THOMAS E. MOSS
UNITED STATES ATTORNEY
AARON N. LUCOFF
ASSISTANT UNITED STATES ATTORNEY
DISTRICT OF IDAHO
MK PLAZA, PLAZA IV
800 PARK BLVD., SUITE 600
BOISE, IDAHO 83712
TELEPHONE: (208) 334-1211
FACSIMILE: (208) 334-1413

U.S. DISTRICT COURT
DISTRICT OF IDAHO
JUL 28 2004
LODGED M. REC'D
FILED

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, vs. CARLOS VELASQUEZ-ORTEGA, Defendant.	Case No. CR 04-136S-BLW RULE 11 PLEA AGREEMENT

TABLE OF CONTENTS

I. GUILTY PLEA 1

A. Summary of Terms 1

B. Acceptance 1

II. WAIVER OF CONSTITUTIONAL RIGHTS 1

III. NATURE OF THE CHARGES 2

A. Elements of the Crime 2

B. Factual Basis 2

IV. SENTENCING FACTORS 3

A. Maximum Penalties 3

B. Supervised Release 3

C. Fines and Costs 4

D. Special Assessment 4

E. Forfeiture 4

V. UNITED STATES SENTENCING GUIDELINES: 6

A. Application of Sentencing Guidelines 6

B. Sentencing Guidelines Recommendations and Requests 6

1. Acceptance of Responsibility 6

2. Downward Departure Request by Defendant 7

VI. COOPERATION 7

A. Truthful Information and Assistance 7
B. Use of Information Against Defendant 8
C. Substantial Assistance Determination 8
D. Defendant's Assumption of Risk 9

VII. WAIVER OF APPEAL AND 28 U.S.C. § 2255 RIGHTS 9

VIII. PROVIDING INFORMATION FOR THE PRESENTENCE REPORT 10

IX. NO RIGHT TO WITHDRAW PLEA. 11

X. CONSEQUENCES OF VIOLATING AGREEMENT 11
A. Government's Options 11
B. Defendant's Waiver of Rights 11

XI. MISCELLANEOUS 12
A. No Other Terms 12
B. Plea Agreement Acceptance Deadline 12

XII. UNITED STATES' APPROVAL 12

XIII. ACCEPTANCE BY DEFENDANT AND COUNSEL 13

I. GUILTY PLEA

A. Summary of Terms. Pursuant to Rule 11(c)(1)(A) and (B) of the Federal Rules of Criminal Procedure, the defendant, the attorney for the defendant, and the Government[1] agree that the defendant will plead guilty to Counts One and Two of the Information. The defendant acknowledges that the plea is voluntary and did not result from force, threats, or promises, other than any promise made in this plea agreement. More specifically, the parties agree as follows:

Count One charges the defendant with Unlawful Possession of a Firearm, in violation of Title 18, United States Code, Section 922(g)(5).

Count Two charges the defendant with Forfeiture, in violation of Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c).

B. Acceptance. Upon acceptance of the defendant's guilty pleas, and the defendant's full compliance with the other terms of this Agreement, including the terms of cooperation set forth below, the Government, under Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure, agrees to recommend a sentence at the low-end of the applicable sentencing guideline range. Upon acceptance of the defendant's guilty pleas, and the defendant's full compliance with the other terms of this Agreement, including the terms of cooperation set forth below, the Government, pursuant to Rule 11(c)(1)(A), agrees not to charge the defendant criminally for unlawfully possessing a J.C. Higgins, Model 101.1, 20 gauge shotgun, bearing no serial number, on March 10, 2004, at approximately 0345 hours in Nampa, Idaho. Defendant acknowledges, agrees and waives objection to the fact that the Court may consider "relevant conduct" in arriving at an appropriate sentence pursuant to Section 1B1.3 of the Sentencing Guidelines.

II. WAIVER OF CONSTITUTIONAL RIGHTS

Defendant understands that he will be placed under oath at the plea hearing and that the government, in a prosecution for perjury or false statement, has the right to use against the

---

[1]The word "Government" in this Agreement refers to the United States Attorney for the District of Idaho.

CUO 26/07/04

7/26/03

THE PARTIES AGREE THAT THE DEFENDANT'S POSSESSION OF THE ABOVE-MENTIONED SHOTGUN WILL NOT BE CONSIDERED AS RELEVANT CONDUCT UNDER THE SENTENCING GUIDELINES. THE PARTIES ARE AWARE OF BLAKELY V. WASHINGTON, 124 S.CT. 2531, AND AGREE THAT, TO THE BEST OF THEIR KNOWLEDGE THERE ARE NO BLAKELY ISSUES IN THIS CASE.

P.G. 7/26/03

defendant any statement that the defendant gives under oath. Moreover, the defendant understands and waives (gives up) the following rights: 1) the right to plead not guilty to the offense(s) charged against the defendant and to persist in that plea; 2) the right to a trial by jury; 3) the right to be represented by counsel, and if necessary, to have the court appoint counsel at trial and at every stage of the proceeding; and 4) the rights, at trial, to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify, to present evidence and to compel the attendance of witnesses. The defendant understands that by pleading guilty he waives (gives up) all of the rights set forth above. The defendant fully understands that by entering a plea of guilty, if that plea is accepted by the District Court, there will be no trial and defendant will have waived (given up) these trial rights.

III. NATURE OF THE CHARGES

A. **Elements of the Crime.** The elements of the crime of Unlawful Possession of a Firearm, as charged in Count One, are as follows:

1. The defendant knowingly possessed a firearm which had been shipped or transported in interstate or foreign commerce.
2. The defendant was an alien illegally and unlawfully in the United States.

The elements of Forfeiture, as charged in Count Two, are as follows:

1. The defendant committed the offense of unlawful possession of a firearm, as charged in Count One of the Indictment.
2. The properties set out in Count Two of the Indictment were involved in the commission of Count One of the Indictment.

B. **Factual Basis.** If this matter were to proceed to trial, the Government and the defendant agree that the following facts would be proven beyond a reasonable doubt, which facts accurately represent the defendant's readily provable offense conduct. This factual summary is not intended to detail all relevant conduct, or cover all specific offense characteristics, which will be determined by the Court after its consideration of the Presentence Report.

On June 8, 2004, ATF and ICE agents contacted the defendant in the parking lot of Computrol located at 499 Executive Drive, Meridian, Idaho. The defendant was standing next to a green Isuzu wagon automobile. The agents identified themselves to the defendant. The defendant identified himself and stated he was an illegal alien from Mexico. He also stated there was a firearm in the car. Agents searched the vehicle and recovered a loaded Norinco, Model 213, 9 mm pistol, bearing serial number 619626, from underneath a CD case on the rear passenger floorboard. The defendant was advised of his Miranda rights and stated he was the owner of the firearm in the car.

ATF agents examined the firearm and determined the firearm was manufactured in China and therefore had to travel in interstate and foreign commerce to be physically present in Idaho. ICE agents determined that the defendant was a native and citizen of Mexico who came to the United States in October 2000 by crossing into Arizona from Mexico on foot. The defendant did not have permission to be in the United States.

IV. SENTENCING FACTORS

A. Maximum Penalties. A violation of Unlawful Possession of a Firearm, as charged in Count One, is punishable by a term of imprisonment of ten years, a term of supervised release of not more than three years, a maximum fine of $250,000, and a special assessment of $100.

Forfeiture, as charged in Count Two, requires the defendant forfeit any and all interest in the Norinco, Model 213, 9 mm pistol, bearing serial number 619626.

B. Supervised Release. Defendant will be sentenced to a term of supervised release, to be served after incarceration, of not more than three years. The defendant's term of supervised release will be a specific (i.e., a determinate) term chosen by the Court at sentencing. The combination of prison time and supervised release is permitted, by law, to exceed the maximum term of incarceration allowed under the statute(s) that defendant is pleading guilty to violating. Violation of any condition of supervised release may result in defendant being imprisoned for the entire term of supervised release or being prosecuted for contempt of court under Title 18, United

States Code, Section 401(3).

C. **Fines and Costs**. Unless the Court determines that the defendant will not reasonably be able to pay a fine, or that paying a fine will unduly burden any of the defendant's dependents, a fine shall be imposed. There is no agreement as to the amount of the fine. The Court may also order the defendant to pay the costs of imprisonment, probation, and supervised release.

D. **Special Assessment.** Defendant will pay a special assessment of $100 per count, in addition to any fine imposed. This assessment will be paid by defendant before sentence is imposed, and defendant will furnish a receipt at sentencing. Payment is to be made to the United States District Court, Clerk's Office, Federal Building and United States Courthouse, 550 W. Fort Street, Fourth Floor, Boise, ID 83724.

E. **Forfeiture**. The defendant agrees to immediately and voluntarily forfeit to the United States the property set out in Count Two of the Information, including the following property:

One Norinco, Model 213, 9 mm pistol, bearing serial number 619626.

Eight (8) 9 mm bullets.

In order to effectuate the Agreement, the defendant also agrees to any civil or administrative forfeiture brought against these properties pursuant to applicable forfeiture statutes, including 18 U.S.C. § 981 and/or 21 U.S.C. § 881, should such proceedings be necessary, whether already pending or yet to be filed. The defendant further agrees not to contest any civil or administrative forfeiture proceedings already brought against properties not named herein which relate to the criminal activity which is the subject of the investigation leading to the charges herein.

The defendant agrees that forfeiture of substitute assets may occur as authorized herein and by law, and that any such forfeiture–if it occurs–shall not be deemed an alteration of the defendant's sentence. Forfeiture of any of the defendant's assets shall not be treated as satisfaction of any fine, restitution, cost of imprisonment, or any other penalty this Court may

impose upon the defendant in addition to forfeiture.

The defendant represents and warrants to the Government that he/she is the sole and exclusive owner of the properties and property interests listed above, and that no other person or entity has any interest in such properties and property interests except as specifically set out herein. The defendant understands and acknowledges that the Government is relying upon the defendant's representations in entering into this Agreement. If the defendant's representations are false or inaccurate, the Government may pursue any and all forfeiture remedies available at law or equity on the basis of the violations covered by this Agreement.

The defendant also agrees to waive any double jeopardy, ex post facto, excessive fines clause, statute of limitations, statutory notice, or other claims as to any additional criminal or civil proceedings that may become necessary in order to accomplish the forfeitures as stated above. The defendant agrees to waive any claims, defenses or challenges arising under the requirements of Rules 32.2 and 43(a), Fed.R.Crim.P., with respect to the imposition of any forfeiture sanction carried out in accordance with this Agreement, and further agrees to not contest or challenge in any manner (including direct appeal, habeas corpus, or any other means) such forfeitures on any grounds, including that the forfeiture constitutes an excessive fine or punishment.

The defendant agrees to the forfeiture of all assets described as forfeitable herein, whether in this criminal proceeding or in separate civil or administrative proceedings, and if the Agreement is withdrawn for any reason, defendant agrees to waive any right to contest civil or administrative forfeitures which are already completed by final judgment or declaration, and agrees not to contest civil or administrative proceedings already underway as to such assets.

The defendant agrees to forfeiture of the properties as stated above, or to substitute properties of equal value, at the Government's option. The District Court for the District of Idaho shall retain jurisdiction to settle any disputes arising from application of the foregoing forfeiture provisions.

V. UNITED STATES SENTENCING GUIDELINES:

A. Application of Sentencing Guidelines. Defendant understands that defendant will be sentenced under the Federal Sentencing Guidelines and that: (1) the sentence has not yet been determined by the District Judge; (2) any estimate of the likely sentence received from any source is a prediction and not a promise; and (3) the District Judge has the final authority to decide what the sentence will be.

The defendant also understands that the Court will determine the applicable sentencing factors at sentencing and that the Court's determination will affect the sentence range under the Sentencing Guidelines. While the Court may take the defendant's cooperation and the recommendations of the parties into account in determining the sentence to be imposed, the Court has complete discretion to impose a sentence other than the sentence recommended, including the maximum sentence possible for the crimes to which defendant has pled.

B. Sentencing Guidelines Recommendations and Requests.

1. Acceptance of Responsibility. Unless the Government learns of new information to the contrary, defendant will be entitled to a reduction of two levels in the combined adjusted offense level, under Section 3E1.1(a) of the Sentencing Guidelines, if the defendant clearly accepts responsibility for the offense. The Government will move for an additional one-level reduction in the combined offense level under section 3E1.1(b) if the following conditions are met: the defendant qualifies for a decrease under section 3E1.1(a); the offense is level 16 or greater; and the defendant has assisted authorities in the investigation or prosecution of defendant's own misconduct by timely notifying authorities of defendant's intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently. If, at any time prior to imposition of sentence, the defendant fails to meet the criteria set out in Section 3E1.1 of the Sentencing Guidelines, or acts in a manner inconsistent with acceptance of responsibility, the Government will not make such a recommendation and/or motion or, if one has already been made, it will withdraw the

recommendation and/or motion.

2. **Downward Departure Request by Defendant.** The defendant will not seek a downward departure without first notifying the Government of defendant's intent to seek a downward departure and defendant's reasons and basis therefor, 21 days before the date set for sentencing.

VI. COOPERATION

A. **Truthful Information and Assistance.** Defendant promises to provide truthful and complete information to the Government and its investigative agencies, including full debriefings and truthful testimony at all proceedings, criminal, civil or administrative, including, but not limited to, grand jury proceedings, trials, and pretrial and post-trial proceedings, concerning defendant's role and the roles of all others involved in the offense or offenses that were part of the same course of conduct or of a common scheme or plan as the offense of conviction. In so doing, the defendant shall neither attempt to protect any person or entity through false information or omission, nor falsely implicate any person. The defendant shall testify truthfully no matter who asks the questions, the prosecutor, judge or defense counsel. It is further understood that the defendant shall be subject to prosecution for perjury and obstruction of justice for any intentional deviation from the truth. The defendant's duty under the terms of this Agreement is to tell the truth whether or not it bolsters the Government's case against any particular individual. The defendant specifically understands that this Agreement is not contingent upon the conviction of any person or the forfeiture of any property.

The defendant agrees to cooperate in good faith, meaning that the defendant will not only respond truthfully and completely to all questions asked, but will also volunteer all information that is reasonably related to the subjects discussed in the debriefings or testimony. In other words, the defendant may not omit facts about crimes, participants, or defendant's involvement, and then claim not to have breached the Agreement because he was not specifically asked questions about those crimes, participants, or involvement. Any actions or statements inconsistent with continued

cooperation under this Agreement, including but not limited to, criminal activity, or a statement indicating a refusal to testify, constitutes a breach of this Agreement.

Defendant agrees to be available for interviews in preparation of all testimony. If necessary, defendant further agrees to submit, upon request, to government-administered polygraph examinations to verify defendant's full and truthful cooperation.

Defendant agrees to identify all property known to defendant, in which defendant or any other person has a legal or equitable interest, that is or was the proceeds of, or acquired with the proceeds of, a drug crime, or that was used in any manner to facilitate a drug crime. Defendant also agrees to identify the extent of any person's or entity's (including defendant's) interest in any such property. The defendant further agrees to assist in the recovery and forfeiture to the United States of any property or property interest which may be forfeitable as the proceeds of criminal activity, or as property which was involved in or facilitated criminal activity, or which is otherwise forfeitable under federal law.

B. <u>Use of Information Against Defendant.</u> In exchange for defendant's agreement to cooperate with the Government, the Government agrees not to use new information defendant provides (pursuant to this Agreement) about the defendant's own criminal conduct. Such information may be revealed to the Court but may not be used against the defendant in determining defendant's sentence range, choosing a sentence within the range, or departing from the range. There shall be no such restrictions on the use of information: (1) previously known to law enforcement agencies; (2) revealed to law enforcement agencies by, or discoverable through, an independent source; (3) in a prosecution for perjury, obstruction of justice, or giving a false statement; or (4) in the event there is a breach of this Agreement.

C. <u>Substantial Assistance Determination.</u> Upon the Government's determination that defendant's cooperation amounts to "substantial assistance" in the investigation of others, the Government will request that the Court depart downward from the applicable sentencing range, pursuant to Section 5K1.1 of the Sentencing Guidelines and/or any mandatory minimum sentence

pursuant Title 18, United States Code, Section 3553(e). The Government reserves the right to make the sole determination as to whether and when defendant has provided substantial assistance for purposes of the Government's motion for a downward departure. If, in good faith, the Government cannot conclude that the defendant has provided substantial assistance, the Government will not be obligated to move for a downward departure.

The Government's final decision whether to file motions pursuant to Section 5K1.1 and/or Title 18, United States Code, Section 3553(e) will be made after evaluating defendant's cooperation with regards to: (1) the significance and usefulness of the defendant's cooperation, (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant, (3) the nature and extent of the defendant's assistance, (4) any injury suffered, or any danger or risk of injury to the defendant or defendant's family resulting from defendant's cooperation, and (5) the timeliness of the defendant's cooperation. The Government's specific recommendation will also be contingent upon its evaluation of all the facts of the case, the sentence that would have been imposed absent an Agreement, and the extent and value of the cooperation provided.

D. <u>Defendant's Assumption of Risk</u>. The defendant agrees that defendant's cooperation is given freely and voluntarily, with a knowledge of the possible consequences of cooperation with the Government. The defendant agrees that defendant's involvement in this case has been made known to defendant's attorney and that he has permission from defendant's attorney to enter into such an agreement. The defendant hereby absolves the Government, any of its political subdivisions and any of its employees from any liability associated with this cooperation, and includes defendant's successors, heirs and assigns.

VII. WAIVER OF APPEAL AND 28 U.S.C. § 2255 RIGHTS

The defendant is aware that Title 18, United States Code, Section 3742 affords defendant the right to appeal the sentence imposed in this case. Acknowledging this, in exchange for the other terms of this Agreement, the defendant knowingly and voluntarily gives up (waives) all

appeal rights defendant may have regarding both defendant's conviction and sentence, including any restitution or forfeiture order, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute, or is the result of an incorrect application of the sentencing guidelines to which the defendant filed a proper and timely objection.

The defendant is also aware that under certain circumstances a defendant has the right to collaterally challenge defendant's sentence through a habeas petition such as a motion pursuant to Title 28, United States Code, Section 2255. Acknowledging this, in exchange for the other terms of this Agreement, the defendant knowingly and voluntarily gives up (waives) defendant's right to contest defendant's pleas, conviction, or sentence in any post-conviction proceeding, including any proceeding authorized by Title 28, United States Code, Section 2255, except as to an appeal claiming ineffective assistance of counsel based upon facts discovered after the entry of defendant's guilty pleas.

The defendant further understands that nothing in this Plea Agreement shall affect the Government's right and/or duty to appeal as set forth in Title 18, United States Code, Section 3742(b).

VIII. PROVIDING INFORMATION FOR THE PRESENTENCE REPORT.

The defendant agrees to provide all material financial and other information as may be requested by a representative of the United States Probation Office for use in preparing a Presentence Report. Failure to execute releases and/or provide such material information as may be required is a violation of the terms of this Agreement, and will relieve the Government of its obligations as set forth in this Agreement, and may subject the defendant to an enhancement under Guidelines Section 3C1.1, or provide grounds for an upward departure under Section 5K2.0 of the Sentencing Guidelines, but at the option of the Government, may not constitute grounds for withdrawing the plea of guilty.

IX. NO RIGHT TO WITHDRAW PLEA.

The defendant understands that the Court is not bound to follow any recommendations or requests made by the parties at the time of sentencing. If the Court decides not to follow any of the parties recommendations or requests, the defendant cannot withdraw from this plea agreement or the guilty plea.

X. CONSEQUENCES OF VIOLATING AGREEMENT

A. <u>Government's Options.</u> If defendant fails to keep any promise in this Agreement including any promise to cooperate or commits a new crime, the Government is relieved of any obligation not to prosecute defendant on other charges, including any charges dismissed as part of this Plea Agreement. Such charges may be brought without prior notice. In addition, if the Government determines after sentence is imposed under this Agreement that defendant's breach of the Agreement warrants further prosecution, the Government will have the choice between letting the conviction(s) under this Plea Agreement stand or vacating such conviction(s) so that such charge(s) may be re-prosecuted. If the Government makes its determination before sentencing, it may withdraw from the Plea Agreement in its entirety.

B. <u>Defendant's Waiver of Rights.</u> Defendant agrees that if defendant fails to keep any promise made in this Agreement, defendant gives up: (1) the right not to be placed twice in jeopardy for the offense(s) to which defendant entered a plea of guilty or which were dismissed under this Agreement; (2) any right under the Constitution and laws of the United States to be charged or tried in a more speedy manner for any charge that is brought as a result of defendant's failure to keep this Agreement; and (3) the right to be charged within the applicable statute of limitations period for any charge that is brought as a result of defendant's failure to keep this Agreement, and on which the statute of limitations expired after defendant entered into this Agreement.

Furthermore, the defendant further understands and agrees that if defendant does not enter a valid and acceptable plea, the Government will move to continue the trial now set. The

defendant agrees not to contest such a continuance, and agrees that the resulting delay would be excludable time under Title 18, United States Code, Sections 3161(h)(1)(I), (h)(3)(A), or (h)(8)(A). This continuance will be necessary to allow the Government adequate time to prepare for trial.

XI. MISCELLANEOUS

A. No Other Terms. This Agreement incorporates the complete understanding between the parties, and no other promises have been made by the Government to the defendant or to the attorney for the defendant. This Agreement does not prevent any governmental agency from pursuing civil or administrative actions against defendant or any property. Unless an exception to this paragraph is explicitly set forth elsewhere in this document, this Agreement does not bind or obligate governmental entities other than the United States Attorney's Office for the District of Idaho. If requested to do so by the defendant or defendant's counsel, the Government will bring the defendant's cooperation and pleas to the attention of other prosecuting authorities.

B. Plea Agreement Acceptance Deadline. This plea offer is explicitly conditioned on acceptance of this plea Agreement no later than 5:00 p.m. on July 16, 2004. It is defendant's sole and complete responsibility to notify the U.S. Attorney's Office of the acceptance of this Agreement by the date specified above in order for this offer to be effectively accepted.

XII. UNITED STATES' APPROVAL

I have reviewed this matter and the Plea Agreement. I agree on behalf of the United States that the terms and conditions set forth above are appropriate and are in the best interests of justice.

THOMAS E. MOSS
UNITED STATES ATTORNEY
By:

AARON N. LUCOFF
Assistant United States Attorney

June 29, 2004
DATE

XIII. ACCEPTANCE BY DEFENDANT AND COUNSEL

A. I have had read to me by an interpreter and carefully reviewed every part of this Plea Agreement with my attorney. I understand the Agreement and its effect upon the potential sentence. Furthermore, I have discussed all of my rights with my attorney and I understand those rights. No other promises or inducements have been made to me, directly or indirectly, by any agent of the Government, including any Assistant United States Attorney, concerning any plea to be entered in this case. In addition, no person has, directly or indirectly, threatened or coerced me to do, or refrain from doing, anything in connection with any aspect of this case, including entering a plea of guilty. I am satisfied with my attorney's advice and representation in this case.

Carlos Velasquez-O

CARLOS VELASQUEZ-ORTEGA
Defendant

26/07/04
DATE

B. I have read this Plea Agreement and have discussed the contents of the agreement with my client. The Plea Agreement accurately and completely sets forth the entirety of the agreement. I concur in my client's decision to plead guilty as set forth above.

PHILLIP GORDON
Attorney for the Defendant

7/26/4
DATE