CLERK'S OFFICE U.S. DIST. COURT
AT HARRISONBURG, VA
FILED

MAY 16 2008
JOHN F CORCORAN, CLERK
BY: DEPUTY CLERK

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

UNITED STATES OF AMERICA	)	
	)	CASE No. 5:07cr00063-4
Plaintiff	)	
v.	)	**REPORT AND RECOMMENDATION**
	)	
JOSE LUIS CORTES GONZALEZ,	)	
	)	By: Hon. James G. Welsh
Defendant	)	U.S. Magistrate Judge

The Grand Jury previously returned a Superseding Indictment ("Indictment") charging this defendant in **Count One** with knowingly combining, conspiring, confederating, and agreeing with diverse persons, both known and unknown to the Grand Jury, to manufacture, distribute, and possess with the intent to distribute, more than five kilograms of a mixture or substance containing Cocaine HCL and more than fifty (50) grams of a mixture or substance containing cocaine base (commonly called "crack"), Schedule II narcotic controlled substances, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A), all in violation of Title 21, United States Code, Section 846; in **Count Thirty-Five** with the knowing and willful distribution and possession with intent to distribute, a measurable quantity of a mixture or substance containing Cocaine HCL, a Schedule II narcotic controlled substance, on or about August 23, 2007, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C); in **Count Thirty-Six** with the knowing and willful distribution and possession with intent to distribute, a measurable quantity of a mixture or substance containing cocaine base ("crack"), a Schedule II narcotic controlled substance, on or about August 23, 2007, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C); in **Count**

Thirty-Eight with aiding and abetting and with the knowing and willful distribution and possession with intent to distribute, a measurable quantity of a mixture or substance containing cocaine base ("crack"), a Schedule II narcotic controlled substance, on or about August 30, 2007, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C), and Title 18, United States Code, Section 2; in **Count Forty-One** with aiding and abetting and with the knowing and willful distribution and possession with intent to distribute, a measurable quantity of a mixture or substance containing cocaine base ("crack'), a Schedule II narcotic controlled substance, on or about September 18, 2007, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B); in **Count Forty-Two** with aiding and abetting and with the knowing and willful distribution and possession with intent to distribute, a measurable quantity of a mixture or substance containing Cocaine HCL, a Schedule II narcotic controlled substance, on or about September 19 - 25, 2007, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C), and Title 18, United States Code, Section 2; in **Count Fifty-One** with aiding and abetting and with the knowing and willful distribution and possession with intent to distribute, a measurable quantity of a mixture or substance containing Cocaine HCL, a Schedule II narcotic controlled substance, on or about November 6, 2007, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C), and Title 18, United States Code, Section 2; in **Count Sixty-Eight** with being an alien illegally in the United States on or about November 15, 2007 and with the knowing and intentional possession or receipt of a firearm which had previously moved in interstate or foreign commerce, in violation of Title 18, United States Code, Sections 922(g)(5) and 924(a)(2); and in **Count Sixty-Nine** with knowingly using and carrying a firearm in relation to the drug trafficking crime described in Count One, in violation of Title 18, United States Code, Section 924(c).

The defendant was previously arraigned and entered pleas of Not Guilty to each of these charges. The defendant having now indicated an intent to change two of his pleas, this case was referred to the undersigned for the purpose of conducting a plea hearing in accordance with the provisions of Title 28 U.S.C. § 636(b)(3).

The plea hearing was conducted before the undersigned on May 14, 2008. The defendant was at all times present in person and with his counsel, H. David O'Donnell. The United States was represented by Donald R. Wolthuis, Assistant United States Attorney. The proceedings were recorded by a court reporter. *See* Rule 11(g), Federal Rules of Criminal Procedure. Also present was a properly qualified Spanish language interpreter for the defendant whom the defendant could understand and who could understand him. *See* Rule 28.

With the defendant's informed and written consent, the undersigned made a Rule 11 inquiry; the government presented an oral proffer of evidence for the purpose of establishing an independent basis for the pleas, and the defendant entered pleas of guilty to Counts One and Sixty-Nine of the Indictment.

A. DEFENDANT'S RESPONSES TO RULE 11 INQUIRY

The defendant was placed under oath and addressed personally in open court. He expressly acknowledged that he was obligated to testify truthfully in all respects under penalty of perjury and

that he understood the government's right, in a prosecution for perjury or false statement, to use against him any statement that he gives under oath. *See* Rule 11(b)(1)(A).

The defendant testified that his full legal name is Jose Luis Cortes Gonzalez, that he is nineteen (19) years of age, that he completed eleven (11) years of school in Mexico, and that he can neither read nor write English, and that he understands only "a little." He testified, however, that he is able to understand and participate fully in the proceedings with the assistance of the Spanish language interpreter. He denied having any medical condition, either physical or mental, which might interfere with his ability to understand and participate fully in the proceedings; he similarly denied using any medication or drugs which might impair his ability to understand and participate fully in the proceedings, and he stated that his mind was clear. Counsel for the defendant represented that he had no reservations about the defendant's competency to change two of his pleas and to enter a plea of guilty to the offense charged in Count One and the offense charged in Count Sixty-Nine.

The defendant testified that he had discussed the charges with his attorney and that he had previously received a copy of the Indictment against him and that it had been fully translated and read to him. He testified that he understood each of the charges against him, and he understood that each was a felony. *See* Rule 11(b)(1)(G). He also testified that he had discussed any defenses he might have and had been given adequate time to prepare any defenses he might have to the charges contained in the Indictment. He stated that he was fully satisfied with the services of his attorney, and that it was his intention and desire to change a prior plea and to enter pleas of guilty to two of the charges pending against him.

The defendant confirmed that he fully recognized and understood his right to have the Rule 11 hearing conducted by a United States district judge, and he gave his verbal and written consent to proceed with the hearing before the undersigned United States magistrate judge. The defendant's written consent [1] was filed and made a part of the record.

The attorney for the government informed the court that the defendant's proposed pleas were to be made pursuant to a written plea agreement. The government's understanding of the plea agreement was then stated in some detail, including: an outline of the charges against this defendant set forth in the Indictment and the range of punishment for each (¶ 1); the defendant's agreement to plead guilty to the charge set forth in Count One and to the charge set forth in Count Sixty-Nine (¶ 2); the defendant's acknowledgment of the maximum and applicable mandatory minimum sentence for the offenses set forth in Counts One and Sixty-Nine (¶ 2); the government's agreement to request the dismissal of the remaining charges against this defendant at the time of sentencing (¶ 3); the parties' agreement to be bound by the court's factual determination of drug weight for purposes of Guideline sections 2D1.1 and 1B1.3 (¶ 4); the agreement's provision pertaining to the defendant's offense role (¶ 5); the "acceptance of responsibility" provision (¶ 6); the defendant's obligation to pay a Two Hundred Dollar ($200.00) special assessment (¶ 7); the provision relating to any proffer of evidence by the defendant (¶ 8); the defendant's duty to provide a financial statement (¶ 9); the terms of the defendant's waiver of his right to appeal either his conviction or any sentencing guideline issues (¶ 10); the terms of the defendant's waiver of his rights to attack collaterally either his conviction or any part of the sentence which might be imposed by the court (¶ 11); the terms of

[1] Before executing his written consent, it was fully translated and read to the defendant by the interpreter.

the defendant's waiver of any right to access investigation or prosecution records (¶ 12); the agreement's substantial assistance provision (¶ 16); the agreement's provisions pertaining to the forfeiture of assets and contraband (¶¶ 13 and 17); and the substance of the agreements other terms (¶¶ 14, 15,and 18 through 21).

Counsel for the defendant and the defendant then separately stated that their understanding of the plea agreement was the same as that set forth by the government's attorney. Counsel for the defendant further represented that all of the terms of the plea agreement had been translated and reviewed with the defendant and that she was satisfied that the defendant understood each of its terms. The defendant was then shown the original of the plea agreement; and he affirmed it to be his signature on the document, and he confirmed that it had been previously fully translated and read to him. In addition, he stated that no one had made any other, different or additional promise or assurance of any kind in a effort to induce him to enter a plea of guilty in this case and that no one had attempted in any way to force him to plead guilty. The plea agreement was then received, filed, and made a part of the record, and the undersigned noted for the record that the written Plea Agreement constituted the best statement of its terms, and as such it "speaks for itself."

The defendant testified that he knew his pleas, if accepted, would result in him being adjudged guilty of two felony offenses and that such adjudication may deprive him 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 any kind of firearm. He also expressly acknowledged that he was proposing to enter pleas of guilty to Counts One and Sixty-Nine of the Indictment which charged him with the specific

conspiracy and firearms possession offenses set forth above and also set forth in paragraphs 1 and 2 of the written plea agreement.

After the attorney for the government stated the mandatory minimum penalty provided by law for the offenses charged in Counts One and Sixty-Nine of the Indictment, the defendant acknowledged unequivocally that he fully understood ten (10) years imprisonment to be the mandatory minimum penalty [2] which the court would be required to impose if his plea of guilty is accepted to Count One and that an enhanced penalty of five (5) years imprisonment to be the mandatory minimum penalty which the Court would be required to impose if his plea of guilty is accepted to Count Sixty-Nine. *See* Rule 11(b)(1)(I).

After the attorney for the government stated the maximum possible penalty provided by law for the offense charged in Count One of the Indictment, the defendant expressly acknowledged that he understood the maximum possible penalty provided by law for conviction of the felony set forth in Count One of the Indictment to be confinement in a Federal penitentiary for the remainder of his life, and a $4,000,000.00 fine, and that he understood the maximum possible penalty provided by law for conviction of the felony set forth in Count Sixty-Nine of the Indictment to be confinement in a Federal penitentiary for the remainder of his life, and a $250,000.00 fine. *See* Rule 11(b)(1)(H). He also stated that he knew that he would be required to pay a mandatory Two Hundred Dollar ($200.00) special assessment. *See* Rule 11(b)(1)(L).

---

[2] The defendant was informed that a sentence of less than the mandatory minimum, however, was possible only if the government in its discretion chose to make a motion pursuant to 18 U.S.C. § 3553(a) on his behalf.

The defendant was informed, and he expressly acknowledged, that the court's determination of his sentence would include consideration of multiple factors, including: the nature and circumstances of the offenses; the defendant's history and characteristics; the seriousness of the offenses; the need to promote respect for the law; the need to provide for just punishment and afford adequate deterrence; the need to protect the public; any determined need to provide the defendant with educational or vocational training, medical care or other correctional treatment in the most efficient manner; the kinds of available sentences; the pertinent sentencing guidelines and policy statements; the need to avoid unwanted sentence disparities; and any need to provide for restitution. He acknowledged that he understood that the court may order him to make full restitution to any victim and may require him to forfeit certain property to the government. *See* Rule 11(b)(1)(J)–(K).

The defendant testified that he and his attorney had talked about how the Sentencing Commission Guidelines might apply to his case, including the obligation of the court to consider these Guidelines and the court's discretion to depart from them under certain circumstances and in accordance with applicable court decisions. *See* Rule 11(b)(1)(M); *United States v. Booker*, 543 U.S. 220 (2005). In addition, he acknowledged that he understood the court would not be able to determine the recommended guideline sentence for his case until after the presentence report had been completed and he and the government each had an opportunity to challenge the facts reported by the probation officer. He acknowledged that he understood, irrespective of any sentence imposed by the court, he would have absolutely no right to withdraw his pleas of guilty. He was informed and acknowledged that parole had been abolished and that he would not be released on parole. Likewise, he acknowledged that upon release from prison at the conclusion of any sentence of

imprisonment, he would be obligated to serve a significant term of supervised release which could include a specific condition that he be deported and remain outside the United States in accordance with 18 U.S.C. § 3583(d), and he stated that he understood that any violation of the terms of supervised release could result in his being returned to prison for an additional period of time.

He acknowledged that in the event the government was seeking forfeiture of property, it could seek forfeiture of substitute assets and he was waiving his rights to a jury determination of forfeitability and to appeal any issues of proportionality. *See Libretti v. United States*, 516 U.S. 29 (1995) and *Austin v. United States*, 509 U.S. 602 (1993). He expressly acknowledged that by pleading guilty he was giving-up his right to have a jury determine beyond a reasonable doubt any of the facts alleged in Count One and Count Sixty-Nine, including those that may relate to sentencing. In addition, he stated that he fully understood that, pursuant to the terms of the plea agreement, he was waiving any right to appeal his conviction, any right to appeal any sentencing guideline issues, any right to appeal any sentence of the court within the guideline range on the ground that it is not reasonable, and any right to challenge his conviction or his sentence in any post-conviction proceeding.

Each of the defendant's procedural rights surrendered on a plea of guilty was also explained, including: his right to persist in his previous pleas of not guilty to the offenses charged against him; his attendant right to a trial by jury and right to be represented and to have the assistance of counsel at trial and at every other stage of the proceeding; his right at trial to see, to hear, to confront and to have cross-examined all adverse witnesses; his right to be protected from compelled self-

incrimination; his right to testify and to present evidence in his defense; his right to the issuance of subpoenas, or compulsory process, to compel the attendance of witnesses to testify in his defense; his presumption of innocence; the obligation of the government to prove his guilt beyond a reasonable doubt; the right on his part to decline to testify unless he voluntarily elected to do so in his own defense; and his right to have a unanimous guilty verdict. *See* Rule 11(b)(1)(B)–(E). The defendant testified that he understood his right to persist in his pleas of not guilty and the attendant rights that he would waive upon entry of a guilty plea to Count One and Count Sixty-Nine. *See* Rule 11(b)(1)(F).

The defendant then stated, under oath, that he was pleading guilty because he was in fact guilty of the crimes charged in Counts One and Sixty-Nine of the Indictment. When asked what he did that he felt made him guilty, the defendant stated, "Because I sold drugs to police," because "on the day of my arrest a gun was found under my bed," because I was "well aware of the distribution of cocaine [in the Winchester area] by Isidro Hernandez-Hernandez [a/k/a "Carlos'] and others," and because "I got a gun from 'Carlos' in connection with the [drug conspiracy] activity after I'd been robbed twice."

In response to further questioning to ensure that his proposed plea was voluntary, the defendant again stated that (other than the promises expressly set forth in the written plea agreement) his plea did not result from any force, threats, or promises of any kind (*See* Rule 11(b)(2)), that his decision to plead guilty was in fact fully voluntary on his part, and that it was being made with the advice and assistance of counsel.

To permit the court to determine that an independent factual basis existed for the defendant's guilty pleas, counsel for the government made an oral proffer summarizing the principal facts which the government was prepared to prove at trial. The defendant and his counsel then separately stated that the government's oral proffer fairly summarized the government's evidence.

After consultation with his attorney, the defendant waived a reading of the Indictment and entered a plea of GUILTY to Count One alleging the defendant's violation of Title 21, United States Code, Section 846, and a plea of GUILTY to Count Sixty-Nine alleging the defendant's violation of Title 18, United States Code, Section 924(c).

After entering his pleas as aforesaid, after an independent basis for the pleas was established and after being informed that the undersigned would recommend acceptance of his aforesaid plea, the defendant reiterated that his pleas of guilty were fully voluntary and that he was fully satisfied with the advice, assistance and services of his attorney.

After directing the preparation of a presentence report, the defendant was then remanded to the custody of the United States Marshal pending its completion.

B. GOVERNMENT'S EVIDENCE

Pursuant to its oral proffer, the government was prepared at trial to establish beyond a reasonable doubt that, as part of the conspiracy, this defendant was involved in a number of illegal

drug transactions in and near Winchester, Virginia, including those described in counts thirty-five (3.1 grams of powdered cocaine), thirty-six (0.85 grams of "crack"), thirty-eight (4.4 grams of "crack"), forty-one (14.2 grams of "crack"), forty-two (24.6 grams of "crack"), and fifty-one (14 grams of powdered cocaine). All five of these transactions were "controlled buys" monitored by law enforcement personnel.

The scope of the conspiracy was such that it involved bringing 10s of kilos of cocaine (HCL)[3] to the Winchester area between November 2006 and November 2007. Some of which was sold in its powdered form (cocaine HCL) and some of which was "cooked" and sold as "crack" (cocaine base). The government's evidence would also show that Isidro Hernandez-Hernandez (an indicted co-conspirator) was principally responsible for bringing the cocaine (HCL) from North and South Carolina for distribution in the Winchester, Virginia area, that approximately 8.5 kilograms was seized by authorities in connection with the execution of a number of searches and arrests in the Winchester area on, or around, November 15, 2007, that the defendant was a "second tier" distributer of cocaine and "crack" on a weekly basis between on or about June and November 2007, and that often with the help of Tricia Tharp, (an indicted co-conspirator) he "cooked" the cocaine he obtained from Isidro Hernandez-Hernandez to make "crack. Evidence of his involvement in the conspiracy has been confirmed by multiple co-defendants, including Isidro Hernandez-Hernandez, Tricia Tharp, Kevin Stottlemyer, Israel Hernandez-Hernandez, and Jose Ginez Hernandez.

[3] Counsel for the defendant noted for the record that his client was unaware that the conspiracy involved this quantity of cocaine (HCL); however, his client was aware of an amount in excess of the relevant statutory amount.

A search, pursuant to a warrant, of the defendant's basement apartment on Wayfaring Drive in Winchester on November 15, 2007 disclosed the defendant's possession of a .22 cal. derringer[4] which he had earlier received from Isidro Hernandez-Hernandez to protect against a repetition of an earlier drug-related robbery and drug-related burglary. Later investigation determined that the gun was stolen, that the defendant had purchased it from Isidro Hernandez-Hernandez in exchange for a gold chain, and that the gun was a "firearm" and in working order and had previously moved in interstate commerce. All relevant drug weights and proof of the cocaine (HCL) or "crack" content of all relevant drugs seized or acquired pursuant to "controlled buys" were confirmed by laboratory analysis.

C. FINDINGS OF FACT

Based on the evidence, representations of counsel, and defendant's sworn testimony presented as part of the Rule 11 hearing, the undersigned submits the following formal findings of fact, conclusions and recommendations:

1. The defendant is fully competent and capable of entering informed pleas of guilty;

2. The defendant is fully aware of the nature of the charges and the consequences of his guilty pleas;

3. The defendant is fully informed, and he understands, the enumerated items set forth in Rule 11(b)(1)(A)–(N);

[4] Citing the recent Fourth Circuit decision in *United States v. Woods*, 2008 U.S. App LEXIS 6212, 2008 WL 795312, counsel for the defendant and for the government noted for the record that the evidence in this case indicated that the firearm was in fact possessed "in furtherance of" the crime alleged in Count One.

4. Before entering his pleas of guilty, the defendant and the government reached a plea agreement which was reduced to writing;

5. The defendant's entry into the written plea agreement, his tender of a plea of guilty to Count One, and his tender of a plea of guilty to Count Sixty-Nine were all made with the advice and assistance of counsel;

6. The defendant's entry of a plea of guilty to Count One was made with knowledge and an understanding both of the nature of the offense and the full range of punishment which might be imposed;

7. The defendant's entry of a plea of guilty to Count Sixty-Nine was made with knowledge and an understanding both of the nature of the offense and the full range of punishment which might be imposed, including the enhanced minimum sentence;

8. The defendant's pleas of guilty are fully voluntary and did not result from any force, threats, or promises other than those contained in the plea agreement;

9. The plea agreement complies with the requirements of Rule 11(c)(1); and

10. The evidence presented by the government established an independent basis in fact supporting the offenses to which the defendant is pleading guilty, including *inter alia* proof of the offense elements, venue, laboratory analyses, and criminal intent.

D. RECOMMENDED DISPOSITION

Based on the above findings of fact, the undersigned RECOMMENDS that the court accept the defendant's plea of GUILTY to Count One and the defendant's plea of GUILTY to Count Sixty-Nine, that the defendant be ADJUDGED GUILTY of these offenses, that the government's motion to dismiss Counts Thirty-Five, Thirty-Six, Thirty-Eight, Forty-One, Forty-Two, Fifty-One, and Sixty-Eight be granted, and that a sentencing hearing be scheduled before the presiding district judge on August 18, 2008 at 11:00 a.m.

E. NOTICE TO PARTIES

Notice is hereby given to the provisions of 28 U.S.C. § 636(b)(1)(C). Within ten (10) 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 the rules of this court. The presiding district judge shall make a *de novo* determination of those portions of the report or specified findings or recommendations to which an 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 presiding district 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 ten (10) days could waive appellate review. At the conclusion of the ten-day period, the Clerk is directed to transmit the record in this matter to the presiding United States district judge.

The clerk is directed to transmit a copy of this Report and Recommendation to all counsel of record.

DATED: 14th day of May 2008.

s/ James G. Welsh
United States Magistrate Judge