ORAL ARGUMENT NOT YET SCHEDULED

BRIEF AND RECORD MATERIAL FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 03-3124, 03-3125, 03-3133

UNITED STATES OF AMERICA, Appellee,

v.

CARLOS G. ERAZO-ROBLES,
WAGNER X. GONGORA-BALON,
WAGNER E. GONGORA-PARRAGA, Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Cr. Nos. 02-252-02, -06, -05(HHK)

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), appellee, the United States of America, hereby states as follows:

A. Parties and Amici: The parties to this appeal are appellants, Carlos G. Erazo-Robles, Wagner X. Gongora-Balon, and Wagner E. Gongora- Parraga, and appellee, the United States of America. There are no amici.

B. Rulings Under Review: This is an appeal from the judgment of United States District Court Judge Henry H. Kennedy, Jr., in Criminal Nos. 02-252-02, -06, and -07. Appellants challenge the district court's decision not to dismiss their indictment. There is no official citation to this ruling, but it is reproduced in appellants' record materials at App. 149.

C. Related Cases: The United States is not aware of any related cases.

I N D E X

TABLE OF CASES

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* Cases chiefly relied upon are marked by an asterisk.

OTHER REFERENCES

STATUTES AND REGULATIONS

Pursuant to D.C. Circuit Rule 28(a)(5), appellee notes that all pertinent statutes and regulations are set forth in the Addendum attached to appellants' brief.

ISSUES PRESENTED

In the opinion of the appellee, the following issues are presented:

I. Whether the district court erred in denying appellants' motion to dismiss the indictment for lack of subject-matter jurisdiction where this Court, in United States v. Delgado-Garcia, 374 F.3d 1337 (D.C. Cir. 2004), cert. denied, 125 S. Ct. 1696 (2005), has held that 8 U.S.C. § 1324(a), the statute prohibiting conspiring to induce aliens to enter the United States illegally, and prohibiting attempts to bring illegal aliens into the United States, applies extraterritorially.

II. Whether appellants, who unconditionally pleaded guilty following the denial of their motion to dismiss the indictment, have waived the other statutory and constitutional challenges raised in their motion, where this Court in Delgado-Garcia, supra, considering claims identical to those raised by appellants, held that unconditional guilty pleas that are knowing and intelligent waived the pleading defendants' claims of error on appeal.

UNITED STATES COURT OF APPEALS
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CARLOS G. ERAZO-ROBLES,
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COUNTERSTATEMENT OF THE CASE

On June 20, 2002, a superseding indictment was filed that charged appellants (and others) with Conspiracy To Encourage and Induce Aliens Illegally To Enter the United States (8 U.S.C. § 1324(a)(1)(A)(v), (a)(1)(A)(iv), and (a)(1)(B)(i)), and Attempted Bringing of Unauthorized Aliens to the United States for Financial Gain (8 U.S.C. § 1324(a)(2), and (a)(2)(B)(ii)). The charges related to appellants' smuggling of more than 200 alien migrants aboard the over-crowded Merchant Vessel ("M.V.") *San Jacinto* between May 6, 2002 and May 15, 2002 (App. 50-55).[1/] On July 17,

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[1/] "App." refers to the consecutively paginated joint (continued...)

2003, all three appellants appeared before the Honorable Henry H. Kennedy, Jr., and, pursuant to an unconditional written plea agreement, pled guilty to Conspiracy To Encourage and Induce Aliens Illegally To Enter the United States (R. 1). On October 3, 2003, Judge Kennedy sentenced each appellant to twenty-seven months' incarceration and three years' supervised release (App. 177-194). Each appellant thereafter filed a timely notice of appeal (App. 195-201).

STATEMENT OF FACTS[2/]

In May 2002, appellants, along with three other individuals,[3/]

[1/](...continued)
appendix filed by appellants. "R." refers to the Record Material filed with this brief.

[2/] This Statement of Facts is based on several sources: (a) the written factual proffer (initialed by each appellant) that was attached to the plea agreement signed by the prosecutor, each appellant, and counsel for appellants (R. 1); (b) the transcript of the plea proceeding; (c) the contemporaneous Situation Reports filed by the United States Coast Guard as events unfolded at sea (App. 202-212); (c) the translation of a request by the United States Military Attache in Quito, Ecuador, to board and inspect the *San Jacinto* (App. 213-214); (d) an affidavit in support of an arrest warrant prepared by Special Agent Cheryl Bassett, Department of Justice, Immigration and Naturalization Service (App. 70-86); and (e) the testimony of Special Agent Bassett before the Grand Jury on June 6 and June 13, 2002. The transcripts of SA Bassett's testimony are part of appellants' joint appendix.

[3/] Cesar M. Espinoza-Macia and Washington R. Gongora-Cedeno also pleaded guilty to Conspiracy To Encourage and Induce Aliens Illegally To Enter the United States. They have not appealed their convictions. Jose R. Saeteros-Narvaes was indicted with appellants (continued...)

comprised the crew of the *M.V. San Jacinto*. The *San Jacinto* was registered with the Republic of Ecuador, but was not flying the flag of any country as it set out on the high seas (outside the territorial waters of any nation) from Ecuador in May 2002 (7/17/03 Tr. 15; R. 1; App. 71, 203). Appellants had earlier agreed to undertake a voyage on the high seas to transport alien migrants from Ecuador to the Republic of Guatemala in preparation for a further land voyage through Mexico and across the border into the United States (7/17/03 Tr. 15-16; R. 1). On or about May 6, 2002, (in the dark of night) appellants moved the *San Jacinto* to an off-shore position and secretly, using small boats, loaded more than 250 undocumented Ecuadorian nationals onto the *San Jacinto* (7/17/03 Tr. 16; R. 1). These people were instructed to remain in the cargo hold during daylight hours so that they could not be seen by others, including a United States Coast Guard (USCG) helicopter that flew over the boat (id.). During the voyage, appellants overheard some of the passengers talking about their final destinations in the United States (id.). Each of appellants acknowledged that they were aware that none of the passengers in the hold of the *San Jacinto* had any travel or immigration documents authorizing entry

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[3/](...continued)
but was not before the district court when appellants pled guilty. His case was subsequently transferred to the United States District Court for the Southern District of New York.

into the United States (7/17/03 Tr. 16-17; R. 1). Appellants also acknowledged that they had been paid (and were promised additional payment) for taking the aliens from Ecuador to Guatemala, with full knowledge that the final destination of the aliens was the United States, and that the aliens would be entering the United States illegally (R. 1).

On May 15, 2002, at approximately 9:00 a.m. local time, a USCG helicopter flew over the fishing vessel *Ronald*, a 45-foot boat with about 50 people on deck (R. 71). The boat bore no flag or markings, and was about 152 nautical miles southwest of San Jose, Guatemala (id.). Shortly thereafter, a detachment from the USCG ship *Sherman* approached the *Ronald* and determined that all of the passengers were from Ecuador (id.).

At approximately 9:50 a.m., the *San Jacinto* - a 160 foot ship - was spotted by the USCG helicopter at a position approximately 150 nautical miles from the border of Mexico and Guatemala - about 35 nautical miles from the *Ronald* (6/6/02 Tr. 3-4; App. 71). The helicopter pilot saw about 150 people in the cargo hold area and it appeared that these people were trying to conceal themselves (6/6/02 Tr. 4; App. 71). Due to the number of people seen aboard the two vessels, the location of the two ships at sea, and their proximity to each other, the USCG concluded that the ships were involved in an alien smuggling operation (App. 71). The *Sherman*

subsequently intercepted the *San Jacinto* and escorted the *San Jacinto* and the *Ronald* to Mexico (App. 202-210). During the voyage, the Coast Guard transferred food and water to the approximately 279 persons aboard the *San Jacinto*. Several people on the *San Jacinto* were treated for dehydration (id.).

APPELLANTS' MOTION TO DISMISS AND THE DISTRICT COURT'S RULING

On August 9, 2002, appellant Gongora-Balon (joined by the other defendants) moved to dismiss the indictment (App. 56). Appellants argued that the U.S. Coast Guard lacked authority to detain and arrest the *San Jacinto* on the high seas, and that the district court lacked subject matter jurisdiction over the case because 8 U.S.C. § 1324 did not provide for extraterritorial application (App. 58-66). In addition, appellants argued that the district court lacked personal jurisdiction over them because they were seized on the high seas in violation of international law and the Due Process Clause of the Fifth Amendment, and that there was an insufficient nexus between the United States and appellants to prosecute them individually (App. 67-68).

After holding a hearing on September 26, 2002, Judge Kennedy denied appellants' motion in an order filed on November 19, 2002 (App. 149-157). The district court first ruled that it had subject-matter jurisdiction over the criminal matter,

because § 1324 is properly applied extraterritorially (App. 151-153). Next, the district court rejected appellants' contention that there was an insufficient nexus between the United States and appellants to prosecute them individually (App. 153). The district court stated that "[a] sufficient nexus is established . . . where an attempted transaction is aimed at causing criminal acts within the United States" (App. 153) (citing United States v. Yeh Hsin-Yung, 97 F. Supp. 2d 24, 27 (D.D.C. 2000)). Finally, the district court rejected appellants' personal jurisdiction argument, finding that "it is beyond dispute that a defendant cannot challenge the means by which he is brought before the court" (id.).[4/]

After the district court denied appellants' dismissal motions, each appellant pled guilty as described above. Although each of the appellants pled guilty pursuant to a written plea agreement, (see R. 1), no appellant sought the permission of either the district court or the government for the entry of a conditional plea of guilty pursuant to Fed. R. Crim. P. 11(a)(2). Instead, each appellant entered an unconditional plea of guilty.

[4/] The district court also found that appellants lacked standing to challenge alleged violations of international law because "[i]t is beyond dispute that international law confers rights upon the sovereign, not the individual" (App. 152-153). Appellants do not appear to challenge this finding.

SUMMARY OF ARGUMENT

Appellants claim that the district court lacked subject-matter jurisdiction over their criminal matters because Congress has nowhere manifested an express intent that 8 U.S.C. § 1324 be applied extraterritorially. However, this Court recently rejected an identical argument in United States v. Delgado-Garcia, 374 F.3d 1337 (D.C. Cir. 2004), cert. denied, 125 S. Ct. 1696 (2005).

As for their remaining claims, appellants unconditionally pleaded guilty to one of the charges in the indictment. This Court held in Delgado-Garcia, a case factually and legally indistinguishable from this one, that the defendants' unconditional pleas waived assertion of those same claims on appeal. In any event, appellants' three other claims, the same as those raised in Delgado-Garcia, are meritless.

ARGUMENT

I. THE DISTRICT COURT HAD SUBJECT-MATTER JURISDICTION

Appellants first contend that the district court lacked subject-matter jurisdiction over this matter because of the absence of affirmative evidence that Congress intended 8 U.S.C. § 1324 to apply extraterritorially (Brief for Appellants at 7-15). Appellants' claim lacks merit because this Court has already determined in United States v. Delgado-Garcia, 374 F.3d 1337 (D.C.

Cir. 2004), cert. denied, 125 S. Ct. 1696 (2005), a case virtually identical to appellants' own, that § 1324 applies extraterritorially and criminalizes appellants' conduct.

In Delgado-Garcia, the defendants admitted to conspiring to transport Ecuadorian nationals in order to facilitate their illegal entry into the United States. 374 F.3d at 1339. The defendants, crew members aboard a fishing vessel that began its voyage off-shore from Ecuador, planned to transport the Ecuadorian nationals to Mexico where the Ecuadorians would continue their trek overland to the United States border. Id. A United States Navy ship carrying a United States Coast Guard law enforcement detachment located and stopped the fishing boat in international waters, 170 nautical miles from Guatemala and Mexico. Further investigation by the law enforcement detachment revealed that the ship had been attempting to facilitate the illegal immigration of the passengers to the United States. Id. at 1339-1340. A grand jury later charged the defendants with the same crimes that appellants were charged with in the instant case, and the Delgado-Garcia defendants moved to dismiss the indictment on the same grounds argued by appellants herein, including the argument that § 1324 did not apply extraterritorially, and therefore not to them. Id. at 1340-1341.[5/]

[5/] Counsel for Erazo-Robles and Gongora-Balon represented (continued...)

After the district court denied their motion, the defendants each pleaded guilty to a violation of § 1324 - two of them to conspiracy to encourage and induce aliens illegally to enter the United States (as appellants did here), and one to attempted bringing of unauthorized aliens to the United States.

On appeal, the Delgado-Garcia defendants reasserted their challenge to the extraterritorial applicability of § 1324, and raised the other arguments that appellants raise now. Id. at 1341. This Court rejected each of appellants' arguments and held, inter alia, that § 1324 applies extraterritorially. Id. at 1345-1349.

According to appellants, application of "well-settled principles of statutory construction, in conjunction with the presumption against extraterritorial application" of laws, leads to the conclusion that "there is no affirmative evidence that Congress intended § 1324 to apply extraterritorially" (Brief for Appellants at 8-9). This argument seeks to resurrect the same arguments that this Court rejected in Delgado-Garcia.

In Delgado-Garcia, this Court examined § 1324 for Congressional intention of extraterritorial application and considered both contextual and textual evidence to support its conclusion that the presumption against reading statutes to have

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[5/] (...continued)
two of the defendants in the Delgado-Garcia case.

extraterritorial effect did not apply. 374 F.3d at 1344-1345. For example, the Court pointed out that, on its face, the statute "protects the borders of the United States against illegal immigration." Id. at 1345. "This contextual feature of § 1324 establishes that it is fundamentally international, not simply domestic, in focus and effect. . . . It is natural to expect that a statute that protects the borders of the United States, unlike ordinary domestic statutes, would reach those outside the borders." Id. This Court wrote that "[t]here is also specific textual evidence that . . . 'the natural inference from the character of the offense[s]' is that an extraterritorial location 'would be a probable place of its commission.'" Delgado-Garcia, 374 F.3d at 1345 (citing United States v. Bowman, 260 U.S. 94 (1922)). The Court found that § 1324, by its terms, "applies to much extraterritorial conduct." Id. at 1347. For example, the Court noted that the statute proscribes "attempts to bring" aliens to the United States, that "bringing" someone suggests "entry," and "[t]hat many attempts to bring someone into the United States will occur outside the United States is strongly suggestive that [the statute applies], as a matter of ordinary language, to extraterritorial acts." Id.[6/] The Court also observed that the

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[6/] Appellants, evidently because this Court observed in (continued...)

prohibition on encouraging or inducing illegal immigration "has many natural extraterritorial applications. . . . [for] it is obviously much easier to [induce a potential illegal immigrant to come to the United States] when in proximity to the immigrant [outside the United States]." Id. at 1347-1348. Additionally, the Court remarked, "it is easier [to conspire to induce illegal immigration into the United States][from] outside the United States, in proximity to those who carry out the plot." Id. at 1348.

Appellants cite Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 174 (1993), and E.E.O.C. v. Arabian Oil Co., 499 U.S. 244, 248 (1991), in support of their argument that the presumption against extraterritoriality should apply here (Brief for Appellants at 8). However, in Delgado-Garcia, this Court noted that Sale and Arabian Oil Co. involved "very different statutes." 374 F.3d at

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[6]/(...continued)
Delgado-Garcia that "[b]ringing someone suggests entry," 374 F.3d at 1347, parse the word "entry" as they make their argument that this Court's interpretation of § 1324 "derives from a misunderstanding of terms that have specific legal definitions" (Brief for Appellants at 10). However, the statute clearly proscribes anyone from bringing or attempting to bring aliens to the United States, encouraging or inducing an alien to come to or enter the United States, or conspiring to do so. These words need not be dissected for their meaning. The statute does not require the violator to have himself "entered" the United States, or that the alien "entered" the United States. We do not believe this Court's decision in Delgado-Garcia reflects a misunderstanding of terms, legal or otherwise.

1348. For example, this Court observed that the statute in Sale governed deportation proceedings which, the Supreme Court concluded, would be held in the United States. This Court found that "[n]othing in [those cases] compels the conclusion that § 1324(a) applies only domestically." 374 F.3d at 1348. According to the Court, the statutes in those cases lacked the "objective evidence of extraterritorial application" present in § 1324. Id.

This Court was also not persuaded by the argument that appellants attempt to revive concerning, e.g., the Maritime Drug Law Enforcement Act (MDLEA), 47 U.S.C. §§ 1901-1903 (Brief for Appellants at 11-13). Appellants' point is that Congress makes it clear when it intends a statute to have extraterritorial effect. The MDLEA criminalizes the manufacture, distribution, and possession of controlled substances, and explicitly applies to extraterritorial acts. However, as this Court pointed out in Delgado-Garcia, "[a] border control statute is more outward-looking than is a prohibition on drug manufacturing [and] [t]hat may be why Congress also thought it necessary to specify explicitly . . . that trafficking in controlled substances aboard vessels is a serious international problem." Delgado-Garcia, 374 F.3d at 1349. As the Court note, "[t]he international focus of § 1324(a) . . . is more obvious." Id.

To summarize, the arguments that appellants now raise - identical to the arguments raised in Delgado-Garcia - have already been rejected by this Court in Delgado-Garcia. Recognizing this, appellants argue that Delgado-Garcia was "wrongly decided" (Brief for Appellants at 7). However, once a panel of this court has decided a matter, subsequent panels are bound by that decision unless and until it is changed by the court en banc. Ranger Cellular v. F.C.C., 348 F.3d 1044, 1050 (D.C. Cir. 2003). The Delagdo-Garcia defendants' petition for rehearing en banc was denied, as was their petition for writ of certiorari. It is clear under the law of this Circuit that § 1324 applies extraterritorially. Therefore, the district court did not err in concluding that it had jurisdiction over this matter.

II. APPELLANTS HAVE WAIVED THEIR REMAINING CLAIMS[7/]

Appellants contend, as they did below in their motion to dismiss, that the indictment should have been dismissed because the

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7/ As Judge Sentelle, writing for himself alone, opined in Delgado-Garcia, there is support for an argument that appellants' claim that § 1324 does not apply extraterritorially is also waived by appellants' unconditional guilty pleas. Delgado-Garcia, 374 F.3d at 1341-1342 (citing, inter alia, United States v. Gonzalez, 311 F.3d 440, 442 (1st Cir. 2002), cert. denied, 124 S. Ct. 47 (2003)). But see United States v. Bustos-Useche, 273 F.3d 622, 626 (5th Cir. 2001). Because the merits of that claim are so clear, however, the Court need not reach the question whether appellants' guilty pleas waived that claim as well.

Coast Guard exceeded its authority when it seized the *San Jacinto* and its crew on the high seas (Brief for Appellants at 15-19). Appellants argue essentially that the district court erred in finding that the Coast Guard did not exceed its authority under 14 U.S.C. § 89(a) based on the court's conclusion that the Coast Guard was authorized to seize the ship once it determined that the boat was transporting undocumented aliens (id. at 15). According to appellants, the *San Jacinto* was in international waters, "beyond the territorial reach" of § 1324 (id. at 17). Thus, appellant's argument derives, in large part, from their erroneous conclusion that § 1324 does not apply extraterritorially. In addition, appellants argue for the first time on appeal that "the Coast Guard lacked reasonable suspicion to believe that the [*San Jacinto*] was engaged in activity subject to the operation of the United States law" (id. at 17). Finally, appellants argue that their due process rights were violated by the extraterritorial application of § 1324 (id. at 19-23). They claim that the district court erred in its decision that it could assert personal jurisdiction over appellants, and they contend that (1) because there was no evidence of a nexus between appellants and the United States, extraterritorial application of § 1324 in this case was "arbitrary" and "fundamentally unfair," and (2) they can challenge the means by which they were brought before the district court because the

government's seizure, detention, and interrogation of appellants "shock[ed] the conscience" (id. at 19). However, as this Court found in Delgado-Garcia under similar circumstances, appellants waived all of these claims when they pleaded guilty.

It is well-established that "[u]nconditional guilty pleas that are knowing and intelligent . . . waive [a defendant's] claims of error on appeal, even constitutional claims." Delgado-Garcia, 374 F.3d at 1341; see also United States v. Drew, 200 F.3d 871, 876 (D.C. Cir. 2000). "Ordinarily, a guilty plea, entered unconditionally -- that is, without reserving an issue or issues for appeal -- establishes guilt and forfeits all objections and defenses." United States v. Gonzalez, 311 F.3d 440, 442 (1st Cir. 2002), cert. denied, 124 S. Ct. 47 (2003); see also Tollett v. Henderson, 411 U.S. 258, 267 (1973) ("When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."); see generally Fed. R. Crim. P. 11(a)(2) (defendant must "reserv[e] in writing the right to have an appellate court review an adverse determination of a specified pretrial motion").[8/]

[8/] Appellants have nowhere suggested that their pleas were (continued...)

There are two exceptions to this well-established rule. "The first is the defendant's claimed right 'not to be haled into court at all;' for example, a claim that the charged offense violates the double jeopardy clause." Delgado-Garcia, 374 F.3d at 1341 (citing Blackledge v. Perry, 417 U.S. 21, 30-31 (1974), and Menna v. New York, 423 U.S. 61, 62-63 (1975)). The second exception is "where the claim on appeal is that the district court lacked subject matter jurisdiction over the case." Gonzalez, 311 F.3d at 442; see also United States v. Cotton, 535 U.S. 625, 630 (2002) ("concept of subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived"); Coleman v. Burnett, 477 F.2d 1187, 1194 (D.C. Cir. 1973) ("well settled rule that an unconditional plea of guilty waives all prior infirmities in the prosecution which affect neither the court's jurisdiction nor the substantive sufficiency of the indictment"). This is true even while "so many other objections and defenses in criminal cases, including constitutional issues and prior professions of innocence, are readily forfeited through a knowing and voluntary

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[8]/(...continued)
anything but knowing and voluntary. Cf. United States v. Abreo, 30 F.3d 29, 31-32 (5th Cir. 1994) (defendant's claim that his plea was not voluntary because "he mistakenly believed that he had the right to challenge the validity of his arrest and the search of his house after entering plea" undermined by, inter alia, "unambiguous plea agreement that made no mention of preservation of his right to pursue a suppression claim").

plea of guilty," because courts must stay within "their grant of authority." Gonzalez, 311 F.3d at 442.

In Delgado-Garcia, the defendants raised in the trial court, and on appeal, the same statutory, constitutional, and international law challenges that appellants raise here.[9/] This Court held, however, that the Delgado-Garcia defendants' unconditional guilty pleas waived the statutory, constitutional and international law claims they raised on appeal because none of the statutory or constitutional provisions that the defendants cited divested the district court of its original jurisdiction under 18 U.S.C. § 3231, and there were no facial constitutional infirmities in the indictment. Delgado-Garcia, 374 F.3d at 1340-1343. "For these reasons, as a matter of pure legal principle, appellants' guilty pleas waived all of their claims." Id. at 1343.[10/]

[9/] The defendants in Delgado-Garcia claimed, first, that the government failed to prove a nexus between their conduct and the United States. Second, the defendants claimed that the Coast Guard exceeded its statutory authority when it seized them in international waters without reasonable suspicion that the crew was engaged in illegal activity. Finally, the defendants claimed that their apprehension violated customary international law and a treaty to which the government was a party. Delgado-Garcia, 374 F.3d at 1340-1341.

[10/] Judge Randolph concurred in the court's opinion "except its statement that by pleading guilty a defendant waives any claim that the offense to which he pled guilty is not a crime." Delgado-Garcia, 374 F.3d at 1351.

Appellants' fail to acknowledge the Delgado-Garcia Court's waiver holding in their brief. Because their appellate claims are virtually identical to the appellate claims in Delgado-Garcia, and because this Court held those claims to be waived by the defendants' guilty pleas, 374 F.3d at 1343, this Court should likewise hold appellant's remaining claims to be waived, and need not reach the merits of these claims.

In any event, appellants claims are without merit.[11/] Even if we accept the premise that appellants -- foreign nationals seized on the high seas -- can invoke the statutory protections of 14 U.S.C. § 89,[12/] this statutory grant of authority has been interpreted to "authorize[] the Coast Guard to seize a foreign

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[11/] Because appellants' argument that the Coast Guard lacked reasonable suspicion to believe the *San Jacinto* was engaged in alien smuggling activities was not raised below, it would not be considered by this Court in any case. See Singleton v. Wulff, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below"). Moreover, this is essentially a Fourth Amendment claim -- which, as foreign nationals, appellants cannot legitimately raise, see United States v. Verdugo-Urquidez, 494 U.S. 259, 274-75 (1990). At any rate, as we discuss below, the facts establish that the Coast Guard had reasonable suspicion that appellants were engaged in alien-smuggling activities.

[12/] Title 14, United States Code § 89(a), provides that "[t]he Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States."

vessel in international waters if the Coast Guard first has reasonable suspicion that those aboard the vessel are engaged in a conspiracy to smuggle contraband into the United States." United States v. Williams, 617 F.2d 1063, 1074 (5th Cir. 1980) (en banc). The Coast Guard had ample reasonable suspicion that the *San Jacinto* was engaged in alien-smuggling activities.[13/] When the Coast Guard spotted the boat, it was in waters known to be traveled by alien-smuggling vessels. According to Special Agent Bassett, the voyage by sea from Ecuador to Guatemala, and then overland through Mexico to the United States, was "a very well-established smuggling route" (6/6/02 Tr. 45-46). The *San Jacinto* was not flying a flag, and it was clear that the boat was overcrowded, with a very large number of people (150 or more) in the cargo hold attempting to hide from the USCG helicopter (App. 202-204).[14/]

[13/] Appellants claim that the United States government did not notify Ecuador that the Coast Guard suspected the *San Jacinto* of violating federal law (Brief for Appellants at 17). However, the United States Defense Attache in Ecuador advised the Ecuadoran government that the Coast Guard believed there were "illegal immigrants" (approximately 150) aboard the ship (App. 213).

[14/] An illegal seizure of the *San Jacinto* would not have barred appellants' subsequent prosecution in the federal district court, as they now suggest. See, e.g., United States v. Alvarez-Machain, 504 U.S. 655, 670 (1992) (because "respondent's abduction was not in violation of the Extradition Treaty between the United States and Mexico . . . the rule of Ker v. Illinois, [119 U.S. 436 (1886)] is fully applicable" and "respondent's forcible abduction does not therefore prohibit his trial in a court in the United States for violations of the criminal laws of the United States").

(continued...)

Appellant's due process claims also lacks merit. First, even assuming the applicability of a due-process nexus test,[15] the record contains facts establishing a nexus between appellants and the United States. The "record" includes appellants' pleas, and those pleas establish the requisite facts. See United States v. Brown, 164 F.3d 518, 521 (10th Cir. 1998) ("An unconditional plea

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[14] (...continued)
At any rate, it does not appear that appellants raised below the argument they now make, i.e., that their seizure, and the delay in bringing them before the court, "shock[ed] the conscience" (Brief for Appellants at 21-23), and, therefore, it would not be considered by this Court in any case. Singleton, 428 U.S. at 120.

Appellants, citing the 1958 Convention on the High Seas, also claim that the Coast Guard interdiction violated both customary international law and U.S. law because the *San Jacinto* was not a U.S. vessel, it was not a stateless vessel, nor did the U.S. obtain consent from Ecuador to seize the ship (Brief for Appellants at 16-17). This claim too is meritless. Article 6 of the 1958 Convention on the High Seas (CHS) states that "save in exceptional cases expressly provided for in . . . these articles," a ship sailing under the flag of one State "shall be subject to its exclusive jurisdiction on the high seas." Convention on the High Seas art. 6(1), opened for signature April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 11 (entered into force Sept. 30, 1962); see also United States v. Postal, 589 F.2d 862, 869 (5th Cir. 1979) ("The regulation of a vessel on the high seas is normally the responsibility of the nation whose flag that vessel flies and of that nation alone."). However, whether or not one of the exceptions would apply in this case, Ecuador is not a party to the CHS. See, e.g., Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2003 (2003), at 418. Accordingly, the CHS's protections are not available to appellants.

[15] Cf. United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993) ("government need not establish a domestic nexus to prosecute offenses under the Maritime Drug Law Enforcement Act").

of guilty is an admission of all material facts alleged in the charge, . . . including those facts that serve as factual predicates to subject matter jurisdiction.").[16/]

In United States v. Davis, upon which appellants place such reliance (Brief for Appellants at 19), the Ninth Circuit concluded that, "'[w]here an attempted transaction is aimed at causing criminal acts within the United States, there is a sufficient basis for the United States to exercise its jurisdiction.'" 905 F.2d 245, 249 (9th Cir. 1990) (quoting United States v. Peterson, 812 F.2d 486, 493 (9th Cir. 1987)); see also United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998) (same); United States v. Alvarez-Mena, 765 F.2d 1259, 1267 n.11 (5th Cir. 1985) ("The required nexus may be shown by demonstrating that a sufficient effect occurs within the United States as a result of their illicit activity, or by demonstrating an intent that the illegal activity have such an effect, or knowledge that it will."). The government's plea proffer - which each appellant agreed was accurate - asserted that appellants knew that the migrants' final destination was the United States of America and that none of the aliens had the proper documentation to enter the United States (R.

[16/] Cf. Masiello v. United States, 304 F.2d 399, 401 (D.C. Cir. 1962) ("[w]e agree that the entire record, which includes evidence adduced at both the pre-trial hearing and the trial, may be considered in deciding whether the error was prejudicial").

1). Thus, appellants' conduct was aimed at causing criminal acts in the United States, specifically, the migrants' unlawful entries into the United States. Further, appellants' plea proffers also demonstrated the consciousness of guilt of each appellant by detailing their activities to avoid detection and capture by the authorities. Appellants directed each alien to hide in the cargo hold of the boat during the day so that the Coast Guard helicopter would not see them (id.). Finally, each appellant admitted participating in the secret migrant pick-up off the coast of Ecuador. Thus, in their proffers, appellants admitted that they helped position the *San Jacinto* off the coast of Ecuador where the migrants were transported to the *San Jacinto* in small boats (id.). The stealthy nature of the embarkation process is further evidence that appellants fully understood the illegal nature of their activities and the ultimate goal of the Ecuadorian nationals. In sum, abundant record evidence supported the conclusion that appellants "aimed" their criminal activities at the United States and thus could well have been expected to be haled into a United States court. See, e.g., United States v. Khan, 35 F.3d 426, 429 (9th Cir. 1994) ("sufficient nexus between the LUCKY STAR and the United States" where, inter alia, smugglers' "primary plan called for landing in Canada and transporting the drugs overland to Montreal, Toronto, and New York").

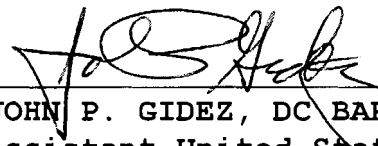
CONCLUSION

WHEREFORE, appellee respectfully requests that the judgments of the district court be affirmed.

Respectfully submitted,

KENNETH L. WAINSTEIN
United States Attorney.

ROY W. McLEESE III,
ELIZABETH TROSMAN,
BARBARA E. KITTAY,
Assistant United States Attorneys.



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CERTIFICATE OF WORD COUNT

I HEREBY CERTIFY that this brief conforms to the word limit imposed by Fed. R. App. P. 32(a)(7)(B) and contains 5358 words.

JOHN P. GIDEZ
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing brief have been mailed (first-class postage prepaid) to counsel for appellants: (1) Joseph Virgilio, Esq., 1000 Connecticut Ave., NW, Suite 613, Washington, DC 20036 (appellant Carlos G. Erazo-Robles); (2) A. J. Kramer, Esq., Federal Public Defender, and Tony Axam, Esq., Assistant Federal Public Defender, 625 Indiana Avenue, NW, Washington, DC 20004 (appellant Wagner X. Gongora-Balon); and Robert S. Becker, Esq., 5505 Connecticut Avenue, NW, Washington, DC 20015 (appellant Wagner E. Gongora-Parraga), on this 20th day of January, 2006.

JOHN P. GIDEZ
Assistant United States Attorney

A D D E N D U M

ADDENDUM AND RECORD MATERIAL

TABLE OF CONTENTS

8 U.S.C. § 1324. Bringing in and harboring certain aliens

(a) Criminal penalties

(1)(A) Any person who--

(i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;

(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

(iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or

(v)(I) engages in any conspiracy to commit any of the preceding acts, or

(II) aids or abets the commission of any of the preceding acts,

shall be punished as provided in subparagraph (B).

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs--

(i) in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined under Title 18, imprisoned not more than 10 years, or both;

(ii) in the case of a violation of subparagraph (A) (ii), (iii), (iv), or (v)(II), be fined under Title 18, imprisoned not more than 5 years, or both;

(iii) in the case of a violation of subparagraph (A) (i), (ii), (iii), (iv), or (v) during and in relation to which the person causes serious bodily injury (as defined in section 1365 of Title 18) to, or places in jeopardy the life of, any person, be fined under Title 18, imprisoned not more than 20 years, or both; and

(iv) in the case of a violation of subparagraph (A) (i), (ii), (iii), (iv), or (v) resulting in the death of any person, be punished by death or imprisoned for any term of years or for life, fined under Title 18, or both.

(C) It is not a violation of clauses (ii) or (iii) of subparagraph (A), or of clause (iv) of subparagraph (A) except where a person encourages or induces an alien to come to or enter the United States, for a religious denomination having a bona fide nonprofit, religious organization in the United States, or the agents or officers of such denomination or organization, to encourage, invite, call, allow, or enable an alien who is present in the United States to perform the vocation of a minister or missionary for the denomination or organization in the United States as a volunteer who is not compensated as an employee, notwithstanding the provision of room, board, travel, medical assistance, and other basic living expenses, provided the minister or missionary has been a member of the denomination for at least one year.

(2) Any person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien shall, for each alien in respect to whom a violation of this paragraph occurs--

(A) be fined in accordance with Title 18 or imprisoned not more than one year, or both; or

(B) in the case of--

(i) an offense committed with the intent or with reason to believe that the alien unlawfully brought into the United States will commit an offense against the United States or any State punishable by imprisonment for more than 1 year,

(ii) an offense done for the purpose of commercial advantage or private financial gain, or

(iii) an offense in which the alien is not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry,

be fined under Title 18 and shall be imprisoned, in the case of a first or second violation of subparagraph (B)(iii), not more than 10 years, in the case of a first or second violation of subparagraph (B)(i) or (B)(ii), not less than 3 nor more than 10 years, and for any other violation, not less than 5 nor more than 15 years.

(3)(A) Any person who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens described in subparagraph (B) shall be fined under Title 18 or imprisoned for not more than 5 years, or both.

(B) An alien described in this subparagraph is an alien who--

(i) is an unauthorized alien (as defined in section 1324a(h)(3) of this title), and

(ii) has been brought into the United States in violation of this subsection.

(4) In the case of a person who has brought aliens into the United States in violation of this subsection, the sentence otherwise provided for may be increased by up to 10 years if--

(A) the offense was part of an ongoing commercial organization or enterprise;

(B) aliens were transported in groups of 10 or more; and

(C)(i) aliens were transported in a manner that endangered their lives; or

(ii) the aliens presented a life-threatening health risk to people in the United States.

(b) Seizure and forfeiture

(1) In general

Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of subsection (a) of this section, the gross proceeds of such violation, and any property traceable to such conveyance or proceeds, shall be seized and subject to forfeiture.

(2) Applicable procedures

Seizures and forfeitures under this subsection shall be governed by the provisions of chapter 46 of Title 18, relating to civil forfeitures, including section 981(d) of such title, except that such duties as are imposed upon the Secretary of the Treasury under the customs laws described in that section shall be performed by such officers, agents, and other persons as may be designated for that purpose by the Attorney General.

(3) Prima facie evidence in determinations of violations

In determining whether a violation of subsection (a) of this section has occurred, any of the

following shall be prima facie evidence that an alien involved in the alleged violation had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law:

(A) Records of any judicial or administrative proceeding in which that alien's status was an issue and in which it was determined that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(B) Official records of the Service or of the Department of State showing that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(C) Testimony, by an immigration officer having personal knowledge of the facts concerning that alien's status, that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(c) Authority to arrest

No officer or person shall have authority to make any arrests for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws.

(d) Admissibility of videotaped witness testimony

Notwithstanding any provision of the Federal Rules of Evidence, the videotaped (or otherwise audiovisually preserved) deposition of a witness to a violation of subsection (a) of this section who has been deported or otherwise expelled from the United States, or is otherwise unable to testify, may be admitted into evidence in an action brought for that violation if the witness was available for cross examination and the deposition otherwise complies with the Federal Rules of Evidence.

(e) Outreach program

The Secretary of Homeland Security, in consultation with the Attorney General and the Secretary of State, as appropriate, shall develop and implement an outreach program to educate the public in the United States and abroad about the penalties for bringing in and harboring aliens in violation of this section.

14 U.S.C. § 89

Title 14. Coast Guard

Part I. Regular Coast Guard

Chapter 5. Functions and Powers

§ 89. Law enforcement

(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

(b) The officers of the Coast Guard insofar as they are engaged, pursuant to the authority contained in this section, in enforcing any law of the United States shall:

(1) be deemed to be acting as agents of the particular executive department or independent establishment charged with the administration of the particular law; and

(2) be subject to all the rules and regulations promulgated by such department or independent establishment with respect to the enforcement of that law.

(c) The provisions of this section are in addition to any powers conferred by law upon such officers, and not in limitation of any powers conferred by law upon such officers, or any other officers of the United States.

U.S. Department of Justice

United States Attorney

District of Columbia

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January 22, 2003

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Re: United States v. Carlos G. Erazo Robles, et al.
Criminal Number 02-252 (HHK)

Dear Counsel:

This letter sets forth a plea agreement this Office is willing to enter into with your clients. The offer expires on January 28, 2003. If your clients all accept the terms and conditions of this offer, please have them execute this document in the space provided below and return it to me. Upon our receipt of the executed document (or individual documents which together provide the signatures of each of the five defendants), this letter will become the plea agreement. With respect to each defendant, the terms of the agreement are as follows:

1. **Charges**. Your client agrees to admit guilt and enter a plea of guilty to Count I of the Indictment in this case, in which your client is charged with Conspiracy to Encourage and Induce Aliens (in violation of 8 U.S.C. §1324(a)(1)(A)(v)(I) and

(a)(1)(A)(iv)) and Aiding and Abetting (in violation of 18 U.S.C. §2). If your client accepts this plea agreement, the Government will move to dismiss Count II, at the time of sentencing, a charge which otherwise carries a mandatory minimum sentence. Your client agrees to the proffer of facts in support of the charges, as set forth in the attachment to this plea agreement.

2. **Potential penalties, assessments, and restitution**. Your client understands that pursuant to 8 U.S.C. §§ 1324(a)(1)(A)(i), and (iv), the offense with which he is charged carries a maximum penalty -- for each alien smuggled -- of 10 years imprisonment, and a fine of $250,000, and a term of three years of supervised release. In addition, your client agrees to pay a special assessment of $100 per felony conviction to the Clerk of Court, U.S. District Courthouse, prior to the date of sentencing. Your client further understands that, pursuant to Section 5E1.2 of the United States Sentencing Guidelines ("Sentencing Guidelines"), the Court may also impose a fine sufficient to pay the federal government the costs of any imprisonment. Your client understands that the sentence in this case will be determined by the Court pursuant to the Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551 *et seq.*, and the United States Sentencing Guidelines, as further described below.

3. **Release/Detention pending sentencing**. Your client agrees not to object to the government's recommendation to the Court at the time of the plea of guilty in this case that, pursuant to 18 U.S.C. § 3143, your client be detained without bond pending your client's sentencing in this case.

4. **Waiver of constitutional and statutory rights**. Your client understands that by pleading guilty in this case, your client agrees to waive certain rights afforded by the Constitution of the United States and/or by statute, including: the right to plead not guilty and the right to a jury trial. At a jury trial, your client would have the right to be represented by counsel, to confront and cross-examine witnesses against your client, to compel witnesses to appear to testify and present other evidence on your client's behalf, and to choose whether to testify. If your client chose not to testify at a jury trial, your client would have the right to have the jury instructed that your client's failure to testify could not be held against your client. Your client would further have the right to have the jury instructed that your client is presumed innocent until proven guilty, and that the burden would be on the United States to prove your client's guilt beyond a reasonable doubt. If your client were found guilty after a trial, your client would have the right to appeal the conviction.

Your client understands that the Fifth Amendment to the Constitution of the United States protects your client from the use of self-incriminating statements in a criminal prosecution. By entering this plea of guilty, your client knowingly and voluntarily waives or gives up this right against self-incrimination. [Your client's waiver of his Fifth Amendment right extends to all information your client is to supply law enforcement authorities pursuant to this agreement.]

5. **Sentencing Guidelines**. The parties to this agreement agree that your client's sentence will be governed by the United States Sentencing Guidelines and that the Guideline applicable to the offense to which your client is pleading guilty is §2L1.1, which sets forth a base offense level of 12, and the addition of 9 levels for the specific offense characteristic of smuggling more than one hundred (100) aliens, for an adjusted base offense level of 21. The parties agree that the defendant would be entitled to a 2-level reduction for acceptance of responsibility, under §3E1.1, for an adjusted offense level of ~~18~~ 19. The parties agree that ~~the defendant can argue in favor, and the government can argue in opposition to a 2-level~~ reduction for minor participation, under §3B1.2(b), and ~~the government can argue in favor, and the defendant can argue against~~ a 2-level increase for endangerment, under §2L1.1(b)(5). The parties agree that no other departure or adjustment shall be applied, as all other grounds for departure were considered when the government agreed to dismiss, at sentencing, the charge carrying the potential mandatory minimum sentence.

Your client fully and completely understands that the final determination of how the United States Sentencing Guidelines apply to this case will be made solely by the Court and that the above calculations or recommendations are not binding upon the Court or the United States Probation Office. Your client understands that the failure of the Court or the Probation Office to determine the guideline range in accordance with the above calculations will not void this plea agreement or serve as a basis for the withdrawal of this plea. Your client understands and agrees that your client will not be allowed to withdraw the guilty plea entered pursuant to this plea agreement solely because of the harshness of any sentence recommended by the Probation Office or imposed by the Court, and that a motion to withdraw the plea on that basis may be treated by the United States as a breach of this plea agreement.

6. **Miscellaneous**. Your client agrees that if an interpreter is required to assist your client in translating this plea agreement into your client's native language, then your

* This includes the agreement that no request will be made for a third point level reduction for acceptance of responsibility.

client agrees to request the Court, pursuant to 28 U.S.C. §1827, "The Court Interpreter's Act", to secure the services of a certified interpreter at Court expense to verbally translate the plea agreement for your client into your client's native language. Your client agrees that it is unnecessary for the plea document to be re-written into your client's native language.

7. **Deportation**. Your client also agrees that the Court may enter a stipulated judicial Order of removal, pursuant to 8 U.S.C. § 1228(c). Your client specifically waives his right to notice and a hearing under the Immigration and Nationality Act and stipulates to the entry of a judicial Order of removal from the United States as a condition of the plea agreement and as a condition of probation or supervised release. The defendant further understands and agrees that the filing of any applications for relief from removal, deportation, or exclusion, either written or oral, or the prosecution of any pending applications, before any federal court, the Board of Immigration Appeals, an immigration judge, or the Immigration and Naturalization Service, shall breach this plea agreement.

8. **Co-defendant contingeny**. Your client understands and acknowledges that this agreement and any plea of guilty which your client may enter pursuant to this plea agreement are contingent upon the entry of guilty pleas by all of your client's co-defendants in this case. If the co-defendants fail to enter guilty pleas, this agreement and any proceedings pursuant to this agreement may, at the government's option, be withdrawn or voided.

9. **Reservation of allocution**. Your client understands that the United States reserves its full right of allocution for purposes of sentencing in this matter. In particular, the United States reserves its right to recommend a specific period of incarceration and fine up to the maximum sentence of incarceration and fine allowable by law. The United States reserves the right to describe fully, both orally and in writing, to the sentencing judge the nature and seriousness of your client's misconduct, including misconduct not described in the charge to which your client is pleading guilty. The United States also reserves the right to inform the presentence report writer and the Court of any relevant facts, to dispute any factual inaccuracies in the presentence report, and to contest any matters not provided for in this plea agreement.

Your client also understands that the United States retains its full right of allocution in connection with any post-sentence motion which may be filed in this matter and/or any proceeding(s)

before the Bureau of Prisons. The United States reserves the right to appeal the sentence in this case. In addition, if in this plea agreement the United States has agreed to recommend or refrain from recommending to the Court a particular resolution of any sentencing issue, the United States reserves its right of full allocution in any post-sentence litigation or appeal in order to defend the Court's ultimate decision on such issues.

10. **Prosecution by other agencies/jurisdictions**. This agreement only binds the United States Attorney's Office for the District of Columbia. It does not bind any other United States Attorney's Office or any other office or agency of the United States government, including, but not limited to, the Tax Division of the United States Department of Justice, the Internal Revenue Service of the United States Department of the Treasury; the Immigration and Naturalization Service of the Department of Justice; or any state or local prosecutor. These individuals, and agencies remain free to prosecute your client for any offense(s) committed within their respective jurisdictions. Your client is not a citizen of the United States, and your client understands and acknowledges that the guilty plea in this case will or might subject your client to detention, deportation and other sanctions at the direction of the Immigration and Naturalization Service.

11. **No other agreements**. No other agreements, promises, understandings, or representations have been made by the parties other than those contained in writing herein, nor will any such agreements, promises, understandings, or representations be made unless committed to writing and signed by your client, your client's counsel, and an Assistant United States Attorney for the District of Columbia, or made by the parties on the record before the Court.

If your client agrees to the conditions set forth in this letter, both your client and you should sign the original in the

spaces provided below, initial every page of this agreement, and return the executed plea agreement to me. The original of this plea agreement will be filed with the Court.

Sincerely,

Roscoe C. Howard, Jr. /BB

ROSCOE C. HOWARD, Jr.
United States Attorney

Barbara Kittay

Barbara E. Kittay
Assistant U.S. Attorney
Transnational and Major
Crimes Section

Michael Barr
Trial Attorney
Domestic Security Section
Criminal Division

Defendants' Acknowledgments

I have read this plea agreement and carefully reviewed every part of it with my attorney. I am fully satisfied with the legal services provided by my attorney in connection with this plea agreement and all matters relating to it. I fully understand this plea agreement and voluntarily agree to it. No threats have been made to me, nor am I under the influence of anything that could impede my ability to understand this plea agreement fully. No agreements, promises, understandings, or representations have been made with, to, or for me other than those set forth above.

7-17-03
Date

Carlos G. Erazo Robles

I am defendant's attorney. I have reviewed every part of this plea agreement with him. It accurately and completely sets forth the entire agreement between defendant and the Office of the United States Attorney for the District of Columbia.

7-17-03
Date

Mona Asiner, Esquire
Counsel for Mr. Robles

I have read this plea agreement and carefully reviewed every part of it with my attorney. I am fully satisfied with the legal services provided by my attorney in connection with this plea agreement and all matters relating to it. I fully understand this plea agreement and voluntarily agree to it. No threats have been made to me, nor am I under the influence of anything that could impede my ability to understand this plea agreement fully. No agreements, promises, understandings, or representations have been made with, to, or for me other than those set forth above.

7-17-03
Date

Cesar M. Espinoza Macia

I am defendant's attorney. I have reviewed every part of this plea agreement with him. It accurately and completely sets forth the entire agreement between defendant and the Office of the United States Attorney for the District of Columbia.

07-17-03
Date

H. Heather Shaner, Esquire
Counsel for Mr. Macia

I have read this plea agreement and carefully reviewed every part of it with my attorney. I am fully satisfied with the legal services provided by my attorney in connection with this plea agreement and all matters relating to it. I fully understand this plea agreement and voluntarily agree to it. No threats have been made to me, nor am I under the influence of anything that could impede my ability to understand this plea agreement fully. No agreements, promises, understandings, or representations have been made with, to, or for me other than those set forth above.

07 - 17 - 03.
Date

WASHINGTON GONGORA-CEDENO.
Washington R. Gongora Cedeno

I am defendant's attorney. I have reviewed every part of this plea agreement with him. It accurately and completely sets forth the entire agreement between defendant and the Office of the United States Attorney for the District of Columbia.

17 Jul 03
Date

Anthony D. Martin, Esquire
Counsel for Mr. Gongora Cedeno

I have read this plea agreement and carefully reviewed every part of it with my attorney. I am fully satisfied with the legal services provided by my attorney in connection with this plea agreement and all matters relating to it. I fully understand

this plea agreement and voluntarily agree to it. No threats have been made to me, nor am I under the influence of anything that could impede my ability to understand this plea agreement fully. No agreements, promises, understandings, or representations have been made with, to, or for me other than those set forth above.

17 Julio 2003
Date

Wagner E. Gongora Parraga

I am defendant's attorney. I have reviewed every part of this plea agreement with him. It accurately and completely sets forth the entire agreement between defendant and the Office of the United States Attorney for the District of Columbia.

7-17-03
Date

Elita C. Amato, Esquire
Counsel for Mr. Parraga

I have read this plea agreement and carefully reviewed every part of it with my attorney. I am fully satisfied with the legal services provided by my attorney in connection with this plea agreement and all matters relating to it. I fully understand this plea agreement and voluntarily agree to it. No threats have been made to me, nor am I under the influence of anything that could impede my ability to understand this plea agreement fully. No agreements, promises, understandings, or representations have been made with, to, or for me other than those set forth above.

7/17/03
Date

Wagner E. Gongora Balon

I am defendant's attorney. I have reviewed every part of this plea agreement with him. It accurately and completely sets forth the entire agreement between defendant and the Office of the United States Attorney for the District of Columbia.

7/17/03
Date

Tony Axam, Jr., Esquire
Counsel for Mr. Gongora Balon

Factual Proffer

Between May 6, 2002 and May 15, 2002, the five defendants, Carlos G. Erazo Robles, Cesar M. Espinoza Macia, Washington R. Gongora Cedeno, Wagner E. Gongora Parraga and Wagner X. Gongora Balon (hereafter "the defendants"), each and together were crew members aboard a merchant vessel known as the "San Jacinto." They were the only persons responsible for piloting and navigating the San Jacinto vessel. The San Jacinto actually had registration with the Republic of Ecuador, but was not flying a flag of any country.

Just before May 6, 2002, the defendants agreed to carry out a voyage on the high seas (outside the territorial waters of any nation), for which they had been contracted to be paid by an individual in the Republic of Ecuador, to provide passage for alien migrants from their country, to the Republic of Guatemala (a common smuggling route for illegal immigration from South America to the United States), as part of and in preparation for a further land voyage, through Mexico, to and across the border of the United States. On or about May 6, 2002 (in the dark of night), the defendants moved the San Jacinto to a position away from the shore-line, and used small boats secretly to load more than two-hundred fifty (250) aliens, a few at a time, onto the merchant vessel. They then told each alien to stay in the cargo hold below the topside deck, and instructed each one that s/he was not allowed to come out of the cargo hold during any daylight hours (particularly later, when a U.S. Coast Guard helicopter flew over the vessel). In this manner, the defendants encouraged and induced each alien to come to the United States, by ~~instructing them how to make the voyage undetected, and by~~ providing transportation on the high seas, making possible the further land voyage to the United States.

The defendants heard the aliens engaging in conversations, throughout the nine-day voyage, about their final destinations in the United States. Each of the defendants knew and/or recklessly disregarded, the fact that none of the aliens had any travel documents, much less proper immigration documents authorizing entry to the United States. The defendants were paid (and were promised additional payment upon completion of the voyage) for taking the aliens from the Republic of Ecuador to the Republic of Guatemala, with full knowledge that the final destination of the aliens was the United States of America and that the aliens intended to enter the United States illegally.