

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
KANSAS CITY, MISSOURI**

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

MOTION TO DISMISS INDICTMENT

COMES NOW the defendant, Gilberto Lara-Ruiz, by and through his attorney of record, Jacquelyn E. Rokusek, and hereby moves the Court to dismiss the Indictment due to a violation of the defendant's due process rights. In support of said motion defendant states the following:

Facts

1. The defendant was indicted in Case No. 07-04002-01-CR-C-SOW. The defendant was charged in the four-count Superseding Indictment with two counts of Possession with Intent to Distribute Methamphetamine, one count of Conspiracy to Distribute and Possess with Intent to Distribute Methamphetamine, and one count of Improper Entry. The defendant, pursuant to an 11(c)(1)(C) plea, entered a change of plea on Count II of the Superseding Indictment which charged defendant with a violation of 21 U.S.C. § 841(a)(1), that is, on or about December 21, 2006, in Jackson and Hickory Counties, in the Western District of Missouri, the defendant did

knowingly and intentionally distribute and possess with the intent to distribute 500 grams or more of a mixture and substance containing a detectable amount of methamphetamine, a Schedule II controlled substance. The defendant also entered a guilty plea on Count IV of the Superseding Indictment, which charged the defendant with a violation of 8 U.S.C. § 1325(a), that is, On or about December 29, 2006, in the Western District of Missouri, the defendant was located and apprehended, and was then and there an alien who did unlawfully enter the United States at a time and place which was designated by immigration officials of the United States. The court accepted the guilty plea on May 2, 2007.

2. Pursuant to paragraph 7 of the plea agreement, the government agreed not to bring any additional charges against the defendant for any federal criminal offenses related to Possession with Intent to Distribute Methamphetamine for which it had venue and which arose out of the defendant's conduct described in the plea agreement. That agreement was based upon all of the evidence the United States Attorney's Office had in its possession at that time. The plea agreement contained a Factual Basis for Guilty Plea on pages two through three (2-3) of the Plea Agreement. However, not all of the evidence that the United States Attorney's Office had in its possession was contained within the Factual Basis for Guilty Plea.
3. The defendant was sentenced on February 14, 2008, to eighty-seven (87) months on Count II to be served concurrently with six (6) months on Count

IV, followed by five (5) years of supervised release. The defendant is currently serving that sentence.

4. On April 9, 2009, the defendant was indicted in the Western District of Missouri for a Continuing Criminal Enterprise and Possession with Intent to Distribute Methamphetamine. The evidence supporting the charges forming the basis of the indictment in 09-00121-01-CR-W-DGK was developed from the same evidence and many of the same witnesses from case 07-04002-01-CR. In essence, the government further developed information stemming from the witnesses and evidence in the 2007 case and used that additional information, what could be characterized as mere “relevant conduct”, to again indict the defendant with additional drug charges. This was accomplished in violation of the 2007 plea agreement, which interestingly was a binding plea agreement.

Argument

5. In *United States v. McGovern*, 822 F.2d 739, 743 (8th Cir. 1987), the court held “[c]ontract principles often provide a useful means by which to analyze the enforceability of plea agreements and ensure the defendant what is reasonably due him in the circumstances. A plea agreement, however, is not simply a contract between two parties. It necessarily implicates the integrity of the criminal justice system and requires the courts to exercise judicial authority in considering the plea agreement and in accepting or rejecting the plea.” If the court accepts a defendant’s guilty plea entered in reliance on a plea agreement or other promise that is then not honored by the government,

the defendant's due process rights are then violated. *Mabry v. Johnson*, 467 U.S. 504, 507 (1984); *see also Santobello v. New York*, 404 U.S. 257, 261-62 (1971). No due process violation can occur until the guilty plea is accepted by the court. *Mabry*, 467 U.S. at 507. Under *Mabry*, specific performance of Mr. Lara-Ruiz's plea agreement is available on due process grounds as the court accepted the plea and approved the bargain. Rule 11 serves as notice to both parties to the plea agreement that (1) the defendant's promise to forego his right to a jury trial and (2) the government's promise not to prosecute further any other covered acts of the defendant, are merely executory until the district court accepts the defendant's associated guilty plea.

6. In the instant offense, the court did accept the defendant's guilty plea on May 2, 2007. Further, the defendant fully performed his duties under the plea agreement at the change of plea hearing and following that hearing. Plea agreements are contractual in nature, and should be interpreted according to general contract principles. *Margalli-Olvera v. INS*, 43 F.3d 345, 351 (8th Cir.1994). "When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). The government's promise in this case was to forego bringing additional charges against the defendant for the acts forming the basis for the indictment, but also included the promise not to bring additional charges based on the information that the U.S. Attorney had at the time the plea agreement was executed. The United

States Attorney's Office for the Western District of Missouri had the 2009 information in its file at the time of the 2007 plea. The government may now have additional information against Mr. Lara-Ruiz, but that information was merely gleaned from proffers of individuals who were working with the defendant and known to the government in 2007. The government, under this approach, could indict drug defendants many times over by simply continuing to proffer unindicted co-conspirators following a plea and sentence hearing.

7. The government's conduct is inexplicable in this case and falls short of the fair treatment that is expected of a representative of the United States. The government has reneged on its word. In this case, the agreement was that additional charges would not be brought against the defendant. Instead, shortly after being sentenced for what amounts to the same criminal conduct, the defendant was indicted again in the Western District of Missouri under a new indictment. Mr. Lara-Ruiz signed and accepted the plea agreement in 07-04002-01-CR and that plea agreement should be enforced. If the court enforces the current plea agreement, the current indictment should be dismissed as it clearly violates the plea agreement on 07-04002-01-CR.
8. In *United States v. Harvey*, 791 F.2d, 294, 300 (4th Cir. 1986), the court held that "with respect to federal prosecutions, the court's concerns were even wider than protection of the defendant's individual constitutional rights – to concerns for the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government." See also *United States v. Thompson*, 403 F.3d

1037, 1039 (8th Cir. 2005). In enforcing plea agreements, the court should keep in mind honor, justice and fundamental fairness.

9. What could be more unfair than entering a guilty plea in a federal case in which a plea agreement factually states that the government will not file additional charges from the facts forming the basis for the indictment, only to later be indicted for a criminal offense which stemmed from the facts that the government had in its possession when the 2007 plea agreement was signed? In other words, the government had the information in the 2007 case file and merely gathered additional information following the 2007 sentencing. The government then used that information to indict the defendant a second time. The defendant upheld his end of the contract, but the prosecution has disregarded the prior plea agreement and violated the contractual terms of that agreement by again indicting the defendant in 09-00121-01-CR-W-DGK. Contract law principles alone warrant specific performance of the agreement in the 2007 case, which would result in a dismissal of case 09-00121-01-CR-W-DGK.
10. The plea agreement was a contract between the government and the defendant regarding his liberty and as such carries additional significance. *United States v. Van Thournot*, 100 F.3d 590, 594 (8th Cir. 1996), states that a plea agreement “must be attended by constitutional safeguards to ensure a *defendant* receives the performance he [or she] is due” (original emphasis). The government must be held “to a greater degree of responsibility” during

plea negotiations than the defendant. *United States v. Wood*, 378 F.3d 342, 348 (4th Cir. 2004).

11. Gilberto Lara-Ruiz entered a change of plea based on the government's promise that no additional charges would be filed against Lara-Ruiz arising out of the present offenses or investigation. Lara-Ruiz has seen the evidence the government possessed in 2007 and agreed to the government's offer based upon that information. The government must now perform its end of the bargain. Certainly the facts forming the basis for the instant offense stem from the facts forming the basis for the 07-04002-01 offense.

12. The government has gained an unfair advantage in failing to uphold its end of the plea agreement. The government's advantage is that by convincing Lara-Ruiz to admit in open court his part in a conspiracy to distribute methamphetamine, this information will then impact every decision the government and Lara-Ruiz has to make in the instant offense. Because the government waited until Lara-Ruiz had performed under the agreement before re-indicting him with additional criminal charges, the advantage the government gained in this case is unfair. The government has deprived Lara-Ruiz of his constitutional right to due process.

Conclusion

For the foregoing reasons, the defendant respectfully requests that the court dismiss the indictment based on the aforementioned argument that the government has violated the terms and conditions of the plea agreement in 07-04002-01-CR. The only remedy for violating the terms and conditions of

paragraph seven (7) of that plea agreement is to dismiss the new indictment on Case No. 09-00121-01-CR-W-DGK. The defendant respectfully requests this matter be set for hearing on the issue.

Respectfully submitted,

/s/ Jacquelyn E. Rokusek
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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2010, I electronically filed with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following attorney of record:

AUSA Bruce Rhoads

/s/ Jacquelyn E. Rokusek
Attorney for Defendant