

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Case No. 04-40107-01-RDR

10-4134-RDR

JERRY L. ROBINSON,

Defendant.

MEMORANDUM AND ORDER

This matter is currently before the court on defendant's motion to vacate his conviction pursuant to 18 USC §2255. (Doc. # 53, filed 11/03/2010). The court includes in its consideration: the government response (Doc. # 55); the defendant's Letter (Doc. # 59); and defendant's reply to the government's response (Doc. # 68). The parties agree that defendant's § 2255 motion is fully submitted to the court for decision.

On consideration of the court file, statements and arguments of counsel and all other matters the court finds:

The government and the defendant mutually agree that defendant's conviction on Count 3 of the indictment, entered June 24, 2005, (doc. # 37) is void and must be vacated. Count 3 of the indictment alleged defendant possessed approximately 1300 grams of marijuana. The defendant did not admit to possession of a greater amount. An element of 21 U.S.C. 841(a)(1)(C), the violation of conviction, is that defendant possessed with the intent to distribute more than 50

kilos of marijuana. Possession of lesser amounts, such as in this case 1.3 kilos, is a violation of 21 U.S.C. 841(a)(1)(D).

The government and the defendant mutually agree and the court finds that the plea agreement is vacated based on mutual mistake and a failure of consideration. See *United States v. Lewis*, 138 F.3d 840 (10th Cir. 1998). Counts 1 and 2 of the indictment shall be reinstated pursuant to 18 U.S.C. § 3296.

The government and the defendant mutually agree the government will amend Count 3 of the Indictment by interlineation to allege a violation of 21 U.S.C. 841(a)(1)(D).

IT IS THEREFORE BY THE COURT ORDERED:

Defendant's motion pursuant to 18 USC §2255 is granted. Defendant's conviction on Count 3 of a violation of 21 U.S.C. 841(a)(1)(C) is hereby vacated; by mutual agreement of the parties' plea agreement (Doc. # 32) is vacated; counts 1 and 2 of the Indictment are reinstated; and the government may proceed to amend Count 3 of the Indictment by interlineation to allege a violation of 21 U.S.C. 841(a)(1)(D).

Further court proceedings in this matter have been scheduled for December 17, 2010, at 9:30 o'clock a.m.

Dated at Topeka, Kansas this 14th day of December, 2010.

s/Richard D. Rogers
United States District Judge