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United States Court of Appeals for the Eleventh Circuit

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SAN PEDRO V. UNITED STATES
79 F.3d 1065 (11th Cir. 1996)
United States Court of Appeals for the Eleventh Circuit

I. FACTS

Alberto San Pedro, a Cuban citizen and lawful, permanent resident of the United States since 1956, was indicted for bribery of a federal public official and conspiracy to commit bribery.¹ He entered into a plea agreement with the United States on the conspiracy charge.² The Immigration and Naturalization Service (INS) filed an order to show cause why he should not be deported.³ San Pedro petitioned for a writ of mandamus and a temporary restraining order on the grounds that the deportation hearings initiated against him violated the plea agreement.⁴ He argued that a promise not to deport him was unequivocally part of the bargain he struck with the Office of the United States Attorney in Florida.⁵ The government duly noted that the written agreement did not refer to the subject of deportation.⁶ However, it conceded that the plea agreement provided complete transactional immunity to San Pedro.⁷

Both parties agreed that if a United States attorney could promise a criminal defendant non-deportation, the authority must lie in §§ 9-16.020 and 9-73.510 of the United States Attorney Manual (USAM).⁸ Section 9-16.020 of the USAM provides:

U.S. Attorneys should also be cognizant of the sensitive areas where plea agreements involve either extradition or deportation. No U.S. attorney or AUSA has the authority to negotiate regarding an extradition or deportation order in connection with any case. If extradition has been requested or there is reason to believe that such a request will be made, or if a deportation action is pending or completed, U.S. Attorneys or AUSAs, before entering negotiations regarding such matters, must seek specific approval from the Assistant Attorney General, Criminal Division.

Section 9-73.510 of the USAM provides:

In a criminal case, the United States Attorney should not as part of a plea agreement or an agreement to testify, or for any other reason, promise an alien that he/she will not be deported, without prior authorization from the Criminal Division.

The United States District Court for the Southern District of Florida maintained that nothing in the USAM or the Immigration and Nationality Act⁹ gave a United States Attorney the authority to promise non-deportation status to a criminal defendant as part of a plea agreement.¹⁰ The court concluded that any promise regarding deportation between San Pedro and the United States Attorney did not bind the INS.¹¹ Hence, San Pedro's plea agreement did not impede the INS deportation proceedings against him.¹² The court entered summary judgment for the government.¹³ San Pedro appealed to the Eleventh Circuit, contending that the government represented to him that his transactional immunity included a promise of non-deportation.

II. HOLDING

The Court of Appeals for the Eleventh Circuit affirmed the summary judgment for the government.¹⁴ The Court of Appeals held that the government attorneys who had negotiated the plea agreement lacked the authority to promise him that he would not be deported. The authority to promise non-deportation to a criminal defendant during plea negotiations was vested solely in the Attorney General. In the court's view, §§ 9-16.020 and 73.510 of the United States Attorney Manual did not constitute a delegation of that authority to United States and assistant United States attorneys.¹⁵

¹ *San Pedro v. United States*, 79 F.3d 1065 (11th Cir. 1996), cert. denied, 117 S. Ct. 431 (1996).

² *San Pedro*, 79 F.3d at 1067.

³ 79 F.3d at 1073.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 1070.

⁹ 8 U.S.C. § 1101 (1988).

¹⁰ *San Pedro*, 79 F.3d at 1067.

¹¹ 79 F.3d at 1068.

¹² *Id.* at 1067.

¹³ *Id.*

¹⁴ *Id.* at 1072.

¹⁵ *Id.*

III. ANALYSIS/APPLICATION

The *San Pedro* Court began its analysis with a brief examination of due process considerations in the context of plea negotiations. The fundamental fairness doctrine of the Fifth Amendment requires the government to fulfill a plea agreement when its promises induce a person to relinquish constitutional rights.¹⁶ The court highlighted Justice Marshall's opinion in *Santobello v. New York*¹⁷: "When a prosecutor breaks the bargain, he undercuts the basis for the waiver of constitutional rights implicit in the plea."¹⁸ In *Mabry v. Johnson*,¹⁹ the Court held that a guilty plea must stand unless the plea is induced by misrepresentation, which includes unfulfilled or unfulfillable promises.²⁰

The Eleventh Circuit highlighted the fact that *San Pedro* did not challenge the voluntariness of his guilty plea, but rather sought to enforce a non-deportation promise made during plea negotiations.²¹ It followed the rule enunciated by the Ninth Circuit in *Johnson v. Lumpkin*²² that the government must adhere to plea negotiation promises if two conditions existed²³: first, the promise had to come from an authorized agent; and second, the defendant had to rely to his detriment on the promise.²⁴ If both conditions were not satisfied, the agreement would be unenforceable and the government could rescind it.²⁵ The Eleventh Circuit emphasized that a plea agreement must have been valid and binding before a defendant could plead guilty under the terms of that agreement.²⁶

Although the Eleventh Circuit maintained that it was mindful of the due process concerns involved in the case, it focused its opinion on the authority of a United States attorney to make non-deportation promises during plea negotiations. The court looked to principles of agency law to determine first, whether a United States attorney had authority to

make non-deportation promises and second, whether such an agreement would be binding on other governmental agencies— particularly, on the INS. The court maintained that principles of estoppel and apparent authority would not bind the United States government to an agreement.²⁷ Instead, a plea agreement would be valid and binding only if the government agent possessed actual authority to make the promise. Hence, the INS would not be bound unless the government attorneys had authority, express or implied, to make the non-deportation representation.²⁸

After the district court issued its decision in *San Pedro*, the Ninth Circuit ruled in *Thomas v. INS*²⁹ that United States attorneys had the authority to bind the INS to the conditions of a cooperation agreement, even when the INS was neither informed of it nor a party to it.³⁰ In *Thomas*, the alien defendant entered into a cooperation agreement with an AUSA obligating the government to refrain from opposing relief from deportation and requiring the defendant to participate as a government drug informant and as a cooperating witness for two years.³¹ The majority reasoned that United States attorneys' power to "prosecute for all offenses against the United States,"³² implied that the government had discretion to oppose or remain silent on deportation motions.³³ The authority to prosecute necessarily signified the power to make any plea agreement which was incidental to a prosecution.³⁴ The *Thomas* majority gave three reasons why entering into a plea agreement with deportation terms was within a United States attorneys' statutory authority to prosecute. First, deportation was a central issue in criminal cases involving aliens, and it would be a powerful inducement for an alien in plea negotiations. Second, both parties' attorneys would carefully consider the effect which conviction and sentencing issues might have on deportation when negotiating

¹⁶ See *Santobello v. New York*, 404 U.S. 257, 262 (1971) (holding that when a state breached a promise regarding sentence recommendation, the Court would remand case to state courts to decide whether specific performance of the agreement on the guilty plea was required in light of circumstances presented in the case or whether the petitioner should be granted the opportunity to withdraw his guilty plea).

¹⁷ *Santobello v. New York*, 404 U.S. 257 (1971).

¹⁸ *Santobello*, 404 U.S. at 268.

¹⁹ *Mabry v. Johnson*, 467 U.S. 504 (1984).

²⁰ *Mabry*, 467 U.S. at 509 (citing *Brady v. United States*, 397 U.S. 742 (1970)).

²¹ *San Pedro*, 79 F.3d at 1068.

²² *Johnson v. Lumpkin*, 769 F.2d 630 (9th Cir. 1985).

²³ *United States v. Kettering*, 861 F.2d 675 (11th Cir. 1988).

²⁴ *Kettering*, 861 F.2d at 677.

²⁵ 861 F.2d at 677.

²⁶ *San Pedro*, 79 F.3d at 1068.

²⁷ 79 F.3d at 1068 (citing *Thomas v. INS*, 35 F.3d 1332, 1338 (9th Cir. 1994)).

²⁸ *Id.* at 1068-69.

²⁹ *Thomas v. INS*, 35 F.3d 1332 (9th Cir. 1994).

³⁰ *Thomas*, 35 F.3d at 1335.

³¹ 35 F.3d at 1335.

³² 28 U.S.C. § 547(1) (1994)

³³ *Thomas*, 35 F.3d at 1339-40.

³⁴ 35 F.3d at 1339-40.

plea agreements. Third, Congress undoubtedly meant to imply this grant of authority by situating United States attorneys and INS officials both within the Justice Department.³⁵

Three months after *Thomas* was decided, the Eighth Circuit adopted the Ninth Circuit's reasoning and upheld the authority of an AUSA to bind the INS to a plea agreement. In *Margalli-Olvera v. INS*,³⁶ the defendant and an AUSA entered into a plea agreement in which the government would recommend against deportation if the defendant participated in a debriefing.³⁷ Furthermore, the agreement obliged the INS to remain silent regarding deportation.³⁸ The Eighth Circuit extended the reasoning of *Thomas* by ruling that any promise made by a United States attorney was binding on all agents of the federal government.³⁹ The court held that an AUSA entering into a plea agreement "enters th[at] agreement on behalf of the United States government as a whole."⁴⁰ The Eighth Circuit went one step further. It reasoned that any ambiguity about whether a particular agency was bound by a plea agreement should be resolved in favor of binding that agency, absent language in the agreement specifically limiting the agencies it obligated.⁴¹ The Eighth and Ninth Circuits emphasized that United States attorneys were high-ranking officials appointed by the President and confirmed by the Senate, and that they had broad prosecutorial discretion. The Eleventh Circuit, in contrast, rejected the concept that a government attorney had authority to bind all government agencies to a plea agreement solely on the basis of prosecutorial power.⁴²

The Eleventh Circuit agreed with the Ninth Circuit's decision in *Thomas* that Congress did not expressly grant United States attorneys authority to bind the INS.⁴³ However, the Eleventh Circuit's agreement with the Ninth Circuit ceased at that point. In *San Pedro*, the court noted that the *Thomas* decision overlooked that the Attorney General alone had explicit authority to enforce immigration law. According to the Eleventh Circuit, the Ninth Circuit "incorrectly harmonized the statutes that

empower the United States attorneys and the attorney general."⁴⁴ The court criticized the Ninth Circuit for failing to explain why Congress might grant United States attorneys the authority to bind the INS while concurrently granting the Attorney General the authority to enforce specific provisions of the Immigration and Naturalization Act.⁴⁵ The Attorney General was responsible for carrying out the mandates of the Immigration Naturalization Act and could choose to delegate her powers to the INS commissioner.⁴⁶ Her authority included the power to deport aliens,⁴⁷ as well as the ability to delegate the power to institute or terminate deportation hearings at the INS.⁴⁸ The *San Pedro* majority responded that if a United States attorney could obstruct a deportation proceeding by promising non-deportation status to a criminal defendant, he would undermine the authority of the INS.⁴⁹ It found that a United States attorney could promise a criminal defendant non-deportation status only if the Attorney General specifically delegated such power to him.⁵⁰ The court further noted that ruling otherwise would permit a United States attorney's prosecutorial power to encroach on the Attorney General's specific power to enforce immigration law.⁵¹

The court interpreted USAM §§ 9-16.020 and 9-73.510, whether read independently or together, as an ineffective delegation of authority from the Attorney General to United States attorneys.⁵² The court stressed that the USAM was not a source of law, but only a source of internal guidance for the Department of Justice which did not have the force of law.⁵³ It rejected *San Pedro*'s argument that the USAM was a source of a government attorney's authority to promise non-deportation, for nothing in the USAM suggested that it was a delegation of authority from the Attorney General to the United States attorneys.⁵⁴ The majority further declared that even if the USAM could serve the function of delegating the Attorney General's authority to United States attorneys, the language in USAM §§ 9-16.020 and 9-73.510 was deficient to achieve the alleged

³⁵ *Id.* at 1340.

³⁶ *Margalli-Olvera v. INS*, 43 F.3d 345 (8th Cir. 1994).

³⁷ 43 F.3d at 348.

³⁸ *Id.* at 348.

³⁹ *Id.* at 353.

⁴⁰ *Id.*

⁴¹ *Id.* at 352.

⁴² *San Pedro*, 79 F.3d at 1069.

⁴³ 79 F.3d at 1069.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See 8 U.S.C. § 1103 (a-b) (1994).

⁴⁷ See 8 U.S.C. § 1251(a) (1994).

⁴⁸ See 8 C.F.R. § 242.1(a) (1995).

⁴⁹ *San Pedro*, 79 F.3d at 1070.

⁵⁰ 79 F.3d at 1070.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 1071.

delegation.⁵⁵ The opinion noted that only a clear and explicit delegation of authority from the Attorney General to a United States attorney would allow a United States attorney to make a deportation promise during plea negotiations.⁵⁶ Absent an explicit delegation, INS officials could freely disregard whether a government attorney promised not to deport a criminal defendant as a term of a plea agreement when implementing its deportation proceedings against that defendant.⁵⁷

By contrast, the Ninth Circuit in *Thomas* reasoned that § 9-73.510 of the USAM implied a United States attorney's authority to promise relief from deportation as long as the agreement was approved by the Criminal Division.⁵⁸ The *San Pedro* court found no evidence that the United States Attorney made promises to the defendant without this approval.⁵⁹ The *Thomas* court noted that the burden of proof fell on the government to show that one of its agents acted beyond his authority⁶⁰ and held that the Attorney General could limit the incidental authority of United States attorneys, which was set out in the Code of Federal Regulations, if she so chose.⁶¹ Most significantly, its opinion highlighted the need for the Department of Justice to implement procedures which would coordinate those various subdivisions forced to confront deportation issues.⁶² However, the court maintained that

such procedures were an administrative concern of the Attorney General and not the province of the judicial branch.⁶³ Furthermore, the Ninth Circuit noted that it was not a defense counsel's duty to ensure that the United States attorney was not "stepping on toes in the Immigration and Naturalization Service."⁶⁴

IV. THE DISSENT

Senior District Judge Goettel dissented in *San Pedro*.⁶⁵ He criticized the majority's complete disregard of fundamental due process considerations and its limited focus on United States attorneys' authority.⁶⁶ Judge Goettel noted that the majority's analysis rendered non-deportation promises unimportant and unenforceable when the government attorney lacked the proper authorization to make non-deportation promises.⁶⁷ He maintained that attorneys should not make unauthorized promises. If a defendant alleged the existence of a non-deportation promise, however, then summary judgement must be precluded.⁶⁸ According to the dissent, the critical issue in the case was due process, and particularly, violations of due process which might arise if the government reneges on a promise made as part of a plea agreement.⁶⁹ If the government made non-deportation promises, due process required it to live

⁵⁵ *Id.*

⁵⁶ *Id.* See also *United States v. Touby*, 909 F.2d 759, 770 (3d. Cir. 1990) (holding that the Attorney General must execute an affirmative act in subdelegating his authority).

⁵⁷ *San Pedro*, 79 F.3d at 1071.

⁵⁸ *Thomas*, 35 F.3d at 1341.

⁵⁹ *San Pedro*, 79 F.3d at 1071.

⁶⁰ *Thomas*, 35 F.3d at 3141. The *Thomas* majority wrote in dicta, "We shall not invent an excuse for the government to break its promise. If they have an excuse, let them prove it." *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *San Pedro*, 79 F.3d at 1072 (Goettel, J., dissenting). The dissent highlighted facts which the majority's factual background did not reveal. *San Pedro* had been recruited by the government to serve as a government witness in an extensive political corruption investigation. Although the district judge ultimately sentenced him to thirty months in prison, the government described his assistance to the investigation of Hialeah political corruption as "substantial, truthful and invaluable." 79 F.3d at 1073. *San Pedro* was not deported immediately after he made parole be-

cause of his cooperation with the government in high profile cases. The plea agreement between the United States Attorney's office and *San Pedro* guaranteed that the government would not prosecute him for any other offense based on evidence revealed in the investigation which had led to his indictment. Judge Goettel suggested that *San Pedro* might have believed reasonably that the phrase "prosecute . . . for any other offenses" covered deportation hearings. *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 1072-1073.

⁶⁸ *Id.* at 1077.

⁶⁹ *Id.* See also *Geisser v. United States*, 513 F.2d 862 (5th Cir. 1975) (holding that when the Department of Justice promised the defendant it would use its best efforts to see that she was paroled after serving three years of a seven year sentence and that she would not be deported to France or Switzerland, the prosecution had a duty to make a strong presentation to the Department of State as to the nature of the promises and the dangers to the accused if the Department of State issued an extradition order and to advise the Parole Board of the important public interest in honoring the plea bargain). This case was binding legal precedent for the Eleventh Circuit when it heard *San Pedro* because decisions of the Fifth Circuit prior to the Fifth Circuit split on September 30, 1981, are binding in the Eleventh Circuit.

up to those promises.⁷⁰ San Pedro was entitled to relief if a factual determination proved the existence of a non-deportation promise; for an unfulfilled promise would make the underlying plea involuntary.⁷¹ An involuntary plea would be unconstitutional unless the breach was remedied. The two possible remedies were specific performance of the agreement or the opportunity to withdraw the guilty plea.⁷² Because San Pedro had completed his term of imprisonment, the withdrawal of a guilty plea would not have been a suitable remedy. As long as the court found that a government attorney had, in fact, made a non-deportation promise, the appropriate relief for San Pedro was specific performance of the plea agreement.

Judge Goettel's dissent agreed with the majority's determination that the power to promise non-deportation to a criminal defendant as part of a plea bargain was vested in the Attorney General.⁷³ It also conceded that the Office of the United States Attorney had no expressed or implied actual authority to promise non-deportation to San Pedro because only the Attorney General had that authority.⁷⁴ Thus, it was unnecessary to follow the reasoning of the Ninth and Eighth Circuits.⁷⁵ In essence, Judge Goettel emphasized the importance of making a factual determination of deportation promises used to induce a plea bargain. Even though a complete

factual determination might have shown that the Department of Justice had authorized a United States attorney to make a non-deportation promise, Judge Goettel noted, San Pedro would have no way of discovering that delegation.⁷⁶ The dissent concluded that if a non-deportation promise was made to San Pedro from the United States Attorney's Office, the government was obligated to adhere to its promise as a matter of due process.⁷⁷

V. CONCLUSION

San Pedro was denied certiorari by the United States Supreme Court. The Court decided that the authority of a United States attorney to bind the INS to a criminal plea agreement was not a justiciable issue even though three circuits were divided on the issue. After *San Pedro*, the issue remains for the circuits to resolve.⁷⁸ Hence, due process principles, agency authority, and deportation matters in criminal plea agreements regarding alien defendants are likely to resurface repeatedly for the Supreme Court's consideration.

The *San Pedro* decision highlights the importance of agency issues in the context of plea negotiations. A plea agreement is a unique contract governed both by ordinary contract and by due process considerations. These principles ensure government-

⁷⁰ *San Pedro*, 79 F.3d at 1077. See also Ray D. Gardner, Note, Due Process and Deportation: A Critical Examination of the Plenary Power and the Fundamental Fairness Doctrine, 8 Hastings Const. L.Q., 397 (1981).

⁷¹ *San Pedro*, 79 F.3d at 1077.

⁷² 79 F.3d at 1077.

⁷³ *Id.* at 1078.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 1072. The dissent noted that Mr. San Pedro's experience was not an isolated instance of a government's breach of a plea agreement. See *United States v. San Pedro*, 781 F. Supp 761, 776 (S.D. Fla. 1991). San Pedro moved to dismiss an indictment alleging RICO violations on the grounds that it violated his plea agreement—the same agreement at issue in this case. The District Court for the Southern District of Florida granted his motion and found that the government breached its duty of good faith and fair dealing by “setting up” San Pedro in an effort to renege on its immunity promise. *San Pedro*, 781 F. Supp at 776. The district court admonished the government for denying San Pedro the benefit of his bargain, declaring that such governmental conduct was simply unfair and unacceptable. The district court wrote, “In a day when the confidence and trust of the American people in their

government ebbs, it is critical that the United States government keeps its word and live up to its obligations The foundation of the Republic will not crack if the United States fails to put Alberto San Pedro in federal prison. It will shatter, however, if the American People come to believe that their government is not to be trusted.” *Id.* The district court maintained that “a deal is a deal, and the government's word must be its bond.” *Id.*

⁷⁸ Several circuits have ruled that a government attorney has the authority to bind the INS to non-deportation promises within a plea agreement. For example, see *Thomas v. INS*, 35 F.3d 1332 (9th Cir. 1994) (holding that a cooperation agreement “plainly and unambiguously” dealt with deportation concerns and expressly bound the INS); *Margalli-Olvera v. INS*, 43 F.3d 345 (8th Cir. 1994) (holding that a plea agreement mentioning to the “United States” referred not only to the Office of the United States Attorney, but also to the United States government and its agencies, including the INS). See also *Ramallo v. Reno*, 931 F. Supp. 884 (D.D.C. 1996) (holding that promise of non-deportation made by an AUSA and an INS attorney bound the government. Although the court did not definitively choose the Ninth Circuit's ruling over the Eleventh Circuit, it mentioned that the reasoning of the Ninth Circuit was more persuasive).

tal integrity and prevent prosecutorial overreaching during the plea bargaining process. However, recent circuit court opinions have shifted from an agency law analysis⁷⁹ to a due process analysis.⁸⁰

The grant of summary judgment to the government embarks on setting dangerous, new precedent. Both United States attorneys and the INS are located within the executive branch of government. Furthermore, both are centralized within the Department of Justice. Yet, the *San Pedro* decision suggests that the INS can disregard any government attorney's promise not to deport. If the INS and other agencies are not required to consider promises made by a United States Attorney, they can pick and choose which governmental promises will bind it.

Although agency authority and due process principles are the major issues in this case, governmental accountability is also an important consideration in *San Pedro*. The government should be held ac-

countable to keep the promises it makes. As the court in *United States v. Carter*⁸¹ mentioned, "the honor of the government, public confidence in the administration of justice, and the efficient administration of justice in a federal scheme of government" are at stake in this case.⁸² Clearly, the Attorney General could authorize the United States Attorney's office to make such a promise not to deport through her executive powers.⁸³ A person in San Pedro's position would have no reason to question that the attorney's plea offer was supported by the Attorney General's authority. Until the Court clarifies the authority of a United States attorney to make non-deportation promises in the context of plea agreements, fundamental due process rights may depend upon the circuit in which a person resides.

Summary and Analysis Prepared by:

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⁷⁹ See *United States v. Thournout*, 100 F.3d 590 (8th Cir. 1996); *San Pedro v. United States*, 79 F.3d 1065 (11th Cir. 1996); *United States v. Rourke*, 74 F.3d 802 (7th Cir. 1996).

⁸⁰ See *Thomas v. INS*, 35 F.3d 1332 (1994); *Margalli-Olvera v. INS*, 43 F.3d 345 (8th Cir. 1994).

⁸¹ *United States v. Carter*, 454 F.2d 426 (4th Cir. 1972).

⁸² *Carter*, 454 F.2d at 428.

⁸³ *Id.*