UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,)
)
Plaintiff,) Criminal No. 10-2626 WJ
)
vs.)
)
PEDRO LEONARDO MASCHERONI,)
also known as "Luke," and)
MARJORIE ROXBY MASCHERONI,)
)
Defendants.)

Department of Energy Declassification Review
1st Review Date: 1/12/2015
Authority: //AOC //DC //ADD
Name: JOHN TRIBOU NA 722 CLASSIF ANALYST
2nd Review Date: N/A
Authority: ADD
Name: N/A
Determination (Circle Number(s))
1. Classification retained.
2. Classification changed to: ______
3. Contains No DOE Classified Info.
4. Coordinate with: ______
5. Classification cancelled.
6. Classified Info. Bracketed.
7. Other (Specify): THIS DOCUMENT PLUS EXHIBITS 1 – 10

UNITED STATES' SENTENCING MEMORANDUM
AS TO DEFENDANT PEDRO LEONARDO MASCHERONI, ALSO KNOWN AS "LUKE"

"This is very dangerous and I am doing it for money . . .. I am, I told you, I'm not an American anymore. This is it."

Defendant Pedro Leonardo Mascheroni, June 28, 2009, to his co-defendant, Marjorie Roxby Mascheroni, Ex.3A, 6-28-09 Clip 1.[1]

[1] Attached to this memorandum are three exhibits that contain clips of recorded conversations the Defendant had during the investigation of this case. The United States submits each of these clips in support of its position that the Defendant should receive a sentence of 66 months. Exhibit 1A is a CD that contains video clips from Defendant's meetings with "Luis Jimenez" on March 30, 2008, March 31, 2008, and August 15, 2009. Exhibit 1B provides a written summary of those clips. Exhibit 2A is a CD that contains audio clips from phone conversations Defendant had with his wife and co-defendant, Marjorie Roxby Mascheroni, on March 29, 2008, March 30, 2008, March 31, 2008, and June 25, 2009. A written summary of those clips is contained on Exhibit 2B. Exhibit 3A is a CD that contains audio clips from conversations Defendant had with his wife in their car on June 28, 2009, August 7, 2009, August 16, 2009, and August 18, 2009. A written summary of those clips is contained on Exhibit 3B.

Introduction

Defendant Pedro Leonardo Mascheroni is not a person who is constrained by the truth when his own interests are at stake. To fully appreciate the self-serving nature of the claims that Defendant has included in his sentencing memorandum, his efforts to recast his place in history must be viewed through the prism of his own recorded words, such as those captured above. Defendant's words, as reflected in writings he authored and in hours of court-authorized recordings – including private conversations recorded under circumstances where Defendant believed he could share his innermost thoughts with his wife and co-defendant – reveal far more of the truth about Defendant's crimes and character than the carefully re-crafted image he now seeks to present to this Court. For example, Defendant wishes this Court to embrace the perverse notion that he should be viewed as some sort of a tragic heroic figure, Doc. 550 at 6, or a martyr, rather than as a man who sought to betray his country for money and to seek retribution against a government he had finally declared to be his "enemy." PSR at ¶ 53. In his dealings with the Venezuelan intelligence agent he knew only as "Luis Jimenez" (hereinafter "Jimenez"),[2] Defendant's aims were never noble, or part of some selfless journey that he had undertaken for the greater good of his fellow citizens. Rather, his actions were criminal to their core.

As a result of his own decisions, for which justice calls for him alone to bear responsibility, Defendant deserves to be sentenced to the longest possible prison term authorized under the plea agreement. In committing the crimes he did, Defendant sold out his country, appropriated ownership of U.S. property to himself in exchange for money, exploited information he knew to be classified for his own selfish purposes, broke faith with the few

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[2] As the United States has expressed in prior public statements, the indictment in this case did not allege that the government of Venezuela or anyone acting on its behalf sought or was passed any classified information, nor did it charge any Venezuelan government officials or anyone acting on their behalf with wrongdoing.

professional allies that would still associate with him, and then tried to cover up his crimes with a series of elaborate, illogical and oftentimes contradictory lies. As revealed by his sentencing memorandum, to this day, Defendant seeks to revise the past despite the mountain of audio, video, and documentary evidence that has been amassed against him.

As the evidence proves, when he matter-of-factly declared to his co-defendant that he was selling secrets for money and that he was no longer an American, Defendant was merely stating the obvious – he had decided to turn upon the country that decades before had welcomed him and had provided him with an education, unlimited opportunity, a chance to raise a family, and United States citizenship. He committed his crimes out of greed, to satisfy his towering ego, and to exact revenge on the United States for imagined wrongs.

As the defense acknowledges, it is "easy to now dismiss Dr. Mascheroni as an evil man who, acting out of avarice, sold classified information to Venezuelan agents." Doc. 550 at 6-7. It is only easy to characterize Defendant in this manner, however, because that is exactly what the evidence proves. Defendant's complete lack of repentance, character, mindset and actions, mark him as a dangerous individual who was and remains a credible and enduring threat to this country. His sentence should reflect as much. Defendant has done nothing to earn the Court's trust for any lesser sentence. The sentencing factors that this Court must consider under 18 U.S.C. § 3553 therefore overwhelming weigh in favor of sentencing Defendant to the maximum 66-month term of imprisonment authorized under the plea agreement.

Argument

A. The nature and circumstances of the offenses

> *"You want the laser fusion code from Germany. You don't want to start from zero. Then you want to put the high explosive package in there. Now you said . . . we have good relations with Iran . . . For sure they have already a high explosive package . . . You study that and if there is something useful, you use." Ex. 1A, 3-30-08 Clip 6.*
>
> *"[Y]ou start building them. You build let's say 40 or 30 ok? You have your stockpile. Now one day there are problems. The United States or this or that, and so on and so Venezuela says, Venezuela says, very clearly, 'We are going to have one test just to let the world know what we got.' One psssssst there in the middle of the Pacific or wherever, [making sound of an explosion], everybody see it. You don't kill anybody. Now you tell the United States, 'Not only we have this, but we have this other designs' and we blow this on top of New York. Nobody dies from this explosion but we've destroyed all the electric power in New York with an EMP Pulse . . . Electro Magnetic Pulse . . . That is . . . full deterrence." Ex. 1A, 3-30-08 Clip 8.*
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> *"You have to come up and say to the other nations, 'We are going to be, we're going to have an umbrella for everybody. If any nation outside Latin America attacks any nation inside Latin America, we are going to retaliate with nuclear bomb!'" Ex. 1A, 3-30-08 Clip 8.*
>
> *Quotes from Defendant to Jimenez*
> *during their first meeting on March 30, 2008*

1. As a highly-trained, former X-Division nuclear physicist, Defendant would be a high-value asset to any foreign adversary

There are perhaps few crimes as serious and unsettling as those charged in the indictment. Defendant sought out a foreign power and, as a former X-Division scientist at one of our nation's premier nuclear weapons laboratories, resolved to use his education, training and experience to help provide that foreign power with nuclear weapons with which to threaten our country and its citizens. As a theoretical physicist in the X-Division at Los Alamos National Laboratory ("LANL") for nearly eight years, Defendant worked on applied problems relating to the compression of materials in nuclear reactions, and he was familiar with important processes in both astrophysics and in nuclear weapons. *See* FBI report summarizing statement of Dr.

David H. Crandall, former Chief Scientist for the National Nuclear Security Administration, attached hereto as Ex. 4, at 2.[3] While the majority of his peers may have never rated Defendant among the top tier of scientists at LANL, with his training and experience, Defendant nonetheless would be a valuable lead or contributing member of any team seeking to develop a nuclear weapons program. *Id.* at 3. According to Dr. Crandall, the program that Defendant gave to Jimenez could work provided that a team of scientists worked through it. *Id.* at 2.[4] Dr. Crandall also considers the cover story that Defendant intended to offer the world to keep his Venezuelan nuclear weapons program secret to be a plausible or credible one. *Id.* at 3.

The United States has never contended that any of the documents Defendant passed to Jimenez described a working prototype of a nuclear weapon. Indeed, that is not what Defendant promised: his program envisioned up to a 20-year timeline, with an in-depth review by expert scientists from Venezuela beginning in the third year of the program. PSR at ¶ 39. Contrary to the suggestion contained in the report attached to Defendant's sentencing memorandum, Doc. 550, Ex. C at 2, the United States has also never alleged that Defendant had yet passed to Jimenez classified data that one might euphemistically describe as a "crown jewel," such as a

[3] A copy of Dr. Crandall's curriculum vitae is included with the exhibit. It reflects Dr. Crandall's wide and deep breadth of experience in working in several positions of high responsibility from 1974 through 2013 in the area of nuclear weapons and scientific programs at the Department of Energy.

[4] Indeed, the United States' theory of prosecution that Defendant would be a valuable member of a team seeking to develop a nuclear weapons program even finds support in the statement attached to Defendant's sentencing memorandum from former LANL scientist, Dr. Marvin Mueller. *See* Doc. 550, Ex. A at 2 and 11 (opining that he thought Defendant was "brilliant, and driven" and relating that Defendant had done work on, and was "fairly knowledgeable" about, nuclear weapons).

blueprint for a nuclear weapon. But it is undisputed that Defendant did pass classified Secret Restricted Data, the release of which by definition could harm the United States.[5]

Defendant passed restricted data about yields, the amount of material, and the high explosives required for nuclear weapons. Ex. 4 at 1. Even Defendant's own derivative classification witness concluded that some of the classified information Defendant passed would be "helpful" and "have some practical utility" to a foreign government interested in developing a nuclear weapon. Doc. 550, Ex. C at 3.[6] Defendant fortunately was arrested before his plan came to full fruition and before he had an opportunity to meet in person with Venezuelan officials and scientists as he had planned, PSR at ¶ 31, where he might have passed even more sensitive information, but his willingness to pass classified information to Jimenez undoubtedly demonstrated his commitment to the criminal enterprise. In his writings, Defendant also placed an extremely high value upon the information he had passed to Jimenez. *Id.* at ¶¶ 40, 49, 50, and 59. Of course, even if Defendant had not passed *any* classified data in the documents he gave to Jimenez, he still represented a high-value asset to any would-be adversary of the United States.

[5] "Secret is applied to information (RD, FRD, or NSI), the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the appropriate official is able to identify or describe." 10 C.F.R. §1045.3.

[6] The fact that Defendant only provided pieces of the mosaic, rather than the finished mosaic, does not diminish the significance of his offense and it does not support a low-end sentence. Rather, much like the defense's comments extolling the virtues of innovative thinking, providing even a small piece of the mosaic can be both significant and harmful if "it lays the loam upon which the ideas that do [provide practical solutions] may germinate." Doc. 550 at 13. With respect to other opinions Defendant's derivative-classifier witness expressed in his report about the claimed relatively low risks posed by the release of some of the Halite-Centurion information Defendant passed, *see e.g.,* Doc. 550, Ex. C at 2 (opining that "the sensitivity of [some] of the information, even though classified as SRD, is low and its impact or damage to the national security is minimal"), this Court should not overlook that neither the derivative-classifier official nor Defendant actually have the authority to assess such risks.

2. Defendant's decision to cross the Rubicon: after years of making threats, Defendant finally resolved that the American government had become his "enemy"

In his effort to reduce his sentence, Defendant is seeking to reframe his years of what he describes in his sentencing memorandum as "bombard[ing] Congressional staffers, former agency heads, and virtually anyone who would listen with manifestos," Doc. 550 at 5, that began sometime after he left LANL and lasted until he made his fateful decision to turn his back on his country. He now claims that in his relentless badgering of Congress, "[t]here was no possible financial return in what Dr. Mascheroni sought," *id.* at 6, that his actions were "of a purely altruistic and patriotic bent," *id.*, and that his unsuccessful efforts for the greater "welfare of humanity," Doc. 550 at 3, evidence a "certain tragic heroism," *id.* at 6. Incredibly, in the parallel universe where Defendant apparently wants this Court to travel, his crimes can be explained as nothing more than an extension of his heroic quest. Thus, according to Defendant, this Court should somehow believe that his interactions with Jimenez were not criminal, but amazingly, evidenced some sort of warped, "last, desperate attempt to open his government's deaf ears to his call for action." *Id.* at 7.[7] Unfortunately for Defendant, his story is full of readily disprovable lies. For example, not even the transcript of Defendant's attorneys' interview of Defendant's long-time professional colleague and collaborator, Dr. Marvin Mueller, which Defendant has attached as Exhibit A to his sentencing memorandum, supports the ludicrous tale Defendant asserts in trying to reduce his sentence. Rather, when asked by Defendant's attorneys what he thought about Defendant's claim that Defendant had been acting as some sort of

[7] As an aside, it should be noted that those who controlled the direction of science at our national laboratories were not deaf to Defendant's criticisms or suggestions. He would not allow them to be. His ideas were considered, but the science at the laboratories simply moved in a direction the leaders believed showed more promise than Defendant's ideas. Surely, many scientists at our national laboratories have found themselves on the losing side of a professional debate. But only Defendant appears to have sought to exact retribution by offering to help a foreign power develop nuclear weapons.

"Venezuelan double agent," Dr. Mueller replied that he "didn't think any jury would buy that argument." *Id.* at Ex. A at 17. Nor should this Court buy it.

Defendant's claim that his efforts to engage Congress were "purely altruistic," with "no possible financial return" for himself are also demonstrably false. One glaring omission in Defendant's story, for example, is the fact that he was seeking Congress to pass a *private* bill for his benefit. *See* Ex. 5 (copy of draft of portion of proposed private bill "[f]or the relief of Pedro Leonardo Mascheroni"). The private bill included provisions that would have provided Defendant with a significant monetary windfall.

Defendant's claim that he always dealt with Congress out of the purest of scientific and patriotic motives is also false. Dr. Mueller, for example, who was one of the scientists who had joined Defendant in his years of lobbying Congress and who was therefore well-familiar with those efforts, told Defendant's attorneys that while he thought that Defendant "was concerned about mankind . . . you know, he was using it as a way, a wedge, you know, to get in, to make himself look a little bit less selfish . . . ." Doc. 550, Ex. A at 14. Dr. Mueller also stated that in his opinion, "primarily [Defendant] was interested in glory and fame. . . . He wanted to be number one, he wanted to be recognized . . . ."[8] *Id.* at 13.[9] In the years after Defendant began to steer his congressional lobbying efforts away from Dr. Mueller's laser experiments to talk about nuclear weapons, a subject upon which Dr. Mueller believed Defendant to be "fairly

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[8] Dr. Mueller went on to comment that Defendant "definitely likes the feeling of power and glory or whatever, that's more important to him than money, although making money became increasingly important to him." Doc. 550, Ex. A at 11.

[9] The Court may recall the video statement from Susan Levin Klein, a friend of Marjorie Roxby Mascheroni's since 1968, that was played for the Court at Marjorie Roxby Mascheroni's sentencing. Defendant's craving for recognition can also be seen in the context of Ms. Levin Klein's searing observation that Marjorie Roxby Mascheroni had "let herself be dominated by an obsessive, single-minded, uncaring narcissist, who never reached the level of professional success *he* thought he deserved." "The Life of Marjorie Mascheroni," at ~ minute 15:26.

knowledgeable," *id.* at 11, Dr. Mueller also thought Defendant liked the "sense of empowerment it gave him." *Id.*

The other glaring omission from Defendant's narrative about his purely "patriotic" dealings with Congress is the many threats Defendant had made over the years about going to work for a foreign power if he did not get the congressional hearing for which he was fighting. These threats raised concerns for both Dr. Mueller and another LANL scientist who had collaborated with Defendant, Dr. Charles Cranfill. *Id.* at 12-18. As Dr. Mueller explained, Defendant would frequently end his papers with a "thinly veiled," *id.* at 11, and "some of them not very veiled," *id.* at 14, threat "[t]hat if they didn't give the hearing he wanted, dire things could happen. That was a threat, and that was his intent. That I think is obvious." *Id.* at 18. Dr. Cranfill was upset about those threats, and he "warned Leo several times . . . 'Be careful, you're playing with fire, twisting the dragon's tail. . . .'" *Id.* at 14. Dr. Cranfill told Dr. Mueller that "he had warned Leo more than once about what he was threatening that could lead to repercussions." *Id.* at 15.[10]

It was partly in light of the threats that Defendant had made over the years that Dr. Mueller also told Defendant's attorneys that he was not surprised at what Defendant had done. Dr. Mueller even illustrated his lack of surprise by describing a lobbying effort from years earlier when Defendant had been trying to get his project funded, an effort which apparently had prompted Dr. Mueller to ask aloud of his colleagues: "And what would happen if he lost? And we all shuddered. We knew he wouldn't go down easily. So in that sense, I'm not surprised.

[10] Even when the FBI interviewed him at the time of execution of the search warrant at his home on October 19, 2009, when he was not yet aware of how much the FBI knew about his activities and he was trying to concoct a cover story, Defendant told agents that "it is a much better deal to give a hearing to me rather than I decide that I'm not an American citizen. I go to Argentina and say I'm not an American citizen anymore."

And after all, he did threaten similar things to Congress any number of times over a period of years. . . . It was an emotional act of immaturity, like a little kid, a spoiled little child not getting his way, starts throwing things." *Id.* at 17.

It was in the fall of 2007, after repeating his threats in Washington and apparently having an interaction that he did not like, that Defendant finally accepted that Congress was not going to capitulate to his blackmail and give him a hearing. It was then that Defendant decided to make good on his years of threats. As Defendant explained to Jimenez: "In my mind, I said, 'Here we have something in common,[11] if the American government doesn't give me this, you know, the American government is going to be my enemy.'" Ex. 1A, 8/15/09 Clip 1. It was for that reason that Defendant explained to Jimenez that he made "a very conscious decision that what [he] wanted to do is to go to the [Venezuelan] embassy," Ex. 1A, 8/15/09 Clip 3, which is what he also told Jimenez that he subsequently did. And once Defendant made his decision, he was single-minded in his pursuit of it.

Several times during the course of his activities with Jimenez, Defendant also spoke in private to his wife about the reasons he had "made my decision . . . [to] talk to the people in Venezuela, which was immediately after I had this very ugly communication" in Washington. Ex. 3A, 8-7-09 Clip 1. Defendant told her that he had not wanted to continue depending on the "little money" that they had when he knew there was "no future" in continuing to try to lobby Congress for a hearing. *Id.* In another private conversation with his wife, Defendant repeated his same theme that America was no "place for me, there is no future . . . now, I am going to

[11] Defendant was referring to the fact that he believed he had something in common with Venezuelan President Hugo Chavez, based upon news reports of President Chavez maligning the United States government.

have money to move my thing. *Real* money, Marjorie, so *I* am going to be the boss with power, money, and science." Ex. 2, 6-25-09 Clip 1.[12]

In fact, based on the evidence, perhaps the most noteworthy aspect of Defendant's arguments in section A of his sentencing memorandum is his claim that he took action to open a government's ears. Sadly, the ears that he sought out, however, did not belong to the United States, but to Venezuela. As Defendant effectively told his wife many times, he had indeed crossed the Rubicon.

3. <u>Defendant's meetings with Jimenez and his efforts to convince Venezuela that they needed to develop nuclear weapons to protect themselves from the United States</u>

As Defendant informed Jimenez, in late 2007, Defendant went to and emailed the Venezuelan embassy in Washington, D.C. Doc. 417 at 9. As discovered at his home during execution of the search warrant, Defendant sent an email to embassy personnel informing them that he had "worked in the division that designs nuclear weapons" at LANL. PSR at ¶ 21. After his embassy visit, he had three in-person meetings with Jimenez. Doc. 417 at 9, 14; Doc. 421 at 11, 19. As captured in the videotapes, from the very outset of his first meeting with Jimenez, with great enthusiasm and exuberance (and very few interruptions), Defendant unveiled his grand and detailed vision for why Venezuelan needed to develop nuclear weapons and how committed he was to help make that happen. It is obvious from the videotapes that Defendant had devoted a great deal of time developing his ideas *before* he ever connected with Jimenez. During their meetings, Defendant dominated the discussions, and sometimes even adopted the

[12] *See also* Ex. 3A, 6-28-09 Clip 1 (Defendant tells his wife "I have done everything I could" and "I am not an American anymore. This is it." And that "this is a great opportunity to save my career as a scientist, get some money."); Ex. 3A, 8-16-09, Clip 1 (after meeting with his wife and Jimenez, Defendant tells her that he "didn't choose this. Reality is there is no option.")

role of an instructor speaking to a student.[13] From the very outset of his relationship with Jimenez, Defendant stressed to Jimenez, with no prompting whatever from Jimenez, that Venezuela needed nuclear weapons to protect itself from the oil-hungry United States. PSR at ¶ 39. He made it clear to Jimenez that he had a program through which Venezuela could develop a nuclear arsenal and that through him, Venezuela would be receiving classified information, including information that "inside [LANL] it's top classified." *See* Ex. 1A (video clips from Defendant's secret meetings with Jimenez on March 30 and 31, 2008). Defendant supported his position by providing Jimenez, during just their second meeting, with a classified presentation he had given to American scientists concerning U.S. nuclear weapons. PSR at ¶ 26. Defendant also told Jimenez that he liked Venezuelan President Hugo Chavez and that he was willing to drop his American citizenship. Ex. 1A 3-30-08 Clip 14.

In fact, Defendant's meetings with Jimenez were apparently not his first clandestine interactions with officials from foreign powers. In another private conversation with his wife about his first meeting with Jimenez, Defendant told her that Venezuela sending Jimenez to meet with him is "what happened with the Argentines, too, they just came just to visit me … in Albuquerque." Ex. 2A 3-29-08 Clip 2. His wife later inadvertently confirmed Defendant's history and his treasonous intentions when she told one of their children that Defendant was "'going to make bombs for Argentina if they don't listen to him in [Congress]. Oh, not Argentina, I'm sorry, Venezuela." Doc. 421 at 10.

Demonstrating the seriousness of his intent, Defendant took countless steps to try to ensure that the United States was completely unaware of his criminal conduct – which is

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[13] For example, at one point during the first meeting, Defendant wanted Jimenez to repeat back to Defendant a (specious) argument that Defendant had for why certain information could be viewed as having been declassified even though the United States government had not declassified it. Ex. 1A 3-30-08 Clip 12.

obviously the opposite of what he now expects the Court to believe. He adopted the codename "Luke," PSR at ¶ 28, and wrote the documents he provided to Venezuela in code,[14] providing only Jimenez with the key to unlock the code. PSR at ¶ 38. He told Jimenez how important absolute secrecy was to their relationship, going so far as to express to Jimenez the concern that if the CIA learned what he was doing, the CIA would try to "put a bullet in [his] brain." Ex. 1A 3-30-08 Clip 13. In order to deploy his "University strategy," which would provide his weapons development program with a plausible cover operation, PSR at ¶ 28, Defendant explained that he needed to recruit respected colleagues to work on a purported energy venture using lasers, the results of which would be used in weapons development. Although he could not keep his lies straight, he had no problem lying to the longtime colleagues he was trying to recruit so that they would not learn of his treachery. In recorded conversations Defendant had with various colleagues on July 12, 2008, March 18, 2009, March 19, 2009, June 8, 2009, and June 29, 2009 (all of which were provided to the defense in discovery), Defendant told his colleagues not that he had been communicating with Venezuela about a nuclear weapons program, but that he had been working with a company (or depending on the colleague, a consortium), that was located in Texas (or sometimes internationally) or that was an American corporation with an international presence. He lied to his colleagues because, as he told Jimenez, his colleagues were true patriots who would report him to government officials if they knew what he was really up to.[15] Ex. 1A 8-15-09 Clip 2.

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[14] He used the term "Em," standing for "Empire," to refer to the United States.

[15] Given his description of himself as a patriot in his sentencing memorandum, it is ironic that when talking to Jimenez, Defendant was frank about recognizing who the true patriots were. As, Defendant explained it to Jimenez, while scientists in Venezuela would be the "group that will produce a bomb," the scientists they worked with in the United States could never be told about that effort because if they did, "those scientists, they are very, very patriotic . . . [a]s soon as they know, the CIA and everything just come after us." Ex. 1A 8-15-09 Clip 2.

Defendant's commitment to his criminal enterprise is also demonstrated by the fact that he was determined to get paid handsomely for his work, PSR at ¶¶ 40, 41, 46, 49, and to keep those payments secret from the American government. *Id.* at ¶¶ 56-57. He traveled to Houston to begin the process of obtaining an Argentine passport. Then, to ensure that the United States never learned what he was doing, he consulted with foreign bankers about setting up accounts under an assumed name, as an Argentine citizen, with foreign banks that would not report his activities to the IRS. *Id.* and Ex. 6 (translated email from Defendant to Argentine banking official dated 9-28-09). Each of the above acts, among many others which Defendant undertook when he did not know that he was under the watchful eye of the FBI, are compelling evidence of Defendant's obvious and true intent to help develop nuclear weapons for Venezuela using classified information.

4. Defendant's nonsensical cover stories

Defendant's plans immediately began to unravel on October 19, 2009, when a pair of FBI agents appeared at his door. As the agents began interviewing him, Defendant had no idea what they knew and did not know about his actions, or about Jimenez. He was never told, for example, that Jimenez was an undercover agent. He was never told about the hours of recordings of him that the FBI had. Defendant nonetheless decided to follow his first instinct: so he lied.[16] Unfortunately for Defendant, he was caught off-guard, and he was not quick on his

[16] In one of the recordings of Defendant with his wife, he succinctly encapsulated his attitude about the need for lying when his interests were on the line. Thus, after Defendant and his co-defendant met with Jimenez, he berated her for failing to lie about editing his work, stating, "You just have to learn to say, 'I don't edit his work.' You lie. Yeah. Big deal. You just have to do it." Ex. 3A 8-16-09 Clip 1. Defendant also explained that if she did not lie then she was "going to get in trouble here in the United States and there in Venezuela, because they are going to say 'Marjorie knew everything,' ok. They are going to make a case against *you*. And then when they say they have a good case against you, they are going to offer you amnesty or some whatever if you talk." *Id.* In other words, Defendant's concern about his wife not lying was about both of them, but mostly about the risks to himself.

feet. Thus began the origins of Defendant's defense(s), a version of which Defendant has presented to this Court, which very quickly came to be comprised of a succession of incredulous, illogical, and internally inconsistent cover stories, each as far-fetched as the next. Like a Rubic's cube – only one that can never be solved – every time Defendant focused on explaining some facet of his conduct, an earlier story he had told to redefine reality would start to fall apart.

a. Statements Defendant made to the FBI[17]

The above said, given the most current version of his defense, it is telling that when agents first appeared at his home and offered him a chance to explain what he had done, Defendant failed to greet them by stating, "Thank goodness you are here. My plan to get the government's attention has worked to perfection." Instead, he began by flatly denying even knowing Jimenez.

It was only after perhaps an hour and a half of questioning, when Defendant realized his story needed to change, that Defendant first suggested that "maybe" it was really all part of his plan that the FBI was involved. He claimed that he was dealing with Venezuela so that the FBI would use its influence with Congress to get him a hearing. Later in the same recorded interview, Defendant floated a different excuse, claiming that he became involved with Venezuela not to get a hearing, but so that he could somehow convince Venezuela to *not* build nuclear weapons. Defendant admitted, as he had to with the documents he provided to Jimenez now placed before him, that nowhere in the information he provided to Venezuela had he made the argument that Venezuela should not develop nuclear weapons. Rather, as far as Defendant knew, Venezuela believed that Defendant was going to assist Venezuela develop nuclear

[17] The FBI recorded their interviews with Defendant. These recordings were provided to Defendant to the defense on December 8, 2010.

weapons. Thus, Defendant had to admit to the agents in his recorded interview that "they [Venezuela] don't want to do anything with the laser. They want nuclear weapons."

Near the end of his interview, Defendant apparently had yet another epiphany. He announced to the agents that he was going to go to Venezuela and present his program to Venezuelan officials and that U.S. intelligence officers should accompany him. When the FBI agent pointed out that his story about presenting his program in Venezuela was different from his story about going to Congress, Defendant acknowledged his story had changed.

b. Statements Defendant made to others[18]

In the days following his interview with the FBI, and with the public aware of the execution of warrants at his home, Defendant contrived even more excuses. For example, during a telephone call on the day after the search warrants were executed with a friend or acquaintance, Defendant said that he knew Venezuela wanted nuclear weapons and, although he was ostensibly going to provide Venezuela with a secret nuclear weapons development program, he was really just going to try to show Venezuela that they should *not* have nuclear weapons. But in the same conversation, he shifted his story to say not that he was trying to dissuade Venezuela from building a nuclear arsenal, but that after he received $400,000 from Venezuela, his plan was to go to Congress and let Congress know what he had been doing, and that Congress would "have to have hearing on all of it."[19] That lie was at odds with another statement Defendant made in

[18] As with his recorded interviews with the FBI, these statements were provided to Defendant beginning on December 8, 2010.

[19] This absurd story makes even less sense when one considers that Defendant did not to go to Congress immediately after he had received a genuine bank statement reflecting the payment of more than $400,000 of the fee he charged, nor did he alert Congress about the $20,000 in cash he had received from Venezuela. Of course, this claim also does not square with the efforts he made to seek out foreign bankers who would be able to help *hide* from the United States government all the money he had received from Venezuela.

the same conversation when he let his guard down and admitted that he did not trust the American system. In the same ever-changing conversation, Defendant also first floated another trial balloon, the contradictory notion that the classified information he had provided to Venezuela was unreliable science,[20] a theme he now reprises in his sentencing memorandum.[21]

[20] The claim that Defendant intentionally provided unreliable science is not only patently untrue, it is also illogical. First, Defendant provided to Jimenez a classified presentation he had made to American scientists concerning U.S. nuclear weapons and information he had provided to Congress when he was still trying to get his project funded by the United States. Defendant did not give unreliable science to the very scientists to whom he sought to sell his scientific theories. Thus, he did not give unreliable science to Venezuela. Second, this contention cuts against Defendant's claims that he obtained Restricted Data that he provided to Venezuela from the internet. *See, e.g., infra* and Doc. 550 at 10. If that were true, it would mean that the scientific documents that he claimed to his wife would provide for the Venezuelans "a very clear assessment of, you know, as a scientist who I am," Ex. 2A 3-30-08 Clip 2, also simply relied on information from the internet. Furthermore, even if he thought that the science he was providing to Venezuela was truly unreliable, there would have been no need to find it on the internet – Defendant could have simply made up the information. Third, it is beyond belief that Defendant intentionally set out to dupe a foreign government: for example, did his plan include trying to swindle Hugo Chavez's government out of $800,000 on the mere hope that there would be no recriminations against him? Finally, Defendant's yarn about providing unreliable science to Venezuela conflicts with his assertion that his dealings with Venezuela were just an attempt to get Congress to fund his project. Certainly, even Defendant would have to admit that he would have no chance at getting Congress to fund a project if he admitted the project was based on worthless science.

[21] For example, as noted previously, while the report attached to Defendant's sentencing memorandum states that the Secret Restricted Data that Defendant gave to Jimenez could be "helpful and have some practical utility" to a foreign adversary interested in developing a nuclear weapon, it also states that "without more" the information would not be enough to develop a nuclear weapon. Doc. 550, Ex. C at 3. The report writer also offered his opinion that the design information that Defendant had provided was "probably not a workable design." Doc. 550 at 9, Ex. C at 2. But the report writer neglects to note – perhaps because he did not know – that Defendant's plan was always for his program periodically to be reviewed by subject matter experts in Venezuela, both at the outset of the program, *see* Ex. 7 (translation of April 17, 2008 Spanish email from Defendant to Jimenez stating "I believe I told you that for this *meeting* we would need people in high positions in the organization and that some of them be experts in defense, others in sciences, and others in economics."); Ex. 8 (April 15, 2009 coded email from Defendant to Jimenez, stating in its decoded form that Venezuela needs to "hire the best experts in the pertinent [weapons] field for (supposedly) academic work."), as well as when the work progressed. PSR at ¶ 39. There was no logical reason for Defendant to have asked for an audience of Venezuelan experts in weapons and science if his grand plan was to sell and present worthless science to them. Finally, the objectivity and reliability of the report writer's opinions

Later, in still another revealing moment, Defendant admitted that he was afraid he might be put to death because "if you have an accusation, and the accusation is treason, and they prove that in fact you were a traitor, then one possibility is, you know, death."

In another conversation with a different individual shortly after his interview with the FBI, Defendant changed tacks again. This time, he claimed that he was trying to build a laser program in a foreign country but that Jimenez had told him that Venezuela was instead interested in nuclear weapons, not technology. Defendant explained that based on his conversations with Jimenez, "Venezuela was not interested in my [laser] proposal. They really were interested in developing nuclear weapons because they were scared of the United States." Putting aside Defendant's false characterization of Jimenez as having been the person to argue for nuclear weapons, which is contradicted by the recorded meetings with Jimenez (that Defendant still did not know existed at the time of this conversation) wherein Defendant enthusiastically explained to Jimenez the reasons why Defendant believed Venezuela needed nuclear weapons,[22] this statement also showed that Defendant knew exactly what he was doing. He was seeking to sell Venezuela a nuclear weapons development program. Moreover, even though in this conversation Defendant acknowledged that Venezuela was not interested in building a standalone laser for energy purposes, he explained how laser programs can be extremely useful

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need to be assessed against the fact that report writer also opined on subjects that range far outside the field of identifying derivatively classified information, such as the report writer's statement that "it is easy to see" Defendant's "desperation . . . to . . . clear his name and reassert his scientific reputation." Doc. 550, Ex. C at 1. Defendant does not reveal how much money the report writer was paid for his two and a half page report on Defendant's behalf.

[22] In vast portions of the documents Defendant wrote for Jimenez, as well as in conversations with him, Defendant elaborated on this same topic, wherein the virtues of lasers were basically relegated to being extolled either for their military applications or for their use as a credible cover program for a nuclear weapons development effort. *See, e.g.,* Doc. 2 at 6, ¶ 11(a) (Defendant explained to Jimenez how lasers could be used to "blind" satellites); Doc. 421 at 14-15; PSR at ¶¶ 28, 39.

in developing nuclear weapons.[23] Also, in direct contradiction to his earlier unreliable science trial balloon, in this conversation, Defendant admitted that the information he had provided to Venezuela was a "truthful from the scientific point of view, nuclear program that a nation would need in order to get deterrence against the United States." The new lie that he floated in this conversation was that his plan all along had been to take the document he provided to Jimenez to Congress "to show to Congress that this is something that nations could do, you know, that they could develop nuclear weapons without testing, and you wouldn't know," so "[t]he answer is the United States should not scare nations around." Defendant went on to acknowledge that he believed that the government was "going to make a case of espionage" against him. He then all but confessed to criminal conduct, stating that the government was going to allege that "my document is classified because even though the information was in the internet, that information was classified. And that is something that I disagree strongly because information that is internet, for anybody to see it, to me, by definition, is unclassified.[24] And that is information I

[23] Dr. Mueller explained the same thing to Defendant's attorneys when he told them that a laser program "gives us a way of mimicking some of the conditions in the weapon more cheaply, in the laboratory . . . it gives a way of testing your bomb theories . . . it's a way of doing nuclear testing more cheaply. It's a way potentially that governments with the resources we don't have could get some data on fusion without building an actual bomb." Doc. 550, Ex. A at 4.

[24] Dr. Mueller stated that both he and Dr. Cranfill had warned Defendant about Defendant's penchant for talking about classified information. *See, e.g.,* Doc. 550, Ex. A at 13-14 ("'Be careful, Leo,' I would say. And I didn't have to say more, because I knew that he knew that it was highly classified."). In their first meeting, Defendant also admitted to Jimenez that the information he was discussing with Jimenez was viewed as "top classified" by the United States. Ex. 1A, 3-30-08, Clip 9. In any event, the evidence that Defendant has always known that classified information does not lose its status as classified information just because it may happen to appear on the internet is overwhelming. *See, e.g.,* Doc. 195 at 7-10 (cataloguing some of the evidence establishing this basic fact). Defendant ultimately admitted in his plea agreement that he knows that classified information, including Restricted Data, does not lose its status as classified information merely because it appears on the internet. Doc. 417 at 7-8. Nonetheless, during litigation in this case, Defendant insisted that the defense was entitled to take the same lawless, legally unsustainable and intransigent position that Defendant outlined during the above conversation. *See* Doc. 180 at 17 ("[w]here the Defense in this case has obtained RD, FRD, or

used,[25] and the government is going to be saying, that information, even though it is in the internet, is classified."[26]

The above are but a handful of examples of Defendant's many lies. In fact, Defendant stands before the Court as a convicted liar who, after being confronted with incontrovertible evidence, has now admitted to many of the lies he told the FBI agents when he spoke to them. *See* Doc. 417 at 6, ¶ 7.d; at 15, ¶ jj. In fact, if the Court were to consider *only* his false statement convictions, his guideline range for those offenses is 121to 151 months. PSR at ¶ 32. Given the gravely serious nature of the other offenses to which he has pleaded guilty, a sentence of 66 months is more than warranted.

NSI information in the public domain, through its own efforts, or through sources other than the United States in connection with this case, *it should not be restrained from utilizing such relevant information as it sees fit.*") (emphasis added).

[25] Any claim Defendant makes that all the information he provided came from the internet, as discussed herein, is demonstrably false. Defendant even has admitted as much. Doc. 417 at 15 (Defendant admitting that "[o]n October 19, 2009, FBI agents obtained from my home classified documents confirmed by DOE to contain classified Restricted Data. Some of the documents were designated with the official classification marking 'SECRET.' I possessed these documents without authorization from LANL and retained them in my home. Some of the classified documents in my home contained the Restricted Data that I provided to 'Jimenez.'") Furthermore, in early drafts of the documents Defendant provided to Jimenez, Defendant shared his intention to lie and claim he did not know the information was classified if he were ever caught, writing that Venezuela "should be aware that in order to justified [sic] that my writing was not classified – thus be prepared for a defense in case the document could end up with [the United States]—I stated that all the information was unclassified because it could be found in the Internet," *see* Ex. 9 (excerpt from early draft of July 14, 2009 cover letter recovered from Defendant's computer), and that "I state that my paper is based on open information found in the internet – while in reality it is founded in my knowledge," *see* Doc. 195-6 (quote from final version of letter sent to Jimenez). *See also* Doc. 417 at 13 (informing Jimenez that his writings were based on what he learned at LANL and "classified and other discussions with former colleagues"). Doc. 417 at 13.

[26]Even if Defendant had gathered all the information he provided to Jimenez from the internet as he falsely claimed, he knew how dangerous such information could be, as he warned the FBI agents, "You should be extremely concerned as an American that all this information is in the internet."

B. The history and characteristics of the defendant

> *"I'm talking about one to two million a year. . . . I don't know which is the number I'm going to end up requesting, a lot of money. And uh, a lot of power, so I am really very, very turned on with this. So that's the idea that you, baby, this time you are going to be cashing in and you're never going to fooling around with any other thing, that's really nice. Okay? That's real, it really is a dream."*
>
> *Defendant to his wife,* Ex. 2A 3-31-08 Clip 2

Defendant's history and characteristics demand a sentence at the highest-end of the negotiated guideline range. Defendant needs only to look into the mirror to know who bears the blame for the succession of life decisions that have led to his appearance before this Court for sentencing. Simply stated, Defendant is an avaricious, consummate liar who refuses to accept any laws, rules, or reality which do not benefit him. He does not care who he harms, satisfying his outsized ego by betraying his country and even recruiting his wife to join him, which landed her in prison where she is today. Defendant has shown no remorse for the damage he has inflicted upon anyone. He has refused to accept any genuine responsibility for his illegal actions, but has instead resorted to concocting absurd explanations for his conduct. An unrepentant, angry man who sees this country as his enemy remains a dangerous man. With the serious flaws Defendant has demonstrated run deep through his character, the public's best defense from Defendant ever seeking to strike out against this country again is for him to remain in custody for the longest term authorized under the plea agreement. He has fully earned a 66-month sentence.

If a man's attitudes in life could be summed up in just a sentence or two, the sentences that might most poignantly sum up Defendant's attitude toward the rest of the world could be his reaction after he ran a red light when driving. His wife told him that had a policeman seen him run the red light the policeman would have stopped him. While a police radar detector beeps in the background, Defendant replied, "Yeah right. But . . . if there is a policeman saying, 'You did

run a red light . . . ,' we're just going to say, 'No, it was a green light.'" Ex. 3A 8-18-09 Clips 1 and 2.

This contemptuous and defiant attitude toward rules, authority, and truth define Defendant. Defendant was given the high privilege and honor of working in a highly secure facility on some of the most highly-guarded secrets in the world. He was given a security clearance to ensure he protected those secrets for the rest of his life. Those who hired him trusted and depended upon him to have the personal integrity and honesty to honor the solemn commitments he had made. Through his intentional acts, Defendant turned against them, and his country.

One theme that seems to run through Defendant's life is that he only seems to want to obey rules if it is convenient for him to do so. If the rules do not suit his interests, then there is a good chance Defendant will look for some way to try to weasel around them, or try to lie his way out of them, or adamantly deny that the rules even exist. There is also a good likelihood that even if he is caught red-handed violating some rule that he will seek to cast himself in the role of being a victim, and complain loudly to whoever he can get to listen.

This background gives one some perspective on the agents' discovery during the search warrant that Defendant possessed in his home stolen classified documents from LANL – the one entity that, for all intents and purposes, has been the only organization to employ him since 1980, which is the same entity that provided his wife and co-defendant with a livelihood to support their family for decades. The cache of documents that Defendant had in his possession included those with official SECRET classification markings on them and included highly valuable testing reports. *See* PSR at 58-59.

The discovery of these documents shed new light upon one of Defendant's most oft-repeated complaints in his life, which is that of portraying himself as the victim of unfair treatment by DOE for having lost his security clearance at LANL. Defendant has always been mule-headed about asserting that security violations that had been brought against him at DOE had been trumped up.[27] Yet it is now clear that at the same time that he was protesting to the world that he was a victim, and not the perpetrator of security violations, Defendant was blatantly violating our nation's security laws by illegally possessing this cache of stolen documents in his home.

The agents' discovery of stolen secret documents at his home years after his termination from LANL also reveals that statements in 1988 from one of his former colleagues were prophetic. As part of a voluminous Office of Personnel Management investigation into the Defendant's security infractions that took place in early 1988, several of Defendant's colleagues at the laboratory were interviewed about the infractions, and asked about their opinions of Defendant's fitness for a security clearance. One interview subject opined that the subject did not think that Defendant was an honest person. *See* 1988 OPM report of subject interview attached hereto as Ex. 10 at NNSA C000179. The subject further opined that the subject thought that Defendant would "lie, cheat or steal" to achieve his ends. *Id.* The subject also opined that he was "untrustworthy" and that the subject had "no doubt" that Defendant had "willingly processed classified information on his PC at home," and that he "would knowingly divulge classified information" if he thought it would be useful in gaining support for his projects. *Id.* The subject also did not believe that Defendant had ever been singled out for any security

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[27] *See, e.g., Mascheroni v. Bd. of Regents*, 1992 WL 674922 at * 3 n.2 (D.N.M. Dec. 14, 199) (noting Defendant's civil claim that DOE suspended his security clearance "after Lab employees allegedly 'made several frivolous and false charges of security violations.'" (quoting Second Amended Complaint ¶ 45)).

violations. *Id.* at NNSA C000179-80. In addition, the subject "did not believe that [Defendant] was loyal to the United States Government . . . but [was] loyal only" to himself. *Id.*

As this Court is aware, on August 15, 2009, Defendant bragged to Jimenez that he had found a way to "beat" the United States' security system. PSR at ¶ 53. But the way that Defendant found to "beat" the system was simply to break the promises he had made when he obtained his security clearances, and thereby break the law, and then when caught, emphatically deny that the classification rules applied to him. In other words, Defendant simply decided to go back on his promises and repudiate his security clearance. He then obdurately maintained that it was his right to do so during the litigation of this case. *See, e.g.,* Doc. 195 at 11-16. Yet as President Barack Obama has stated: "[O]ur nation's defense depends in part on the fidelity of those entrusted with our nation's secrets. If any individual who objects to government policy can take it into their own hands to publicly disclose classified information, then we will not be able to keep our people safe, or conduct foreign policy."[28]

The information Defendant sought to give away belongs to the American people. They paid for it and it was developed on their behalf. It is held in trust for the American people. Defendant never had the right to disclose classified information without authorization. No person who has held or holds a security clearance has that right. The decision is not their decision to make. Nor does any person who has held or holds a clearance necessarily ever know the full repercussions of such foolhardy, and criminal, choices. Defendant knew that, but he nonetheless decided to appropriate the choice to disclose classified information to himself alone, and for purely selfish, not altruistic, reasons.

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[28] President Barack Obama, remarks of January 17, 2014, www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence.

C. The need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, and avoid unwarranted sentencing disparities between defendants who have committed similar crimes

Even on the eve of sentencing, Defendant continues to make hollow claims about himself and attempts to minimize the gravity of his conduct. *See* Doc. 550 at 7. As just described, his protests demonstrate that he continues to fail to appreciate the seriousness of his offenses and that he does not have any respect for the laws that he has broken. His lack of acceptance of responsibility thus continues to this day. If only for these reasons, Defendant's sentence should vastly exceed the 12-months-and-one-day sentence received by his co-defendant. Yet, as discussed below, Defendant's culpability for all of the charged offenses also vastly exceeded his wife's guilt. Accordingly, the Court should impose a sentence at the high-end of the sentencing range contained in the plea agreement to reflect the seriousness of the offense, promote respect for the law, and appropriately account for the difference in Defendant's conduct and that of his co-defendant.

There can be no doubt that co-defendant Marjorie Roxby Mascheroni committed grave crimes against the United States. However, her conduct still pales when it is compared to Defendant's conduct. He was the undeniable leader and his punishment should fully reflect his leadership role. Defendant alone initiated the criminal conduct in this case. Defendant alone solicited the Venezuelan embassy, marketing himself as a top physicist who had worked in a division at LANL that designs nuclear weapons. *See* PSR ¶ 20-21. Defendant alone attended all of the meetings with Jimenez and arrived at the initial meetings with a well-formed plan for Venezuela to develop and use nuclear weapons, including a cover-up strategy. *See* Ex. 1A 3-30-08 Clips 1 through 14. Defendant alone had the requisite expertise to develop and author the documents concerning his nuclear weapons program for Venezuela. Defendant alone dealt with

foreign banking officials to attempt to open foreign bank accounts that would hide from the United States any money he received from Venezuela. And Defendant alone disavowed his American citizenship. Because Defendant was the driving force without which there never would have been any crimes, his sentence should exponentially exceed the sentence his co-defendant received, especially in light of the fact that Defendant Roxby Mascheroni's sentence was premised on Defendant's leading, domineering, and more culpable role in the offense. A sentence of 66 months would appropriately reflect the starkly different roles played by Defendant and his co-defendant.

In addition to his aggravating role in the offense conduct, Defendant's sentence should greatly exceed the sentence received by his co-defendant given the disparity in their acceptance of responsibility. While Defendant Roxby Mascheroni greatly minimized her involvement in the offense, she nevertheless accepted responsibility for the crimes she committed, resulting in her receipt of the low-end of her negotiated sentencing range. Defendant, on the other hand, stands before the Court entirely unrepentant, having attempted to withdraw his guilty plea and continuing to peddle his fantastical and logically-inconsistent excuses. For this reason alone, he has earned a sentence of 66 months.

D. The need for the sentence imposed to protect the public from further crimes of the defendant

Only by Defendant being imprisoned will the public be protected from him. Typically, one would hope that being detained would cause an individual to become self-reflective, seek rehabilitation, and leave prison a better person. Here, because Defendant refused to comply with his conditions of release, the Court has the benefit of seeing the impact prison has on his behavior. It has none. Even while in custody he continues to produce documents that DOE has confirmed contain classified information. This Court can have no assurance that without four

prison walls confining him, Defendant will not risk harming our national security by again choosing to illegally disclose classified information. The public deserves to be protected from Defendant for the full 66 months authorized under the plea agreement.

E. To provide the defendant with need educational or vocational training, medical care, or other correctional treatment

Despite his efforts to portray himself as such, Defendant is not a feeble, ill man. He was 72 years old when he first contacted Venezuela, extolling to Jimenez his conquests of the ski slopes and his exploits on the tennis courts. Some time has, of course, passed since those meetings but an overwhelming amount of that time is due to the tactics Defendant employed to delay the resolution of this case. He should not now be rewarded for those actions. Furthermore, the United States was well aware of Defendant's age and fully took that factor into account when it negotiated the agreed-upon prison term set out in the plea agreement. Indeed, a sentence of 66 months is not even one-third of the *lowest* end of the advisory guideline range Defendant faces.

The sentencing guidelines do not control in this case. But the principles underlying them remain compelling and persuasive. Under U.S.S.G. § 5H1.4, for example, departures based on a defendant's physical condition are restricted solely to "extraordinary" circumstances when a defendant is "seriously infirm." Over the years, applying the guidelines, courts have refused time and again to give any sentencing discounts to defendants suffering from medical ailments more serious than those Defendant claims to have. For example, in *United States v. Krilich*, 257 F.3d 689, 693 (7th Cir. 2001), the defendant was 69 years old and had chronic cardiovascular disease, chronic peripheral vascular disease with hypertension, obstructive pulmonary disease, and lower back pain of lumbar and lumbosacral origin. *Id.* at 692. Yet the *Krilich* Court found that such ailments would only be "extraordinary" if "the prison medical facilities cannot cope with it." *Id.,* at 693. The Court went on to state:

> The Bureau of Prisons can provide Krilich with the medical regimen (which is to say, the drugs and diet) that his physicians believe to be appropriate. That the Bureau has not provided (and does not propose to provide) the quality of care that top private specialists provide is neither here nor there; wealthy defendants can afford exceptional care, but this does not curtail punishment for their crimes. Krilich did not establish that his condition is either "debilitating" or "extraordinary," and a departure therefore conflicts with norms established by [U.S.S.G.] § 5H1.1 and § 5H1.4.

Id.

Indeed, courts have frequently denied departures to defendants who were suffering from very serious medical problems. *See, e.g., United States v. Mallon*, 345 F.3d 943 (7th Cir. 2003) (defendant who had a heart attack, followed by quadruple by-pass surgery, followed by a second heart attack, and who also had skin cancer, was not entitled to a departure because there was no showing that institutional medical care would be markedly inferior to that available outside, or that the defendant's medical conditions were of a type that would shorten the defendant's life as compared to those at liberty); *United States v. Johnson*, 318 F.3d 821 (8th Cir. 2003) (defendant who had heart attack in prison following his conviction, and was suffering from coronary heart disease, hypertension and Hodgkin's disease, was not entitled to a departure, as defendant's impairments would not have a substantial impact on his ability to function within a prison environment, his Hodgkin's disease had not recurred, his cholesterol and blood pressure were controlled, and his most recent heart tests revealed no reason for surgery); *United States v. Persico*, 164 F.3d 796 (2nd Cir. 1999) (defendant who, while in the care of Bureau of Prisons' medical personnel, had a kidney removed because of cancer, and was also given a triple bypass, was not entitled to a downward departure because the BOP was able to accommodate his medical conditions); *United States v. LeBlanc*, 24 F.3d 340 (1st Cir. 1994) (upholding judge's decision not to depart for a defendant who had suffered two heart attacks, because there was no

indication that the defendant's life would be threatened or shortened by virtue of being incarcerated, and no evidence that the BOP would be unable adequately to accommodate defendant's medical needs).

Defendant's description of his physical ailments is not any more compelling or extraordinary than the poor health conditions of any number of other defendants in the past. Defendant is not suffering from any medical issue that would warrant a sentence below 66 months. When he last appeared in court, he appeared robust and despite his continual claims to the contrary, he is not suffering from any medical issue that would warrant a minimal sentence. For example, notwithstanding his constant claims that he is suffering from diabetes, Doc. 550 at 7, PSR ¶ 117, the medical professionals who attend him have concluded that he does not. *See* Doc. 550, Ex. B (Physician concluding that Defendant is only pre-diabetic).

Even if Defendant's age and physical condition were theoretically relevant to determining what sentence within the agreed upon range he should receive, his actions would overwhelm that consideration and would dictate a sentence of 66 months. Age and physical condition are not slowing Defendant down. During the commission of his crimes, when he was 73, he dedicated nearly 400 hours to writing just one of the tomes he provided to Jimenez. Doc. 417 at 11; Doc. 421 at 15; PSR ¶ 40. He traveled to Washington. Doc. 417 at 9; Doc. 421 at 10; PSR ¶ 20. He traveled to Houston just to begin the process of obtaining an Argentine passport, Doc. 417 at 15; Doc. 421 at 20; PSR ¶ 40, and to open an offshore bank account. Doc. 421 at 20. He planned to travel and relocate to Venezeula. PSR ¶ 22, 25, 29, 30. Since the time he was charged he has proven himself to be energetically engaged in his defense and fully capable of producing even more classified information. Defendant's age and health have not seemed to

have slowed him down from producing documents, and they should not result in him receiving a sentencing windfall. Instead, he should receive the 66 month sentence that his conduct justifies.

F. The sentencing guidelines that would otherwise apply absent the plea agreement

For repeatedly lying to the FBI, Defendant faces an advisory guideline sentence of 121-151 months. PSR ¶ 75. He faces the same guideline sentence for conveying and converting our nation's secrets for his own financial gain. PSR ¶ 75. For illegally retaining our nation's classified documents in his home, Defendant faces a guideline range of 97-121 months. PSR ¶ 93. For passing our nation's secrets to Jimenez, Defendant faces a guideline range of 210-262 months. PSR ¶¶ 81, 87.[29] As the Court is aware, the plea agreement grossly understates the actual prison exposure that Defendant was facing. The United States was committed to resolving this case for many reasons, but not one of them was because the statutory penalties or guidelines that the defendant was facing failed to fit his crimes.

By pleading the case, the United States helped avoid the risk that classified information might be further put at risk during Defendant's litigation of the case. In an era of very tight budgets, the plea agreement also saved taxpayers from shouldering the enormous burden and expense of even more years of protracted litigation followed by a protracted trial. It is therefore entirely appropriate for the Court to consider that the terms of Defendant's plea agreement have already fully taken into account all of the potentially mitigating factors that Defendant has presented to the Court, including his life expectancy. Hence, the 66-month sentence provided for in the plea agreement might be viewed as already providing a windfall for Defendant. He should not receive an additional windfall.

[29] As correctly noted in the PSR, pursuant to 18 U.S.C. § 3624, Defendant will be receiving a three-year term of supervised release. PSR at ¶¶ 30-31.

Conclusion

In sum, Defendant is a narcissistic, selfish, and dishonest man who committed grave offenses. He is also wholly unrepentant, and deserving of the maximum possible sentence. His lies are the construct of a man who lacks the moral fiber to fully own up to his own conduct. They are a craving for the world to see him as something he was not. It is an effort to re-paint white as black, and black as white – or, perhaps more appropriately in Defendant's case, red as green. Defendant betrayed his country and was caught red-handed, but he does not want the world to view him as wearing the scarlet letter that now appears upon his chest. He instead wants the world to see him as some sort of a martyr for a greater good, or to dismiss or forgive his conduct as some sort of misguided farce. He refuses to accept responsibility for what he did, despite recordings of him and his coded writings. He would like to go back and erase the words he actually said and wrote to Jimenez, and to the agents who interviewed him, and replace them with a different story – a story in which he is cast as the mistreated hero, the U.S. government is cast as the villain, and the American people embrace him as having been engaged in a noble venture on their behalf. The problem for Defendant is that his story is just not true. He remains defiant and bitter. He cannot be trusted not to turn on his country again. Justice demands that he receive the maximum sentence possible under the plea agreement.

Respectfully submitted,
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I HEREBY CERTIFY that on January 12, 2015, this document was filed electronically through the Court's CM/ECF system which is designed to provide service to counsel of record.

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