in the commentary to U.S.S.G. § 1B1.1); United States v. Boudreau, 250 F.3d 279, 285 (5th Cir. 2001) (holding that district court erred in

considering relevant conduct to determine application of upward adjustment because "under the narrow scope" of the applicable guideline language "the term 'offense' did not include relevant conduct," under the definition contained in the commentary to U.S.S.G. § 1B1.1). Stated otherwise, the cross-reference in the commentary to Section 2M3.3 applies only if the conduct of which "the defendant was convicted" supports application of the more severe guideline. In this case, it does not.

Here, the government charged MRA in a one-count Superseding Information with the unauthorized retention (not transmission) of tangible (not intangible) information, specifically, two documents containing information relating to the national defense, in violation of 18 U.S.C. § 793(e). Regardless of what other conduct the government might (or might not) be able to prove by a preponderance of the evidence, this is the only conduct to which MRA pleaded guilty and, hence, the only conduct of which "the defendant was convicted," as that phrase is used both in Section 1B1.2(a), and the commentary to Section 2M3.3.

In sum, MRA "was convicted" of retaining documents he was not authorized to possess, nothing more. Hence, both the government and the Probation Office have erred by proposing application of U.S.S.G. § 2M3.2. The Court should not be misled by them into a serious error, which would result in the imposition of a sentence far more severe than the one recommended by the Sentencing Guidelines, or warranted by MRA's actions. Rather, the Court

should apply U.S.S.G. § 2M3.3, as envisioned by the Sentencing Commission.

2) Scope Of Relevant Conduct

The final PSR is burdened with a substantial amount of information that bears no relation to the Court's sentencing of MRA. As discussed above, the offense of conviction conduct is limited to MRA's unauthorized retention of government documents. No effort whatsoever is made by the government or the Probation Office to distinguish among conduct undertaken by MRA personally, possible "jointly undertaken criminal activity," and activity that bears no relation to MRA. See U.S.S.G. § 1B1.3(a)(1). In light of the fact that the "offense of conviction" conduct is exceedingly limited, a clear delineation of the "acts and omissions" committed by MRA himself, see United States v. Abrogar, 459 F.3d 430 (3d Cir. 2006), and of the alleged "jointly undertaken criminal activity," is critical, especially because a defendant's relevant conduct "does not include conduct of members of a conspiracy prior to the defendant's joining the conspiracy, even if the defendant knows of that conduct." 1B1.3, comment. See United States v. Turner, 400 F.3d 491, 499-500 (3d Cir. 2005).

Here, the government appears to believe -- and the Probation Office apparently endorses the view -- that the applicable "jointly undertaken criminal activity" is the attempted overthrow of the Philippines government. MRA denies having joined with LA and others to overthrow the Philippines government by force of arms.

Certainly the government is not claiming that all organized political opposition to the fraudulently elected President of the Philippines is "jointly undertaken criminal activity," or that the expression of one's political views is illegal. Indeed, political opposition is constitutionally protected in this country and not "criminal" activity at all. Roth v. California, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."). Nor is plotting to overthrow a foreign government in and of itself against U.S. law; conduct that does not violate U.S. law is not relevant conduct at all. See Abrogar, supra.

Moreover, there is a clearly defined limit to the jointly undertaken criminal conduct that can be considered by the Court at sentencing. Specifically, Section 1B1.3(a)(1)(B) provides that relevant "jointly undertaken criminal activity" is limited to those "reasonably foreseeable" acts and omissions "that occurred during the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." Here, plotting to overthrow the Philippines government is not the jointly undertaken criminal activity which MRA admitted at his plea hearing. Rather, the relevant jointly undertaken criminal activity is, at most, LA's forwarding of government documents to MRA, and his retention of those documents.

Nevertheless, over the defendant's objection, the PSR includes a detailed description of conduct that is not "offense conduct" within the meaning of the Sentencing Guidelines, upon which the government relies, including:

1) Conduct by LA that predates January 2, 2005, see ¶¶ 53-76, 90-105;

2) Other conduct by LA that MRA had nothing to do with, see ¶¶ 4-8, 152-155, 199-216, 229-238;

3) The Dacer-Corbito Murder allegations;

4) The Kuratong-Baleleng Massacre allegations;

5) The Dumlao Affidavits;

6) The Jose Pidal Scandal;

7) The "Hello Garci" Scandal;

8) The Storming of Malacanang Palace; and

9) The Oakwood Mutiny.

In response to defense counsel's objection, the Probation Office seeks to justify inclusion of this information in the PSR as relevant "background" information, and by pointing out that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a defendant for the court's consideration in imposing sentence." See PSR, Addendum at 108. The areas cited above, however, are not included in a "Background" section of the PSR, or in Part B ("Criminal History") or Part C ("Offender Characteristics") of the PSR. Rather, this conduct is included as a substantive part of the "Offense Conduct" section of the final PSR.

Yet, these allegations are not properly included in the PSR even as background information. They are not necessary to understand the offense of conviction or any possible relevant conduct the Court might consider in imposing sentence. Moreover, the Probation Office is wrong that there are no limits to the information that can be considered at sentencing. The Third Circuit has expressly held that when a defendant has pled guilty to certain counts of an indictment in exchange for dismissal of other counts, the facts used for sentencing must have "some minimal indicium of reliability beyond mere allegation," and "must, either alone or in the context of other available information, bear some rational relationship to the decision to impose a particular sentence." United States v. Baylin, 696 F.2d 1030, 1040 (3d Cir. 1982). Indeed, the court's ability to consider information at sentencing is circumscribed by considerations of due process, including considerations related to the accuracy of information considered when imposing a sentence. United States v. Harris, 558 F.2d 366, 373 (7th Cir. 1977).

None of the conduct listed above is established by reliable evidence, nor does it bear any rational relationship to the sentencing decision the Court is required to make. Consequently, not only does such conduct fall outside the definition of relevant conduct but, in addition, it may not otherwise be considered by the Court in imposing sentence. If the Court intends to rely upon such conduct in imposing sentence, then the government must prove each

and every act by a preponderance of the evidence, and the defendant must be given the resources necessary to defend against them. Otherwise, the referenced paragraphs should be struck from the PSR, and disregarded by the Court.

3) "Aquino's Denial of the Offense of Conviction"

The Probation Office appears to take offense at the fact that defense counsel's objections to the draft PSR were quite critical of the Probation Office's analysis and recommendations. First, even the government has abandoned the Probation Office's guidelines analysis because it was so obviously flawed. Second, the unavoidable truth is that a man's liberty is at stake, and the Probation Office -- for better or worse -- plays a critical role in advising the Court on how much liberty should be lost. Under such circumstances, it seems fair to demand that at very least the Probation Office analyze fundamental concepts correctly.

For example, the Probation Office, in its Addendum to the PSR, includes a section entitled "Aquino's Denial of the Offense of Conviction," in which the Probation Office asks the Court to reconsider granting a three-level reduction for "Acceptance of Responsibility" on the grounds that MRA has denied the "offense of conviction." Specifically, the Probation Office focuses on the fact that defense counsel denied the repeated but erroneous suggestion in the draft PSR that MRA pleaded guilty to the knowing possession of classified documents:

> Counsel repeatedly denies, ten separate times, that Aquino knew the documents and information he received from Aragoncillo were classified or protected. However, counsel cannot make such representations without jeopardizing the award of acceptance of responsibility under U.S.S.G. § 3E1.1. These denials are in direct contradiction to admissions Aquino made at his guilty plea.

PSR, Addendum at 103. As discussed above, MRA pleaded guilty to the unauthorized retention of national defense information. The classified nature of the documents is not an element of the offense and, hence, not a part of the offense of conviction.

For that reason, contrary to the Probation Office's assertion, MRA was not required to admit, and did not admit, at his Rule 11 colloquy that he knew the documents were classified at the time he possessed them. Rather, MRA admitted that the government could prove at trial that the documents were classified at the "Secret" level, a fact that has guidelines implications regardless of whether MRA knew the documents were classified. MRA still admits that the government could prove that the documents were classified "Secret." Thus, MRA has not changed any answer offered at his Rule 11 colloquy, and does not -- in the Probation Office's words -- "den[y] the Offense of Conviction."

Although beyond the scope of the section's heading, the Probation Office also suggests that MRA's denial of contemporaneous knowledge of the classified nature of the documents constitutes a false denial of relevant conduct which might also warrant the denial of a reduction for acceptance of responsibility. As an

initial matter, the government bears the burden of proving that the denial is, in fact, false. In any event, MRA's knowledge of the classified nature of the documents is not relevant at all to the application of the Sentencing Guidelines: it is not relevant to the initial choice of Chapter Two guideline, it is not relevant to calculating the Base Offense Level or Specific Offense Characteristics, and it is not relevant to application of the cross reference in the commentary to Section 2M3.3. The only reason counsel was compelled to deny MRA's knowledge of the classified nature of the documents is because the Probation Office mistakenly but repeatedly suggested in the draft PSR that such knowledge is an element of the offense of conviction. It is not.

MRA has fully accepted responsibility for his offense. In doing so, however, he does not forfeit the right to be sentenced based upon a reliable and accurate characterization of his offense of conviction or the right to object when the PSR fails to satisfy this basic standard. Therefore, it would be unfair to deny MRA a reduction for acceptance of responsibility simply because he objected to something in the draft PSR that did not belong their in the first instance.

4) Role Adjustment

MRA also objects to the Probation Office's recommendation, and the government's assertion, that he merits a three-level aggravating role adjustment. As discussed above, the Probation Office makes no effort to consider what actually constitutes

offense conduct within the meaning of the Sentencing Guidelines. Rather, it simply accepts the government's assertion that all of the government's allegations -- dating back to 1995 and continuing to February 2006, five months after MRA was incarcerated -- are related to the offense of conviction.

As an initial matter, the Probation Office applies a double standard with respect to its role adjustment recommendation. When considering the government's request for an aggravating role enhancement, the Probation Office insists that all of the conduct listed in the PSR is "relevant conduct." However, in rejecting MRA's claim that he is entitled to a mitigating role reduction, the Probation Office limits its analysis to "Offense of Conviction" conduct. See PSR, Addendum at 102 ("Aquino was not significantly less culpable than Aragoncillo in the retention of the national defense documents, a determination necessary to the award of the role adjustment."). The use of different standards for the prosecution and the defense is both unfair and unsupportable.

In any event, the Probation Office's recommendation of a role enhancement is premised upon the government's assertion that MRA played a leadership role in a conspiracy to overthrow the Philippines government. See PSR ¶ 252. As mentioned, MRA denies joining any such conspiracy. Political opposition and the holding of minority views are not criminal acts at all. Moreover, as discussed above, a conspiracy to overthrow the Philippines government is not against U.S. law, is not the jointly undertaken

activity alleged in the indictment, and is a characterization imagined by the U.S. Attorney's Office to exaggerate the severity of MRA's conduct for purposes of sentencing. Indeed, under the circumstances of this case -- whether as characterized by the government (far-flung conspiracy) or by the defense (retention of national defense documents) -- MRA is entitled to a mitigating role reduction under U.S.S.G. § 3B1.2.

A defendant whose conviction is limited to conduct in which he "personally was involved and who performs a limited function in concerted criminal activity," is still eligible for a role reduction. U.S.S.G. § 3B1.2, comment. (n.3(A)). The factors to weigh when considering an adjustment under § 3B1.2 include: "[1] the nature of the defendant's relationship to other participants, [2] the importance of the defendant's actions to the success of the venture, and [3] the defendant's awareness of the nature and scope of the criminal enterprise." United State v. Rodriguez, 342 F.3d 296, 299 (3d Cir. 2003) (citing United States v. Headley, 923 F.2d 1079, 1084 (3d. Cir. 1991)). See United States v. Isaza-Zapata, 148 F.3d 236, 239 (3d Cir. 1998) (same). As the defendant's relative culpability is the issue under § 3B1.2, "a district court should consider the defendant's conduct under the Headley factors in relation to the other participants." United States v. Isaza-Zapata, 148 F.3d at 239.

In this case, MRA pleaded guilty to retaining two documents, one in January 2005 and the other in February 2005. Aquino

received those documents only after LA recruited him for the purpose of making an introduction to Senator Lacson. The participant who stole the documents in question, removed their classification markings, and forwarded them to SPML in the Philippines, was Leandro Aragoncillo. Indeed, LA initiated a scheme to obtain and transmit classified documents to officials in the Philippines as early as July 27, 2000. See Exhibit 7 (LA Rule 11 Tr. at 40-41). For the next 4½ years, LA transmitted documents to Philippines officials without the knowledge, involvement or assistance of MRA. MRA played absolutely no role whatsoever, and had no awareness of the scope of LA's activities prior to January 2005, or even thereafter.

At that time, nine months before MRA was arrested, LA began to send emails to Lacson, copying MRA. Those communications ceased shortly after MRA's release from ICE custody. Thus, at most, MRA was involved in LA's scheme to obtain U.S. government documents for 4 of the 62 months that LA actively orchestrated this scheme. Similarly, LA possessed many more documents than MRA. These numerical disparities alone illustrate the substantial difference between the roles that MRA and LA played in the offense conduct at issue, belies the government's assertion that MRA was a leader of the relevant conduct, and justifies a mitigating role reduction.

A consideration of the respective charges to which MRA and LA pleaded guilty also demonstrates that MRA's role was a less culpable one compared to LA and the other Philippines officials

discussed in the PSR who actively solicited LA's assistance. MRA pleaded guilty to one count of receiving two documents in violation of 18 U.S.C. § 793(e). LA, on the other hand, pleaded guilty to four counts, including willful transmission of national defense information in violation of 18 U.S.C. § 794(a), to a wide variety of Philippines officials about whom MRA had no knowledge.

Even if one concedes arguendo the government's assertion that MRA was involved in a broader conspiracy to overthrow the Philippines government, such facts simply strengthen MRA's argument that a mitigating role reduction is warranted. Under the government's theory, SPML, JV Ejercito, or Ernesto Fuentabella was the leader of such conspiracy, together with former Philippines President Joseph Estrada (even though the emails indicate that SPML had no idea that Estrada and others were scheming with LA). The government's theory -- set forth in its abandoned indictment -- was that MRA was nothing more than an agent for SPML. And, contrary to the government's absurd claim that MRA recruited LA, LA admitted at his guilty plea colloquy that he had been distributing U.S. government documents to other Philippine officials years before he recruited MRA, in order to reach SPML.

Considering all of these circumstances, the Headley factors clearly weigh in favor of a role reduction. First, LA orchestrated a 62-month scheme during which all but one of the alleged unindicted coconspirators participated concurrently with LA. In contrast, MRA was a participant with LA for four (4) months.

Second, MRA's participation in LA's scheme was not critical to the success of the venture; it thrived for 4½ years before MRA became involved and continued for five months after LA stopped copying MRA on emails to SPML. Third, MRA did not know the full extent of LA's scheme and associated deceptions. Indeed, as reflected in the PSR, LA repeatedly lied to MRA to mislead him into believing that LA's activities were known by U.S. authorities, see PSR at 138. Ultimately, MRA's role was far less significant than that of the other conspirators identified by the government who -- if the government's characterization of the evidence is to be credited -- were on the ground in the Philippines meeting and organizing a coup against President Arroyo, utilizing the information they received directly from LA.

The government cannot have it both ways. MRA denies that he conspired to unlawfully overthrow GMA. Yet, if it the government wants the Court to believe that MRA was part of a broad conspiracy to achieve that objective, then it must also fairly characterize MRA's marginal role in such an enterprise. See also Section III, infra (noting other factors supporting mitigating role adjustment). Accordingly, the Court should grant the defendant a minimal, or at least a minor, role reduction.[3]

[3] The government argues in conclusory fashion that MRA should receive a "special skill" enhancement under U.S.S.G. § 3B1.3. See Gov't Mem. at 72. MRA was not trained in foreign espionage, and there is no evidence that he used any special skill to significantly facilitate the offense.

III. OTHER OBJECTIONS, CLARIFICATIONS, AND CORRECTIONS

In addition to the objections discussed above, the following objections, clarifications, and corrections are made by reference to the paragraph numbers contained in the PSR. Defense counsel fully intends to require the government to bear its burden of proving with actual evidence each and every allegation upon which it will rely to punish MRA:

11) The classified nature of the documents provided by LA is not an element of the offense of conviction or otherwise relevant to a calculation of MRA's exposure under the Sentencing Guidelines. The documents were not marked classified, much of the information was already publicly available, and the documents' content did not inherently suggest that they were classified. For example, some of the documents at issue relate to terrorism and assassination attempts on President Arroyo (see ¶ 110), yet are not classified. Other documents deal with economic issues, yet are classified. Cf. ¶ 72, 108, 134.

11) MRA denies knowledge of LA's pilfering of Top Secret documents. The government concedes that no such documents were sent to MRA. Therefore, the claim that LA pilfered Top Secret documents is relevant to MRA only insomuch as it demonstrates that he is less culpable than LA, and entitled to a mitigating role reduction.

12) MRA objects to the allegation that LA downloaded information to support MRA's and others' goal to destabilize the

Philippines government without any reference to time frame. The PSR states that LA was downloading information long before he made contact with MRA in January 2005. MRA had no involvement with, or awareness of, LA's conduct other than their own relevant interactions which began in January 2005. Section 1B1.3 precludes consideration of such evidence as relevant conduct. MRA denies that he ever joined an unlawful conspiracy to overthrow GMA; he admits that he was hopeful that her misdeeds would be revealed and lead to her downfall.

12) The allegation that LA sought a position with the CIA at during some unspecified time frame was not known by MRA and can have no bearing on his sentence. Accordingly, the last sentence of paragraph 12 should be struck from the PSR and disregarded by the Court.

13) MRA objects to the Probation Office's routine reference in the PSR to "the defendants." MRA has never been charged together with LA, and they are not co-defendants. Indeed, even the cover page of the draft PSR states "NONE" for co-defendants. The Probation Office justifies its inclusion in MRA's PSR of extensive information relevant only to the Court's punishment of LA by claiming that it is the Probation Office's policy to prepare joint PSRs. If so -- and that has been counsel's experience in other multiple-defendant cases in the District of New Jersey -- the policy is nonetheless wrong. The Court is required to sentence each defendant as an individual based upon information relevant

only to that defendant. Information that bears no relation to the defendant being sentenced has no place in that defendant's PSR, even if it is more convenient for the Probation Office to prepare a joint report. Accordingly, the Court should direct the Probation Office to prepare a new PSR that focuses solely on MRA.

14) MRA's rise through the ranks was completely meritorious. Indeed, he was promoted to the rank of Senior Superintendent not by SPML but by the then-Chief of the PNP, General Robert Lastimoso.

15) MRA objects to the inclusion of paragraph 15 in the final PSR. MRA did not even know LA in July 2000, and the allegations contained in this paragraph can have no bearing upon MRA's (as opposed to LA's) punishment. See Objection to ¶ 13, supra.

17) Both MRA and Senator Lacson deny that MRA was acting as Senator Lacson's agent in the United States. See Exhibit 9 (Lacson Statement). There is no evidence whatsoever that Senator Lacson directed or controlled MRA's actions, as required by the statute, see 18 U.S.C. § 951(d); rather, MRA was independently interested in the Philippines' political situation and in publicizing unlawful activity by GMA, whom he personally believed was elected by way of fraud. Even in its Sentencing Memorandum, the government claims only that MRA acted "on behalf of Lacson," but not that his acts were controlled or directed by Lacson, which they were not.

Moreover, MRA has a long personal and professional relationship with Lacson which explains their communications and MRA's efforts to defend SPML's reputation and integrity.

Specifically, MRA first met Lacson through work, in December 1989. In September 1992, Lacson hired MRA to work on the Task Force Habagat. They became friends as a result of their regular work contact and joint successes in combating the rampant kidnapping schemes that were terrorizing the Philippines. Consistent with Philippines custom, Senator Lacson agreed to serve as MRA's "godfather" at his 1993 wedding, a position of honor. MRA respected Lacson for his integrity and embraced Lacson as a surrogate father when his own father died in 1995. A close relationship, however, is not the same thing as being subject to another's direction or control, as required by the statute.

18) MRA denies involvement in, or prior knowledge of, the storming of Malacanang Palace in May 2001. He heard about the incident, and the accusations that he and SPML were its masterminds, at the same time. He went into hiding and joined in the motion to the Supreme Court contesting the validity of warrantless arrests, with which the court agreed. The storming of Malacanang Palace in May 2001 has nothing to do with the offense of conviction and is not otherwise relevant to MRA's sentence. Accordingly, this paragraph should be struck from the PSR and disregarded by the Court. If the government intends to rely upon such information at sentencing, the defendant must be afforded the resources necessary to rebut them.

19) MRA denies involvement in, or prior knowledge of, the Oakwood Mutiny in July 2003. Indeed, the PSR's purportedly

chronological timeline fails to report between paragraphs 18 and 19 the critical fact that MRA left the Philippines for Hong Kong on or about June 24, 2001, and continued on to the United States on or about July 5, 2001. He was traveling to Maryland from New York when he learned about the mutiny. The uprising has nothing to do with the offense of conviction, and is not otherwise relevant to MRA's sentence. Accordingly, this paragraph should be struck from the PSR and disregarded by the Court. If the government intends to rely upon such information at sentencing, the defendant must be afforded the resources necessary to rebut them.

20) MRA denies that he directed Daniel Cruz's activities in the Arroyo investigation. MRA left the Philippines on or about June 24, 2001 and was not involved in the "Jose Pidal Scandal." SPML's speech, which was front-page news in the Philippines, was raised by Cruz in response to an email from MRA that had nothing to do with the speech. Although MRA did respond to Cruz's comments with his own personal observations, he did not direct Cruz to take any action, nor was the nature of their relationship such that MRA would direct Cruz. Rather, MRA was introduced to Daniel Cruz in 1999 by Dionardo Carlos, a Police Superintendent and PMA classmate of MRA, who was walking with Cruz at Camp Grame during a civilian security training camp run by Cruz and Carlos. MRA was given the impression that Cruz was in the security business. MRA later discovered that Cruz had a connection with the USDEA when MRA saw him with DEA Agent Jeff Wendling at a PNP press conference about

the seizure of a truckload of cocaine (shabu) that the DEA had been invited to attend. Cruz described himself to MRA as an "errand boy" for the DEA. In 2001, MRA, Cruz, and Evaristo Gana discussed starting a security consultancy business together, which is why Cruz calls MRA "partner" in their email correspondences. Indeed, it was Cruz (and not MRA) who initiated their email correspondence in or about May 2002. Gana and Cruz ended up starting the business ("Gana & Associates") without MRA, who could not afford the initial capital contribution. Nevertheless, this background reflects how MRA viewed Cruz -- not as a U.S. government employee but as a Filipino business partner and colleague.

24) MRA denies involvement in, or prior knowledge of, the attempted coup on February 24, 2006. The PSR's purportedly chronological version of the offense fails to report after paragraph 23 and before paragraph 24 that MRA was arrested on September 10, 2005. Thus, the allegations in paragraph 24 post-date MRA's arrest by five months, has nothing to do with the offense of conviction, and is not otherwise relevant to MRA's sentence. Accordingly, this paragraph should be struck from the final PSR and disregarded by the Court. If the government intends to rely upon such information at sentencing, the defendant must be afforded the resources necessary to rebut them.

27) The PNP activities described in paragraph 27 encompassed only domestic intelligence responsibilities. The PNP was responsible for responding to domestic terrorist groups such as

cessation movements, Islamic fundamentalist groups and organized crime syndicates, but had no extra-territorial jurisdiction or foreign espionage duties. See Exhibit 11.

31-35) MRA denies wrongdoing in the Kuratong-Baleleng matter which, in any event, is not related to the offense of conviction, is not otherwise relevant conduct under Section 1B1.3 and, therefore, can have no bearing upon the Court's sentencing determination. The government's allegations are unsubstantiated and hotly disputed, as evidenced by the fact that the listed officers have never been convicted of any offense. These paragraphs should be struck from the PSR and disregarded by the Court. Otherwise, the government must bear its burden of proving MRA's involvement in the "massacre" by a preponderance of the evidence, and MRA must be afforded the resources necessary to defend against the allegations.

31) Lacson did not announce at a press conference that "the gang members had been killed during a shootout between the PNP and members of the KB." That announcement was made by PNP Director General Recaredo Sarmiento II.

31, 34) The "witnesses [who] came forward alleging the deaths were a 'rubout' by the PNP" and who "specifically named Lacson and Aquino" have since recanted their allegations. If the government intends to rely upon such allegations, the defendant must be afforded the resources necessary to defend against them.

35) It is not true that the case "languished for years under the former presidencies of Fidel Ramos and Joseph Estrada." Rather, the case was aggressively opposed by the defendants. Specifically, in 1996, the case was remanded for reinvestigation upon the motion of SPML, as a result of which the charges against him were downgraded. The case was then transferred to another region for jurisdictional reasons, a decision subsequently challenged by the Office of the Special Prosecutor. The transfer decision was later upheld on appeal. Before the defendants were arraigned, the original complainants recanted their affidavits. Consequently, the twenty-six (26) accused filed motions challenging the existence of probable cause, which was heard on March 22, 1999. On March 29, 1999, Judge Agnir issued Resolution 25 dismissing Criminal Cases Nos. Q-99-81679 to Q-99-81689 on the basis of lack of probable cause. When GMA assumed the presidency of the Philippines, she directed PNP Director Leandro R. Mendoza to reopen the investigation as a politically motivated prosecution.

36-40) MRA denies wrongdoing in the Dacer-Corbito matter which, in any event, is not related to the offense of conviction is not otherwise relevant conduct under Section 1B1.3 and, therefore, can have no bearing upon the Court's sentencing determination. The government's allegations are unsubstantiated and hotly disputed, as evidenced by the fact that the listed officers have never been convicted of any offense. These paragraphs should be struck from the PSR and disregarded by the Court. Otherwise, the government

must bear its burden of proving MRA's involvement in the murders by a preponderance of the evidence, and MRA must be afforded the resources and discovery necessary to defend against the allegations.

38, 41-51) Glenn Dumlao has recanted his accusations against MRA, see Exhibit 13, which were the sole basis of the charges filed against MRA in the Philippines, and in return for which statement the pre-existing charges against Dumlao were dropped, see Exhibit 14. Only after multiple meetings with the government, at which he was likely pressured, did he recant his recantation and provide the government with favorable statements akin to those that had been elicited from him in the first instance by the Arroyo Administration by threats to his physical safety. The government of the United States -- effectively making itself a partner to the "threats, intimidation, and physical force" used against Dumlao by the Arroyo Administration, see Exhibit 13 (Dumlao Aff. ¶ 6) -- relies upon this type of "reliable" evidence to argue for the imposition of a statutory maximum sentence against the defendant.[4] See United States v. Warren, 186 F.3d 358, 365 (3d Cir. 1999) (reversing upward departure because the requirement that evidence

[4] The government denies that it pressured Dumlao. Nevertheless, Dumlao's own affidavit, attached as Exhibit A to the government's Sentencing Memorandum, describes at length his fear of being returned to the Philippines where he will again be tortured and abused by those who work for GMA. The government's assertion that anything Dumlao says constitutes "reliable" evidence is self-serving and oblivious to the circumstances under which Dumlao's statement was obtained by the U.S. Attorney's Office. In any event, Dumlao does not say that MRA had any more involvement in Dacer and Corbito's demise than Dumlao himself.

relied upon by the court at sentencing have "sufficient indicia of reliability" "should be applied rigorously"); see also United States v. Brothers, 75 F.3d 845 (3d Cir. 1996) (vacating sentence because district court clearly erred by relying upon evidence at sentencing that was not sufficiently reliable); United States v. Miele, 989 F.2d 659, 663-68 (3d Cir. 1993) (same). If the U.S. Attorney's Office intends to reduce itself to the level of a foreign government in which "political murder" is a "routine" method for controlling the political opposition, see Exhibit 12, then at very least the defense should be provided with all reports memorializing Dumlao's statements so that the defendant has a full and fair opportunity to defend against them, including an opportunity to examine Dumlao under oath.

52) MRA denies the statements attributed to Mancao. Mancao and Dumlao worked in a different region from Vina and they would have never crossed paths in carrying out their assignments. This demonstrates that the stories Dumlao and Mancao fabricated when faced with pressure from the Philippine and U.S. governments were sufficiently implausible so that the interrogators would not be able to reasonably rely on them. The defense should be provided with all reports memorializing Mancao's statements so that the defendant has a full and fair opportunity to defend against them, including an opportunity to examine Mancao under oath.

53-64) These paragraphs deal solely with LA and are not relevant to MRA. They should be struck from the final PSR.

66) The PSR's characterization of MRA's relationship with LA prior to January 2, 2005 is inaccurate. See supra.

67) MRA denies that "he acted as Lacson's foreign agent in the United States," or that he unlawfully conspired to destabilize the Philippines government. MRA admits that, having been persecuted by GMA, he was personally opposed to her fraudulent administration of the Philippines, and was interested in having her illegal activities uncovered and publicized so that she would be forced to resign. Admittedly, the retention of U.S. government documents is a crime; being motivated by a desire to uncover and publicize wrongdoing by politicians is neither a crime nor an aggravating factor.

68-76) The PSR should have clarified that the only relevance of the allegations in these paragraphs, which relate solely to LA, is that they demonstrate that MRA did not "recruit" LA, as the government alleges, and that MRA's role in the universe of relevant conduct claimed by the government is substantially less significant than that of LA, thus warranting a mitigating role reduction. MRA had no relevant contact or involvement with LA prior to January 1, 2005.

77) MRA opted not to return to the Philippines in the face of a politically motivated and unfounded criminal prosecution brought against him by GMA's administration. He was not subject to the direction or control of SPML and did not act as his "agent." All

of his actions, whether lawful or unlawful, were self-motivated and independent.

77) MRA started the website at the prompting of his PMA classmates. He accepted the responsibility because he was not working and, thus, had the time to handle it. Once he started nursing school, however, he turned the website over to Lacson's campaign personnel who used it for the campaign.

77-79) MRA denies involvement in the Jose Pidal scandal. Allegations regarding that scandal have no relevance to the offense of conviction, are not otherwise relevant to the Court's sentencing determination under U.S.S.G. § 1B1.3, and should therefore be struck from the PSR and disregarded by the Court.

80-85) The PSR grossly mischaracterizes the nature of the August 2003 email correspondence between MRA and Daniel Cruz. It is not true that "as early as August 18, 2003, Aquino communicated with Daniel Cruz ... about Lacson's accusations against Mike Arroyo." It is clear from the emails that MRA did not contact Cruz in connection with Lacson's speech to the Philippines Senate; the "SOS" issue MRA raised -- as reflected in the subject line -- was to alert Cruz to a business opportunity for his security agency, which was brought to MRA's attention by former kidnap-for-ransom victims Eric Ngan, Rachel Ngan, and Arabelle Lee. It was Cruz who made reference to SPML's speech sua sponte; thereafter, MRA simply responded with his personal opinions. This back and forth was consistent with the nature of the men's correspondence over the

years, which covered the Philippines political situation, their personal opinions, and cases they had worked on in the past. MRA never directed Daniel Cruz to do anything. The excerpt from a longer email quoted in paragraph 83 is accurately translated as: "I wish, if possible, a background investigation might be run on Ronald Gin and the Tohs and Kelvin Tan [who were] mentioned in the privileged speech of SPML." Thus, MRA was simply observing that a background investigation of the individuals mentioned in SPML's speech would reveal more information about them. It was not meant or understood as a direction. Indeed, a later email from Cruz makes clear that he "pulled some toll subscriber info" on his own, having also on his own initiative "identified [the cell number] belonging to Mike Arroyo." If the government intends to rely at sentencing upon allegations regarding MRA's relationship with Daniel Cruz, the defendant should be provided the resources necessary to travel to the Philippines to meet and confer with Cruz in order to defendant against the allegations.

87) The government has not disclosed to the defense the results of any 2003 investigation by the USDS and DEA. Notably, no action was taken against MRA at that time, despite the fact that he was then present inside the United States. The investigation report should be disclosed to the defense which, to the extent it resulted in no action being taken against MRA, constitutes Brady material.

88) Lacson did not "task" MRA to do anything, and MRA went to Florida simply to visit with Lacson, whom he considered a mentor and father figure. MRA arrived in Florida on Saturday morning. Mancao met him at the airport. They had lunch and then drove Lacson and Sigfried Fortun to a meeting which MRA did not attend. Mancao showed MRA around Miami Beach. On Sunday, MRA had lunch with Lacson, Mancao, Dumlao and Dumlao's cousin. During the meals, there was friendly conversation regarding current events in the Philippines, including the fact that the Arroyos had denied the allegations made by Lacson in his privileged speech. Lacson did not direct MRA to investigate the Arroyos' ownership of property, and there is no evidence that MRA actually conducted any such investigation.

90-96) These allegations deal solely with LA and are not relevant to MRA other than to further demonstrate MRA's minimal role in the universe of offense conduct claimed by the government.

97) MRA denies that he assumed an "alias" in order to conceal his identity. MRA is widely known as "Ninoy," by friends and foes alike. The email address in question was created while he was training at the FBI Headquarters in Virginia.

98) Graduates of PMA regularly refer to themselves or other graduates by their year of graduation, a habit not exclusive to MRA. They were not code names, as acknowledged in ¶ 114 note 12. MRA always referred to Gloria Arroyo as GMA or PGMA.

99-105) MRA was not aware of the correspondence between JV Ejercito and LA which, in any event, predates MRA's involvement with the latter. These allegations are not relevant to MRA other than to further demonstrate his minimal role in the universe of offense conduct claimed by the government. Moreover, the emails constitute legitimate political opposition. The entire history of email correspondence between LA and JV Ejercito should be disclosed so that counsel can defend against these allegations.

102) This email proves that JV Ejercito and others were orchestrating the opposition and that MRA knew nothing of it; indeed, the email states that Lacson had not accepted the group's invitation to meet with them. This email belies the government's claim that MRA was part of an organized effort to coordinate opposition forces and to overthrow the government.

103) The entire history of email correspondence between LA and Salvador Enriquez should be disclosed so that counsel can defend against these allegations.

105) The entire history of email correspondence between LA and Noel Valdes should be disclosed so that counsel can defend against these allegations. On its face, this email proves that Noel Valdes and others were orchestrating the opposition for Estrada, Ramos, and others. There is no evidence that Lacson or MRA were involved. Apparently, between December 19, 2004, and January 2, 2005, LA made a decision to try to recruit Lacson through MRA. There is absolutely no evidence that MRA joined the effort to install a

revolutionary government at any stage, and certainly not prior to January 2, 2005. Consequently, nothing that took place prior to January 2, 2005 is relevant conduct under U.S.S.G. § 1B1.3.

106) The thoughts expressed in MRA's January 2, 2005 email to Lacson regarding the desirability of a revolutionary government were a summary of LA's stated views, and not MRA's personal opinions. The email corroborates paragraph 105 above.

107) After MRA introduced LA to Lacson, LA communicated with Lacson directly. The email referenced in this paragraph was directed to Lacson. In addition, the documents sent by LA were not marked classified.

108) Same clarification as paragraph 107. The entire history of email correspondence between LA and Lacson should be disclosed so that counsel can defend against these allegations.

109) MRA denies that he received any instructions from Lacson and denies knowledge of the quoted email.

110) It is inaccurate to state that MRA "provided further information about the informant." MRA simply corrected information contained in the unmarked documents sent to him by LA.

111) This paragraph deals solely with LA and is not relevant to MRA. MRA had no knowledge of this communication. The paragraph should be struck from the PSR. The entire history of email correspondence between LA and Tony Choa should be disclosed so that counsel can defend against these allegations.

112) MRA does not know, and has never met, anyone named Tony Choa. Consequently, MRA certainly did not know about Choa's correspondence with Aragoncillo. This paragraph is not relevant to MRA and should be struck from the PSR.

114) MRA was angry about GMA's fraudulent election to the presidency and wanted her misdeeds to be exposed. He was particularly upset that she caused politically motivated and false charges to be brought against him (including the murder of his good friend and colleague, John Campos), as a result of which he felt compelled to flee his home country. She also caused the arbitrary cancellation of his passport, which resulted in his immigration problems in the United States. The quoted email reflects MRA's venting, and not actual plans for a coup d'etat. MRA's views in this regard are more fully reflected in a June 17, 2005 email to colleagues, which demonstrates that he was in favor of a democratic solution to the fraudulent election of GMA:

> Personally, I do not wish another EDSA ["People Power" revolution]. Just imagine kung EDSA XXXVIII na sir, parang Super Bowl. Putik na idildil natin.
>
> If there were massive fraud/cheating in the election, then the democratic process is violated. From the very start, maybe the election is invalid and they may not be worthy to be bestowed the Honor of Commander in Chief or Head of State. Resignation maybe is not the right word or right thing to do. But in our country where there are many constitutionalists, law experts and the like are [sic], there will be a lot of interpretation. Anything may happen.
>
> There may be other democratic solution though. Even coup d'Etat, the most common and accepted way to

> change government leadership is a democratic solution according to Edward N. Luttwak.

Thus, MRA's reference to Coup d'Etat is not evidence of his actual involvement with others in a jointly undertaken scheme to forcefully overthrow GMA but, rather, part of a thoughtful and ongoing political conversation about the options for change in the Philippines. See ¶ 123, infra.

115) MRA did not know Choa, and was not aware of Choa's correspondence with LA. This paragraph is not relevant to MRA and should be struck from the PSR.

116) The email was sent from LA to SPML. The documents were not marked classified.

117) This excerpt is taken out of context. As requested, the entire email should have been included in the PSR, which would show that MRA was simply making comments regarding the information he received from LA, none of which was marked classified.

118) The documents forwarded by LA did not have classification or "NO FORN" markings. As far as defense counsel can tell, the government has not produced a February 28, 2005 email to MRA from LA.

119) The e-mail exchange between LA and MRA during this time frame focused on MRA's immigration problems. The referenced e-mail, and the use of the phrase "close hold information," had nothing to do with classified information. Specifically, when MRA had his immigration problem, LA offered to reach out to a family

friend (whose wife was a Filipina) at the INS office in New York. Obviously, the woman's identity was not classified. Nevertheless, LA said that the identity of the friend was "close hold" because he did not want word to get out in the Filipino community that these people would help anyone with an immigration problem. As used by MRA, "close hold information" simply mimicked LA's use of the phrase in a context having nothing to do with classified national defense information.[5]

120) The documents forwarded by LA did not have classification markings.

121) This allegation does not relate to MRA and should be struck from the final PSR.

122) The documents forwarded by LA did not have classification markings.

123) In the quoted email, MRA was simply commenting on news reports relating to Philippines Brigadier General and former National Security Adviser Jose Almonte and Major General Fortunato Abat, who had called for the installation of a military government. See ¶ 170, infra. MRA was not personally planning a coup and had no relationship with Almonte or Abat. The Probation Office has mistranslated and omitted relevant parts of the email. For

[5] The government and the PSR make reference to snippets of various email correspondences among many individuals throughout their submissions to the Court. MRA hereby makes the entire government production of MRA's email correspondence a part of the sentencing record. MRA also moves the Court to compel the government to disclose to the defense email correspondence among those other than MRA, upon which it and the Probation Office rely, but which have not been provided to the defense.

example, the PSR omits a sentence from the last paragraph which makes clear that MRA is commenting on Almonte's speech ("This was mentioned by Almonte in his speech entitled Democratic Solutions (www.tapatt.org). Almonte has read this book several times."). Coups and popular uprisings were not uncommon phenomena in the Philippines, as reported in the PSR itself, and discussions of the possibility of a recurrence were neither unusual nor illegal. Similarly, the government's translation is wrong. It should be: "Send book to PJEE so that he will realize it/or wake up." MRA said this because he knew that the EDSA II incident toppling Estrada is an example of a coup d'etat, as explained by Luttwak.

126) MRA's answers are true, see Exhibit 10, and were provided only after consultation with immigration counsel, upon whose advice MRA reasonably relied. The paragraph is entirely irrelevant, should be struck from the PSR, and disregarded by the Court.

129) This paragraph deals solely with LA and is not relevant to MRA, who did not know that LA had applied to the CIA. It should be struck from the PSR and disregarded by the Court.

130) The PSR's phraseology is misleading. MRA did not thank LA for sending him "classified documents." The documents were not marked classified.

131) MRA did not understand what LA was talking about in this email, which is unresponsive to MRA's email to LA. Further, LA's email reflects how LA was lying in order to mislead MRA that LA's sharing of information was known to at least some representatives

of the U.S. government. Finally, LA's use of the phrase "my agenda" demonstrates that LA had his own agenda of which MRA was not a part, belying the government's assertion that MRA had at this time joined a broader conspiracy with LA.

132-33) MRA was not aware of this correspondence between Lacson and LA. In any event, LA's email demonstrates that LA is again lying in order to give the impression that his activities were approved by the U.S. government (e.g., "One embassy official asked me to be discrete when meeting with 'significant' political personalities.").

134) Same objection as paragraphs 118 and 151. The entire "Hello Garci" scandal was a public affair in the Philippines.

137) MRA was unaware of this correspondence, which is not relevant to MRA. It should be struck from the final PSR and disregarded by the Court.

138) The "original story" is the factually correct story. The Thanksgiving Mass referenced in footnote 17 was to celebrate MRA's release from ICE custody, not to thank LA.

139) The government has mistranslated "Paseniya na." Per the dialect, it means "sorry for the inconvenience," referring to any inconvenience LA may have encountered by offering his help to MRA with respect to the immigration matter.

141-145) MRA was not aware of this correspondence and these paragraphs are not relevant to MRA. They should be struck from the PSR and disregarded by the Court.

146) MRA denies that he conspired with others in the Philippines to overthrow the Philippines government. MRA's possession of U.S. government documents was unlawful; his political opposition to GMA's administration is constitutionally protected.

151) The "Hello Garci" scandal was a huge story in the Philippines. There were, and remain, publicly available tapes and transcripts of the conversation. Indeed, there are Hello Garci ringtones that can be downloaded to one's mobile telephone. See http://pcij.org/blog/wp-files/tapes.php. MRA admits that he has listened to and commented upon the "Hello Garci" tapes, as have many others inside and outside the Philippines. The investigation and discussion of political corruption is an accepted form of political expression in the United States, as well as the Philippines.

152-55) These paragraphs are not relevant to MRA, who was not involved with LA, and should be struck from the PSR. The entire history of email correspondence between LA and Stanley Loh should be disclosed so that counsel can defend against these allegations.

156-196) At this point, any jointly undertaken criminal activity with LA had come to a conclusion, as the government admits, see PSR ¶ 146. Hence, these allegations are not relevant to the offense of conviction under U.S.S.G. § 1B1.3.

159) Aureliano Rulloda is MRA's former PMA classmate. Both belonged to the same squad, and MRA was the squad leader in 1987. Rulloda is a member of several email groups related to Philippines

affairs. MRA emailed a news article entitled "A-6 de Mayo" by Arnold Clavio, and received an unsolicited direct email from Rulloda giving him information about the misappropriation of funds during the elections. See PSR ¶ 178. There is absolutely nothing wrong with this email correspondence.

165) It is an accepted investigatory technique in the Philippines to obtain toll records. Indeed, this technique was used by United States Attorney for the Southern District of New York in his prosecution of the suspects in the WTC bombing, who were captured in the Philippines.

168) Aquino's email to Ellen Tordesillas accurately reflects his intention vis-à-vis the GMA administration: "We will just establish the truthfulness of the events that transpired ... and the exact locations mentioned by Garci in this conversation with other people other than GMA or Code I as referred to the narrator." This email belies the government's assertion that MRA was conspiring to overthrow the government; MRA's objective was for the truth about GMA to be known.

170) MRA purchased a copy of Luttwak's book because it and others were mentioned in a speech by Brigadier General and former National Security Adviser Jose Almonte, who warned "of an imminent coup d'etat arising from a 'mismanaged society' due to massive corruption in the incumbent government." "FVR Aide Pushes Transition Gov't By AFP," Daily Tribune, March 28, 2005 (available at http://www.korakora.org/sulatin/cd_archive/korakora_digests_71-

75.pdf). Almonte is the godfather of the Reform the Armed Forces Movement and well respected within the Philippines. A small Think Tank he ran in the early 1980s was the catalyst for the formation in 1985 of the reform group of younger AFP officers who a year later played a key role in the ouster of Ferdinand Marcos. The day after Almonte's speech, another former security aide, Major General Fortunato Abat, "upped the ante and called for the installation of a revolutionary, dictatorial government that will see the Armed Forces of the Philippines (AFP) appointing its commander-in-chief as the chief of state that oversees the governance of the nation while 'civil society' does away with the President and appoints instead a chief executive officer as head of government." Id. MRA had no connection to Almonte or Abat, but was interested in events in the Philippines and the underlying basis for such declarations by respected leaders.

197) MRA denies that he was acting as Lacson's agent. He shared the same political objectives as SPML, but he did not act pursuant to Lacson's direction and control, as required by statute. See 18 U.S.C. § 951(d) (defining an "agent" as "an individual who agrees to operate within the United States subject to the direction or control of a foreign government or official."); see also 28 C.F.R. § 73.1. In any event, all of the activities described in paragraphs 156-197 post date any jointly undertaken criminal activity with LA.

198) MRA posted this message in an e-group. It was copied without his permission by the webmaster of "Be Not Afraid."

199-216) These allegations have no relevance to MRA other than to provide further support for a minimal role reduction.

229-238) These paragraphs have no relevance to MRA and should be struck from the PSR and disregarded by the Court.

242) None of the 47 documents recovered from MRA were marked classified. LA removed all such markings. It was only after MRA's arrest that the government determined that the materials retained by MRA included classified information.

247) See objection set forth at length above.

249-252) See objection set forth at length above.

250) MRA did not introduce himself to LA; rather, LA contacted MRA in 2002.

250) MRA did not know of LA's position with the FBI. LA had represented to MRA that he had trained at the FBI and was going to work for the Directorate of Intelligence (which the government concedes is one of many lies told by LA to MRA). MRA knew that training with the FBI did not mean that a person necessarily works for the FBI because MRA himself had trained with the FBI but did not work for the FBI.

250) MRA did not "enlist" Cruz to do anything.

250) The italicized text is MRA's quoting of LA's views and not an expression of his own.

250) The documents provided by LA were not marked classified.

250) MRA did not enlist Aureliano Rullado to do anything; rather Rullado offered the information.

251) MRA did not knowingly participate in any scheme to convey classified information to the Philippines. MRA introduced LA to Lacson. The documents LA forwarded were not marked classified.

251) MRA did not recruit anyone.

251) MRA did not "vet and interpret the classified intelligence." MRA offered his opinions regarding the information contained in the documents forwarded by LA, much of which was public knowledge.

251) MRA did not, and still does not, know anyone named Tony Choa.

251) MRA denies that he knowingly conspired with SPML, former President Estrada, JV Ejercito, and Tony Choa, to gather classified information.

252) MRA did not act in a leadership capacity to unify anyone or anything. In any event, "political opposition" is constitutionally protected activity in the United States and the Philippines.

252) MRA repeats the objections to paragraph 251.

253-258) These paragraphs have nothing to do with MRA and should be struck from the PSR.

274) See objection set forth at length above regarding choice of guideline.

277) See objection set forth at length above regarding role adjustment.

279) See objection set forth at length above regarding choice of guideline and role adjustment.

282) See objection set forth at length above regarding choice of guideline and role adjustment.

284) See objection set forth at length above regarding choice of guideline and role adjustment.

288-289) The referenced prosecutions are politically motivated. MRA is innocent of the charges and neither the U.S. nor Philippines government can prove them. Their inclusion in the PSR is inappropriate.

290-292) These are all baseless charges filed by convicted defendants in retaliation for their being arrested by MRA. Moreover, the allegation that the charges were dropped pursuant to a plea bargain is false because there is no plea bargaining in the Philippine justice system.

294) The family was “reunited,” not “reconciled.”

324) MRA was officially commissioned as an officer on March 12, 1988, the date of his graduation from PMA. He was first assigned to the Philippine Constabulary of the Integrated National police.

324) On September 23, 1992, MRA was appointed as Chief of Operations of Task Force Habagat (not Chief of the Intelligence

Division of the PNP). Indeed, only a two-star general can hold such a position, and MRA never attained that rank.

325-327) These are all baseless charges filed by convicted defendants in retaliation for their being arrested by MRA. Moreover, the allegation that the charges were dropped pursuant to a plea bargain is false because there is no plea bargaining in the Philippine justice system.

328) The "money owed" is virtually uncollectable due to the family members' financial situations. Most of the bank accounts represent Fatima's assets. The Commerce Bank accounts belong to MRA but they are inaccessible because they have been inactive for so long due to his incarceration. The amounts are not accurate in dollars as they represent Fatima's approximations based upon what she thinks their values are based upon the fluctuating exchange rate. The pension/savings plans are for MRA's son's education and cannot be accessed until he reaches college age. The 1999 Honda CRV belongs to MRA's security company in the Philippines. The 1995 Mitsubishi Montero was sold over a year ago. The jewelry is the approximate value of all items owned by Fatima, MRA and their son. The two real properties that belong to Fatima are not relevant to MRA's ability to pay a fine. Two properties belong to both MRA and Fatima, and the 31 Contractor property belongs solely to MRA. An additional 1.6 million pesos should be included in the unsecured debts as the amount MRA borrowed from Yap Yok, Jr., to purchase the

Rosewood property. With respect to footnote 21, no one person has donated $20,000.

332) As discussed above, MRA denies that he has the ability to pay a fine. He has been found by the Court to be indigent. His wife and child live on handouts from strangers; they cannot afford to rent their own apartment. The assets listed in the PSR are mostly uncollectible, indisposable, or overvalued.

334) See objection set forth at length above regarding choice of guideline.

336) MRA does not have a history of drug use or abuse and the drug testing requirement should, therefore, be waived.

345) As a result of the Probation Office's miscalculation of MRA's offense guideline, the recommended fine range is in error, as well.

IV. DEPARTURES

The government has moved the Court to depart upward based upon several factors which it claims takes this case outside of the heartland of cases considered by the Sentencing Commission. The government is wrong in every respect.

1) Dismissed Conduct

The government has moved the Court to depart upwards based upon dismissed conduct alleged in the original indictment. As discussed above, both SPML and MRA deny that MRA acted as SPML's agent in the United States under 18 U.S.C. § 951. MRA also denies that he conspired to overthrow the Philippines government which, in

any event, is not against U.S. law and not an unusual occurrence in the Philippines. Finally, the guideline pursuant to which MRA will be sentenced -- whether U.S.S.G. § 2M3.2 or 2M3.3 -- already takes into consideration the sensitive nature of the documents at issue. See U.S.S.G. § 2M3.1 comment. (n.2). Hence, there is no dismissed conduct which warrants an upward departure.

2) Disruption of Government Function

The government asks the Court to depart upward pursuant to U.S.S.G. § 5K2.7 on the basis that "[d]isruption of a significant government function is an encouraged basis for an upward departure." Gov't Sentencing Mem. at 80. The government is wrong. Mere disruption of a government activity -- whether that activity is a significant or an insignificant one -- is not a basis for an upward departure at all. Rather, Section 5K2.7 provides that if a defendant's conduct resulted in a "significant disruption of a government function," the Court may depart from the guidelines. The government has failed to articulate a significant disruption of government function other than that inherent in the offense.

In this regard, a departure under Section 5K2.7 is not warranted where -- as mentioned above, see U.S.S.G. § 2M3.1 comment. (n.2) -- the Sentencing Commission, through the applicable guideline, already took into consideration disruption to government function at issue. See U.S.S.G. § 5K2.0 comment. (n.3(B)(i)). In the certifications submitted by the government in support of its departure application, the declarants talk about types of harm that

"could reasonably be expected," but do not aver that there was any actual harm that turns this into a "rare" and "exceptional" case warranting a departure based upon a factor the Sentencing Commission has already considered in drafting the applicable guideline. Cf. United States v. Baird, 109 F.3d 856, 871 (3d Cir. 1997) (holding that upward departure was warranted for significant disruption of government function where police officer's corruption caused "unprecedented" harm by requiring the reopening of innumerable criminal cases to determine whether convictions were obtained on the basis of illegally obtained evidence, city set aside more than 150 convictions leading to the release of innocent persons from prison resulting in civil lawsuits seeking damages against the city requiring the city to expend "enormous resources in making right the wrongs" caused by the defendant).

In any event, the defense denies that his activity caused a significant disruption of any government activity. If the government wants to proceed on this basis, then the defendant is entitled to the assistance of an expert qualified to analyze and rebut the assertions contained in the materials submitted by the government.

3) Significant Endangerment of National Security

The government has also asks the Court to depart from the guidelines pursuant to U.S.S.G. § 5K2.14 on the alleged basis that MRA's conduct significantly endangered national security. Specifically, the government claims that: 1) MRA conspired with

others to overthrow the government of the Philippines; and 2) if the conspiracy had succeeded it would have endangered the national security of the United States.

First, MRA denies that he conspired with others to overthrow the government of the Philippines.

Second, the notion that President Arroyo's fall from power -- whether by legitimate or illegitimate means -- would significantly endanger national security is belied by Philippines history. In 1986, Philippines President Ferdinand Marcos, a corrupt leader allied to the United States, was toppled from power in a coup, and it did not significantly endanger national security. Similarly, in 2001, Philippines President Joseph Estrada, a corrupt leader allied with the United States, was toppled from power, and it did not significantly endanger national security. Therefore, there is no reason to believe -- and the government has not presented any evidence -- that the replacement of President Gloria Arroyo, a corrupt leader allied with the United States, would significantly endanger national security.

The government claim that national security would be significantly endangered might have some validity if Gloria Arroyo were likely to be replaced with a government that was hostile to American political, military, or business interests. The opposition forces that the government claims were conspiring to overthrow Arroyo, however, are equally committed to preserving the Philippines' relations with the United States. Therefore, the

government's assertion that MRA should be punished more severely because his conduct significantly endangered national security is without any factual basis.

It bears noting that there are those who believe that the attempted military coup in July 2003 was fomented by neo-conservatives in the Bush Administration, which seeks a wider U.S. military presence in the Philippines than that supported by the Arroyo Administration. See "Philippines Mutineers Point To Neo-Cons," Executive Intelligence Review, August 8, 2003 (reprinted at http://www.larouchepub.com/other/2003/3031phil_mutiny.html). The Bush Administration's hostility to the Arroyo administration -- and its desire for changed leadership more sympathetic to U.S. interests -- is supported by the substance of the materials forwarded by Aragoncillo. To the extent that the government claims that MRA's activities significantly endangered U.S. security, the defense is entitled under Brady to, and demands production of, discovery regarding all U.S. intelligence gathering operations in the Philippines directed at uncovering illicit activities by the Arroyo Administration, as well as permission to retain an expert in Philippines political history who can educate the Court regarding the history of U.S.-Filipino relations.

Third, the GMA administration was not overthrown and there was not actual harm to U.S. interests. Indeed, the government is unable to prove any specific event that took place in the Philippines that was a result of MRA's conduct. In fact, MRA's

conduct did not have any impact in the Philippines. The Philippines is a country with a history of popular and military uprisings. The notion that by receiving U.S. government documents from Aragoncillo, MRA created some unprecedented danger to U.S. national security is preposterous.

4) Past Criminal Conduct & Risk of Future Conduct

The government also asks the Court to depart upward pursuant to U.S.S.G. § 4A1.3, on the basis that MRA's criminal history category "does not adequately reflect the seriousness of defendant's past criminal conduct or the likelihood that the defendant will commit other crimes," relying upon MRA's alleged involvement in the Dacer & Corbito murders. MRA denies the "past criminal conduct" upon which the government's motion turns.

First, if the government intends to proceed with its motion, the defendant has a right to be provided with the resources necessary to defend against it. Because the events upon which the government relies are alleged to have taken place in the Philippines, counsel will need to travel to the Philippines and, with the assistance of a Philippines investigator, investigate the government's allegations. Defense counsel has moved the court under the Criminal Justice Act for authorization to expend the resources necessary to prepare this sentencing defense.

Second, the type of allegations relied upon by the government do not support an upward departure. The Guidelines provide that even foreign sentences imposed after conviction are not

automatically considered as part of a defendant's criminal history. See U.S.S.G. § 4A1.2(h). Here, the "criminal history" relied upon by the government is not even an actual conviction or prior sentence, as required by Section 4A1.3(a)(2)(A) & (B), but mere allegations -- and politically motivated allegations at that. MRA was not pending trial or sentencing on another charge at the time of the offense, as required by Section 4A1.3(a)(2)(D), and the conduct alleged by the government -- murder -- is not "similar adult criminal conduct," as required by Section 4A1.3(a)(2)(E). See United States v. Chunza-Plazas, 45 F.3d 51 (2d Cir. 1995) (vacating sentence and holding that upward departure under U.S.S.G. § 4A1.3 could not be based upon foreign criminal conduct of which defendant had not been convicted).

No other basis for an upward departure under Section 4A1.3 applies. For these reasons, MRA should either be afforded a full and fair opportunity to defend against the allegations relied upon by the government, or the Court should deny all of the government's departure applications.

5) Number of Documents and "Facilitating Expanding The Corruption Of An Intelligence Analyst"

Finally, the government argues that MRA should be sentenced to the statutory maximum by way of departure because of the number of documents (47) found in his possession, and "for facilitating expanding the corruption of an Intelligence Analyst." Gov't Sentencing Mem. at 88-89.

First, the number of documents in MRA's possession bears no relation to the harm caused by his conduct. Second, the claim that "facilitating expanding the corruption of an Intelligence Analyst" -- aside from being very difficult to pronounce -- highlights the government's primary misconception: Leandro Aragoncillo was a thoroughly corrupt employee of the White House long before he trained to be an intelligence analyst, yet the government of the United States has gotten into bed with him in order to avoid the politically embarrassing fact that there was a traitor in the Office of the Vice President long before MRA came onto the scene. Admittedly, MRA violated the laws of the United States for which he stands ready to be punished. But he should not be punished for the actions of another.

V. IMPOSITION OF SENTENCE

Pursuant to U.S.S.G. § 2M3.3, MRA's base offense level is 24. He should receive a three-level reduction for acceptance of responsibility, resulting in an offense level of 21 and a guidelines range of 37-46 months. If the Court awards a two-level minor-role reduction, MRA's offense level will be 19, and his sentencing range will be 30-37 months.

Under either scenario, three (3) years in prison (including the past 1½ years in the Passaic County Jail) is a sufficiently harsh punishment for the offense conduct. This is particularly so in light of MRA's personal history, which will be addressed in a separate submission to the Court, see Note 1, supra, as well as the

inevitable fact that once his sentence is completed, MRA will be returned to the Philippines to face the justice (or vengeance) of the Arroyo Administration, which is well situated to assess the expansive claims made by the government in connection with sentencing in this case.

CONCLUSION

For the reasons set forth above, the Court should calculate defendant Michael Ray Aquino's sentence pursuant to U.S.S.G. § 2M3.3, and grant a mitigating role reduction. The government's departure applications should be denied, or defense counsel must be afforded the resources and discovery necessary to prepare a sentencing defense on MRA's behalf.

Respectfully submitted,

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