

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

UNITED STATES OF AMERICA,)	CASE NO. 5:06CR00051-4
)	
)	
v.)	
)	<u>REPORT AND RECOMMENDATION</u>
RUTILO MENDOZA-NUNEZ,)	
a/k/a "Tony,")	
)	
)	
Defendant.)	By: B. WAUGH CRIGLER U.S. MAGISTRATE JUDGE

In accordance with the provisions of Title 28 U.S.C. § 636(b)(3) and upon the defendant's consent, this case was referred to the undersigned to conduct a plea hearing.

DEFENDANT'S RESPONSES TO RULE 11 INQUIRY

The Grand Jury has returned a multiple count Indictment charging defendant in Count One with willfully and knowingly combining, conspiring, confederating and agreeing with persons known and unknown to the Grand Jury, to commit the following offenses against the United States, to wit: to distribute and possess with intent to distribute a mixture or substance containing more than 500 grams of methamphetamine, a Schedule II narcotic controlled substance in violation of Title 21, United States Code, Section 841(b)(1)(A), all in violation of Title 21, United States Code, Section 846; in Count Six with knowingly and willfully distributing or possessing with intent to distribute, more than 500 grams of methamphetamine, a Schedule II narcotic controlled substance, all in violation of Title 21, United States Code, Section 841(a)(1) and (b)(1)(A); in Counts Seven and Eight with knowingly and willfully distributing or possessing with intent to distribute, a detectable quantity of a mixture or substance containing methamphetamine, a Schedule II narcotic controlled substance, all in violation of Title 21, United States Code, Section 841(a)(1) and b(1)(B);

in Count Nine with being an alien illegally or unlawfully in the United States, did knowingly and intentionally possess or receive a firearm, which was shipped or transported in interstate or foreign commerce, all in violation of Title 18, United States Code, Section 922(g)(5) and 924(a)(2); and in Count Ten with knowingly using and carrying a firearm during or in relation to a drug trafficking crime for which may be prosecuted in a court of the United States, as set forth in Count Eight of the Indictment, in violation of Title 18, United States Code, Section 924(c).

On April 25, 2007, a plea hearing was conducted before the undersigned, and the defendant entered a plea of guilty to Counts One and Ten of the Indictment. The government has agreed to move for the dismissal of the remaining counts of the Indictment upon acceptance of defendant's guilty plea. The defendant agreed that the government had probable cause to bring all counts in the Indictment which are being dismissed.

At this hearing the defendant was placed under oath and testified that his full legal name is Rutilo Mendoza-Nunez, and he was born in Mexico on March 5, 1973. The defendant further testified he completed high school in Mexico and is presently working on his GED. The defendant stated that he can read English, cannot write English, and can understand about 80% of the English he hears.¹ The defendant stated that he was fully aware of the nature of the charges against him and the consequence of pleading guilty to those charges. The defendant further testified that he was not under the influence of alcohol, medicine, or any drug. The defendant stated that he had no other physical or mental condition which impaired his ability to understand the nature of the proceedings being held.

The defendant testified that he had received a copy of the Indictment pending against him

¹An interpreter assisted the defendant during the hearing.

and that he had fully discussed the charges therein, and his case in general, with his counsel. The defendant stated that he was pleading guilty of his own free will because he was, in fact, guilty of the offenses charged. The defendant testified that he understood that he will be required to pay a mandatory assessment of \$200, and that, at the discretion of the court, he may also be denied federal benefits, as that term is defined in 21 U.S.C. § 862(a), for a period of years or indefinitely, as set forth in the plea agreement. The defendant specifically testified that he understood that under the terms of the agreement he was waiving rights to appeal or to collaterally attack his conviction or sentence and that he was waiving his right to have a jury determine beyond a reasonable doubt any facts alleged in Counts One and Ten. The defendant testified that he also understood that the government retained its right to appeal Sentencing Guidelines issues. The defendant stated that no one had made any promises, assurances, or threats to him in an effort to induce his plea. The defendant agreed that if for any reason the plea agreement is withdrawn or otherwise not consummated he waived his right to raise the defense of the statute of limitations. The defendant testified that he understood that the offenses with which he is charged in Counts One and Ten are felonies and that, if his plea is accepted, he will be adjudged guilty of those offenses. The defendant stated he understood that he must submit to the government a complete and truthful financial statement revealing all his assets and liabilities on a form provided by the government within thirty days of the date of the plea agreement. The defendant also testified that he was waiving all rights under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act, 5 U.S.C. § 552a, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of his case. The defendant acknowledged that he consented to the forfeiture, official use and/or destruction of any illegal firearms or illegal contraband seized by law

enforcement officials from his possession or control. The defendant further acknowledged that he consented to forfeit any right, title and interest he has in assets purchased with proceeds of his illegal activity, directly or indirectly and that such a forfeiture of property is proportionate to the degree and nature of the offenses he committed and does not raise any of the concerns addressed in *United States v. Austin*, 113 S.Ct. 2801 (1993).

The defendant was informed that the maximum possible penalty provided by law for the offense with which he is charged in Count One is a \$4,000,000 fine and life imprisonment. The defendant was further informed that Count One has a mandatory minimum sentence of ten years imprisonment. The defendant was informed that the maximum possible penalty provided by law for the offense with which he is charged in Count Six is a \$4,000,000 fine and life imprisonment. The defendant was informed that the maximum possible penalty provided by law for the offense with which he is charged in Counts Seven and Eight is a \$2,000,000 fine and forty years imprisonment, for each count. The defendant was informed that the maximum possible penalty provided by law for the offense with which he is charged in Count Nine is a \$250,000 fine and ten years imprisonment. Finally, the defendant was informed that the maximum possible penalty provided by law for the offense with which he is charged in Count Ten is a \$250,000 fine and five years imprisonment.

The defendant was informed that under the Sentencing Reform Act of 1984, the United States Sentencing Commission has issued guidelines for judges to follow in determining the sentence in a criminal case. The defendant was then informed that, in light of the United States Supreme Court's decision in *United States v. Booker*, 125 S.Ct. 738 (2005), the Sentencing Guidelines are no longer mandatory but that the sentencing judge may apply them in an advisory fashion in determining a

reasonable sentence. The defendant testified that he and his counsel had discussed how the Sentencing Guidelines might apply in his case. The defendant also testified that he understood that the court would not be able to determine the applicable guideline range, for advisory purposes, until after a presentence report has been prepared and both parties have been given an opportunity to challenge the reported facts and application of the guidelines. He stated that he understood that the eventual sentence imposed may be different from any estimate his attorney had given him and that the court has the authority to impose a sentence that is either higher or lower than that called for by the guidelines, so long as the sentence is not greater than the statutory maximum for the offenses to which the defendant is pleading guilty. The defendant stated that he knew that parole had been abolished and that if he is sentenced to prison he will not be released on parole but on supervised release, a violation of which could result in additional incarceration.

The defendant stated that he agreed to accept responsibility for his conduct and he understood that, contingent upon his acceptance of responsibility and continued cooperation in the sentencing process, and fulfillment of his duties under the plea agreement, the government will recommend a two-level (2) reduction under USSG § 3E1.1(a), and because he meets the listed criteria, the government agrees that he should be granted an additional one-level (1) reduction under USSG § 3E1.1(b). The defendant stated that he was aware that pursuant to the Sentencing Guidelines the sentencing judge could add or subtract up to four sentencing points to his sentencing level based upon his role in the offenses, and defendant acknowledged that he and the government had stipulated that his base offense would neither be increased or decreased based on USSG §§ 3B1.1 and 3B1.2. However, the defendant was informed that this would not affect possible role increases based on USSG §§ 3B1.3 and 3B1.5. The defendant stated that he understood that even

if he fully cooperates with law enforcement officials, the government is under no obligation to file a motion for substantial assistance. The defendant stated that he and the government agreed that for purposes of USSG §§ 2D1.1 and 1B1.3 he should be held responsible for 1529.9 grams of methamphetamine and 915.2 grams of amphetamine. The defendant stated that he understood that any information given by him during a proffer or cooperation would not be used against him to enhance his sentence under USSG § 1B1.8.

The defendant testified that he understood that he had the right to a trial by a jury, in addition to the following rights, which will be waived or given up if his guilty plea is accepted:

1. The right to plead not guilty to any offense charged against him;
2. The right at trial to be presumed innocent and to force the government to prove his guilt beyond a reasonable doubt;
3. The right of assistance of counsel at trial and in any subsequent appeal;
4. The right to see, hear and cross-examine witnesses;
5. The right to call witnesses to testify in his own behalf and to the issuance of subpoenas or compulsory process to compel the attendance of witnesses;
6. The right to decline to testify unless he voluntarily elects to do so in his own defense;
7. The right to a unanimous guilty verdict; and
8. The right to appeal a guilty verdict.

The defendant also testified that he understood that if he is adjudged guilty of these charges, he may be deprived of valuable civil rights, such as the right to vote, the right to hold public office, the right to serve on a jury, and the right to possess a firearm.²

The defendant stated that he was fully satisfied with the advice and representation given to him in this case by his counsel. The defendant also stated that he believed his counsel's representation had been effective. He further stated that his counsel had kept him informed, helped him understand the

²The defendant would not possess these rights which appertain only to citizens.

charges against him, and otherwise been a “good” lawyer. The defendant testified that he understood the possible consequences of his plea. The defendant asked the court to accept his plea of guilty to Counts One and Ten of the Indictment.

THE GOVERNMENT’S EVIDENCE

The defendant waived his right to have the government’s Factual Summary read in open court and had no objection to the Summary. The Factual Summary having been filed in open court, the evidence presented therein is as follows:

The Defendant, Rutilo Mendoza-Nunez, a/k/a “Tony”, was a supplier of amphetamine and methamphetamine for redistribution to Orbelin Vasquez-Damian, a/k/a “Angel”, and Carlton Oscar Massie on multiple occasions during the period July-September 2006.

On or during the period preceding July 18, 2006, Vasquez was trying to get Mendoza to supply Vasquez with pound or multi pound amounts of methamphetamine. In order to demonstrate his trustworthiness as a pound level meth dealer, Vasquez invited Mendoza to witness a one pound meth distribution that Vasquez was to make. On July, 18, 2006, Mendoza was present and observed Vasquez distribute one pound of meth to a customer known as “Vic”. Vic, as in turned out, was a CI working at the direction and under the close supervision of the narcotics investigators. The drugs in question went through the proper chain of custody and were delivered to the DEA laboratory where the substance was tested and determined by chemical analysis to be 453.8 grams of a substance or mixture containing methamphetamine.

Following the July, 18, 2006, transaction there were multiple negotiations about potential multi-pound meth deals. There were discussions about a twenty pound deal a sixteen pound deal a ten pound deal, and finally a four pound deal was arranged. The plan was for Mendoza to get two pounds of meth

from his source and provide it to Vasquez. Vasquez was to get two additional pounds of meth from a second source and in turn Vasquez was to sell all four pounds to Vic.

On or about September 6, 2006 Mendoza received his two pounds from his source in a closed blue cooler. Mendoza in turn asked Guillermo Campos-Garza to take the cooler to Vasquez. Campos delivered the cooler to Vasquez. Vasquez then went to the arranged location to deliver the 4 pounds of meth to Vic. Vasquez was in the back seat of the pickup truck. An individual named Cristobal Mundo-Hernandez was driving the truck and Guillermo Campos-Garza was the front passenger seat. The investigators then approached the truck. Vasquez was found to have a one pound package in each of the front pockets of his shorts. Also recovered from the back seat floor was the blue cooler which contained two pounds that had come from Mendoza. These drugs went through the proper chain of custody and were delivered to the DEA laboratory where the substances were tested and determined by chemical analysis to be 915.2 grams of amphetamine (from Vasquez' pockets) and 913.8 grams of methamphetamine (from the blue cooler provided by Mendoza).

On or about September 6, 2006, in a separate matter, investigators arrested Carlton O. Massie with an estimated 2 ounces of methamphetamine. Following his arrest, Massie gave a post Miranda statement in which he identified Mendoza as the source of those two ounces. Massie then at the direction of the investigators placed an order and arranged for two more ounces to be delivered to Massie on September 7, 2006. Mendoza arrived at the arranged location at the arranged time. Mendoza was placed under arrest. An estimated 4 ounces of meth was located in the hat that Mendoza was wearing. A search of Mendoza's vehicle revealed a loaded .22 caliber rifle behind the seat back of the pickup. Following his arrest and being advised of his Miranda rights, Mendoza admitted his involvement in supplying the two pounds of meth to Vasquez on September 7, 2006, his providing

meth to Massie the preceding day, as well as the drugs he was arrested with. Mendoza also admitted the possession of the firearm and bringing it to the deal. The drugs recovered from Massie which had been supplied by Mendoza and the drugs recovered from Mendoza's hat went through the proper chain of custody and were delivered to the DEA laboratory. The substance recovered from Massie was determined by chemical analysis to be 50.1 grams of methamphetamine. The substance recovered from Mendoza was determined by chemical analysis to be 112.2 grams of methamphetamine.

All of these events occurred in the Western Judicial District of Virginia.

FINDINGS OF FACT

Based on the evidence presented at the plea hearing, the undersigned now submits the following formal findings of fact, conclusions and recommendations:

1. The defendant is fully competent and capable of entering an informed plea;
2. The defendant is aware of the nature of the charges and the consequences of his plea;
3. The defendant knowingly and voluntarily entered a plea of guilty to Counts One and Ten of the Indictment; and
4. The evidence presents an independent basis in fact containing each of the essential elements of the offenses to which the defendant is pleading guilty.

RECOMMENDED DISPOSITION

Based upon the above findings of fact, the undersigned RECOMMENDS that the court accept the defendant's plea of guilty to Counts One and Ten of the Indictment and adjudge him guilty of those offenses. The undersigned further DIRECTS that a presentence report be prepared. A sentencing hearing hereby is scheduled for July 23, 2007 at 2:15 p.m. before the presiding District Judge in

Harrisonburg.

NOTICE TO PARTIES

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C): Within ten days after being served with a copy of this Report and Recommendation, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. The presiding District Judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. The presiding District Judge may accept, reject, or modify, in whole or in part, the findings or recommendations made by the undersigned. The judge may also receive further evidence or recommit the matter to the undersigned with instructions.

Failure to file timely written objections to these proposed findings and recommendations within 10 days could waive appellate review. At the conclusion of the 10-day period, the Clerk is directed to transmit the record in this matter to the presiding United States District Judge.

The Clerk is hereby directed to send certified copies of this Report and Recommendation to all counsel of record.

ENTERED: _____
United States Magistrate Judge

Date

