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

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

GOVERNMENT'S SENTENCING MEMORANDUM AND LEGAL ANALYSIS

Defendant Gilberto Lara-Ruiz is scheduled to be sentenced on October 10, 2012, at 10:30 a.m. before District Judge Greg Kays. The United States submits this memorandum to support its request to this Court to resentence Lara-Ruiz in a manner reflecting the Court's original sentencing intent, while fashioning a reasonable sentence under 18 U.S.C. § 3553.

FACTS

The investigation of this multiple person conspiracy case, in which Lara-Ruiz had direct dealings with all the defendants, found that approximately 100 pounds of methamphetamine was distributed throughout the conspiracy. (PSR 10). Unlike the other defendants in this conspiracy, Lara-Ruiz was the only known "principal" in the enterprise. (PSR 10-11).

In addition to being a drug dealer, Lara-Ruiz was also a drug user. (Trial Trans. 114). For multiple days – and sometimes for over a week, he would stay awake as a result of, and in order to curb his addiction to methamphetamine. (Trial Trans. 114-15). More often than not, Lara-Ruiz was away from his five children and his wife. (Trial Trans. 123). He was getting high on methamphetamine, he was shooting guns in the basement of his paramour's mother's home, and

he was earning illegitimate money from drug trafficking – his only source of income. (Trial Trans. 114 and 123).

Lara-Ruiz regularly wielded firearms in his drug transactions. (Trial Trans. 123). At trial, witnesses recounted how Lara-Ruiz used firearms to further his drug trafficking activities, from barter to intimidation. On November 18, 2006, Lara-Ruiz met with Heather Bledsoe, who was indebted to Lara-Ruiz for drug purchases. (Trial Trans. 125-26). Lara-Ruiz demanded Ms. Bledsoe's new car to pay off her debt, but the value of the car was worth more than the drug debt so she resisted the trade. (Trial Trans. 127-28).

Lara-Ruiz wasn't getting his way and he resorted to violence. (Trial Trans. 128 and 227-28). With a pistol in his hand, he struck Ms. Bledsoe. (Trial Trans. 128 and 229). Leatha Mae Gutierrez, who was also present, tried to intervene, and Lara-Ruiz again responded violently. (Trial Trans. 129). Lara-Ruiz held Ms. Gutierrez at gun point until Ms. Gutierrez' daughter, Lara-Ruiz' paramour, helped to de-escalate the situation. (Trial Trans. 129). Lara-Ruiz left the house and began to leave in his vehicle; but then, he discharged his pistol from his vehicle and shot eight bullets that pierced the body of Ms. Bledsoe's new car. (Trial Trans. 129, 145, and 230).

At trial, Ms. Gutierrez gave a list of Lara-Ruiz's various drug barters, "I've seen him take cars, guns, laptops, anything of value[,] TVs, [and] stereos." (Trial Trans. 118). Ms. Gutierrez also testified to observing Lara-Ruiz in possession of a variety of firearms, including hand guns, an Uzi, and a Tec-9. (149).

As this Court is well aware, on appeal of the conviction and sentence, the 8th Circuit Court of Appeals remanded the case for re-sentencing in light of their decision reversing one count of conviction and then dismissing that count from the indictment. That conviction reversal

has a potential impact on the re-sentencing of the remaining count as the statute involved, 18 U.S.C. § 924(c), requires a consecutive 25 year minimum sentence for a subsequent conviction of the same statute. The remaining count of conviction is also a violation of 18 U.S.C. § 924(c).

In that appeal, the 8th Circuit found that the remaining count of conviction met the definition of the exemption to additional charges contained in the plea agreement in the Jefferson City Division case. That language, addressed ad nauseam in the briefs and appellate record, is as follows: "The defendant understands that this plea agreement does not foreclose any prosecution for . . . an act or attempted act of physical or sexual violence against the person of another …." As the published opinion set out, the 8th Circuit eventually found that the remaining count of conviction fell into that exemption and thus the Government was allowed to, as they did so at the trial of this matter, pursue prosecution of Lara-Ruiz for that crime. As a result, that conviction was upheld, but as set out above, re-sentencing was necessary.

LEGAL DISCUSSION

"It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify the crime and the punishment to ensue." *Gall v. United States*, 552 U.S. 38, 52 (2007).

Courts fashion sentences for an offense by looking at the advisory Guidelines and by giving proper weight to 18 U.S.C. §3553(a). *United States v. Clay*, 579 F.3d 919, 930 (8th Cir. 2009). The minimum sentence for discharging a firearm in furtherance of a crime of violence or a drug trafficking crime is ten years of imprisonment. 18 U.S.C. 924(c)(1)(A)(iii). For brandishing a firearm in furtherance of a crime of violence or a drug trafficking crime, the minimum sentence is seven years imprisonment. For violating any part of 18 U.S.C. § 924(c),

"the guideline sentence is the minimum term of imprisonment required by statute." (Sentencing Guidelines Manual § 2K2.4(b).) "[N]o term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed." 18 U.S.C. § 924(c)(1)(D)(ii). Therefore, any sentence imposed in re-sentencing Lara-Ruiz must be *consecutive* to Lara-Ruiz's prior conviction and sentence in the Jefferson City Division of this Court. Lara-Ruiz is currently serving that sentence.

While it may possibly be arguable whether the 8th Circuit's opinion decided conclusively that the remaining count of conviction was for brandishing or discharge, or both, there is absolutely no reasonable, legitimate factual or legal basis to argue that the remaining count of conviction was for anything but brandishing or discharge. Therefore, while this Court will have to determine whether the statutory *minimum* sentence in the remaining count of conviction is seven (7) years or ten (10) years, the 8th Circuit has already plainly spoken that a five year minimum sentence isn't applicable.

The entire 8th Circuit opinion upholding the remaining count of conviction is based on the fact of Lara-Ruiz striking Bledsoe with the gun and then discharging it into her vehicle. The 8th Circuit stated that the only reason they were upholding this remaining count of conviction was because it met the definition of "an act of physical violence against another," as set out above from the Jefferson City Division case plea agreement. The Government's position that the very crime of 18 U.S.C. § 924(c) met the definition of an act of violence or even an act of

physical violence was clearly rejected[1] and that rejection was the very the basis for the 8th Circuit's reversal and dismissal from the indictment of the first count of conviction.

The Government's position is that the remaining count of conviction is one act that starts with the brandishing assault on Bledsoe inside the house and ends with the discharging of the firearm outside the house. While this position is based entirely on the Government's reading and review of the 8th Circuit's factual recitation and determinations in its opinion, the Government strongly asserts to this Court it's reading and review is not some twisted or tortured interpretation or "logical extension" of said opinion. Thus, as the crime of conviction is one charged in violation of 18 U.S.C. § 924(c), and as that one charged violation has within it the dual acts of brandishing *and* discharge, the Court should find the applicable statutory *minimum* sentence to be ten (10) years.

The 8th Circuit reviews a district court's interpretation and application of the advisory guidelines *de novo*. *United States v. Gayekpar*, 678 F. 3d 629, 639 (8th Cir. 2012). Since *Booker*, the 8th Circuit has held on numerous occasions that due process only requires application of a preponderance of the evidence standard for finding sentencing facts. That applies even if said fact-finding has an "extremely disproportionate impact" on the defendant's sentencing range. *United States v. Lee*, 625 F. 3d 1030, 1034-35 (8th Circuit 2010). *See also United States v. Villareal-Amarillas*, 625 F. 3d 892, 898 (8th Cir. 2009). The Government addresses this out of an abundance of caution and with an eye toward judicial economy as while this was a jury trial and it is arguable all the facts the Court might use for re-sentencing were found by the jury on a beyond a reasonable doubt standard, the defendant may object.

[1] Not that it effects these proceedings, but that rejection was due to the fact that the Government's argument failed to tie the other acts of violence or physical violence "to the person of another" as required under the plea agreement.

Additionally, the Government sets out these cases in light of the Government's recommended sentence below.

A. *This Court is authorized to impose the same sentence on resentencing as its original sentence.*

This Court has given the same sentence on remand even where a defendant has successfully nullified one of his counts on appeal. *United States v. Harris*, No. 10-CR-06006-DGK, at *1-2 (W.D. Mo. Dec. 13, 2011) (resentencing defendant on remand from 444 Fed. Appx. 110 (2011) on firearm charge). Similarly, this Court should do so here. Such a sentence is consistent with *North Carolina v. Pearce*, establishing a presumption of vindictiveness if a "judge imposes a more severe sentence upon a defendant after a new trial." *Sexton v. Kemna*, 278 F.3d 808, 810 (8th Cir. 2002) (emphasis added) (quoting Pearce, 395 U.S. 711, 725-26 (1969)). Most courts, including the Court of Appeals for the Eighth Circuit, hold that "the *Pearce* presumption of vindictiveness does not apply when the same sentence is imposed following a successful appeal." *Sexton*, 278 F.3d at 810 (emphasis added). The minority view is to impose a new sentence on a "count-by-count basis" rather than simply by comparing the total prison sentence imposed before and after the successful appeal. *Id.* But again, the 8th Circuit favors the majority view: "the trial judge has the authority to re-evaluate the sentencing package in light of the changed circumstances and resentence the defendant to effectuate the original sentencing intent without violating *Pearce." Sexton v. Kemna*, 278 F.3d 808, 810 (8th Cir. 2002) (emphasis added) (finding that prior cases confirm the Missouri Court of Appeals reliance on the majority view and upholding the imposition of the same forty-year sentence for fewer counts of conviction after Defendant successfully appealed his initial conviction) (quoting *United States v. Shue*, 825 F.2d 1111, 1114 (7th Cir.), *cert denied*, 484 U.S. 956 (1987)).

Lara-Ruiz regularly wielded firearms in his drug transactions, and was the sole 'principal' in a drug enterprise that was involved with approximately 100 pounds of methamphetamine. Lara-Ruiz should not receive an unjust windfall where the evidence giving rise to his sentence is the same on resentencing as on the original sentencing. The United States urges this Court to consider its original sentencing package and effectuate its original intent. Not only is this Court authorized to issue the same sentence, the same sentence is also what is appropriate under 18 U.S.C. § 3553.

B. *Sentencing Considerations under 18 U.S.C. § 3553(a)*

1. *The nature and circumstances of the offense and the history and characteristics of the defendant.*

The United States adopts the statement of this Court when Lara-Ruiz was originally sentenced: "these types of cases with [Lara-Ruiz's] type of background and history is such that we shouldn't deal with multiple times. We should deal with one time." (Sent. Tr. 35). We also agree with this Court's view that "[t]his is a terrible offense, [and that methamphetamine distribution] is a cancer on our society and our young people, and [that Lara-Ruiz was] a big part of it." (Sent. Tr. 34). We further agree with this Court that Lara-Ruiz "used guns to help facilitate" his drug transactions and that he "shot guns to intimidate, to threaten, [and] to coerce." (Sent. Tr. 34).

2. *This Court must provide just punishment for this serious offense*

The United States likewise adopts this Court's view that, "this [offense] is one of the more serious offenses that [this Court] deal[s] with . . ." (Sent. Tr. 34).

3. *The need for the sentence imposed to afford adequate deterrence to criminal conduct.*

The Government also agrees with this Court that, "people [need to] know if they want to be drug dealers that wield guns and intimidate people, there's going to be a harsh consequence to this." (Sent. Tr. 34).

4. *The need for the sentence imposed to protect the public from further crimes of the defendant.*

Finally, the United States agrees with this Court that, "[if] Lara-Ruiz is sitting in a federal prison somewhere[, then] someone else may not have a chance to use drugs." (Sent. Tr. 34).

CONCLUSION

For the foregoing reasons, the United States presents as its sentencing recommendation, based in large part on this Court's own words and clear sentencing intent, this Court's original 30-year sentence as an appropriate and reasonable sentence because we should deal with these types of cases, in this Court's words, just "one time." To quote the United States Supreme Court in *United States v. Watts*, 519 U.S. 148, 154 (1997), "sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction."

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on September 28, 2012, to the Electronic Filing System (CM/ECF) of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

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