

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA)
)
 v.) 09 CR 383-3
)
 JESUS VICENTE ZAMBADA-NIEBLA) Judge Ruben Castillo
)

**DEFENDANT JESUS VICENTE ZAMBADA-NIEBLA’S MOTION TO DISMISS
ALL COUNTS AGAINST HIM ON THE GROUND THAT
THE GOVERNMENT CONFERRED IMMUNITY ON HIM.**

Defendant, Jesus Vicente Zambada-Niebla, by his attorneys, respectfully submits the following Motion to Dismiss All Counts Against Him On the Ground that the Government Conferred Immunity On Him. Defendant also requests a hearing to establish any material, controverted facts before the Court. In support of these motions, Defendant, Jesus Vicente Zambada-Niebla, by counsel, states as follows:

FACTUAL BACKGROUND

Defendant’s immunity motion is based upon investigations and interviews by defense counsel in Mexico and the United States, including interviews of Mexican citizen, Humberto Loya Castro (“Loya”).¹ Loya is an attorney and Sinaloa Cartel member who in the late 1980s into the early 1990s became an adviser and confidante of, *inter alia*, the defendant, Joaquiz Guzman Loera (“Chapo”) and Ismael Zambada Garcia (“Mayo”) who are also charged here.

Beginning in or about 1998 Loya entered into an agreement with the United States government through agents then of the Department of Justice, including the Immigration and

¹ Defendant’s Motion For Discovery re Defense of Public Authority also recounts these facts in greater detail.

Naturalization Service, (now, Department of Homeland Security, Immigration and Customs Enforcement (“ICE”)) and the Department of Justice, Drug Enforcement Administration (“DEA”). Under the agreement Loya was to provide information to the government, particularly about rival cartels, in return for immunity for Loya’s prior acts and continuing acts. Loya understood that this agreement was known and approved by attorneys in the Department of Justice and the leaders of the Sinaloa Cartel.

In exchange for the information he provided, Loya was promised immunity for past and future activities involving the Sinaloa Cartel and that a federal indictment against him in San Diego would be dismissed. Indeed, in December of 2008, the case against Loya in San Diego was dismissed, representing the government’s fulfillment of its commitment to furnish transactional immunity. Nor has Loya been prosecuted for anything since that time.

Defendant was party to the agreement between the United States government, through its officials, and the Sinaloa Cartel through Loya. Defendant had provided information that Loya transmitted to the government. Like Loya, he too was under indictment and the agreement contemplated that defendant would receive immunity as it did with Loya.

In 2008, Loya advised the government that defendant was going henceforth to take the role of primary liaison on behalf of the Sinaloa Cartel with the United States government. A meeting took place in Mexico City between Loya and defendant on the one hand, and DEA agents from Washington and Mexico on the other. By the time of this meeting, the DEA had been investigating the case that gave rise to this indictment for at least eight months. A DEA agent named “Manny” [last name unknown] who had interacted extensively with Loya was there. Also present was a DEA agent named David and both agents made clear that they were

there with the approval of attorneys in the Department of Justice in Washington. Other Washington-based DEA agents were also in the hotel.

At this meeting defendant gave additional information. Attendance at the meeting from his secure location exposed the defendant to the danger of physical harm from others, including extremely dangerous cartels as to which defendant had valuable information. In addition, by traveling to Mexico City, defendant risked arrest by Mexican authorities.

At the meeting, it was made clear that the existing agreement with the United States that covered Loya and defendant – *i.e.* that defendant was immunized for his actions – remained in place and would continue. Defendant was specifically told that he would receive immunity, not only under Loya's prior agreement, but as an agreement with him personally and approved at the highest levels of the government. As further indication of the agreement that was in place, even though defendant had a federal warrant issued for his arrest and was physically in the presence of DEA agents, he was not arrested or detained in any way, but rather, was allowed freely to leave the hotel where the meeting took place. However, just a few hours after this meeting defendant was arrested, not by federal agents, but by Mexican authorities. He was taken into custody by Mexican authorities acting on their own although he was thereafter extradited to the United States on this case. But the ongoing agreement and commitment to grant him immunity had already been made and continued by federal agents acting with authority on behalf of the Department of Justice.

ARGUMENT

The case against defendant Jesus Vicente Zambada-Niebla must be dismissed for the simple reason that the government gave him immunity for his past and future actions under the above-described agreement originally made through Humberto Loya Castro (“Loya”) and subsequently made applicable to defendant. Just as the government dismissed Loya’s case under the agreement, so too was it obligated to dismiss this case against defendant under the same agreement which defendant and Loya were told had the knowledge and approval of Department of Justice attorneys. Even apart from whether a binding bilateral agreement was in place, defendant relied on assurances of immunity by the government in exchange for providing information and other assistance. In addition to the risks in providing information about Mexican cartels, he attended a meeting in Mexico City that exposed him to arrest by Mexican authorities, and otherwise relied on the government assurances to his detriment, such that fundamental fairness mandates that the promised immunity be enforced.

A. Standards

1. Immunity agreements

It is well settled that immunity agreements between the government and a private citizen are enforceable in criminal proceedings whether they concern agreements not to use statements taken from a suspect (use immunity) or agreements not to prosecute (transactional immunity). *See, e.g., United States v. Eliason*, 3 F.3d 1149, 1152 (7th Cir. 1993). “Agreements of this nature are enforced not because of the self-incrimination clause but because the due process clause requires prosecutors to scrupulously adhere to commitments made to suspects in which they induce the suspects to surrender their constitutional rights in exchange for the suspects

giving evidence that the government needs against others which simultaneously implicates themselves.” *Id.* at 1153. See *Santobello v. New York*, 404 U.S. 257, 261-63 (1971).

“Any agreement made by the government must be scrupulously performed and kept.” *United States v. Lyons*, 670 F.2d 77, 80 (7th Cir. 1982). There is no requirement, however, that the agreement be written or achieve a particular level of formality. Indeed, courts have held that unwritten immunity agreements are enforceable even while criticizing government agents and prosecutors for not memorializing them in writing. See, e.g., *United States v. Harvey*, 869 F.2d 1439, 1443 (11th Cir. 1989)(finding informal transactional immunity agreement but noting “astonishing failure of the DEA agents... to keep any written records....”). Unwritten agreements, are more likely, however, to contain issues of interpretation, and such ambiguities are resolved in all agreements against the government. *United States v. Pelletier*, 898 F.2d 297, 302 (2d Cir. 1990)(although agreement unwritten, deliberate use of grand jury testimony “in violation of the government’s express agreement to the contrary violates due process”). In the case of unwritten agreements, district courts should “make a record that allows [reviewing courts] to determine the existence, scope and effect of an immunity agreement.” *United States v. Aleman*, 286 F.3d 86, 91 (2d Cir. 2002).

In *United States v. Fuzer*, 18 F.3d 517 (7th Cir. 1994) , the Seventh Circuit held that neither state prosecutors nor federal ATF agents could alone confer federal immunity, although they could if authorized by the relevant federal prosecutors. *Id.* at 520. Likewise the First Circuit has held that federal agents do not have the power alone to confer immunity but they *can* make binding immunity promises if they are authorized to do so, or have such promises ratified by a federal prosecutor. *United States v. Flemmi*, 225 F.3d 78, 86-88, 90-91 (1st Cir. 2000)(citing *Fuzer*, *inter alia*).

2. Detrimental reliance

Even short of an actual immunity agreement between the parties, due process can compel enforcement if the defendant can establish that a promise of immunity induced the defendant to rely to his detriment or was otherwise fundamentally unfair. The Seventh Circuit has noted that under the doctrine, where a “promise of immunity induces a defendant to cooperate with the government to his detriment, due process requires that the prosecutor’s promise be fulfilled.” *United States v. Fuzer*, 18 F.3d 517, 521 (7th Cir. 1994)(quoting *Rowe v. Griffin*, 676 F.2d 524, 526 n.3 (11th Cir. 1982)(internal quotes omitted).² In the *Flemmi* case, the First Circuit noted that an exception would apply “when the government’s noncompliance with an unauthorized promise would render a prosecution fundamentally unfair.” 225 F.3d at 91 &n.4. Other courts have noted that fundamental fairness can allow for dismissal even if there is no actual immunity agreement under the right facts. *See United States v. Costello*, 750 F.2d 553, 556 (7th Cir. 1984)(doctrine not applicable on facts of case but would apply where immunity promised in bad faith without intending to comply or with knowledge that immunity legally not available); *United States v. Streebing*, 987 F.2d 368, 373 (6th Cir. 1993)(exception would apply if defendant suffered “prejudice []or detrimental reliance” or where prosecution otherwise “fundamentally unfair”); *United States v. Williams*, 780 F.2d 802 (9th Cir. 1986)(even if immunity promise unauthorized fundamental fairness doctrine can still apply where defendant suffers “prejudice that might render his conviction unfair”).

² While citing this equitable immunity doctrine and rejecting its application on the facts of that case, *Fuzer* noted that the Court has not yet formally adopted or rejected the doctrine. *Id.* at 521.

B. Application

1. Immunity agreement

As described more fully above, the government gave defendant Jesus Vicente Zambada-Niebla transactional immunity for his past and future actions by extending to defendant the agreement made with Humberto Loya Castro (“Loya”). In exchange for information about rival cartels in particular, Loya was granted immunity for his past and ongoing activities. Even if the agreement was not in writing, the authorities cited above establish that such agreements do not have to be in writing. Although Loya’s immediate contacts with the federal government were agents, he understood that attorneys in the Department of Justice knew of and approved his agreement. That the government deemed itself party to such an agreement was established when the federal case against Loya in San Diego was dismissed and no further prosecution of Loya transpired, as per the agreement, by prosecutors in that jurisdiction.

As one of the individuals who passed information to Loya for the benefit of the U.S. government, defendant was also a party to the agreement and thus was himself granted immunity. The agreement with defendant was recognized when he and Loya traveled to Mexico City to formalize the arrangement under which defendant would replace Loya as principle liaison to the government from the Sinaloa Cartel. As with Loya, defendant would and did provide information to the DEA in exchange for transactional immunity. Defendant was specifically told that he would receive immunity, not only under Loya’s prior agreement, but as an agreement with him personally and approved at the highest levels of the government. Although Loya and defendant met with DEA agents they understood that Department of Justice attorneys in Washington authorized the agreement. At that time, the investigation by the Justice Department

and the DEA which led to the instant indictment had been ongoing for at least eight months. Dismissal of Loya's case by the government, through the U.S. Attorney's office in San Diego, underscored that attorneys had authorized the agreement in question. Defendant, like Loya, performed under the agreement by furnishing information and by going to the meeting in Mexico City, despite the risks to him given the possibility of detention by Mexican Authorities.

Under these facts, defendant had a specific immunity agreement with the government that the government was bound to fulfill. Under that agreement the indictment must be dismissed.

2. Detrimental reliance

Even if it could be concluded that there was no valid, authorized agreement, defendant relied to his detriment on the assurance of immunity he was given, and it was fundamentally unfair to unilaterally deny him that protection. In reliance on assurances that he was immune from federal prosecution, he placed himself at grave risk by traveling from his secure location to Mexico City, providing information about rival and extremely powerful and dangerous cartels, and agreeing to provide ongoing assistance. All of this put him at risk of retribution by rival cartels and detention by the Mexican government.

In fact, that is exactly what happened. Although the DEA agents allowed him to freely leave the meeting notwithstanding the existence of a federal arrest warrant, defendant was arrested by Mexican authorities, thus making defendant's reliance on the agreement very much to his detriment. He also was dealing with foreign agents operating, in most unusual circumstances, on Mexican soil. Without benefit of U.S. counsel, he could not have been expected to make informed judgments whether the representations to him were authorized or binding. The fact of the matter is that he placed himself in grave jeopardy by relying on an

assurance of immunity from U.S. prosecution having every appearance of being authorized to confer immunity, yet now finds himself under federal indictment and facing charges exposing him to extremely heavy federal sentences.

Under these circumstances it would be fundamentally unfair, indeed a travesty, to deny defendant the benefits of the immunity assurances made to him.

CONCLUSION

The charges against defendant should be dismissed as a matter of due process and fundamental fairness under the agreement between defendant and the government, or because of defendant's detrimental reliance on assurances of immunity under all of the circumstances. Defendant also requests a hearing should any material, contested facts need to be established before the Court.

Dated: July 29, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for defendant Vicente Jesus Zambada-Niebla certifies in accordance with Fed. R. Crim P. 49, Fed. R. Civ. P. 5, LR 5.5 and the General Order on Electronic Case Filing (ECF), that on July 29, 2011, the attached DEFENDANT JESUS VICENTE ZAMBADA-NIEBLA'S MOTION TO DISMISS ALL COUNTS AGAINST HIM ON THE GROUND THAT THE GOVERNMENT CONFERRED IMMUNITY ON HIM. was, on July 29, 2011, filed with the Court and served pursuant to the district court's ECF system as to ECF filers:

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