

UNITED STATES OF AMERICA, :
:
vs. : Docket No.: CR 13-159
:
DANIEL A. : Washington, DC
GUERRERO-GARCIA, : 2:54 p.m.
Defendant. : Thursday
September 26, 2013
:
X

APPEARANCES :

Also Present: KATHIE MCGILL, Probation
TERESA SALAZAR, Interpreter

CHANTAL M. GENEUS, RPR, CRR
Certified Realtime Captioner
Certified Realtime Reporter
Registered Professional Reporter
cmrreporter@gmail.com

1 P R O C E E D I N G S

2 (Whereupon, at 2:54 p.m. the proceedings
3 commenced and the following ensued:)

4 THE COURTROOM DEPUTY: Criminal Action
5 13-159, United States of America versus Daniel
6 Garcia-Guerrero. Alessio Evangelista for the
7 government. Carlos Vanegas for the defendant. Kathie
8 McGill for the probation office. And Teresa Salazar
9 for the interpreter.

10 THE COURT: Thank you.
11 Good afternoon. First, I just want to make
12 sure, Ms. Salazar, the interpreter, have you been
13 sworn?

14 THE COURTROOM DEPUTY: Yes, ma'am.

15 THE INTERPRETER: Your Honor, I have not
16 been sworn on the record, but I do have a standing
17 oath since I am the staff interpreter.

18 THE COURT: Wonderful. Thank you very much.

19 We are here for the sentencing of the
20 defendant, Mr. Daniel Garcia-Guerrero who has pled
21 guilty to one count of illegal reentry into the United
22 States after having been previously deported in
23 violation of 8 U.S.C. 1326 (a) and (b) (2).

24 I have now received and reviewed the
25 presentence report and sentencing recommendation from

1 the probation department and also the documents that I
2 have received from both counsel, the sentencing
3 memorandum from the government, the sentencing
4 memoranda from defense counsel, and the government's
5 notice of relevant authority regarding possible
6 departure from the applicable Sentencing Guideline
7 range.

8 First, let me just note that it appears as
9 though the parties had no objections to the
10 presentence report calculation.

11 Is that correct?

12 MR. EVANGELISTA: That is correct, Your
13 Honor.

14 MR. VANEGAS: Yes, Your Honor.

15 THE COURT: Thank you.

16 The final report is complete, and there does
17 not appear to be any information excluded.

18 Mr. Garcia, this sentencing hearing will
19 essentially proceed in four steps, many of which may
20 seem mechanical to you but I want you to keep in mind
21 why we are here, and I want you to understand the
22 gravity of the situation.

23 You have committed and pled guilty to
24 conduct that constitutes a federal crime. This is a
25 serious matter because it is fundamentally about the

1 consequences that you will incur as a result of your
2 decision to engage in criminal behavior.

3 The first of these steps is for me to
4 determine whether you have reviewed the presentence
5 report and whether there are any outstanding
6 objections to that document, and if so, to resolve
7 those objections.

8 The second step is to determine what the
9 Sentencing Guidelines say about your offense and the
10 sentencing range that applies to your case. And this
11 is based on your criminal history and the
12 considerations of any mitigating or aggravating
13 factors that may warrant a departure under the
14 guidelines. This is a requirement of the law.

15 The third step is going to be to hear from
16 the government and from your counsel and from you if
17 you want to be heard about sentencing.

18 And the last step is for the Court to
19 fashion a just and fair sentence in light of the
20 factors that Congress requires courts to consider in a
21 statute that is labeled 18 U.S.C. 3553(a).

22 As part of this last step, the Court will
23 actually impose the sentence along with the other
24 required consequences of the offense.

25 So let me turn, first, to a discussion about

1 the presentence report.

2 The final presentence report was filed in
3 this matter on September 19th, 2013.

4 Does the government have any objection to
5 any of the factual or other determinations set forth
6 in the presentence report?

7 MR. EVANGELISTA: No, Your Honor.

8 THE COURT: And are you expecting any sort
9 of evidentiary hearing today?

10 MR. EVANGELISTA: No.

11 THE COURT: Okay.

12 Mr. Vanegas, defense counsel, have you and
13 your client read and discussed the presentence report?

14 MR. VANEGAS: Yes, Your Honor.

15 THE COURT: And does the defendant have any
16 objection to the factual statements or other
17 determinations in the report?

18 MR. VANEGAS: No, Your Honor, he does not.

19 THE COURT: Okay. Thank you.

20 Now, I want to ask you, Mr. Garcia, are you
21 fully satisfied with your attorney in this case?

22 THE DEFENDANT: (Through interpreter) Yes.

23 THE COURT: Do you feel that you've had
24 enough time to talk to him about the sentencing report
25 and the papers filed by the government in this case?

1 THE DEFENDANT: Yes.

2 THE COURT: And are you expecting to have
3 any evidence presented today?

4 THE DEFENDANT: I didn't understand that.

5 THE COURT: Mr. Vanegas, will you have any
6 witnesses as a part of the sentencing hearing?

7 MR. VANEGAS: No, Your Honor.

8 THE COURT: Okay. Thank you.

9 Okay. You may be seated.

10 Hearing no objection by either side, the
11 Court will accept the factual recitation in the
12 presentence report as undisputed, and the facts that
13 are stated in the presentence report will be the
14 Court's findings of fact at sentencing.

15 The presentence report also lays out the
16 probation office's calculation of the advisory
17 Guideline range that applies in this case. And this
18 calculation I'm going to state for the record is as
19 follows:

20 The presentence investigation found that you
21 have one prior conviction, which is a prior conviction
22 for a drug offense. That prior conviction puts you,
23 Mr. Garcia, in Criminal History Category II.

24 The applicable guideline in this case is
25 2L1.1, which has a base offense level of 8, and the

1 presentence report states that the specific offense
2 characteristic that requires a 16 level increase for a
3 prior drug offense applies.

4 The government has also represented that
5 Mr. Garcia has demonstrated acceptance of
6 responsibility in a manner that entitles him to a
7 three-level reduction under Section 3E1.1. Therefore,
8 before any considerations of departures, the
9 defendant's total offense level is 21.

10 Again, I will ask you if there are any
11 objections to either the criminal history calculation
12 or the offense level as stated in the presentence
13 report?

14 MR. EVANGELISTA: Not from the government.

15 MR. VANEGAS: No, Your Honor.

16 THE COURT: Thank you.

17 Now, I do want to address something,
18 however, that I find very troubling in this case,
19 which is the fact that the stipulated Guidelines
20 sentencing calculation in the plea agreement is
21 different from the one in the PSR.

22 Mr. Alessio, do you have a comment to make
23 about that?

24 MR. EVANGELISTA: Yes. It's actually the
25 first comment I was going to make during my elocution,

1 but I'm happy to make it now.

2 THE COURT: Yes.

3 MR. EVANGELISTA: First of all, the
4 government acknowledges that error in the estimated
5 Guideline range and apologizes to the defendant,
6 actually, and acknowledges that that was a mistake
7 that we did not catch and his counsel did not catch,
8 and that should not happen.

9 It is, in fact, correct, the probation
10 office did accurately apply the guidelines. His prior
11 conviction does result in an increase of sixteen
12 levels, not eight.

13 So while the agreement covers this situation
14 because this does happen, we still regret it, and it
15 shouldn't happen, and we acknowledge that error.

16 THE COURT: Thank you.

17 Mr. Vanegas, did you want to make a comment?

18 The Court recognizes that the defendant is
19 constrained by the terms of the plea agreement with
20 respect to making arguments related to departures, but
21 you may address this if you wish.

22 MR. VANEGAS: Yes, Your Honor. Like the
23 government, I didn't catch it. And then even after
24 translating the document from Spanish and reviewing
25 it, we just went through it and I did not look at the

1 fact that it would incur a sixteen-point enhancement
2 and was under the misunderstanding incorrectly that it
3 was an eight-point enhancement. That it was just an
4 aggravated felony as opposed to one of the enumerated
5 ones of the first subsections from a crime of violence
6 to serious drug traffic offense.

7 THE COURT: Have you explained to Mr. Garcia
8 that this error was made so that he understands?

9 MR. VANEGAS: Yes, that was explained
10 immediately when we looked at the PSR because the
11 difference is substantial and severe regarding what
12 was stipulated in the plea agreement and what the
13 probation officer found. Then in looking at the
14 guideline, it's clear that the probation officer had
15 it correct.

16 I explained that to Mr. Garcia and that --
17 the problems that we would face in withdrawing the
18 plea and other issues. So that was adequately
19 explained to him, Your Honor.

20 THE COURT: Thank you. Given those
21 representations, again, about something which I did
22 find troubling, I will, nevertheless, agree with and
23 adopt the probation officer's calculation as it
24 relates to the total offense level before any
25 departures or variances are considered.

1 Now, let's turn to the possible departures.

2 As has been stated, there was a plea
3 agreement in this case in which the government agreed
4 to request a four-level downward departure under the
5 Attorney General's fast-track policy, and the
6 government has made a motion for expedited disposition
7 under Guideline Section 5K3.1. With that four-level
8 adjustment per the government's motion, the total
9 offense level is adjusted downward to Level 17.

10 I didn't know, Mr. Alessio, whether you
11 wanted to say anything about that.

12 MR. EVANGELISTA: Not unless the Court has
13 questions. But we do believe that it's appropriate.
14 He took responsibility for his conduct at a very early
15 stage, and we would ask the Court to depart downward
16 pursuant to that motion.

17 THE COURT: Thank you.

18 Mr. Vanegas, did you have anything to say?

19 MR. VANEGAS: Not on that issue, Your Honor.

20 THE COURT: Okay.

21 So also under consideration, the Court gave
22 the parties notice that it was considering a Smith
23 departure, which is a departure that has long been
24 recognized in this jurisdiction. The Court noted that
25 even in the plea agreement, the Smith departure is

1 referenced, so it's clearly something that's
2 well-known.

3 And so I will at this time permit the
4 parties to express their views. I have read the
5 government's notice in relation to that, but if you
6 would like to speak to it, that would be good.

7 MR. EVANGELISTA: Thank you, Your Honor.

8 I just put the notice together quickly,
9 obviously, last night so that the Court and the
10 defense would know what cases we were relying on.

11 We -- the government actually feels strongly
12 on this point that the Smith departure would not
13 apply. Unlike a situation where a defendant is
14 convicted of a crime that does not relate to his
15 immigration status and, therefore, certain
16 consequences may take -- may occur because of their
17 status while they're incarcerated, the government
18 agrees with the overwhelming body of case law which
19 says that in this instance the guidelines have already
20 taken account -- or taken into account the fact that
21 the defendant is a deportable alien.

22 In fact, that is going to be the case for
23 all of the defendants, generally speaking, that are
24 convicted of illegal reentry. They are, by
25 definition, illegally back in the country and will be

1 subject to removal absent very extraordinary
2 circumstances.

3 THE COURT: Well, here's my question because
4 I understood the argument you were making from the
5 cases that you presented. But with respect to your
6 first point, I don't know that the consequences of
7 being in prison, the thing that the Smith court was
8 worried about, flows from the fact of the defendant
9 having been convicted of an illegal reentry crime as
10 opposed to anything else.

11 So I'm a little concerned about saying that,
12 if a defendant who is a deportable alien was convicted
13 of a drug crime, that somehow the fortuitous harshness
14 of the extent of his sentence would be different than
15 in a deportation crime. Because my understanding was
16 the harshness that they're discussing has to do with
17 the conditions of confinement, and that applies in
18 both situations, that he would not be eligible for
19 minimum security prison, that he would not be
20 transferable to community confinement on his way out
21 of prison, and that those were the conditions that the
22 Smith court was concerned about and they don't only
23 apply where the deportable alien has been convicted of
24 a nonimmigration offense.

25 So can you address that?

1 MR. EVANGELISTA: Yes.

2 Where the concern is, as I understand it of
3 the Smith court, was that defendants who committed the
4 same crime but some of whom were citizens and would be
5 eligible for the program that you just discussed
6 versus defendants who are not, who were illegal
7 aliens, would not be eligible, would be treated
8 differently.

9 And the reason the departure existed or was
10 created was because there was no belief, I guess, on
11 the part of the court, that the Sentencing Guidelines,
12 when they were developed for that crime, were -- took
13 into account the fact that there would be
14 similarly-situated defendants, but because of their
15 immigration status, they would actually not serve
16 their sentence in the same way.

17 In other words, those two groups of
18 defendants would not be treated the same under the
19 same circumstances. Whereas, in this situation, under
20 this offense, under illegal reentry, the defendants --
21 that disparity is never going to exist. These
22 defendants, every defendant -- and I know the Court
23 has more experience, frankly, relevant experience with
24 the Sentencing Guidelines, but it had to be, according
25 to the Court of Appeals, that when that Guideline

1 range was set, there was no possibility that
2 defendants who would be -- would be treated
3 differently under that range.

4 In other words, if there were a group of
5 defendants out there, unlike a drug offense where a
6 range is established, it's expected to be applied
7 across the board, but it turns out, probably
8 unbeknownst to the sentencing commission, that there
9 were gonna be a group of defendants that range would
10 not be the same.

11 If they were sentenced to a certain period
12 of incarceration, they would have to serve -- as the
13 example the Court gave -- all of it, they would never
14 be eligible for halfway house release.

15 That is not the case for all of the
16 defendants that come before the federal courts charged
17 with illegal reentry. They will all be in the same
18 situation. They are all ineligible for those
19 programs. They would all serve a sentence that is
20 within that Guideline range in the same way.

21 So to apply that departure in this
22 circumstance, the rationale for the departure doesn't
23 apply at all in the context of an illegal reentry
24 case.

25 THE COURT: Thank you.

1 Mr. Vanegas, again, I'm bearing in mind your
2 plea agreement obligations, but I do invite you to
3 speak to this legal point.

4 MR. VANEGAS: Yes, Your Honor.

5 I looked at the case of Vasquez, and Vasquez
6 stands for the proposition that Mr. Evangelista just
7 stated, which is that the sentencing commission took
8 into account based on the nature of the offense that,
9 as a result, you could not afford that type -- that
10 class of defendant, that type of a relief, a departure
11 based on the type of severity of conditions,
12 incarceration, and also that he or she may not be able
13 to access the same type of educational opportunities
14 as a U.S. citizen or as an illegal alien who is in
15 court, is gonna be sentenced based on a nonimmigration
16 case.

17 What I find that's different in a post
18 context is that, essentially, using that rationale and
19 that thinking, that it runs counter to Booker, in that
20 the Sentencing Guidelines, it's just one of the
21 various factors in which you take into account as far
22 as sentencing.

23 So one of the important factors of
24 sentencing is educational and vocational training. It
25 doesn't make sense that you look at this class of

1 defendants and say because he or she is an illegal
2 alien, therefore, this person should not get the
3 benefit of vocational and educational training because
4 it's one of the enumerated factors that applies to all
5 defendants.

6 The sentencing statute does not make -- does
7 not distinguish between a certain class of defendants.
8 And based on the rationale in Vasquez and what the
9 government is saying right now, it's okay for someone
10 who comes in as an illegal reentry and they get
11 sentenced in such a way that their status within the
12 Bureau of Prisons is going to be at least a median and
13 above and that they do not deserve or do not merit any
14 of the vocational educational programs that are
15 available to all defendants, and that is -- that would
16 be available under the sentencing statute.

17 THE COURT: So you're saying there's still a
18 distinction between illegal reentry defendants and
19 other defendants serving a similar amount of time in
20 federal prison?

21 MR. VANEGAS: Yes. And certainly, I think
22 more to the point it, runs counter to the view
23 expressed in Booker and you follow the lines of cases
24 in Kimbrough and Gall, to include *Rita*, in that it's
25 not a fair approximation that a sixteen-point

1 enhancement -- it always takes into account all the
2 3553 factors in a sentencing.

3 THE COURT: Are you aware of any cases in
4 your experience in which a sentencing judge in an
5 illegal reentry case has applied this departure?

6 MR. VANEGAS: -- yes. I do have, but it
7 escapes me now. I cannot name them right off. I know
8 that colleagues in my office have had those
9 experiences.

10 There are few. There are some judges who
11 take the view that the government is taking, and this
12 case of Vasquez is one that is raised in a number of
13 sentencing hearings, but there are judges that have
14 sentencing hearings and where judges would give a
15 Smith's departure notwithstanding Vasquez and these
16 other opinions because they are not binding on this
17 circuit. There's no opinion in the DC Circuit that
18 holds similar to Vasquez.

19 THE COURT: Thank you.

20 Mr. Evangelista, are you aware, from your
21 experience, of any illegal reentry cases in which the
22 Smith departure is applied in this circuit?

23 MR. EVANGELISTA: I'm not aware of them
24 personally, but I don't -- you know, I don't question
25 Mr. Vanegas's representations that a judge may have

1 applied it.

2 Although, I would -- I would -- I would
3 wonder if, rather than a Smith departure, it was
4 simply a variance. In other words, Smith wasn't the
5 basis for varying from the Guideline range.

6 THE COURT: Right.

7 MR. EVANGELISTA: In other words, I suppose
8 it's a distinction without a difference to a
9 defendant, but it is an important distinction to the
10 government that that Guideline range is the Guideline
11 range and that the departure -- there is no departure
12 available under Smith.

13 THE COURT: Thank you.

14 Well, setting aside the Smith departure for
15 a second, let me go back to the fast track. And the
16 Court will grant the government's fast-track motion,
17 which amounts to a four-level departure under 5K3.1,
18 four levels downward in order to account for the
19 government's motion and the expedited review policy
20 that is currently in place.

21 The Court is going to -- in light of the
22 arguments that have been presented today regarding the
23 circumstances under which the Smith departure in
24 particular applies, the Court is not going to grant a
25 Smith departure per se.

1 So the final Guideline range before
2 considering any variances, with the four-level
3 reduction, there is a level -- the defendant's offense
4 level will be 17, and the criminal history category
5 is II, which results in a Guideline range -- let me
6 find it here. Hold on one second. -- of 27 to
7 33 months.

8 Is that correct, Mr. Evangelista?

9 MR. EVANGELISTA: Yes, Your Honor.

10 THE COURT: Mr. Vanegas?

11 MR. VANEGAS: Yes, Your Honor. That is
12 correct.

13 THE COURT: Okay. Under the Sentencing
14 Guidelines, Mr. Garcia-Guerrero also faces a
15 supervised release range following imprisonment of one
16 to three years and a fine range of \$7,500 to \$75,000.

17 And, in addition, there's the \$100 special
18 assessment that would be applicable to this case.

19 Now, I want to discuss for a moment
20 supervised release.

21 The PSR has recommended a term of supervised
22 release of thirty-six months, which is the maximum
23 called for under the guidelines, but the Guidelines
24 Manual at 5D1.1 advises that a court should ordinarily
25 not impose a term of supervised release in a case in

1 which supervised release is not required by statute
2 and the defendant is a deportable alien who likely
3 would be deported after imprisonment.

4 As far as I can tell, the statute offense
5 here does not require imposition of a term of
6 supervised release, and this defendant will likely be
7 deported. So I would invite the parties to address
8 the issue of whether imposition of a term of
9 supervised release is appropriate in this case.

10 Mr. Evangelista.

11 MR. EVANGELISTA: Your Honor, the government
12 agrees with the Court that it's not required. The
13 Court doesn't have to impose it, and it is highly
14 likely that he would be deported or removed from the
15 country. So we do not believe that any period of
16 supervised release needs to be imposed.

17 THE COURT: Thank you.

18 Mr. Vanegas.

19 MR. VANEGAS: Your Honor, I agree with that
20 position, that there's no need for imposition of
21 supervised release. It's a guarantee that he will be
22 deported based -- there is an ICE detainer. It's an
23 illegal reentry case. There's a previous deportation
24 order of removal, and so I don't see Mr. Garcia going
25 to remain in this country.

1 And after a significant term of
2 incarceration followed by a two to maybe three-month
3 stay in deportation proceedings before he's actually
4 removed to El Salvador, I think there's no need for
5 further encumbrances, especially since he's not going
6 to be here.

7 THE COURT: Let me ask you as a practical
8 matter, either or both of you, how does it work if
9 there is no supervised release?

10 In other words, will Mr. Garcia be sent to
11 the ICE detainer immediately upon release from prison
12 after the -- serving the entire time of imprisonment,
13 or how does that work?

14 MR. VANEGAS: At the time that he's about to
15 be released, the Bureau of Prisons communicates with
16 ICE, because there's always a pending ICE detainer.
17 And it's up to immigration and customs to come pick
18 him up.

19 Depending on the jurisdiction where he's at,
20 if he's somewhere in this area, ICE rents out
21 contracts with detention facilities in Virginia, which
22 is where Mr. Garcia-Guerrero was initially, and that's
23 where they would hold him until there's a stipulated
24 order of removal, and then he is sent back to
25 El Salvador.

1 So he goes from one detention facility to
2 another. He goes from Bureau of Prisons to a federal
3 facility contracted by ICE.

4 MR. EVANGELISTA: That's my understanding as
5 well.

6 THE COURT: As well. Thank you.

7 Okay. Well, before I discuss the other
8 sentencing factors that will bear on the Court's final
9 decision, I would like to give the parties an
10 opportunity now to address what the appropriate
11 sentence should be in this case and any of the other
12 considerations under 3553(a).

13 Mr. Evangelista.

14 MR. EVANGELISTA: Thank you, Your Honor. I
15 don't think I need to go through everything that the
16 government argued in the sentencing memorandum, but I
17 would point out that because of his early acceptance
18 of responsibility, because he was not arrested on any
19 other charges in connection with this case, in other
20 words, the illegal reentry is the offense, we believe
21 that a sentence at the bottom of the guidelines is
22 appropriate.

23 The bottom of the guidelines is still a
24 fairly significant sentence in this case of
25 twenty-seven months. But I think that when viewed in

1 light of the seriousness of his prior offense and the
2 fact that he came back to this very same community
3 where it would have been obvious, I'm sure, to him,
4 that law enforcement was already aware of him, it did
5 reflect -- and while I understand there are personal
6 circumstances that clearly led him here based on
7 representations of counsel and the letter that the
8 Court received, that was a fairly brazen act by the
9 defendant to return to the jurisdiction where he had
10 previously committed a serious offense, was
11 incarcerated for 84 months and then removed from the
12 country.

13 And the concern that the government has is
14 if the Court's sentence is, colloquially speaking,
15 just a slap on the wrist, then the immigration law
16 will have less effect.

17 In other words, the deterrence value will be
18 lost if you can reenter after committing a serious
19 offense and know that if you happen to be picked up,
20 you'll go before a judge, you'll explain difficult
21 circumstances, which I'm sure there are, and that the
22 judge -- well, there really won't be any consequence.
23 That would not give effect either to the Sentencing
24 Guidelines and the ranges that were developed or the
25 statute itself.

1 So the government -- while, again, under all
2 the circumstances of this case, we are very
3 comfortable with where the ultimate bottom of the
4 guidelines wound up, they wound up there because of a
5 series of good decisions that the defendant then made
6 after he was arrested, and we believe that that
7 sentence is appropriate.

8 THE COURT: Thank you.

9 Mr. Vanegas.

10 MR. VANEGAS: Your Honor, constrained by the
11 plea agreement, as a result, I'm asking for the low
12 end of the guideline. This is a very difficult moment
13 for Mr. Garcia-Guerrero. It marks another permanent
14 separation from his family.

15 And it's one thing that we see in the
16 immigration debate now, what motivates it a lot is the
17 notion of families being separated. And clearly, Mr.
18 Garcia-Guerrero brings a lot of baggage.

19 His criminal history is what has put him in
20 this terrible situation. That is, as a young man,
21 when he was living in Washington, DC, he decided to
22 deal drugs, and that has had a tremendous impact in
23 his life.

24 He's already lost more than close to six
25 years of his life in United States custody. He came

1 back to the United States in order to be with his
2 fiancée. They have an infant child. They are in the
3 court.

4 He has a brother-in-law in the court, so he
5 has a lot of family -- he has family in the community.
6 The reason he came back is because that's where the --
7 that's where his fiancée is.

8 And what we know from his record is that he
9 has been able to obtain gainful employment. That drug
10 dealing was an act of desperation. It was clearly
11 misguided and criminal in nature, but for that he paid
12 dearly, and he is paying dearly again in more ways
13 than one.

14 He's being separated from his family. He's
15 gonna be incarcerated again in the United States, and
16 then he will be in El Salvador where he hasn't spent
17 that much time. However, he'll have to make the best
18 of his situation.

19 What he earns here in one hour, at best, he
20 can earn in a full day when he returns home, and he'll
21 be competing with people who are looking for work or
22 being deported from this country.

23 In the meantime he knows that there are many
24 kin folk, many family members who, because they've
25 been able to not engage in criminal behavior, that

1 there's a possibility, there's a likelihood that there
2 is some relief, there's a light at the end of the
3 tunnel for their situation to be legalized, and
4 clearly he's lost that opportunity.

5 The low end of the guideline, I believe,
6 takes into account all the factors of 3553(a).
7 Certainly, it's not a slap on the wrist. It's a
8 serious sentence that corresponds with coming back to
9 the United States without seeking permission.

10 It does provide a general and specific
11 deterrence. I think to lose another two and a half
12 years of his life or two years is significant to
13 Mr. Garcia-Guerrero, that totals close to eight years
14 in the United States of being incarcerated.

15 So the public is protected. At least when
16 he came back this time he did not go back to the
17 criminal behavior that got him into trouble the first
18 time. On this occasion he's proven to be a good
19 person.

20 As the Court knows from the letter you
21 received, he's a good parent; he's a good caregiver;
22 he's responsible, and he certainly was not involved in
23 criminal contact.

24 It's a very sad episode for him, but at this
25 point he accepted the consequences. Immediately he

1 was hoping for the sentence that was stipulated in the
2 plea agreement, but he acknowledges that from the
3 get-go the Court was not bound by the agreement and
4 that the probation office is not bound by the
5 calculations, and as a result he has to accept the
6 fact that his new range is much more severe than what
7 was contemplated.

8 For all those reasons, Your Honor, I ask for
9 the Court to impose a sentence of the low end.

10 THE COURT: Thank you.

11 Mr. Garcia-Guerrero, would you like to say
12 anything that you want me to consider before imposing
13 sentence?

14 THE DEFENDANT: Your Honor, well, all I
15 would ask is for forgiveness for what happened before.
16 I know that this has marked me for life, and I just
17 want -- I'm very sorry for what has gone on. I'm
18 truly very sorry.

19 And I don't know, perhaps it's due to
20 ignorance that you get involved in things without
21 really knowing the problems that these things will
22 cause or bring. And I have suffered for five years.
23 I spent five years, and now I have become a changed
24 person. I learned to value people and I learned to
25 value myself.

1 And I repeat, now I have become a new
2 person. And when I came back here, I didn't come back
3 with the intention of doing anything bad or doing any
4 harm. I came because my child was about to be born.
5 And I came because I had to find a way -- I had to
6 find a way to fight for the economic well-being of my
7 daughter and my wife.

8 I came knowing that this time I could not
9 afford to make it in the States but I had to work. I
10 had to do whatever it took to struggle and keep
11 working for their well-being.

12 I don't know if you know, but it does hurt
13 me that I will be separated from my daughter and my
14 wife. But the law is the law, and I'm paying for
15 mistakes I made in the past and I'm still paying for
16 it and I'm truly very sorry.

17 And I would just ask for another opportunity
18 to be allowed to see my daughter grow and to be beside
19 me.

20 Mistakes are made. It's human to make
21 mistakes, and I am paying for that.

22 And, as I said, I know now and I'm asking
23 you and the Court of the United States to forgive my
24 actions, and I ask you for consideration of my case
25 because mistakes are made and it is human to make

1 mistakes. And perhaps this is all due to one's own
2 ignorance. I assure I am -- I have become a changed
3 person.

4 I learned in jail that it's really not worth
5 getting involved in things that bring no good either
6 to you or to your family or to others. And I know
7 that more than ever. I need to be here now that I'm a
8 father, that I have a daughter, and I just ask for
9 that one chance, and I promise you that I will not
10 fail you; that I have learned to value other people.

11 And I know that my daughter and my wife
12 really need me now, and I also know that I will be
13 separated from my family. I made a mistake, and now I
14 must pay for it.

15 I do ask for your consideration. Please
16 take into account my situation that I came back here
17 to be beside my wife and my daughter. Please take
18 into account that I am not a bad person, that I have
19 changed, and ask -- I ask that you not be too severe
20 with me; that I wish to thank you for listening to me,
21 and I ask the pardon of the United States and the
22 government, and that's all. God bless.

23 THE COURT: Thank you, Mr. Garcia-Guerrero.
24 You may have a seat.

25 After the calculation of the Sentencing

1 Guidelines and departures and hearing the statements
2 made by counsel and by the defendant,
3 Mr. Garcia-Guerrero, I must now consider the relevant
4 factors set out in the statute at 18 U.S.C. 3553(a)
5 and ensure that the Court imposes a sentence that is
6 sufficient but not greater than necessary to comply
7 with the purposes of sentencing.

8 These purposes include the need for the
9 sentence imposed to reflect the seriousness of the
10 offense, to promote respect for the law, and to
11 provide just punishment for the offense.

12 The sentence should also deter criminal
13 conduct, protect the public from future crimes by the
14 defendant, and promote rehabilitation.

15 In addition to the guidelines and the policy
16 statements, the Court must consider the nature and
17 circumstances of the offense, the history and
18 characteristics of the defendant, the types of
19 sentences available, the need to avoid unwarranted
20 sentencing disparities among defendants with similar
21 records who have been found guilty of similar conduct,
22 and the need to provide restitution to any victims of
23 the offense.

24 And we don't have victims in this case.

25 I have considered all of these factors when

1 deciding the appropriate sentence in this case, and I
2 won't detail my considerations with respect to each
3 factor orally, but I do, Mr. Garcia-Guerrero, want to
4 provide remarks for the record and for you about my
5 considerations in regard to the nature of the offense
6 and the history and characteristics of you as an
7 offender.

8 In regard to the nature of the offense, the
9 Court notes from the presentence report that this is
10 not the first time that Mr. Garcia-Guerrero has
11 returned to this country illegally. The record
12 reflects that he has been deported to El Salvador at
13 least once before and has returned.

14 It is also evident that Mr. Garcia-Guerrero
15 keeps returning for economic reasons, to make a better
16 life for himself and also presumably for his
17 children -- one of whom is an infant -- who are here
18 in the United States with their mothers.

19 Nevertheless, Mr. Garcia-Guerrero previously
20 committed a serious drug trafficking offense on one of
21 the prior occasions when he was previously in this
22 country, and he was convicted of that drug offense in
23 this very courthouse.

24 Mr. Garcia-Guerrero, under federal law, if
25 you have already been caught and convicted of a crime

1 and then deported, if you return again, it is illegal.
2 It is an offense that is considered to be a serious
3 one and that, under our law, is punishable by up to
4 twenty years in prison.

5 That penalty is stiff because one of the
6 purposes of punishment is to deter people from
7 continuing to repeat past criminal behavior.

8 Now, as we discussed, the Guideline range in
9 this case is twenty-seven to thirty-three months, and
10 that is one of the factors that I have to consider.

11 Because of the need for deterrence and the
12 fact that you are a repeat offender, the Court is not
13 inclined to vary far from the Guideline range of
14 twenty-seven to thirty-three months.

15 But the Court does take into account that in
16 your returning, you did not commit an additional crime
17 that the government is aware of, and that there were
18 family circumstances that appeared to be the
19 motivation for your return, and that given the party's
20 previous discussions and stipulations which, as we
21 know were mistaken about the nature of the guidelines,
22 nevertheless there were representations that a less
23 severe sentence was the appropriate sentence for a
24 defendant in your circumstance.

25 The Court believes that the just and

1 appropriate sentence, taking into account all of the
2 circumstances as set out in 3553(a) does fall below
3 the Guideline range, both in fairness to you because
4 you were told at the plea stage that the Guideline
5 range would be significantly lower and in light of the
6 fact that you would be deported upon release. And the
7 Court, as all courts, have to be mindful of the length
8 of sentence and the impact on the public with respect
9 to the cost of incarceration.

10 So the Court also, I think, primarily is
11 interested in ensuring that similar sentences are
12 imposed for defendants in similar circumstances, and
13 the Court has found data and looked at circumstances
14 nationally and both in this -- and also in this
15 courthouse with respect to the average sentences that
16 are imposed for similarly situated illegal reentry
17 defendants.

18 And the Court believes that a sentence
19 slightly below the Guideline range is -- fits into --
20 it is consistent with the average sentences that are
21 imposed in this case and satisfies the statutory
22 interest in avoiding unwarranted disparity.

23 Therefore, based on my considerations of
24 these factors and the things that I have stated, I
25 will now speak the sentence to be imposed.

1 It is the judgment of the Court that you,
2 Mr. Daniel Garcia-Guerrero are hereby committed to the
3 custody of the Bureau of Prisons for a term of
4 twenty-one months on Count I.

5 You are further sentenced to no period of
6 supervised release pursuant to the representations
7 made both by the government and defense counsel.

8 And you must pay \$100 special assessment.
9 The Court finds that you do not have the ability to
10 pay a fine, and the Court therefore waives the
11 imposition of the fine in this case.

12 The \$100 special assessment is immediately
13 payable to the Clerk of the Court for the U.S.
14 District Court, District of Columbia. And within
15 thirty days of any change of address, you should
16 notify the Clerk of the Court of the change until such
17 time as your financial obligation is paid in full.

18 Now, you don't have supervised release, so
19 the ordinary conditions about reporting to the
20 probation office after custody -- or after release
21 from custody do not apply.

22 The Court is assuming that both counsel
23 accurately represented the state of affairs with
24 regard to deportation.

25 You must comply with the Bureau of

1 Immigration and Customs Enforcement immigration
2 process. And this is important, Mr. Garcia-Guerrero.
3 If you are deported -- and we assume that you will
4 be -- once you serve your term of imprisonment, you
5 cannot, you shall not enter the United States without
6 legal authorization. It is against the law to commit
7 that crime. If you receive permission to return to
8 the United States, that's another story. But as of
9 now, if you are deported, you may not return.

10 The probation office is going to be required
11 to release the presentence investigation report and
12 the judgment and commitment order of the Court to the
13 Bureau of Immigration and Customs Enforcement to
14 facilitate any deportation proceedings.

15 The probation office will also release your
16 report to all appropriate agencies in order to execute
17 the sentence of the Court.

18 Finally, you have the right to appeal the
19 sentence imposed by this Court if the period of
20 imprisonment is longer than the statutory maximum,
21 which it is not, or the sentence departs upward, which
22 it doesn't.

23 If you choose to appeal, you must file any
24 appeal within fourteen days after the Court enters
25 judgment.

1 If you are unable to afford the cost of an
2 appeal, you may request permission from the Court to
3 have an attorney file an appeal without cost to you.

4 Is there anything else that we need to
5 address either from the parties or the probation
6 office or Mr. Garcia-Guerrero?

7 MR. EVANGELISTA: Not for the government,
8 Your Honor.

9 MR. VANEGAS: No, Your Honor.

10 THE COURT: Let me ask probation.

11 MS. MCGILL: Nothing, Your Honor.

12 THE COURT: Thank you.

13 Well, Mr. Garcia-Guerrero, good luck to you.
14 And I wish you the best on this next stage of your
15 life.

16 (Whereupon, at 3:48 p.m. the proceedings
17 concluded.)

CERTIFICATE

I, Chantal, M. Geneus, a Court Reporter in and for the District of Columbia, before whom the foregoing hearing was taken, do hereby certify that the proceedings were taken by me by machine shorthand at the time and place mentioned in the caption hereof and thereafter reduced to typewriting under my supervision; that said hearing is a true record of the proceedings; that I am neither counsel for, related to, or employed by any of the parties to the action in which this proceedings is taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

/s/ Chantal M. Geneus
Chantal M. Geneus, CRC, CRR, RPR