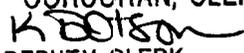


MAR 11 2009

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

JOHN F. CORCORAN, CLERK
BY: 
DEPUTY CLERK

UNITED STATES OF AMERICA,)

) Case No. 5:08cr00037

v.)

) **REPORT AND**
) **RECOMMENDATION**

FIDEL LUIS VIDAL,)

) By: Hon. James G. Welsh
) U.S. Magistrate Judge
)

Defendant

The Grand Jury previously returned a single count Indictment charging that on or about April 11, 2008 this defendant, an alien who had been previously convicted of an aggravated felony offense and who had been previously deported from the United States, was found in the United States, within the Western Judicial District of Virginia, after having failed to re-apply for admission and without the express consent of the Attorney General of the United States and the Secretary of the Department of Homeland Security, in violation of Title 8, United States Code, Section 1326(a) and (b). The defendant was previously arraigned and entered a plea of Not Guilty to this charge. The defendant having now indicated an intent to change his plea, 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).

In accordance with the provisions of Title 28 U.S.C. § 636(b)(3), this case was referred to the undersigned for the purpose of conducting a plea hearing on February 17, 2009. The defendant was at all times present in person and with his counsel, Frederick T. Heblich, Jr., Assistant Federal Public Defender. The United States was represented by Ryan Souders, Assistant United States

Attorney. The proceedings were recorded by a court reporter. *See* Rule 11(g). 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 a written proffer of evidence for the purpose of establishing an independent basis for the plea, and the defendant entered a plea of guilty to the single charge set forth in the Indictment.

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 to the following personal facts: his full legal name is Fidel Luis Vidal; he is twenty-six (26) years of age; he completed the sixth grade in school in Mexico; although he cannot read or understand much English, he was able to understand and participate fully in the hearing with the assistance of the Spanish language interpreter; he has no medical condition, either physical or mental, which might interfere with his ability to understand and to participate fully in the proceeding; he was using no alcoholic beverage, medication or drugs which might impair his ability

to participate fully in the proceeding; his mind was clear, and he understood he was in court for the purpose of entering a plea of guilty to a felony offense which he could not later withdraw. The defendant's attorney represented that he had no reservations about the defendant's competency to change his plea and to enter a plea of guilty.

The defendant acknowledged that he had received a copy of the Indictment and that it had been fully translated and read to him. He testified that he had discussed the charge with his attorney and had been given enough time to do so. He stated that he understood the charge and understood it was a felony. *See* Rule 11(b)(1)(G). He testified that he had discussed any possible defenses with his attorney and that he had been given adequate time to prepare any defenses he might have to the charge. He stated that his decision to enter a plea of guilty had been made after consulting with his attorney, that he was fully satisfied with the services of his attorney, and that it was his intention and desire to change his prior plea and to enter a plea of guilty to the charge 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 was filed and made a part of the record.

The attorney for the government informed the court that the defendant's proposed plea was being made pursuant to no plea agreement or understanding. Counsel for the defendant and the defendant then separately confirmed that the defendant's decision to enter a plea of guilty was being

made without any plea agreement or understanding. The defendant then further testified that no one had made any promise or assurance of any kind in an 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. He stated that he knew that his plea, if accepted, would result in him being adjudged guilty of a felony offense 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 expressly acknowledged that he was proposing to enter a plea of guilty to Count One of the Indictment which charged him with the felony offense set forth above, and that a plea of guilty is an admission of all of the elements of a criminal offense, and that upon acceptance of his plea he would be adjudicated a convicted felon. He further acknowledged that such adjudication may deprive him of valuable civil rights, including a right to vote, a right to hold public office, a right to serve on a jury and any right to possess a firearm. And the defendant then expressly acknowledged that he was proposing to enter a plea of guilty to a charge of illegally re-entering the United States after having been previously convicted of an aggravated felony offense and deported, in violation of Title 8, United States Code, Section 1326(a) and (b). *See* Rule 11(b)(1)(G).

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 twenty (20) years and a \$250,000.00 fine. *See* Rule 11(b)(H). He acknowledged that after completion of any sentence of

incarceration he would be required to serve a period of supervised release and his sentence could provide, as a condition of supervised release, he be deported and remain outside the United States. He also acknowledged that he understood that he would be required to pay a mandatory \$100.00 special assessment. *See* Rule 11(b)(1)(L).

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 offense; the defendant's history and characteristics; the seriousness of the offense; 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 and the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Guidelines and other factors under 18 U.S.C. § 3553(a). *See* Rule 11(b)(1)(M). He stated that he understood that the court will 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. The defendant acknowledged that in the event that he received a more severe sentence than he expected he would nevertheless still be bound by his plea of guilty and would have no right to withdraw it. He also acknowledged that he knew parole had been abolished and that he would not be released on parole.

Each of his procedural rights surrendered on a plea of guilty were also explained: including, his right to plead not guilty to any offense charged against him and his right to persist in any such not guilty plea; his attendant right to a trial by an impartial jury; his right to counsel to assist in his defense; his presumption of innocence, the obligation of the government to prove his guilt beyond a reasonable doubt, his right at trial to see, to hear, to confront, and to have cross-examined all witnesses presented against him; his right to decline to testify unless he voluntarily elected to do so in his own defense, his right to remain silent; his right to the issuance of subpoenas or compulsory process to compel the attendance of witnesses to testify in his defense, and his right to a unanimous guilty verdict. *See* Rule 11(b)(1)(B)– (E). The defendant testified that he understood his right to plead not guilty and the attendant rights that he would waive by pleading guilty. *See* Rule 11(b)(1)(F).

The defendant then acknowledged that he knew the entry of a guilty plea constituted an admission of all of the elements of a formal felony charge, and he knew that irrespective of any sentence imposed by the court he would have no right to withdraw this guilty plea. He further testified that he knew and understood any sentence of incarceration imposed by the court would also

include a period of “supervised release,” and he knew any violation of the terms or conditions of such supervised release could result in his being returned to prison for an additional period of time.

In direct response to further questioning, the defendant also testified that he was pleading guilty because he was in fact guilty of illegally re-entering the United States after having been convicted of an aggravated felony offense and previously deported, as alleged in Count One.

To permit the court to determine whether an independent basis in fact existed for the defendant’s plea, counsel for the government submitted for filing a written Statement of Facts which summarized the facts that the government was prepared to prove at trial. After confirming that this written statement had been fully reviewed with the defendant, both he and his attorney agreed that it fairly summarized the government’s case. *See* Rule 11(b)(3). It was then received, filed and made a part of the record.

After testifying that he had heard and understood all parts of the proceeding, the defendant consulted with his attorney, voluntarily waived a reading of the Indictment, and entered a plea of GUILTY to Count One alleging his violation of Title 8, United States Code, Sections 1326(a) and (b). The clerk then read the written guilty plea form to the defendant. After acknowledging it to be correct, the defendant executed it, and it was filed and made a part of the record.

After entering his plea of guilty, after an independent basis for the plea was established, the defendant was again addressed personally, and he reconfirmed that his decision to plead guilty was

fully voluntary and that it did not result from any force, threats, promises of leniency or other inducement of any kind. *See* Rule 11(b)(2).

The defendant was then informed that acceptance of his plea of guilty would be recommended to the presiding district judge, that a presentence report would be prepared, that he would be asked to give information for that report, that his attorney may be present if he wished, and that he and his attorney would have the right to read the presentence report and to file objections to it. The defendant was then remanded to the custody of the United States Marshal pending acceptance of his guilty plea and preparation of the presentence report.

GOVERNMENT'S EVIDENCE

After reviewing the government's written evidence proffer, the contents of which the defendant and this attorney expressly agreed, it was filed and made a part of the record. It is incorporated herein and made a part hereof by reference.

FINDINGS OF FACT

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

1. The defendant is fully competent and capable of entering an informed plea to the charge set forth in the Indictment;

2. The defendant is fully aware of the nature of the charge and the consequences of his plea;
3. The defendant is fully informed, and he understands, the applicable enumerated items set forth in Rule 11(b)(1)(A)–(N);
4. The defendant’s plea of guilty was not made pursuant to any plea agreement or understanding with the government;
5. The defendant’s tender of a plea of guilty was made with the advice and assistance of counsel;
6. The defendant knowingly and voluntarily entered a plea of guilty to Count One of the Indictment;
7. The defendant’s plea of guilty is fully voluntary and did not result from force, threats, promises, or inducements of any kind; and
8. The evidence presents an independent basis in fact containing each essential element of the offense to which the defendant pleaded guilty.

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 of the Indictment, that he be adjudged guilty of the offense, and that a sentencing hearing be scheduled before the presiding district judge on April 30, 2009 at 1:00 p.m.

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 court. The presiding district judge shall make a *de novo* determination of those portions of the report or specified 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 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: 11th day of March 2009.

s/ James G. Welsh
U.S. Magistrate Judge