UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES	:	12 Cr. 266 (ABJ)
v.	:	
DWIGHT KNOWLES	:	
Defendant.	:	

DEFENDANT KNOWLES' MOTION TO DISMISS INDICTMENT

INTRODUCTION

Defendant Dwight Knowles is charged in Count One of the pending Indictment with a dual object conspiracy to: (1) distribute; and (2) possess with intent to distribute more than five kilograms of cocaine on board an airplane registered in the United States, in violation of 21 United States Code 959(b) and 960(b)(1)(B)(ii). The Government alleges generally that from May 2011 to December 12, 2012, the defendant conspired to use United States registered airplanes to transport cocaine. Significantly, the Government has not charged the defendant with any drug trafficking offense involving the importation of drugs into United States. Defendant Knowles is a citizen of the Bahamas and during the alleged time frame of the conspiracy he was residing in Colombia, South America.

As set forth herein in greater detail, the conspiracy count must be dismissed (in whole or in part) for three separate, but equally compelling reasons. First, by its express terms, the statute charged in this case applies extraterritorially only to "acts of manufacture or distribution committed outside the territorial jurisdiction of the United States." 21 U.S.C. Section 959(c). Thus, the second object of the conspiracy – possession with intent to distribute – must be dismissed because the statue does not reach the charged conduct.

Second, even if this Court were to somehow construe the statue to apply extraterritorially

to possession with intent to distribute cocaine on board a United States registered vessel, the count would still have to be dismissed as an unconstitutional exercise of Congressional power to criminalize criminal activity with no nexus to the United States. Third and finally, the due process clause acts as a limitation on Congressional power. In order to comport with the requirements of due process, the Government must demonstrate that there exists a "sufficient nexus" between the conduct condemned and the United States such that the application of the statute would not be "arbitrary or fundamentally unfair to the defendant". See United States v. Medjuck, 156 F.3d 916, 918 (9th Cir. 1998). The Government cannot satisfy this burden and Count One must be dismissed.

As the Court knows, these arguments were recently denied by the Honorable John D. Bates, in the case of *United States v. Bodye*, 2016 WL 1091058 (D.C.). With all deference to that court, the *Bodye* opinion is not binding herein, and the defense continues to believe that the arguments advanced by this motion are meritorious. See Community Health Systems, Inc. v. Burwell, 113 F. Supp. 3d 197, 228 (D.D.C. 2015)("[d]istrict Court decisions do not establish the law of the circuit, nor, indeed, do they even establish the law of the district")(internal citations omitted).

FACTUAL BACKGROUND

The Government has alleged in various pleadings that it intends to introduce evidence at trial to prove that defendants Thompson and Knowles, while living Colombia, South America were members of a conspiracy to transport cocaine via United States registered airplanes. One aircraft that the defendants allegedly used was an U.S. registered aircraft with tail number N157PA. That craft was ultimately detained and seized in Haiti in May of 2012 en route to Honduras, resulting in the arrest of former co-defendant Dario Davis.

In addition, the Government has alleged a large series of "other crimes," which include allegations that co-defendant Thompson used his contacts in Colombia and Venezuela (allegedly including cocaine brokers, investors, sources of supply, and members of drug trafficking organizations) in an effort to arrange other cocaine transactions, including the transportation of cocaine by boat, aircraft, and shipping containers. The Government has also alleged that the defendants also attempted to utilize foreign registered aircraft, including ones located in the United States, the Bahamas, the Dominican Republic, Panama, and Belize.

The evidence against the defendants appears to consist of intercepted phone conversations, emails, and text messages made by the defendants while located in Colombia, South America and other foreign nations. In addition, the Government has obtained the testimony of various former co-defendants and other cooperating defendants. Although counsel only recently entered his appearance in this case, it does not appear from a preliminary review of the discovery in this case, that the Government alleges that defendant Dwight Knowles ever traveled outside of Colombia in furtherance of the alleged conspiracy or that he came to the United States. Likewise, the Government has not charged him with any drug trafficking activity that involves the successful – or even attempted – importation of cocaine into the United States.

LEGAL ANALYSIS

1. The Plain Language Of The Statute Does Not Apply To A Conspiracy To Possess With Intent To Possess Cocaine On Board A U.S. Registered Airplane

The primary rule of statutory construction is that a court looks first to the "plain meaning of the text." United States v. Barnes, 295 F.3d 1354, 1359 (D.C. Cir. 2002). If the language of the statute is unambiguous, then the "judicial inquiry" is finished. See Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992). The Supreme Court has held that courts "must presume that a legislature says in a statute what it means and means in a statute what it says

there." Carcieri v. Salazar, 555 U.S. 379, 380 (2009). Moreover, the federal judiciary is not tasked with "saving" poorly or oddly drafted legislative pronouncements. "[W]e must adopt the plain meaning of a statute, however severe the consequences. "Jay v. Boyd, 351 U.S. 345, 357 (1956). With these precepts in mind, the analysis of the provision of the statute at issue in this case is straightforward.

The statute at issue – 21 United States Code Section 959 - is organized into three subsections. The first section declares it unlawful to "manufacture or distribute" a controlled substance knowing or intending that it will be unlawfully imported into the United States or its maritime waters. 21 U.S.C. Section 959(a)(1) and (2).

The second section is divided into two sub-provisions. The first declares it unlawful to "manufacture or distribute" a controlled substance on board a United States registered airplane. 21 U.S.C. Section 959(b)(1). It then independently declares it unlawful to "possess" a controlled substance "with intent to distribute" on board such aircraft. 21 U.S.C. Section 959(b)(2).[1]

The final section of the statute states that the "section is intended to reach acts of **manufacture or distribution committed outside the territorial jurisdiction of the United States**." 21 U.S.C. Section959(c)(emphasis added). The extraterritorial mandate is clear and by its express language does not apply to the offenses of possession with intent to distribute cocaine on board a United States registered airplane.

Moreover, interpreting the plain language of the statute in this manner is consistent with the Supreme Court's recent pronouncement in Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013). In Kiobel, the Supreme Court concluded that the Alien Tort Statute ("ATS") did not create a cause of action for alleged violations of international law concerning torture when

[1] Subsection (b) also applies to: (1) any United States citizen on board "any aircraft;" and (2) any person on board an aircraft "owned" by a United States citizen. These provisions do not apply to this case.

the acts took place in a foreign nation. In reaching this decision, the Court relied upon the "presumption" against extraterritorial application of federal statutes. The Court noted that even if the ATS created a cause of action in the United States for acts of piracy committed on the High Seas, the existence of jurisdiction for that offense did not imply that jurisdiction existed for other violations of international law. "[W]hen a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." 133 S.Ct. at 1667. This analysis is consistent with the statutory canon of *expressio unius est exclusio alterius*, or the "mention of one thing implies the exclusion of another thing." See Independent Insurance Agents of America v. Hawke, 211 F.3d 638, 644 (D.C. Cir. 2000).

The federal courts have expressly limited the extraterritorial application of other drug statutes under similar circumstances. In United States v. Lopez-Vanegas, 493 F.3d 1305 (11th Cir. 2007), the Eleventh Circuit ruled that the provisions of 21 United States Code Sections 841, 846 did not apply to a drug trafficking conspiracy that transported cocaine from Colombia to Venezuela to Saudi Arabia and finally to France, for ultimate distribution. The Court found that the statute was silent as to any extraterritorial application and dismissed the drug trafficking charge (even though meeting among various co-conspirators took place in the United States) because the object of the conspiracy was not a violation of United States' law. In language that is particularly appropriate to the question presented in this case, the Court noted that:

> Congress has shown it is capable of addressing acts involving controlled substances occurring outside of the United States, and has shown it thinks it necessary to make specific provisions in the law that allow the locus to include acts of manufacture or distribution of controlled substances on foreign soil when there is an intent to unlawfully import such substances or chemicals into the United States.

493 F.3d at 1313.

In this case, Congress drafted a statute that does not provide for extraterritorial jurisdiction for the offense of possession with intent to distribute cocaine on board a plane

registered in the United States. The rules of statutory construction prohibit the interpretation of the statute in any other manner. Notwithstanding, Judge Bates rejected this "plain language" analysis, noting that the context of the statute overcame the presumption against extraterritorial effect. The Court reasoned that the "most compelling indication is this: if § 959(b)(2) did not have extraterritorial reach, it would only cover conduct that was already prohibited by 21 U.S.C. § 841." United States v. Bodye, 2016 WL 1091058 at p.3.

That analysis, however, fails to appreciate that there are numerous federal statutes with overlapping reach. Thus, for example, even in the context of international drug trafficking, 21 U.S.C. Section 959(a) criminalizes distribution of a controlled substance outside the United States "knowing or intending" that it will be unlawfully imported. Likewise, 21 U.S.C. Section 952(a) makes it a federal offense to unlawfully import a controlled substance into the United States. In the case of a completed international drug trafficking conspiracy, the exact same conduct would therefore constitute a violation of both offenses. There is no rule of statutory interpretation that authorizes a court to "insert" language into a criminal statute because it is co-extensive with another provision of the criminal code.

There does not appear to be any legislative history accompanying the amendment of 21 U.S.C. 959 to explain the Congressional intent behind the criminalization of drug trafficking on board a United States registered airplane. But even if the failure to extend 959(b)(2) extraterritorially was simply a drafting error or oversight, that omission does not provide license for this court to "fix" the problem. The Supreme Court has been quite precise in repeatedly holding that "[i]t is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think ... is the preferred result." Lamie v. U.S. Trustee, 540 U.S. 526, 542 (2004). Accord Consolidated Rail Corporation v. United States, 896 F.2d 574, 579

(D.C.Cir.1990) (courts are generally not "free to 'correct' what they believe to be congressional oversights by construing unambiguous statutes to the contrary of their plain meaning").

Based upon the plain language of the statute, this Court should strike the second object of the charged conspiracy because it is outside the scope of 21 U.S.C. Section 959(b)(2).

2. Congress Does Not Possess An Enumerated Power To Criminalize International Drug Trafficking With No Nexus To The United States

Congressional power to criminalize extraterritorial criminal conduct is not without its limits. Under the Constitution, Congress may only legislate in connection with its enumerated powers. As the Supreme Court recently noted, the "enumeration of powers is also a limitation of powers, because the enumeration presupposes something not enumerated. The Constitution's express conferral of some powers makes clear that it did not grant others." National Federation of Independent Business, v. Sebelius, 132 S.Ct. 2566, 2577, 183 L.Ed.2d 450 (2012). As explained further herein, no enumerated power authorizes Congress to criminalize international drug trafficking without any nexus to the United States.

Pursuant to Article I, Section 8, clause 10 of the United States Constitution, Congress has the authority to "[t]o define and punish . . . Offences against the Law of Nations." In United States v. Bellaizac-Hurtado, 700 F.3d 1245 (11th Cir. 2012), the Court of Appeals concluded that Congress could not punish drug trafficking that took place in the domestic territorial waters of other nations because of specific constitutional limitations on its enumerated powers. The Court reasoned that Congress lacked the power to declare such conduct illegal in the United States because international drug trafficking was not punishable as a violation of the Law of Nations:

> We need not decide whether the power granted to Congress under the Offences Clause changes with the evolution of customary international law because, under either approach, the result is the same. Drug trafficking was not a violation of customary international law at the time of the Founding, and drug trafficking is not a violation of customary international law today.

700 F.3d at 1253-54.

The Court of Appeals thus found the Maritime Drug Law Enforcement Act, 47 U.S.C. 70501 unconstitutional as applied. "Because drug trafficking is not a violation of customary international law, we hold that Congress exceeded its power, under the Offences Clause, when it proscribed the defendants' conduct in the territorial waters of Panama. And the United States has not offered us any alternative ground upon which the Act could be sustained as constitutional. As applied to these defendants, the Act is unconstitutional, and we must vacate their convictions." Id. at 1258.

In this case, Congress has likewise acted outside of its enumerated powers by criminalizing drug trafficking on board a United States registered airplane without limitation. First, although the statute criminalizes conduct "on board" an airplane registered in the United States, it does not require that the airplane be "in flight" or otherwise used in any airspace as a pre-requisite for jurisdiction. Second, the statute does not require that the plane's registration play any role in the offense. Third, the statute does not require that the drugs be destined for the United States. Fourth and finally, the statute does not require any other connection with this country whatsoever. [2]

Thus, defendant Dwight Knowles was charged without any allegation in the Indictment that the cocaine involved in the conspiracy was destined for the United States. By its express terms, the Indictment in this case alleges only that conduct in furtherance of the conspiracy occurred in the "Bahamas, Colombia, Haiti, Honduras, Venezuela, [and] the Dominican

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[2] By its express terms, the statute would reach the following hypothetical conduct: if a load of cocaine were hidden in a United States registered aircraft that was being towed on a highway in Europe from Italy to Germany, and the ultimate destination of the drugs was Turkey, federal prosecutors in any part of the United States could initiate a criminal prosecution against the participants.

Republic. See Indictment, DE 3. Congress' enumerated power to punish violations of the "law of nations" does not authorize the broad sweep of the statute as applied to this case.

In the *Bodye* decision, the Court found (notwithstanding that the Government did not raise the argument) that the "foreign commerce clause" as supplemented by the "necessary and proper clause" provided textual support for the statute. This Court, however, should reject that argument.

Pursuant to Article 1, Sec.8, cl. 3, Congress has the power to "regulate commerce with Foreign Nations." On its face, the clause authorizes only the regulation of United States commerce "with" foreign nations, not "between foreign nations." There is no allegation in this case that the cocaine shipment at issue was connected "with" the United States. Based upon a similar analysis, the Court of Appeals in United States v. Weingarten, 632 F.3d 60 (2d Cir. 2011) concluded that a statute criminalizing the transportation of a minor in foreign commerce for unlawful sexual activity did not extend to "travel occurring wholly between two foreign countries and without any territorial nexus to the United States." Weingarten, 632 F.3d at 71.

Likewise, the necessary and proper clause does not authorize an extension of Congressional power to conduct between foreign nations where none otherwise exists. In National Federation of Independent Businesses v. Sebelius, 132 S. Ct. 2566 (2012), the Supreme Court found that the individual mandate of the Affordable Care Act was not sustainable under the Necessary and Proper Clause. Chief Justice Roberts emphasized that the Clause grants no additional powers, but only allows Congress to exercise powers that are merely "incidental" to its enumerated powers:

> As our jurisprudence under the Necessary and Proper Clause has developed, we *2592 have been very deferential to Congress's determination that a regulation is "necessary." We have thus upheld laws that are " 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.' " *Comstock,* 560 U.S., at ——, 130 S.Ct., at 1965

> (quoting *McCulloch, supra,* at 413, 418). But we have also carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution. Such laws, which are not "consist[ent] with the letter and spirit of the constitution," *McCulloch, supra,* at 421, are not "*proper* [means] for carrying into Execution" Congress's enumerated powers. Rather, they are, "in the words of The Federalist, 'merely acts of usurpation' which 'deserve to be treated as such.' " *Printz v. United States,* 521 U.S. 898, 924, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997) (alterations omitted) (quoting The Federalist No. 33, at 204 (A. Hamilton)).

National Federation of Independent Businesses, 132 S.Ct. at 2592. See also United States v. Lopez, 514 U.S. 549 (1995)(Congress' enumerated power to regulate commerce does not authorize statute criminalizing possession of a firearm in a school zone).

In this case, there is no enumerated power to regulate commerce "among foreign nations" and the Necessary and Proper Clause does not authorize the extension of a power that does not exist *ab initio*. As a matter of both constitutional interpretation and statutory construction, this Court should not validate the charges in this case based upon the foreign commerce clause. [3]

3. **Due Process Is Also Violated By This Criminal Prosecution**

In addition to the enumerated powers limitation on Congressional authority, the Due Process Clause restrains legislative power. Thus, at a minimum, "in order to apply extraterritorially, a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair." United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011). Accord United States v. Medjuck, 156 F.3d 916, 918 (9th Cir. 1998).

Likewise, due process imposes a notice requirement with respect to domestic criminal

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[3] The involvement of a United States registered airplane is also an insufficient proxy to support this prosecution. The fact that a plane is registered in the United States does not authorize it to fly. Moreover, registration is not limited to citizens of the United States, but is available to foreign individuals and corporations. See https://www.faa.gov/licenses_certificates/aircraft_certification/aircraft_registry/register_aircraft/. Likewise, registration does not authorize flight. A United States registered plane can only fly when it has been authorized a "certificate of airworthiness." See https://www.faa.gov/aircraft/air_cert/airworthiness_certification/aw_overview/.

statutes. Lambert v. People of the State of California, 355 U.S. 225, 228 (1957)(holding criminal penalty for failure "register" after residing or staying in Los Angeles for more than five days was unconstitutional for failure to provide sufficient notice to an ordinary person). Similarly, in the context of extraterritorial criminal statutes, due process requires that "a defendant prosecuted in the United States "should reasonably anticipate being haled into court in this country." United States v. Shi, 525 F.3d 709, 722 (9th Cir. 2008). These principles have been noted by our own Court of Appeals in an international piracy case. See United States v. Ali, 718 F.3d 929, 943 (D.C. Cir 2014).

As one example of the application of these principles to a criminal case, in United States v. Sidorenko, 2015 WL 1814356 (N.D. Cal), the Court dismissed a wire fraud and bribery case where payments were made by one group of foreign nationals to another in connection with international passport standards. The alleged bribery payments were all made outside of the United States and the Court noted further that the Indictment did not allege any harm to United States' interests. The Court reasoned that more connection was required to satisfy due process. The Court also addressed the larger issue of criminalizing extraterritorial conduct in such a broad and undefined manner:

> Of course, the United States has some interest in eradicating bribery, mismanagement, and petty thuggery the world over. But under the government's theory, there is no limit to the United States's ability to police foreign individuals, in foreign governments or in foreign organizations, on matters completely unrelated to the United States.

Sidorenko at p. 7.

In this case, the Indictment does not allege any activity occurring inside of the United States. There is no allegation that any of the drugs were destined for the United States or that the interests of this country were otherwise implicated. Defendant Knowles is a Bahamian citizen, who was apparently living in Colombia, South America during the time frame of the conspiracy.

Thus, for the same reasons as articulated by the *Sidorenko* Court, this Court must dismiss the charges against him. The allegations in the Indictment are precisely the type of conduct that a reasonable person would not have foreseen as the basis for being "haled" into court in the United States. Thus, due process concerns likewise compels dismissal of the charges against defendant Knowles.

CONCLUSION

The issues presented by this motion are serious and the defense does not lightly ask this Court to determine that an Act Of Congress either: (1) does not apply extraterritorially; (2) is an unconstitutional exercise of Legislative power; or (3) its application violates due process. Nonetheless, under the legal principles set forth herein and the unique facts presented by the case, this Court should grant the defendant the relief requested.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent, via Electronic Case Filing, to Paul Joesph, Brian Sardelli, and Erin Cox, Trial Attorneys, Narcotic and Dangerous Drug Section, via this Court's ECF system, this 11th day of April 2016.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent, via email to Erin Cox and Paul Joseph, Charles Trial Attorneys, Narcotic and Dangerous Drug Section, and all other counsel of record, via the ECF notification system, this 6th day of April 2016.

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