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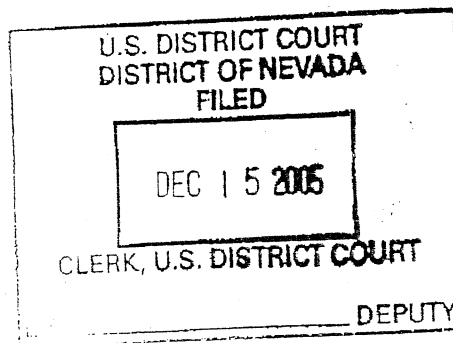
December 12, 2005

MEMORANDUM

TO: Honorable Brian E. Sandoval
United States District Judge

FROM: Brian L. Sullivan *BLS*
Assistant United States Attorney

SUBJECT: U.S. v. Javier Rodriguez-Guzman
3:05-cr-00203-BES



THERE IS NO PLEA NEGOTIATION IN THIS CASE

I. GUIDELINE CALCULATION

A. Charges

The defendant, Javier Rodriguez-Guzman, is charged in a single count Indictment filed October 12, 2005, with Unlawful Reentry by Deported Alien, in violation 8 U.S.C. § 1326(a) and 6 U.S.C. §§ 202(3), (4) and 557. The Government has been advised that the defendant will plead guilty as charged in the Indictment. There is no plea negotiation in this case. This Memorandum is provided to assist the Court at the change of plea hearing.

B. Offense Level

1. The defendant should be advised that the Court must consider the United States Sentencing Guidelines (U.S.S.G.) in Title 18, United States Code, Federal Sentencing Guidelines, and take them into account in determining the defendant's sentence, but should also be advised that the Sentencing Guidelines are advisory and not binding on the Court. *United States v. Booker*, 125 S.Ct. 738, 757, 767 (2005). The defendant should further understand that after the Court determines the final Offense Level and the Criminal History Category and considers the sentencing range from the Sentencing Table in U.S.S.G., Chapter Five and the fine

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range from the Fine Table in U.S.S.G. § 5E1.2(c)(3), the Court must then consider all of the factors set forth in 18 U.S.C. § 3553(a). *Booker, supra*, 125 S.Ct. at 764-765. The defendant should be advised that after the Court considers the Sentencing Guidelines and the factors in 18 U.S.C. § 3553(a), the Court has jurisdiction and authority to impose any sentence within and up to the statutory maximum set for the offense or offenses to which the defendant pleads guilty.

2. The Base Offense Level for the offense set forth in the Indictment is a Level 8 pursuant to U.S.S.G. § 2L1.2(a).

3. The Offense Level may be increased by 4, 8, 12 or 16 levels pursuant to U.S.S.G. § 2L1.2(b)(1), depending on defendant's previous criminal convictions.

4. The Offense Level may be reduced by 2-3 levels for Acceptance of Responsibility under U.S.S.G. § 3E1.1(a) and (b).

5. The Criminal History Category directly affects the possible sentencing range available to the Court. Prior to sentencing, the United States Probation Office will conduct an investigation and prepare a Presentence Investigation Report (PSR). That report will calculate the total Offense Level and Criminal History Category. Both parties will have the opportunity to comment on those calculations and the Court will make its own findings with respect to the final Offense Level and the Criminal History Category at the time of sentencing.

II. PENALTY

A. Statutory

8 U.S.C. §§ 1326(a) and (b), provide for a penalty of imprisonment of not more than 2-20 years, or a fine of not more than \$250,000.00 [pursuant to 18 U.S.C. § 3571(b)(3)], or both, depending on defendant's previous criminal convictions.

B. Sentencing Guidelines

1. Pursuant to Title 18, United States Code, United States Sentencing Guidelines, Chapter 5, Part A, the possible range of months of imprisonment for this offense runs from 0-6 months for an Offense Level 6 (Offense Level 8 minus 2 levels for Acceptance of Responsibility), with a Criminal History Category I and 100-125 months for an Offense Level 24 with a Criminal History Category VI. The fine would range from \$500.00 to \$5,000.00 for an offense level 6 and \$10,000.00 to \$100,000.00 for an offense level 24. U.S.S.G. § 5E1.2(c)(3).

2. A federal prison sentence can no longer be shortened by early release on parole, because parole has been abolished. However, a defendant may qualify for a reduction of approximately 15% of a prison sentence for good conduct. 18 U.S.C. § 3624(b). Under U.S.S.G. § 5D1.1(a), a term of supervised release following a term of imprisonment should be imposed

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when the term of imprisonment is more than one year. A term of supervised release is discretionary in any other case. U.S.S.G. § 5D1.1(b). If the Court determines this offense to be a Class C or D felony under 18 U.S.C. § 3559(a)(3) or (4), then a term of supervised release of at least 2 years, but no more than 3 years, must be ordered pursuant to U.S.S.G. § 5D1.2(a)(2), if a term of supervised release is imposed. If the Court determines this offense to be a Class E felony under 18 U.S.C. § 3559(a)(5), then a term of supervised release of one year must be ordered pursuant to U.S.S.G. § 5D1.2(a)(3), if a term of supervised release is imposed. If the defendant violates the terms and conditions of supervised release, the defendant may be required to serve an additional term of imprisonment. 18 U.S.C. § 3583(e). Revocation of supervised release is mandatory for the possession of a firearm or a controlled substance or if the defendant refuses to comply with drug testing. 18 U.S.C. § 3583(g).

3. Under the provisions of U.S.S.G. § 5E1.2(a), the Court should impose a fine, unless the defendant establishes that he or she is unable to pay a fine and is not likely to become able to pay any fine. However, U.S.S.G. § 5E1.2(e) allows the Court to lower or waive any fine or impose an alternative sanction, such as community service, if the defendant establishes that he or she does not have the ability to pay a fine. If the defendant fails to pay a fine, the defendant may be required to pay interest and penalties. 18 U.S.C. § 3612(f) and (g). The failure to pay a fine may also result in the revocation of probation or supervised release and may require the defendant to serve an additional term of imprisonment. 18 U.S.C. §§ 3613A and 3614. A willful failure to pay a fine may also subject the defendant to prosecution for the separate crime of Criminal Default. 18 U.S.C. § 3615.

4. 18 U.S.C. §§ 3663 and 3663A and U.S.S.G. § 5E1.1 may require the defendant to pay restitution. If the defendant fails to pay restitution, the defendant may be required to pay interest and penalties. 18 U.S.C. § 3612(f) and (g). The failure to pay restitution may also result in the revocation of probation or supervised release and may require the defendant to serve an additional term of imprisonment. 18 U.S.C. §§ 3613A and 3614.

5. Pursuant to 18 U.S.C. § 3013(a)(2)(A) and U.S.S.G. § 5E1.3, the Court is required to impose a special assessment in the amount of \$100.00. This special assessment shall be collected in the same manner that fines are collected in criminal cases. 18 U.S.C. § 3013(b).

III. ESSENTIAL ELEMENTS OF THE OFFENSE

Before a verdict of guilty can be found, the Government would have to prove the following elements of the offense beyond a reasonable doubt:

First: That the defendant is an alien;

Second: That the defendant was previously deported or removed from the United States; and