

1 THOMAS E. MOSS
UNITED STATES ATTORNEY
2 JACK B. HAYCOCK
ASSISTANT UNITED STATES ATTORNEY
3 DISTRICT OF IDAHO
801 E. SHERMAN #192
4 POCATELLO, IDAHO 83201
TELEPHONE: (208) 478-4166
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U. S. COURTS
OCT 20 2004
REC'D _____ FILED _____
CAMERON S. BURKE
CLERK IDAHO

9 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

10 UNITED STATES OF AMERICA,)
)
11 Plaintiff,) Case No. CR 04-193-E-BLW
)
12 vs.)
) RULE 11 PLEA AGREEMENT
13 FRANCISCO UBALDO ERIVES-)
ALTAMIRANO)
14 Defendant(s).)
15

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1 **I. GUILTY PLEA**

2 **A. Summary of Terms.** Pursuant to Rule 11(c)(1)(B) of the Federal Rules of
3 Criminal Procedure, the defendant, the attorney for the defendant, and the Government¹ agree that
4 the defendant will plead guilty to Count One of the Indictment. The defendant acknowledges that
5 the plea is voluntary and did not result from force, threats, or promises, other than any promise
6 made in this plea agreement. More specifically, the parties agree as follows:

7 Count One charges the defendant with Illegal Reentry, in violation of Title 8 U.S.C. §
8 1326(a) and (b)(2).

9 **II. WAIVER OF CONSTITUTIONAL RIGHTS**

10 Defendant understands that he will be placed under oath at the plea hearing and that the
11 government, in a prosecution for perjury or false statement, has the right to use against the
12 defendant any statement that the defendant gives under oath. Moreover, the defendant understands
13 and waives (gives up) the following rights: 1) the right to plead not guilty to the offense charged
14 against the defendant and to persist in that plea; 2) the right to a trial by jury; 3) the right to be
15 represented by counsel, and if necessary, to have the court appoint counsel at trial and at every
16 stage of the proceeding; and 4) the rights, at trial, to confront and cross-examine adverse
17 witnesses, to be protected from compelled self-incrimination, to testify, to present evidence and to
18 compel the attendance of witnesses. The defendant understands that by pleading guilty he waives
19 (gives up) all of the rights set forth above. The defendant fully understands that by entering a plea
20 of guilty, if that plea is accepted by the District Court, there will be no trial and defendant will
21 have waived (given up) these trial rights.

22 **III. NATURE OF THE CHARGES**

23 **A. Elements of the Crime.** The elements of the crime of Illegal Reentry, as charged
24 in Count One, are as follows:

25 _____
26 ¹The word "Government" in this Agreement refers to the United States Attorney for the
27 District of Idaho.

1 First, the defendant is an alien;

2 Second, the defendant was arrested and lawfully deported from the United States;
3 and

4 Third, the defendant reentered the United States without the consent of the
5 Secretary of Homeland Security of the United States (Immigration and Customs
6 Enforcement).

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

12 The defendant is an alien and a citizen of Mexico. He was arrested and lawfully deported
13 from the United States through El Paso, Texas, on March 5, 2003, and through San Ysidro,
14 California on September 16, 2003. He was found in the United States in Butte County, Idaho, on
15 September 22, 2004. He did not obtain the express consent of the Secretary of the Department of
16 Homeland Security to reapply for admission to the United States before returning to the United
17 States.

18 **IV. SENTENCING FACTORS**

19 **A. Maximum Penalties.** A violation of Illegal Reentry, as charged in Count One, is
20 punishable by a term of imprisonment of twenty (20) years, a term of supervised release of three
21 (3) years, a maximum fine of \$250,000, and a special assessment of \$100.

22 **B. Supervised Release.** If defendant is sentenced to one year in prison, or less, the
23 Court may also order that, following release from prison, defendant be placed on supervised
24 release for at least three years. If defendant is sentenced to imprisonment for more than one year,
25 such a term of supervised release will be imposed. The defendant will be sentenced to a term of
26 supervised release to be served after incarceration.

1 The defendant's term of supervised release will be a specific (i.e., a determinate) term
2 chosen by the Court at sentencing. The combination of prison time and supervised release is
3 permitted, by law, to exceed the maximum term of incarceration allowed under the statute(s) that
4 defendant is pleading guilty to violating. Violation of any condition of supervised release may
5 result in defendant being imprisoned for the entire term of supervised release or being prosecuted
6 for contempt of court under Title 18, United States Code, Section 401(3).

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

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

17 **V. UNITED STATES SENTENCING GUIDELINES:**

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

23 The defendant also understands that the Court will determine the applicable sentencing
24 factors at sentencing and that the Court's determination will affect the sentence range under the
25 Sentencing Guidelines. While the Court may take the defendant's cooperation and the
26 recommendations of the parties into account in determining the sentence to be imposed, the Court
27

1 has complete discretion to impose a sentence other than the sentence recommended, including the
2 maximum sentence possible for the crimes to which defendant has pled.

3 **B. Sentencing Guidelines Recommendations and Requests.**

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

18 2. **Agreement for Reinstatement of Removal.** Pursuant to Rule 11(c)(1)(B)
19 of the Federal Rules of Criminal Procedure and USSG §5K3.1, the Government agrees to
20 recommend a two-level downward departure from the Sentencing Guidelines range that the court
21 finds to be applicable.

22 This Agreement is based, in part, on the defendant's **agreement for reinstatement of**
23 **removal**, in which defendant admits that he was the subject of a previous order of removal,
24 deportation or exclusion entered on March 4, 2003, at El Paso, Texas, and agrees to the
25 reinstatement of that previous order as set forth in the Order of Reinstatement attached to this Plea
26 Agreement. In the event this Plea Agreement is accepted by the Court, the defendant agrees not to
27

1 contest, either directly or by collateral attack, the reinstatement of the prior order of removal,
2 deportation or exclusion.

3 This Agreement is conditioned on the defendant having less than 13 criminal history
4 points. If the defendant has 13 or more criminal history points, the Government reserves the right
5 to withdraw from this Agreement.

6 **VI. WAIVER OF APPEAL AND 28 U.S.C. § 2255 RIGHTS**

7 The defendant is aware that Title 18, United States Code, Section 3742 affords defendant
8 the right to appeal the sentence imposed in this case. Acknowledging this, in exchange for the
9 other terms of this Agreement, the defendant knowingly and voluntarily gives up (waives) all
10 appeal rights defendant may have regarding both defendant's conviction and sentence, including
11 any restitution or forfeiture order, or to appeal the manner in which the sentence was imposed,
12 unless the sentence exceeds the maximum permitted by statute, or is the result of an incorrect
13 application of the sentencing guidelines to which the defendant filed a proper and timely
14 objection.

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

23 The defendant further understands that nothing in this Plea Agreement shall affect the
24 Government's right and/or duty to appeal as set forth in Title 18, United States Code,
25 Section 3742(b). Also, the Government may defend any action of the district court on appeal.
26
27

1 **VII. PROVIDING INFORMATION FOR THE PRESENTENCE REPORT.**

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

10 **VIII. NO RIGHT TO WITHDRAW PLEA.**

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

15 **IX. CONSEQUENCES OF VIOLATING AGREEMENT**

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

25 **B. Defendant's Waiver of Rights.** Defendant agrees that if defendant fails to keep
26 any promise made in this Agreement, defendant gives up: (1) the right not to be placed twice in
27

1 jeopardy for the offense(s) to which defendant entered a plea of guilty or which were dismissed
2 under this Agreement; (2) any right under the Constitution and laws of the United States to be
3 charged or tried in a more speedy manner for any charge that is brought as a result of defendant's
4 failure to keep this Agreement; and (3) the right to be charged within the applicable statute of
5 limitations period for any charge that is brought as a result of defendant's failure to keep this
6 Agreement, and on which the statute of limitations expired after defendant entered into this
7 Agreement.

8 Furthermore, the defendant further understands and agrees that if defendant does not enter
9 a valid and acceptable plea, the Government will move to continue the trial now set. The
10 defendant agrees not to contest such a continuance, and agrees that the resulting delay would be
11 excludable time under Title 18, United States Code, Sections 3161(h)(1)(I), (h)(3)(A), or
12 (h)(8)(A). This continuance will be necessary to allow the Government adequate time to prepare
13 for trial.

14 **X. MISCELLANEOUS**

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

23 **B. Plea Agreement Acceptance Deadline.** This plea offer is explicitly conditioned
24 on acceptance of this plea Agreement no later than 5:00 p.m. on October 27, 2004. It is
25 defendant's sole and complete responsibility to notify the U.S. Attorney's Office of the acceptance
26 of this Agreement by the date specified above in order for this offer to be effectively accepted.

1 **XII. UNITED STATES' APPROVAL**

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

4 THOMAS E. MOSS
5 UNITED STATES ATTORNEY

6 By:



7 **JACK B. HAYCOCK**
8 Assistant United States Attorney

10/26/04
DATE

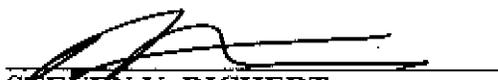
9 **XIII. ACCEPTANCE BY DEFENDANT AND COUNSEL**

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

18 Francisco E Altamirano
19 **FRANCISCO UBALDO ERIVES-ALTAMIRANO**
20 Defendant

10-26-04
DATE

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

24 
25 **STEVEN V. RICHERT**
26 Attorney for the Defendant

10/26/04
DATE

Notice of Intent/Decision to Reinstate Prior Order

File No. A046 622 891
Case No: VIF0409000035
Date: September 22, 2004

FIN #: 13181453

Name: Francisco Ubaldo ERIVES-Altamirano AKA: HERNANDEZ, FRANCISCO

In accordance with section 241(a)(5) of the Immigration and Nationality Act (Act) and 8 CFR241.8, you are hereby notified that the Attorney General intends to reinstate the order of Removal entered against you. This intent is based on
(Deportation / exclusion / removal)

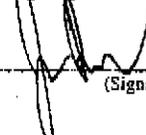
the following determinations:

- You are an alien subject to a prior order of deportation / exclusion / removal entered on March 4, 2003 at El Paso, Texas
(Date) (Location)
- You have been identified as an alien who:
 - was removed on March 5, 2003 pursuant to an order of deportation / exclusion / removal
(Date)
 - departed voluntarily on _____ pursuant to an order of deportation / exclusion / removal on or after the date on which such order took effect (i.e., who self-deported).
(Date)
- You illegally reentered the United States on or about March 7, 2004 at or near Columbus, New Mexico
(Date) (Location)

In accordance with Section 241(a)(5) of the Act, you are removable as an alien who has illegally reentered the United States after having been previously removed or departed voluntarily while under an order of exclusion, deportation or removal and are therefore subject to removal by reinstatement of the prior order. You may contest this determination by making a written or oral statement to an immigration officer. You do not have a right to a hearing before an immigration judge.

The facts that formed the basis of this determination, and the existence of a right to make a written or oral statement contesting this determination, were communicated to the alien in the ENGLISH language.

JAMES BOENING
(Printed or typed name of official)


(Signature of officer)

SPECIAL AGENT
(Title of officer)

Acknowledgment and Response

I do do not wish to make a statement contesting this determination.

September 27, 2004
(Date)

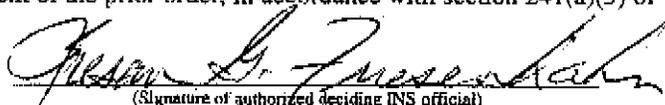
X Francisco Erives A
(Signature of Alien)

Decision, Order, and Officer's Certification

Having reviewed all available evidence, the administrative file and any statements made or submitted in rebuttal, I have determined that the above-named alien is subject to removal through reinstatement of the prior order, in accordance with section 241(a)(5) of the Act.

9/27/04
(Date)

IDAHO FALLS, IDAHO
(Location)


(Signature of authorized deciding INS official)

SUSAN G. FRISENHAHN
(Printed or typed name of official)

RESIDENT AGENT IN CHARGE
(Title)