

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

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

DEFENDANT’S OBJECTIONS TO THE PRESENTENCE REPORT

DEFENDANT OBJECTS that it would be a violation of Due Process for the Court to impose any sentence in this case because the government broke its promise not to prosecute him for offenses of which it had knowledge – and it did – related to those included in the plea agreement under which defendant pleaded guilty on May 2, 2007, in support of which defendant states:

1. Defendant entered pleas of guilty on May 2, 2007, to Count 2, distributing and possessing with intent to distribute 50 grams or more of methamphetamine on or about December 21, 2006, in the Western District of Missouri, and to Count 4, unlawful entry into the United States in *United States v. Gilberto Lara-Ruiz*, No. 07-04002-01-CR-C-SOW (hereinafter, *Lara-Ruiz I*), pursuant to a Rule 11(c)(1)(B) agreement with the government (Doc. #26); defendant was sentenced to 87 months on Count 2 and to 6 months on Count 4 on February 5, 2008, to be served concurrently (Doc. #36).
2. In the plea agreement the government promised that it would dismiss Count 1 which charged him with conspiracy to distribute and possess with intent to distribute 50 grams or more of methamphetamine on or about November 29, 2006, and Count 3 which charged him with conspiracy to distribute and possess with intent to distribute 500 grams or more of methamphetamine between December of 2004 and December 26, 2006, in the Western District of Missouri. The government kept this promise.
3. By filing the charges in the instant case, however, the government broke the promise it made to defendant in the following provision:

“Based upon evidence in its possession at this time, the United States Attorney’s Office for the Western District of Missouri, as part of this plea agreement, agrees 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 has venue and which arose out of the defendant’s conduct described above.” (Emphasis added) (Doc. #26, p. 6).

4. Defendant complied fully with his obligations but the government breached the plea agreement when it prosecuted and tried the defendant in the instant case for offenses it had evidence and knowledge of before the plea agreement was reached and accepted by the Court in *Lara-Ruiz I* and which it used to obtain his convictions.¹
5. These offenses survived defendant’s motion to dismiss (Doc. #222) upon the Magistrate’s² interpretation – adopted by the District Court (Doc. #237) – that the following *Lara-Ruiz I* plea agreement provision preserves the government’s right to prosecute the defendant for the instant charges even if it had knowledge of them before the plea agreement was entered into:

“The defendant understands that this plea agreement does not foreclose any prosecution for an act of murder or attempted murder, an act or attempted act of physical or sexual violence against the person of another, or a conspiracy to commit any such acts of violence or any other criminal activity *of which the United States Attorney for the Western District of Missouri has no knowledge.*” (Emphasis added).

Magistrate’s Report and Recommendation (R&R), pp. 10 - 11.

6. Defendant, *pro se* and by specific reference to Rule 11 (c) (1), objected to his prosecution on the first day of trial on the ground that the guilty plea process in

¹ Cooperating Informant Heather Bledsoe who had been reporting defendant’s criminal activities to law enforcement investigators testified that her car had been shot up on November 18, 2006, and then told DEA Special Agent Brendan Fitzgerald about it [Transcript of Trial, Vol. II (hereinafter, “T.N.”), p. 216] (confirmed by Agent Fitzgerald at T.II, p. 255); that she believed defendant shot her car and thereafter made several telephone calls controlled by DEA agents and other officers trying to get defendant to admit the shooting [T.II, p. 219]; that defendant hit her on the head with a gun [T.II, p. 239]; and that defendant brandished a gun in her presence [T.II, pp. 246-47] – all included in the Court’s Verdict-Directing Jury Instructions 18 and 19.

² The Hon. John T. Maughmer

Lara-Ruiz I barred the government from prosecuting him for the charges to be tried. [T.I, p. 16].

The Court concluded that the government’s right to file the disputed charges is preserved by the language quoted in 5, above, even though the government had knowledge of them at the time the plea bargain was executed on the basis that the provision “must have some meaning.” [R&R, p. 10].

But so must the knowledge language plainly and expressly set forth in and made part of the provision beginning with “*Based upon evidence in its possession at this time*” and ending with *of which the United States Attorney for the Western District of Missouri has no knowledge*” This language explicitly conditions the right of the government to bring new charges against the defendant to those of which the government had no knowledge at the time the plea agreement was executed. The plain language of the provision does not require interpretation. Even so, “under federal common law ‘a contract should be interpreted as to give meaning to all of its terms - presuming that every provision was intended to accomplish some purpose, and that none are deemed superfluous.’” *Harris v. the Epoch Group*, 357 F.3d 822, 825 (8th Cir. 2004) (citation omitted). By excluding the knowledge terms from its conclusion, the R&R renders them superfluous and rewrites the plea agreement of the parties.

Assuming *arguendo* that the provision in dispute is ambiguous, the ambiguity being whether the knowledge terms in the Plea Agreement prohibit the government from bringing the new charges against the defendant because it had evidence or knowledge of them on November 18, 2006, before the Agreement was executed and accepted by the Court, “the ambiguities are construed against the government.” *United States v. Andis*, 333 F.3d 886, 890 (8th Cir. 2003) (*en*

banc). Construing the ambiguity against the government here requires the dismissal of charges because “a breach of a promise that induced a guilty plea violates due process,” *United States v. Van Thournout*, 100 F.3d 590, 594 (8th Cir. 1996), and “[a]ny promise made by the Government that constitutes a significant part of the defendant’s inducement or consideration for making the plea agreement must be fulfilled to satisfy due process. *Santobello v. New York*, 404 U.S. 257, 262 (1971).

The Court’s ruling is constitutionally untenable because it permits the government to strip an unwitting defendant, as here, of his Fifth and Sixth Amendment rights by plea agreement and to obtain a conviction for use as a predicate for new charges of which the government had knowledge before the plea agreement was executed. Any defenses that defendant may have had to the new charges are then crippled, if not destroyed. This is the unfairness that the Due Process Clause of the Fifth Amendment protects against. See, *Santobello v. New York*, 404 U.S. 257, 264 (1971) (Douglas, J., concurring).

For all of the above reasons, the charges in this case should be dismissed.

DEFENDANT OBJECTS to being sentenced to the 30 year term set forth in Paragraph 72 of the Preliminary Presentence Investigation Report (PSI) on the ground that he was constitutionally entitled to be reasonably informed of the penal consequences of a finding or plea of guilty in this case but was denied that critical information, defendant stating that:

1. his first lawyer, Mr. Ronald Partee, told him that he could get 20 years if he went to trial and lost;
2. his second lawyer, Jacquelyn Rokusek, advised him in writing (copies attached as Exhibits A-1 and A-2, together with translations thereof by Sara Gardner) that
 - A. Count XIV was punishable by no more than 5 years and Count XV by no more than 10 years,

- B. he would get a 5-year sentence concurrent with the one he is serving by pleading guilty pursuant to a plea bargain with the government, but that that offer was later withdrawn because the prosecutor's supervisors would accept no less than a 10-year sentence concurrent with the one being served;
 - C. if he were to lose at trial he would be facing a 10-year sentence consecutive to his current sentence which, at that time, she calculated to be a total of 14 years;
 - D. he based his decision to go to trial on those penal projections;
- 3. the first notice he has had that his convictions expose him to a mandatory 30-year sentence to be served consecutively to the sentence he is currently serving was provided by the PSI, a punishment his current lawyer says is correct; and that
 - 4. he has been misled and is confused by the differing punishment advice that he has been given so as not to know who or what to expect regarding the sentences he is facing..

DEFENDANT OBJECTS to the 3-point assessment to his criminal history in PSI

Paragraphs 55 and 56 as double counting because it is based upon the offense used here as the predicate to enhance the sentence for the offenses of conviction.

Respectfully submitted,

/s/ Cenobio Lozano, Jr.
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3001 N. State Route 291, Suite 10
Harrisonville, MO 64701
(816) 380-5521 Fax: (816) 380-2461
clozano380@gmail.com

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that a copy of the foregoing motion was electronically delivered to all parties via the Court's CM/ECF system, on September 20, 2011, and especially to:

AUSA Bruce Rhoades
400 East 9th, Fifth Floor
Kansas City, MO 64106
Attorney for Plaintiff

and a copy was faxed to:

Wes Garber
Senior U.S. Probation Officer
Kansas City, MO
(816) 512-1320

/s/ Cenobio Lozano, Jr.
Cenobio Lozano, Jr.

Jacquelyn E. Rokusek

Attorney at Law

105 E. Park Street • Olathe, Kansas 66061

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January 4, 2011

Sr. Gilberto Lara-Ruiz
CCA
100 Hwy. Terrace
Leavenworth, Kansas 66048

Estimado Gilberto,

Estoy escribiendo para decirte que hemos recibido el Report y Recommendation del juicio. Este documento es la repuesta del Motion to Dismiss que yo mandé al juicio el 14 de junio de 2010. He incluido una copia para su referencia. Voy a hacer una cita para quedarnos, pero yo quería que tuviera una copia del documento ahora.

En suma, el Juicio recomienda que el gobierno sobresea todos de los cargos a excepción de numeros XIV y XV. Cargos XIV y XV son los cargos en relación a las armas de fuego. Cargo XIV tiene una pena castigo de no más que 5 años mientras cargo XV tiene una pena castigo de no más que 10 años. Dudo que tú recibas la pena máxima pero es necesario que entiendas las penas potenciales.

Voy a visitarte pronto pero yo quería que tuviera una copia de este documento porque es muy importante. Si tengas preguntas antes de nuestra cite, llámame o escíbeme a mi oficina.

Sinceramente,



Jacquelyn E. Rokusek
Abogada de Ley

January 4, 2011

Mr. Gilberto Lara-Ruiz
CCA
100 Hwy. Terrace
Leavenworth, Kansas 66048

Dear Gilberto,

I am writing to tell you that we have received the Report and Recommendation of the trial. This document is the response of the Motion to Dismiss that I sent to the trial on June 14, 2010. I have included a copy for your reference. I am going to make an appointment so we can stay, but I wanted you to have a copy of the document now.

In conclusion, the Trial recommends that the government dismiss all the charges with exception to numbers XIV and XV. Count XIV and XV are the charges relating to the firearms. Count XIV has a sentence punishment of no more than just 5 years while count XV has a sentence punishment of no more than just 10 years. I doubt you will receive the maximum sentence but it is necessary that you understand the potential sentences.

I am going to visit you soon but I wanted you to have a copy of this document because it is very important. If you have questions before our to [summons/make appointment/quote], call or write me at my office.

Sincerely,

[illegible signature]

Jacquelyn E. Rokusek
Attorney of Law

Objection Exhibit A - 1 Translation

Jacquelyn E. Rokusek
Attorney at Law

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17 de enero de 2011

Sr. Gilberto Lara-Ruiz
CCA
100 Hwy. Terrace
Leavenworth, Kansas 66048

Estimado Gilberto,

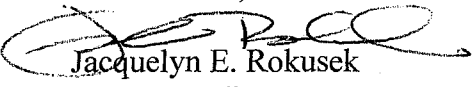
He propuesto la sentencia simultánea de cinco años de la que hablamos con la fiscalía en CCA. Desafortunadamente, el fiscal ha rechazado esta oferta. No obstante, se que se la mencionó a sus supervisores, quienes indicaron que no están interesados en aceptar nada que sea de menos de diez años simultáneos a su sentencia actual. El fiscal tomó su decisión según el siguiente razonamiento:

1. Lo deportarán en cuanto haya cumplido su sentencia, así que añadir a su Historial Delictivo no le comporta ningún beneficio al gobierno, que ha decidido que si lo declaran culpable en un juicio o en una apelación, usted se encontraría en la misma situación que si se hubiera declarado culpable y recibido 5 años simultáneos.
2. El gobierno solicita una sentencia mínima estatutaria de 5 años basándose en los hechos del caso y la jurisdicción. Creen que usted recibiría más de diez años si el caso fuese a juicio.
3. El delito también es de una sentencia a cumplir de manera consecutiva, lo que significa que si perdiese el juicio, se arriesgaría a una sentencia de un mínimo de 10 años consecutivos a la sentencia que está cumpliendo en la actualidad, lo que resultaría en una sentencia total de 14 años.

Si se declarase culpable y lo sentenciasen a 10 años simultáneos, tendría que cumplir 24 meses además de la sentencia que está cumpliendo por su caso anterior. En cualquier caso, si va a juicio y lo gana, tendrá que cumplir la sentencia de su caso anterior. Si perdiésemos el juicio se jugaría mucho más porque acabaría cumpliendo como mínimo 10 años consecutivos (después de su actual sentencia).

Por favor, considere todas las cuestiones del caso a la hora de decidir cómo proceder. Si quisiese escribirme una carta con cualquier pregunta o preocupación, no dude en hacerlo, y pediré que me traduzcan su carta al inglés. Gracias por su tiempo, y espero saber de usted pronto.

Atentamente,


Jacquelyn E. Rokusek
Attorney at Law

January 17, 2011

Mr. Gilberto Lara-Ruiz
CCA
100 Hwy. Terrace
Leavenworth, Kansas 66048

Dear Gilberto,

I have proposed the simultaneous/concurrent sentence of five years of which we talked about with the prosecution at CCA. Unfortunately, the prosecutor has denied this offer. However, I know it was mentioned to his supervisors, who indicated they weren't interested in accepting anything that was less than ten years simultaneous/concurrent to your actual sentence. The prosecutor made his/her decision according to the following reasoning:

1. You will be deported once you have finished your sentence, so adding to your Criminal History does not bring any benefit to the government, who has decided that if you're found guilty in a trial or in an appeal, you would find yourself in the same situation as if you would have pled guilty and received 5 simultaneous/concurrent years.
2. The government is asking for a statutory minimum sentence of 5 years based on the facts of the case and the jurisdiction. They believe you would receive more than ten years if the case goes to trial.
3. The crime is also of a sentence to be completed consecutively, which means that if you lose the trial, you would risk getting a sentence of a minimum of 10 years consecutive to the sentence that you are completing currently, which would result in a total sentence of 14 years.

If you pled guilty and were sentenced to 10 years simultaneous/concurrent, you would have to serve 24 months besides the sentence you are serving for your prior case. Either way, if you go to trial and win it, you will have to complete the sentence in your prior case. If we lose the trial you would bet much more because you would end up serving as a minimum 10 years consecutive (after your actual sentence).

Please, consider all the issues in the case when it's time to decide how to proceed. If you would like to write me a letter with any question or concern, don't hesitate to do it, and I will ask for your letter to be translated into English. Thank you for your time and I hope to hear from you soon.

Sincerely,

[illegible signature]

Jacquelyn E. Rokusek
Attorney at Law

Objection Exhibit A - 2 Translation