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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,) CR 07-60038-02-HO
)
Plaintiff,) **GOVERNMENT'S**
) **SENTENCING**
v.) **MEMORANDUM**
)
FRANCISCO YVANEZ DIAZ,) **Sentencing date: 4/7/09 @ 10:00 a.m.**
)
Defendant.)

The United States of America, by Karin J. Immergut, United States Attorney for the District of Oregon and Frank R. Papagni, Jr., Assistant United States Attorney, respectfully submits the following sentencing memorandum. Sentencing is currently scheduled for April 7, 2009 @ 10:00 AM before the Honorable Michael R. Hogan, U.S. District Court Judge.

Concurrence with the Presentence Report

The Government concurs with the accuracy of the facts and the calculations of the advisory sentencing guidelines as set forth in the Presentence Report prepared by U.S. Probation Officer Aimee Petersen on March 27, 2009.

Statute Mandates a 60-Month Minimum Sentence

Defendant pleaded guilty pursuant to a plea agreement to committing a single drug trafficking offense, in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(B)(viii). *PSR* ¶ 1. During his plea colloquy, Mr. Diaz admitted that he conspired with George Yvanez to possess more than 50 grams of a mixture or substance containing methamphetamine with the intent to distribute it. Accordingly, he faces a 40-year maximum term of imprisonment with a mandatory minimum of five years imprisonment.

Status of Co-Conspirators' Prosecutions

Arturo Arciga

Arturo Arciga supplied methamphetamine to Diaz and his brother, George Yvanez. Arciga who was the leader of a drug trafficking organization pled guilty pursuant to a plea agreement to possessing with the intent to distribute 1800.8 grams of heroin and 266.4 grams of actual methamphetamine. He was sentenced to 160 months of imprisonment.

George Yvanez

Defendant's brother pled guilty pursuant to a plea agreement to conspiring with defendant to possess 168 grams of a substance containing methamphetamine with the intent to distribute it. Like defendant, at sentencing, Yvanez asserted that his mental and physical infirmities warranted a lesser sentence. Lacking a criminal history, Yvanez's advisory sentencing guideline range was 37 to 46 months. Consistent with the terms of the plea agreement, this Court sentenced Yvanez to a 30-month term of imprisonment.

**Advisory Sentencing Guideline Range and
Probation Officer's Sentencing Recommendation**

Factual Basis of Sentencing Guidelines Calculations

The Government and Probation Officer Petersen calculate that defendant and his accomplice/co-conspirator brother possessed with the intent to distribute 168 grams of a substance containing methamphetamine. *PSR ¶¶ 11-15*. This amount was determined from the recorded statements of defendant and his co-conspirator brother with their methamphetamine supplier, Arturo Arciga. The recordings were obtained pursuant to an order issued by U.S. District Court Judge Ann Aiken authorizing the interception of their wire communications.

Yvanez and defendant first met Arciga at the Alaska Bush Company on Highway 99 in Eugene in August 2006. Yvanez obtained Arciga's telephone number and in

December 2007 he provided defendant with \$200 to buy a quarter of an ounce of methamphetamine from Arciga.

An intercepted recording disclosed Yvanez informing Arciga that he had the money and his “dude” (customer) was going to pay “Wednesday.” Arciga told Yvanez that his brother, the defendant, was to get the methamphetamine from Arciga and deliver it to Yvanez. Yvanez later received the methamphetamine from defendant.

Non-Career Offender Advisory Sentencing Guideline Range – 92 to 115

Defendant pled guilty on October 28, 2008, to conspiring with Yvanez to possess 168 grams of a substance containing methamphetamine with the intent to distribute it. Like Yvanez, defendant’s base offense level is 26. *PSR* ¶ 20; *U.S.S.G.* § 2D1.1(a)(3)(c)(7). Unlike Yvanez, because of his extensive criminal history, defendant has a Criminal History Category of VI. A reduction for his acceptance of responsibility results in an advisory sentencing guideline range of 92-115 months.

A Career Offender Advisory Sentencing Guideline Range – 188 to 235

In 1987, the then 18-year old defendant, a gang member, was convicted of Assault with a Deadly Weapon, not a Firearm. *PSR* ¶ 30. Because of a parole violation for this conviction in 1991, coupled with a 2001 felony illicit drug delivery conviction, defendant qualifies as a career offender. *U.S.S.G.* § 4B1.1. Probation Officer Petersen correctly

calculated defendant's advisory career offender sentencing guideline range to be 188 to 235 months. *PSR* ¶¶ 28, 42, 67.

Plea Negotiations

During plea negotiations, the parties were aware of the 1987 conviction but did not have the handwritten documentation obtained by the Probation Office from the State of California which established the 1991 parole violation for the Assault with a Deadly Weapon. *Plea Ltr.* ¶ 8. During negotiations, the parties concluded defendant was not a career offender because his 1987 conviction was outside the 15-year applicable time period. *U.S.S.G. § 4A1.2(e)(1)*. Accordingly, both parties anticipated a base offense level of 23 with a Criminal History of V or VI. *Plea Ltr.* ¶¶ 6-10. Further, the sentencing recommendation by the Government at the low-end of that applicable sentencing guideline range was agreed to by the investigating agency, DEA, and by the supervisory AUSA. *Id. at* ¶ 11.

18 U.S.C. § 3553(a)

Sentencing Procedure – *United States v. Carty*

The overarching statutory charge for a district court is to impose a sentence sufficient, but not greater than necessary after considering the factors set forth in 18 U.S.C. §§ 3553(a) and (b). *United States v. Carty*, 520 F.3d 984, 990-991 (9th Cir. 2008)(*en banc*). The process is to commence with a correctly calculated advisory

sentencing guideline range. *Kimbrough v. United States*, 128 S.Ct. 558, 575 (quoting *Gall v. United States*, 128 S.Ct. 586, 596 (2007)). The district court must provide the parties the opportunity to argue for whatever sentence they think appropriate. *See Rita v. United States*, 127 S.Ct. 2456, 2465 (2007). It must next consider the § 3553(a) factors and decide if they support the sentence suggested by the parties. *Gall*, 128 S.Ct. at 596-597 n. 6.

The district court may not presume the sentencing guideline range factor is more reasonable than the § 3553(a) factors. *Kimbrough*, 128 S.Ct. at 570; *Gall*, 128 S.Ct. at 594, 596-597, 602. It must make an “individualized determination” based on the facts. *Gall*, 128 S.Ct. at 597, 599. Once the sentence is selected, the sentencing court must explain it sufficiently to permit meaningful appellate review. *Carty*, 520 F.3d at 992 (citing *Rita*, 127 S.Ct. at 2468). “What constitutes a sufficient explanation will necessarily vary depending on the complexity of the particular case, whether the sentence chosen is inside or outside the Guidelines, and the strength and seriousness of the proffered reasons for imposing a sentence that differs from the Guideline range.” *Carty*, 520 F.3d at 992.

Nature and Circumstances of the Offense and Defendant’s History and Characteristics

Defendant co-conspired with his brother to obtain 168 grams of methamphetamine from Arciga with the intent to distribute it. He faced a potential life sentence with an

advisory career offender guideline range of 262 to 327 months. If he had gone to trial, the guideline range would have likely been 360 months to life imprisonment.

In addition to his career offender convictions at ages 18 and 32, the 40-year old defendant was convicted of felony domestic assault at age 25 and misdemeanor domestic assaults at ages 28 and 29, felonious possession of controlled substances at ages 28 and 32, a felony failure to appear at age 33, and driving under the influence of intoxicants at age 37. *PSR ¶¶30-38.*

Defendant's attorney and Dr. Low provides thorough reports of defendant's life history of addiction and crime coupled with a very difficult juvenile life that has resulted in significant mental and physical problems.

Avoiding Unwarranted Disparities - 18 U.S.C. § 3553(a)(6)

A significant issue for the Government in sentencing this defendant is the avoidance of unwarranted sentencing disparities. In addition to Yvanez, this Court has sentenced four other defendants who were methamphetamine users who, like this defendant, supported their addiction by selling methamphetamine supplied them by the Arciga Drug Trafficking Organization (DTO). All blamed their addictions for causing them to violate the law. Most retained drug treatment/psychological experts who, like Dr. Low, issued somewhat guarded positive prognoses and were not supportive of the terms of imprisonment recommended by the advisory sentencing guidelines.

A female methamphetamine user who supported her addiction by selling methamphetamine supplied to her by the Arciga DTO did very well on pretrial release and received a probationary sentence (she lacked a significant criminal history – Criminal History Category II). While on probation she has experienced some difficulties attending drug court.

The other three received prison terms: Javier Campos-Diaz – 60 months (64 actual grams of methamphetamine and 224 grams of a substance containing methamphetamine, no prior convictions); Daniel McCahan – 46 months (prior criminal history and 1,344 grams of a substance containing methamphetamine); and, Stanley Hixson – 57 months (prior criminal history). Additionally, some or all of these defendants received further reductions for their post-arrest efforts.

Concurrent or Consecutive Sentence

The plea agreement permits defendant to argue for a 60-month term of imprisonment concurrent with his undischarged state sentences. *Plea Agree.* ¶ 11.

The agreement requires the Government to recommend a sentence at the low-end of the applicable sentencing guideline range and is free to recommend a concurrent or consecutive sentence, or a partially concurrent sentence. *Id.*

Sentence Must Reflect the Seriousness of the Offense

The 60-month sentence recommended by defendant when held up to his continuing to commit crimes despite his past criminal history would **not** “reflect the seriousness of the offense,” “promote respect for the law,” and “provide just punishment for the offense,” nor (B) “afford adequate deterrence to criminal conduct,” nor (C) “protect the public from further crimes of the defendant.” 18 U.S.C. § 3553(a)(2)(A-C).

Conversely, in view of the sentences previously imposed on those who committed the same crime and the sentences received by the supplier and members of his drug trafficking organization, a 188-month prison term would appear to be a sentence greater than necessary and would be clearly disproportionate even considering this defendant’s extensive criminal history.

Government’s Sentencing Recommendations

In accordance with the plea agreement, the Government can recommend Francisco Diaz be sentenced at the low-end of the advisory sentencing guideline range, *i.e.* 188 months imprisonment, followed by a 4-year term of supervised release on conditions recommended by the Probation Office.

However, (1) considering that both the Government and defendant did not conclude defendant was eligible for a career offender sentence when the plea agreement was reached, and that (2) a sentence of 188 months would be clearly disproportionate to

the 168-month term of imprisonment received by the leader of the drug trafficking organization, and the 30-month term of imprisonment imposed on his equally culpable brother, *the Government recommends a reasonable sentence for the instant offense would be 92 months.* *Gall*, 128 S.Ct. at 596-597 n. 6. This sentence would be at the low-end of the applicable sentencing guideline range as determined by the parties – total offense level of 23 with a Criminal History of VI.

Further, the Government recommends *8 months of this sentence be run concurrently* with the undischarged term of imprisonment in Lane County Circuit Court case # 200123713C. *18 U.S.C. § 3583.* This would *effectively sentence Defendant to an 84-month term of imprisonment.* The Government concurs with the conditions of the four year term of supervised release recommended by the Probation Office.

DATED this 6th day of April 2009.

Respectfully submitted,

KARIN J. IMMERGUT
United States Attorney

/s/ Frank R. Papagni, Jr.
FRANK R. PAPAGNI, JR.
Assistant United States Attorney