

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

UNITED STATES OF AMERICA

v.

NERY RODRIGUEZ DIAZ

Criminal No. 18-cr-10192-1

SENTENCING MEMORANDUM OF THE UNITED STATES

The United States submits this memorandum in support of its request that the Court accept the plea agreement submitted in this case and sentence defendant Nery Rodriguez Diaz to 14 months in custody followed by 3 years of supervised release.

I. Defendant's Plea and Guideline Range.

On March 13, 2019, Rodriguez Diaz pleaded guilty to Count One of the Indictment, which charged him with being an alien in possession of a firearm and ammunition on May 22, 2018. *See* PSR, ¶¶ 1-2.

The Probation Department correctly calculated the defendant's Guideline Range as 10 to 16 months in custody and 1 to 3 years of supervised release. PSR, ¶¶ 58-62.

The plea agreement submitted pursuant to Rule 11(c)(1)(C) asks the Court to impose a sentence of 14 months in custody and 3 years of supervised release.

II. The Sentencing Factors in 18 U.S.C. § 3553(a) Strongly Support the Requested Sentence.

The sentencing factors articulated in 18 U.S.C. § 3553(a) strongly support the recommend sentence, which is towards the higher end of the guideline range of imprisonment and is at the high end of the guideline range of supervised release. The government comments briefly on the sentencing factors and provides some additional context to the information contained in the PSR:

A. History and Characteristics of the Defendant.

The defendant's criminal history score of zero does not capture the danger he poses to society, and unlike most defendants who have no criminal convictions, the history and characteristics of Rodriguez Diaz raise significant concerns.

Although it may not matter for purposes of the current charge against him, the government notes it has significant evidence that Rodriguez Diaz is a member of the MS-13 gang. Indeed, in this case, members of the federal task force investigating MS-13 activities arrested the defendant in an area where MS-13 members are known to congregate, and the defendant was arrested with a co-defendant who is also an MS-13 member, with both defendants carrying loaded firearms in a public park.¹ PSR, ¶¶ 9-11.

Further, while the defendant has no prior criminal convictions, his prior arrests are troubling and are consistent with the types of activity associated with MS-13 members or associates. In 2014, while a juvenile, the defendant was arrested for carrying a knife on school grounds. *See* PSR, ¶ 33. In 2017, while a juvenile, the defendant was arrested for armed assault with intent to murder (knife),² the Massachusetts version of attempted murder. *See* PSR, ¶ 35. State prosecutors have informed federal prosecutors that although the case against Rodriguez Diaz was nolle prossed, the case against the co-defendant in that case, who is also an alleged MS-13 member, is still proceeding.

¹ The defendant filed an objection to the PSR claiming he is not an MS-13 member. The government does not wish to litigate the issue because the defendant's membership in MS-13 is not an element of the offense or the basis for a sentencing enhancement. If it were, the government would have presented evidence of the defendant's MS-13 membership at sentencing. In any event, even being just an MS-13 associate, not an MS-13 member, raises many of the same concerns.

² The use of bladed weapons like knives and machetes to commit acts of violence has long been a hallmark of MS-13 activity.

B. Nature and Circumstances of the Offense.

At the age of 18, barely two months after an attempted murder charge against him was nolle prossed, Rodriguez Diaz was arrested with another MS-13 member for unlawfully possessing a loaded firearm in an East Boston park.

Having presided over the prosecution of dozens of MS-13 members in recent years, this Court is all too familiar with what it means to be an MS-13 member and the dangers involved in members or associates of MS-13 carrying weapons in public areas.

The nature and circumstances of an offense involving the unlawful possession of a firearm are troubling in the abstract, but they are especially troubling when the possession involves a member or associate of a violent gang like MS-13 carrying a loaded firearm as he congregates with other MS-13 members in a public park.

C. Need to Reflect Seriousness of the Offense, Promote Respect for the Law, Protect the Community, and Afford Adequate Deterrence.

The other 3553(a) factors—such as the need to reflect the seriousness of the offense and promote respect for the law—also support the recommended sentence.

As for the need to protect the community and afford adequate deterrence, the government expects the defendant to be removed from the United States following the completion of his sentence. If the defendant is not removed, or returns to the United States after removal, the maximum period of supervised release will help the Court exert greater control over the defendant's activities and help protect the community.

D. Avoiding Unwarranted Sentencing Disparities.

The recommended sentence is a month greater than the 13-month sentence imposed on co-defendant Elmer Hercules, which reflects this defendant's more troubling history. The sentence is in line with other sentences imposed in this District.

CONCLUSION

For the reasons above and those to be advanced at the sentencing hearing, the government requests that the Court sentence Rodriguez Diaz to 14 months in custody, followed by supervised release for three years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this document was filed through the Electronic Court Filing (ECF) system and will be sent electronically to the registered participants as identified in the Notice of Electronic Filing.

/s/ Kunal Pasricha
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