

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Case No. <u>09-00121-01-CR-W-DGK</u>
)	
GILBERTO LARA-RUIZ,)	
)	
Defendant.)	

DEFENDANT LARA-RUIZ’S RE-SENTENCING MEMORANDUM

COMES NOW the defendant through his attorney and offers the following sentencing memorandum requested by the Court on August 29, 2012, upon the question: whether under the facts of this case the Court has discretion or is required to apply the five-year, seven-year, or ten-year minimum sentence provided by subsections (i), (ii), and (iii) of 18 U.S.C. § 924(c)(1)(A), respectively, in sentencing defendant on remand from the Eighth Circuit Court of Appeals for the one of two firearms convictions affirmed upon appeal.

PROCEDURAL HISTORY

On May 2, 2007, defendant pled guilty to possession of methamphetamine pursuant to a plea agreement in *United States v. Gilberto Lara-Ruiz*, No. 07-04002-01-CR-C-SOW (hereinafter, *Lara-Ruiz I*), and was sentenced to a term of imprisonment of 87 months on February 5, 2008. The plea agreement precluded the government from bringing new charges against defendant for offenses related to possession with intent to distribute methamphetamine, except for crimes of physical violence against the person of another. On April 9, 2009, the government obtained an indictment against defendant charging him with various drug-related offenses and the two firearms offenses that survived defendant’s pretrial motion to dismiss,

Counts Fourteen and Fifteen, and for which defendant was convicted on or about May 26, 2011, after jury trial. On December 15, 2011, this Court sentenced defendant to five years on Count Fourteen and to 25 years on Count Fifteen, each of which is to be served consecutively to the other and both of which are to be served consecutively to the undischarged 87-month term imposed in *Lara-Ruiz I*. On appeal, *United States v. Gilberto Lara-Ruiz*, No. 11-3775, the Eighth Circuit vacated defendant's conviction of Count Fourteen and remanded Count Fifteen to this Court for sentencing.

DISCUSSION

The Eighth Circuit affirmed defendant's conviction on Count Fifteen, holding that the government had preserved its right in Paragraph 7 of the *Lara-Ruiz I* plea agreement to prosecute defendant for using a firearm during and in relation to a drug trafficking crime pursuant to 18 U.S.C. § 924(c)(1)(A) by excluding from its non-prosecution promise: "an act . . . of physical . . . violence against the person of another," which the trial evidence supported but failed to with respect to Count Fourteen because the discharge of a firearm into an unoccupied motor vehicle is not an act of physical violence against the person of another.

In relevant part, 18 U.S.C. § 924(c)(1)(A) provides:

"[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

"(i) be sentenced to a term of imprisonment of not less than 5 years;

"(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

"(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years."

In *Harris v. United States*, 536 U.S. 545, 552-56 (2002), the Supreme Court made clear that § 924(c)(1)(A) defines a single offense and its subsections identify sentencing factors to channel the judge's discretion, two of which are brandishing and discharging to be found by the judge who is the fact finder in this regard. "[T]he subsections address 'special features of the manner in which [the] basic crime was carried out (e.g., that the defendant . . . brandished a gun)' – features which the United States Supreme Court recently identified as traditional sentencing factors. *Castillo* [*v. United States*, No. 99-658 (U.S. June 5, 2000)], 2000 WL 712805, at *4; accord *Almendarez-Torres v. United States*, 523 U.S. 224, 243 (1998) (construing statute as defining single crime with sentencing enhancements in part because "sentencing factor at issue . . . is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence")." *United States v. Carlson*, 217 F.3d 986, 987-88 (8th Cir. 2000).

CONCLUSIONS

Regarding the Count Fifteen offense of conviction of using a firearm during and in relation to a drug trafficking crime, this Court may sentence defendant to the 5-year minimum term provided by subsection (i) of § 924(c)(1)(A). If the Court finds that the defendant brandished a firearm when he struck Heather Rene Bledsoe with the back of his hand in which he held a firearm in attempt to collect a drug debt [Tr. II, p. 229], the Court may sentence defendant to the 7-year minimum term provided by subsection (ii) of § 924(c)(1)(A).

But defendant submits that the Court does not have the legal or factual support to sentence defendant to the 10-year minimum term provided by subsection (iii) of § 924(c)(1)(A) because:

1. the trial evidence was that shots were fired at an unoccupied vehicle which the Eighth Circuit held was not an act of "physical . . . violence against the person of another" [since the phrase] plainly refers to a bodily act of substantial force against the person—not the property—of another" [Eighth Circuit Opinion, p. 8], and is therefore not excluded from the government's Paragraph 7 *Lara-Ruiz I* plea agreement promise not to prosecute defendant;

2. there is no evidentiary support that defendant discharged the firearm because Heather Rene Bledsoe testified that a Hispanic male passenger was in the truck defendant was driving at the time shots were fired at her car from the passenger side [Tr. II, p. 250] but she did not see who fired them [Tr. II, p. 253]; and even so,

3. the discharge of the firearm is not a special feature of nor does it describe the manner in which the offense of conviction was carried out as required by the Court in *Castillo, supra*, to qualify as a sentencing factor in this case.

Respectfully submitted,

/s/ Cenobio Lozano, Jr.

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that a copy of the foregoing motion was electronically delivered to all parties via the Court's ECF system, on September 28, 2012, and especially to:
Bruce Rhoades, 400 East 9th, Fifth Floor, Kansas City, MO 64106, Attorney for Plaintiff.

/s/ Cenobio Lozano, Jr.

Cenobio Lozano, Jr.