

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
v. : CRIMINAL NO. 98-643-2
JOSE PENA-GENAO :

**GOVERNMENT’S SENTENCING MEMORANDUM and MOTION FOR DEPARTURE
PURSUANT TO SENTENCING GUIDELINES SECTION 5K1.1 and
TITLE 18, UNITED STATES CODE, SECTION 3553(e)**

The United States of America, by its Attorneys, Michael R. Stiles, United States Attorney, in and for the Eastern District of Pennsylvania, Thomas J. Eicher, Section Chief, and Judy Goldstein Smith and Eric B. Henson, Assistant United States Attorneys for the district, respectfully moves pursuant to § 5K1.1 of the Sentencing Guidelines and Title 18, United States Code, Section 3553(e) for a downward sentencing departure based on substantial assistance in the investigation of others provided by defendant Jose Pena-Genao. The government respectfully submits this memorandum to address this and other issues that it anticipates may be raised at sentencing.

I. INTRODUCTION

The defendant, Jose Pena-Ganao, was charged in the above Indictment with

conspiracy to distribute more than one kilogram of heroin, in violation of Title 21, United States Code, Section 846 (Count One), possession with intent to distribute heroin, in violation of Title 21, United States Code, Section 841 (Counts Two, Three, Four, and Five), obtaining an Immigration and Naturalization Service Employment Authorization Card by fraudulent means, in violation of Title 18, United States Code, Section 1546(a) (Count Seven), and illegal reentry into the United States after deportation, in violation of Title 8, United States Code, Section 1326 (Count Ten).

At his guilty plea to these charges, the defendant agreed to provide substantial assistance in the investigation or prosecution of others. In exchange, the government agreed to file a motion permitting the Court to make a downward departure from the applicable Sentencing Guideline Range and statutory maximum penalties, provided that the defendant kept his agreement and, in fact, supplied substantial assistance to law enforcement. The government has determined that the defendant has provided the assistance to law enforcement that he promised and that his information has been of substantial assistance.

The United States Probation Office has submitted a presentence investigation report to which the government and the defendant had no objections.

II. PERTINENT TERMS OF THE PLEA AGREEMENT

The defendant pled guilty pursuant to a written plea agreement which was made part of the record of this case. The plea agreement provided in pertinent part that:

1. The defendant will cooperate fully and truthfully with the government as follows:

a. Defendant agrees to provide truthful, complete and accurate

information and testimony. The defendant understands that if he testifies untruthfully in any material way he can be prosecuted for perjury.

- b. Defendant agrees to provide all information concerning his knowledge of, and participation in, the crimes of conspiracy to distribute more than a kilogram of heroin (21 U.S.C. § 846), possession with intent of deliver heroin (21 U.S.C. § 841), and obtaining an Immigration and Naturalization card by fraudulent means (18 U.S.C. § 1546(a)) , and any other crimes about which he has knowledge. The defendant further understands and agrees that: (I) all information and cooperation provided pursuant to this agreement is on the record; and (ii) all information provided under any prior off-the-record proffer letter shall be on the record as of the date of the defendant's entry of a guilty plea.
- c. Defendant agrees that he will not falsely implicate any person or entity and he will not protect any person or entity through false information or omission.
- d. Defendant agrees to testify truthfully as a witness before any grand jury, hearing, or trial when called upon to do so by the government.
- e. Defendant agrees to hold himself reasonably available for any interviews as the government may require.
- f. Defendant agrees to provide all documents or other items under his

control or which may come under his control which may pertain to any crime.

- g. Defendant understands that his cooperation shall be provided to any federal or other law enforcement agency as requested by the government.
- h. To enable the Court to have the benefit of all relevant sentencing information, defendant waives any rights to a prompt sentencing, and will join any request by the government to postpone sentencing until after his cooperation is complete.
- i. Defendant agrees and understands that this agreement requires that his cooperation may continue even after the time that the defendant is sentenced. Failure to continue to cooperate after sentence is imposed shall be grounds for the government to void this agreement.
- j. Defendant understands that it is a condition and obligation of this cooperation agreement that defendant not commit any additional crimes after the date of this agreement.
- k. Defendant agrees that if the government determines that the defendant has not provided full and truthful cooperation, or has not provided full and truthful information about the defendant's assets, income and financial status, or has committed any federal, state or local crime between the date of this agreement and his sentencing,

or has otherwise violated any other provision of this agreement, the agreement may be voided by the government and the defendant shall be subject to prosecution for any federal crime of which the government has knowledge including, but not limited to, perjury, obstruction of justice, and the substantive offenses arising from this investigation. This prosecution may be based on any information provided by the defendant during the course of his cooperation, and this information may be used as evidence against him. Moreover, the defendant's previously entered guilty pleas will stand and cannot be withdrawn by him.

2. If the government in its sole discretion determines that the defendant has fulfilled all of his obligations of cooperation as set forth above, at the time of sentencing, the government will:

- a. Make the nature and extent of the defendant's cooperation, if any, known to the Court.
- b. Move to allow the Court to depart from the Sentencing Guidelines pursuant to Sentencing Guideline § 5K1.1 and to impose a sentence below any mandatory minimum term of imprisonment pursuant to 18 U.S.C. § 3553(e), if the government, in its sole discretion, determines that the defendant has provided complete and substantial assistance in the investigation or prosecution of another person who has committed an offense, including testifying

at any trial or proceeding as required. The defendant understands and agrees that: (1) the government will exercise its sole discretion regarding whether and how to investigate any information provided by the defendant; (2) as of the date of this agreement no determination has been made as to the defendant's eligibility for either a Section 5K1.1 or Section 3553(e) motion; and (3) the government may refuse to file a Section 5K1.1 or Section 3553(e) motion if this plea agreement is breached in any way including the commission of a crime after the date of this agreement.

Finally, the defendant understands and agrees that the filing of such motion will not obligate the government to recommend a downward departure from the sentencing guidelines or the mandatory minimum term of imprisonment.

- c. Make whatever sentencing recommendation as to imprisonment, fines, forfeiture, restitution and other matters which the government deems appropriate.
- d. Comment on the evidence and circumstances of the case; bring to the Court's attention all facts relevant to sentencing including evidence relating to dismissed counts, if any, and to the character and any criminal conduct of the defendant; address the Court regarding the nature and seriousness of the offense; respond factually to questions raised by the Court; correct factual

inaccuracies in the presentence report or sentencing record; and
rebut any statement of facts made by or on behalf of the defendant.
at sentencing.

3. Nothing in the agreement shall limit the government in its comments in,
and responses to, any post-sentencing matters.

4. Pursuant to § 6B1.4 of the Sentencing Guidelines, the parties enter into the
following stipulations under the Sentencing Guidelines Manual effective November 1, 1998. It is
understood and agreed that: (1) the parties are free to argue the applicability of any other
provision of the Sentencing Guidelines, including offense conduct, offense characteristics,
including criminal history, adjustments, and departures; (2) these stipulations are not binding
upon either the Probation Department or the Court; and (3) the Court may make factual and legal
determinations that differ from these stipulations and that may result in an increase or decrease in
the Sentencing Guidelines range and the sentence that may be imposed:

(a) The parties agree and stipulate that at least one kilogram of heroin was
possessed or distributed in furtherance of the criminal activity jointly undertaken by the
defendant and co-conspirators; this amount was within the scope of the defendant's agreement;
this amount was reasonably foreseeable to the defendant in connection with the conspiracy; and
the defendant's Guideline range should be calculated based on this amount pursuant to Guideline
Section 1B1.3.

(b) The parties agree and stipulate that under Guideline Section 2D1.1, the
base offense level for this offense is 32.

(c) The parties agree and stipulate that under Guideline Section 3B1.1(c), the offense level is increased by 2 levels because the defendant was an organizer, manager, or supervisor in the criminal conspiracy to which he is pleading guilty.

(d) The parties agree and stipulate that, as of the date of this agreement, the defendant has demonstrated acceptance of responsibility for his offense making the defendant eligible for a 2-level downward adjustment under Guideline Section 3E1.1(a). The parties further agree and stipulate that, as of the date of this agreement, the defendant has assisted authorities in the prosecution of his misconduct by timely notifying the government of his intent to plead guilty and timely providing complete information about his own involvement in the offense, making the defendant eligible for an additional 1-level downward adjustment under Sentencing Guideline 3E1.1(b).

5. The defendant understands that Title 18, United States Code, Section 3742 affords the right to appeal the sentence imposed and that, subsequent to an appeal, the defendant has the right to challenge the sentence or the manner in which it was determined in any collateral attack including one under Title 28, United States Code, Section 2255. In the event that the Court adopts the parties' stipulations respecting the Sentencing Guidelines application to this case (see ¶ 6 above), and in consideration for the promises set forth in this agreement, the parties agree knowingly and voluntarily to waive their respective rights to file an appeal relating to these particular Guideline computations, and, in the defendant's case, to collaterally attack the Court's findings on these computations, including an attack under Section 2255. The parties agree that should the Court not adopt the parties' stipulated Guidelines computations, either party may pursue whatever appellate or collateral attack rights are available.

The Plea Agreement was made pursuant to Fed.R.Crim.P. 11(e)(1)(B). Having been accepted by the Court, the defendant's plea is final and may not be withdrawn.

III. MAXIMUM SENTENCE (STATUTORY)

Count One: The maximum penalty for a violation of 21 U.S.C. § 846 (conspiracy to distribute more than 1 kilogram of heroin) is a minimum of twenty years and a maximum of life imprisonment, a minimum of ten years to a maximum lifetime supervised release, a \$8,000,000 fine, and a \$100 special assessment.

Count Two: The maximum penalty for a violation of 21 U.S.C. § 841(a)(1) (distribution of heroin) is thirty years imprisonment, six years minimum to lifetime maximum supervised release, a \$2,000,000 fine, and a \$100 special assessment.

Count Three: The maximum penalty for a violation of 21 U.S.C. § 841(a)(1) (distribution of heroin) is thirty years imprisonment, six years minimum to lifetime maximum supervised release, a \$2,000,000 fine, and a \$100 special assessment.

Count Four: The maximum penalty for a violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B)(i) (possession with intent to distribute more than 100 grams of heroin) is a minimum of ten years to a maximum of life imprisonment, eight years minimum to lifetime maximum supervised release, a \$4,000,000 fine, and a \$100 special assessment.

Count Five: The maximum penalty for a violation of 21 U.S.C. § 841(a)(1) (distribution of heroin) is thirty years imprisonment, six years minimum to lifetime maximum supervised release, a \$2,000,000 fine, and a \$100 special assessment.

Count Seven: The maximum penalty for a violation of 18 U.S.C. § 1546(a) (obtaining INS cards by fraudulent means) is ten years imprisonment, three years supervised

release, a \$250,000 fine, and a \$100 special assessment.

Count Ten: The maximum penalty for a violation of 8 U.S.C. § 1326 (illegal reentry into the United States after deportation) is twenty years imprisonment, three years supervised release, a \$250,000 fine, and a \$100 special assessment. The defendant is subject to deportation.

IV. EVIDENCE IN SUPPORT OF THE GUILTY PLEA

To support the defendant's guilty plea, the government summarized the evidence of his guilt of the charged offenses as follows:

Background of the Investigation

In May 1998, the Immigration and Naturalization Service (INS) and the Drug Enforcement Administration (DEA) set up an undercover operation for the sale of resident alien or green cards. During this operation, a cooperating individual (CI) posed as a paralegal who could supply green cards and other INS documents to illegal aliens in exchange for cash or drugs. The cost of these fraudulent INS documents far exceeded any fee that would have been charged by the INS for legitimate documents. The decision whether to pay for these documents with cash or drugs was left to the individual targets. Law enforcement agents corroborated the CI's activities by physical surveillance, audio tape, video tape, photographs, and fingerprints of the targets.

Evidence against Jose Pena-Genao

INS records show that at all relevant times **Jose Pena-Genao** was an illegal alien, who had been deported from the United States to the Dominican Republic on October 16, 1997, after conviction of an aggravated felony, and who, Department of Justice records show, had not

applied for and had not been given permission to reenter the United States. At all relevant time, therefore, **Pena-Genao** was subject to deportation.

On August 19, 1998, in Philadelphia, the CI met with Orlando Genao-Maldonado, Ramon Ramos, and **Jose Pena-Genao** and discussed the purchase of fraudulent INS documents. The CI told all three men that they could pay the CI cash or heroin, at their option. On August 20, 1998, again at a Philadelphia hotel, the CI processed the three men for fraudulent INS cards, including employment authorization cards (INS Form I-688B, which is prescribed by statute and regulation as evidence of authorized stay or employment in the United States). The CI explained that the price for Pena-Genao's INS documents would be \$8,000 or an equivalent amount of heroin, a higher price than charged Genao-Maldonado and Ramon Ramos because **Pena-Genao** had a criminal record. The three men agreed to pay for their fraudulent cards with heroin, and Genao-Maldonado began preliminary negotiations to purchase fraudulent immigration papers for Alonzo Ramos who he said had problems, that is, a criminal record. He also said that he would bring the CI other "expensive" cases, that is, persons with criminal records for whom fraudulent papers would be costly to obtain. These meetings were videotaped and observed by law enforcement agents.

On August 21, 1998, Genao-Maldonado met with the CI at a Philadelphia hotel to take delivery of the fraudulently obtained employment authorization cards for himself, **Pena-Genao**, and Ramon Ramos. Genao-Maldonado left the cards in the hotel room went to meet with **Pena-Genao** in the hotel parking lot. A short time later, Genao-Maldonado delivered about 93 grams of heroin to the CI. The remainder of the CI's fee would come due upon delivery of green cards. This meeting at which Genao-Maldonado received fraudulent employment authorization cards

for Pena-Gano, Ramon Ramos, and himself and delivered heroin to the CI was videotaped. Genao-Maldonado's meetings with the CI and with Pena-Genao were observed by law enforcement agents.

On August 26, 1998, the CI met with **Pena-Genao** and Alonzo Ramos at the Best Western Inn, 11580 Roosevelt Boulevard, Philadelphia. The CI processed Alonzo Ramos for his employment authorization card and told him, in **Pena-Genao's** presence, that the price for the fraudulent INS documents would be \$10,000 or 90 grams of heroin, because of Ramos's criminal history. On September 15, 1998, at the Roosevelt Inn, 7600 Roosevelt Boulevard, Philadelphia, Ramos and **Pena-Genao** met with the CI who gave Ramos his employment authorization card. In Ramos's presence, **Pena-Genao** gave the CI 45 grams of heroin in exchange for the fraudulent employment authorization card. An additional 45 grams of heroin would be due upon Ramos's receipt of a fraudulent green card. These meetings were videotaped and observed by law enforcement agents.

During surveillances on October 8, 9, 12-16, and 19, 1998, the Philadelphia Police observed activities at 5011 F Street that were consistent with a busy narcotics packaging operation. Based on these observations and additional information, on October 22, 1998, the police executed a search warrant at 5011 F Street, Philadelphia. During the search, the police seized about 500 grams of heroin and packaging paraphernalia, including 16 stamps used for "branding" heroin packages for street sales. Alonzo Ramos, Ramon Ramos, and Jose Lizardo were arrested while packaging heroin.

On October 30, 1998, Genao-Maldonado and **Pena-Genao** met with the CI, told him that they would deliver 60 grams of heroin that the CI had agreed to purchase from them at another

time. They also discussed with the CI their knowledge of the October 22d arrest of Ramon Ramos, Alonzo Ramos, and Jose Lizardo, told the CI that they had bailed out Ramon Ramos and were attempting to raise money to bail out Alonzo Ramos but not for Lizardo who had been involved for only several weeks in the packaging house. Genao-Maldonado told the CI that the three men who had been arrest had the heroin “to work for a while.” To obtain fraudulent cards for Alonzo Ramos following his arrest, **Pena-Genao** agreed with the CI to give Ramos a new name and Genao-Maldonado discussed signing papers for Ramos while he was in jail. These meetings were videotaped and observed by law enforcement agents.

Later on October 30, 1998, Ramon Ramos met with the CI who processed him for a fraudulent green card. Ramon Ramos discussed obtaining a green card for Alonzo Ramos who was still in prison. Finally on October 30, Genao-Maldonado delivered 60 grams of heroin to the CI for \$5,500. Genao-Maldonado negotiated a final price for the fraudulent INS documents for himself, **Pena-Genao**, and Ramon and Alonzo Ramos of 180 grams of heroin. These meetings were videotaped and observed by law enforcement agents.

On November 13, 1998, Genao-Maldonado, **Pena-Genao**, and Ramon Ramos met with the CI at a restaurant in Philadelphia. The three men negotiated a final payment of 185 grams of heroin for green cards for them and for Alonzo Ramos, and the CI arranged to purchase 315 grams of heroin for \$28,000. This meeting was audio taped.

On November 18, 1998, Genao-Maldonado and **Pena-Genao** met with the CI at a Philadelphia hotel and renegotiated the amount of heroin they would sell the CI from 315 to 700 grams. On November 19, 1998, they were arrested when they attempted to pick up their green cards from the CI.

The heroin delivered to the CI and the heroin seized by the Philadelphia Police has been laboratory-tested and confirmed to contain the controlled substance heroin.

V. SENTENCING GUIDELINES APPLICATION

The government concurs in the Sentencing Guidelines calculation that is included in the presentence investigation report and for the sake of brevity and clarity will not repeat that calculation here. The applicable Sentencing Guidelines range is 240 months imprisonment, at least ten years supervised release, a fine of from \$15,000 to \$ 8,000,000, and a special assessment of \$700.

VI. DEFENDANT'S COOPERATION

In his cooperation, the defendant has given information against his co-defendants, who pled guilty with the knowledge that the defendant had chosen to plead guilty and would testify at trial, against a co-defendant who is a fugitive, against a fugitive subject of the investigation in which the defendant was caught, and against at least ten additional persons who are or were engaged in heroin trafficking in Philadelphia, Pennsylvania. This information has been of substantial assistance in the investigation of the most significant of these drug traffickers, will aid in prosecutions related to the sting operation in which the defendant was caught, and may aid in drug trafficking prosecutions. Accordingly, the defendant has provided substantial assistance to law enforcement.

VII. GOVERNMENT'S SENTENCING RECOMMENDATION

The government respectfully requests that the Court depart from the applicable

Sentencing Guideline range and statutory mandatory minimum term of imprisonment of 240 months to which the defendant is subject and that the Court credit the defendant for his substantial assistance in the investigation of others. The government recommends respectfully that the Court depart modestly from the Sentencing Guidelines ranges for imprisonment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Government's Sentencing Memorandum has been served by me this date, by first-class mail, postage prepaid, upon:

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