

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION**

UNITED STATES OF AMERICA,)	CRIMINAL ACTION NO.
)	
)	03-50015-01
)	
v.)	
)	
XXXX,)	
)	
)	
_____)	

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO
WITHDRAW GUILTY PLEA**

On August 27, 2003, XXXX moved to withdraw his guilty plea. In that motion he asserted, through prior counsel, that his plea of guilty was involuntary because he made it as a result of threats made to his family. The motion did not specify the nature or motive of those threats, but did make clear those threats were not made by the government. In addition, the motion asserted that the government had refused to give Mr.XXXX the opportunity to “earn” a downward departure pursuant to §5K1.1 by refusing to meet with him. This supplemental brief will expand on this assertion.

Facts

Prior to entering his guilty plea on May 22, 2003, XXXXXXXXX met with government agents between five and eight times.¹ The undersigned counsel, who met with AUSA Hathaway and Agent Anderson regarding this matter On October 9, 2003, learned that these meetings initially appeared productive to the government.

On the day of his guilty plea, Mr.XXXX, apparently stricken by pangs of conscience, reported to Mr. Ransdell Keene, his counsel at that time, that he had falsely implicated a defendant in a related case. Mr. Keene advised Mr.XXXX to disclose the falsehood to the government case agent, D.E.A. Agent Anderson, who had debriefed Mr.XXXX.

In the courtroom, *prior to the entry of the guilty plea*, Mr.XXXX informed Agent Anderson about the falsehood. Agent Anderson, in turn, informed the AUSA sitting at counsel table for government.² Despite this important revelation, neither Mr. Keene, nor the AUSA assigned to represent the government that day, sought a postponement of the arraignment proceeding, and Mr.XXXX entered his guilty plea after the Court administered the standard Rule 11 plea colloquy.

¹ Mr.XXXX's previous counsel did not attend all these debriefing sessions. Mr.XXXX was unable to recall exactly how many meetings took place.

² AUSA Hathaway, the prosecutor assigned to this case, was not present in the courtroom on that day.

After the plea colloquy on May 22, 2003, D.E.A. Agent Scott Lee went to the detention center, where Mr.XXXX was incarcerated, to discuss Mr.XXXX's revelation. According to Mr.XXXX, Agent Lee asked Mr.XXXX whether it was true that he had falsely implicated the co-defendant. When Mr.XXXX said that it was true, Agent Lee abruptly said, "Deal's Off!," and left the facility.

Mr. Keene and Mr. Hathaway confirm that afterwards Mr. Keene attempted to persuade Mr. Hathaway to continue debriefings with Mr.XXXX. Mr. Hathaway stated that he personally sought to use Mr.XXXX as a witness in the trial of the co-defendant Keith English, but Mr. Hathaway's supervisor would not permit Mr.XXXX to be used as a witness due to the prior false statement.³ Mr. Hathaway also confirmed that Mr.XXXX has no future prospect of a downward departure motion or a motion to reduce his sentence.

Analysis

In this case, Mr.XXXX pleaded guilty to a one count indictment. There were no counts to dismiss in exchange for the defendant's entry of a guilty plea. Mr.XXXX was advised that he could be sentenced anywhere from five to forty years, the statutory range. In addition, the plea agreement

³ Mr. English was subsequently acquitted of the same charge to which Mr.XXXX pleaded guilty.

stated that the government, *in its sole discretion*, could file a motion requesting that the Court depart downwards from the guideline sentencing range based on “substantial assistance” rendered to the government by the defendant. The plea agreement also provided that the defendant was agreeing to cooperate fully and truthfully in the government’s investigation of the acts that led and relate to the charges in this matter.

Given this factual the defendant received no consideration for his plea of guilty. The only “benefit” the defendant received in the plea agreement was the potential prospect that the government would file a motion for downward departure based on his substantial assistance. Because Mr.XXXX had provided false information, however, *prior to his entry of guilty plea*, the government, understandably, took the position that it would no longer continue to work with Mr.XXXX. Although, the government’s position is understandable, the effect of that decision is that any benefit Mr.XXXX received by the entry of the guilty plea was illusory.

Law

A plea agreement is a contract between the government and the defendant.⁴ The fact that this contract occurs in the context of a criminal case should make no difference in the analysis of the validity of the contract.

For example, if the Court were to consider the following contract -- “In consideration of \$30,000, Chrysler, in its *sole discretion*, will consider giving Jane Roe a 2003 Chrysler automobile.” -- would the Court consider this contract valid? Of course it would not, because the purported consideration, namely, that Chrysler would *think about* selling the automobile is, in fact, no consideration whatsoever.

This analysis applies in every federal criminal case in which the only consideration is the possibility that the government will think about making a motion for downward departure. The facts in this case are unusual, in that, not only did the government purport in the plea agreement to offer nothing in exchange for the guilty plea other than the consideration of making a downward departure motion, in fact, when the defendant entered the plea, the government would not consider making such a motion. The government

⁴Plea agreements are “contracts” and are to be analyzed as such. *See, e.g., United States v. Ballis*, 28 F.3d 1399, 1409 (5th Cir. 1994) (“Plea bargain agreements are contractual in nature, and are to be construed accordingly.”). It is black letter, contract law, of course, that valid contracts require mutual consideration.

would not even consider making that motion because the government had already determined that the defendant had provided false information prior to entering the guilty plea. This reality is reflected by the fact that after Mr.XXXX entered his guilty plea, the government never gave him the opportunity to debrief or testify on behalf of the government in the trial of the codefendant.

As noted above, in a section of the plea agreement *requiring* Mr.XXXX to meet with and cooperate with the government, the plea agreement provided:

8. At or before the time of sentencing, the United States will advise the Court of any assistance provided by the Defendant in the ongoing investigation into drug trafficking and related criminal activity within the Western District of Louisiana and elsewhere, or in the prosecution of another person who has committed a criminal offense. The United States may, but shall not be required to, make a motion requesting the Court to depart from the sentencing range called for by the guidelines in the event he provides “substantial assistance.” This decision shall be *in the sole and nonreviewable discretion* of the United States Attorney.

In *United States v. Underwood*, 61 F.3d 306, 321 (5th Cir. 1995), the court held that a defendant has *no ability whatsoever*, under such plea agreement language, to request specific performance and require the government to file a downward departure motion under U.S.S.G. § 5K1.1 in the event he or she provides substantial assistance. Indeed, the government is not even required to act in “good faith” in deciding not to file a U.S.S.G. §

5K1.1 motion as long as it does not engage in unconstitutional discrimination in exercising its discretion. *Id.* A year later, in *United States v. Price*, 95 F.3d 364, 369-39 (5th Cir. 1996) the court held that under such plea agreement language, the government does not even have to give a defendant an opportunity to qualify for a downward departure under U.S.S.G. § 5K1.1

In short, downward departure language such as the language contained in the instant plea agreement, creates no enforceable promise and is absolutely meaningless. Moreover, on the facts of this case, not only is the promise meaningless as a practical matter, when the government entered the plea, it, and the defendant's attorney at the time, both knew that the government would not fulfill its extremely limited obligation under the plea agreement. In other words, not only is the promise to *think about* making a motion for a downward departure unenforceable, the government knew it would not consider such a motion because it had already determined that Mr. XXXX had provided untruthful information. Because the plea agreement, is, in fact, a contract without any consideration, and the defendant entered his plea in the belief that he was receiving some benefit from the plea agreement he should be permitted to withdraw his guilty plea.

Finally, the Court should consider the fact that the defendant is probably worse off as a result of this plea agreement than he would be if he went to trial and were convicted. At best, he will now receive a thirty-year sentence, and will nearly be sixty-years old upon release. In reality, after serving thirty years in prison, and having lost all connection to his family members and any opportunity to support himself outside of an

institutionalized setting, the defendant will likely prefer to remain incarcerated. In other words, sometimes a life sentence is better than an extraordinarily long sentence.

Respectfully submitted,

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Attorney for Defendant
XXXX

CERTIFICATE OF SERVICE

I, Franklyn Mickelsen, certify that on September 24, 2003, I caused the foregoing document to be served by first class mail, postage prepaid, on Donald E. Hathaway, Jr., Assistant United States Attorney for the Western District of Louisiana, 300 Fannin Street, Suite 3201, Shreveport, La. 71101-3068.

Franklyn Mickelsen

CERTIFICATE OF CONFERENCE

I certify that on September 24, 2003, I attempted to confer with Donald Hathaway, the AUSA assigned to this case, and he was unavailable.

Franklyn Mickelsen

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ORDER

Counsel for Mr. XXXX requests a brief continuance of the hearing on his motion to withdraw his guilty plea and his sentencing hearing. For the reasons stated in the motion, that request is GRANTED. The hearing on the motion to withdraw his guilty plea is set for __, day of _____, 2003, and the sentencing hearing is set for the _____, day of _____, 2003.

So ORDERED.

Dated: _____

U.S. District Judge