UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES	:	14 Cr. 057 (BAH)
V.	:	
AUGUSTIN FLORES APODACA	:	
and	:	
PANFILO FLORES APODACA	:	
Defendants.	:	

DEFENDANT AUGUSTIN AND PANFILO FLORES-APODACA'S
MOTION TO DISMISS COUNT TWO OF THEIR RESPECTIVE INDICTMENTS

INTRODUCTION

Defendants Augustin Flores-Apodaca and Panfilo Flores-Apodaca individually and jointly move this Court to dismiss Count Two of their respective Indictments, which charge each with a violation of 18 United States Code, Section 924(c) – Possession of A Firearm In Furtherance Of A Drug Trafficking Offense. As set forth herein, the count must be dismissed because the offense has no extraterritorial application. Neither the plain language of the statute, nor any legislative history suggests – directly, indirectly, or otherwise – a Congressional intent to create criminal liability in a federal court in the United States for the possession of a firearm outside our national borders. In accordance with controlling Supreme Court precedent, the firearms charges must therefore be dismissed. See Morrison v. Australia National Bank, 561 U.S. 247, 255 (2010)("when a statute gives no clear indication of extraterritorial application, it has none"). Accord Kiobel v. Royal Dutch Petrol Company, 133 S.Ct. 1659 (2013)(neither plain language nor legislative history of Alien Tort Statute created extraterritorial jurisdiction for violation of statute); RJR Nabisco v. European Community, 136 S.Ct 2090 (2016)(the first step

in analysis is whether a statute "gives a clear, affirmative indication that it applies extraterritorially").

In addition, the Indictment fails to provide either defendant sufficient information to defend themselves against the charge. Defendant Augustin Flores-Apodaca is alleged to have possessed a firearm during the time frame July 2010 – May 2012 and defendant Panfilo Flores-Apodaca is alleged to have possessed a firearm during the **nine-year period** from January 2005 until March 2014. The Indictments do not identify what weapons were allegedly possessed by either defendant.

Moreover, the discovery provided in this case does not identify with any specificity the other pertinent details of the alleged possession, including where and when the weapons were possessed and whether they were used, carried or brandished, as alleged in the Indictments. Each defense counsel has sent a letter to the prosecutors requesting particularized information concerning these Counts, but the requests remain unanswered. Due process requires that a defendant have sufficient notice of the charges against him to prepare a defense and the Government's failure to provide this information warrants dismissal of the counts. United States v. Hillie, 2017 WL 61930 (D.D.C)(dismissing indictment that failed to apprise the defendant with sufficient detail as the nature of the charges against him).

RELEVANT CHARGES

Augustin Flores-Apodaca

Defendant Augustin Flores-Apodaca is charged in Count Two of the Indictment in criminal case 12 Cr. 116 as follows:

> From in or about July 2010, and continuing thereafter, up to and including May 2012, both dates being approximately and inclusive, pursuant to Title 18, United States Code, Section 3238, within the venue of the United States District Court for the District of Columbia, the defendants FAUSTO ISIDRO MEZA

> FLORES, also known as "Chapo Isidro," AUGUSTIN FLORES APODACA, also known as "El Nino," "El Barbon" and "El Ingeniero," and SALOME FLORES APODACA, also known as "Pelon" and "Finn" did knowingly and intentionally use, carry, and brandish a firearm, during and in relation to one or more drug trafficking crimes, to wit: the crimes charged in Count One, and did knowingly and intentionally possess a firearm in furtherance of such drug trafficking crimes.
>
> (Use of a Firearm, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i), 924(c)(1)(A)(ii), 924(c)(1)(B)(ii) and aiding and abetting in violation of Title 18, United States Code Section 2).

Count Two expressly references the provisions of 18 United States Code Section 3238, which is the extraterritorial venue statute. [1] Thus, by its express terms, the Indictment charges an offense which is alleged to have taken place outside of the United States.

Panfilo Flores-Apodaca

Defendant Panfilo Flores-Apodaca is charged in Count Two of the Indictment in criminal case 14 Cr. 057 as follows:

> From in or about January 2005, and continuing to and including the date of the filing of this Indictment, both being approximate and inclusive, the defendant PANFILO FLORES APODACA, also known as "Charmin," did knowingly and intentionally use, carry and brandish a firearm, during and in relation to one or more drug trafficking crimes, to wit: the crimes charged in Count One, and did knowingly and intentionally possess a firearm in furtherance of such drug trafficking offenses, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i), 924(c)(1)(A)(ii), 924(c)(1)(B)(ii).
>
> (Use of a Firearm, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i), 924(c)(1)(A)(ii), 924(c)(1)(B)(ii) and aiding and abetting in violation of Title 18, United States Code Section 2).

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[1] The section provides as that:

> The **trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district**, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

18 U.S.C. Section 3238 (emphasis added).

This Count charges only defendant Panfilo Flores-Apodaca with possession of a firearm and does not include any language indicating that the offense was carried out jointly with other persons – known or unknown – to the grand jury. Since this defendant never was present in the United States during the alleged time frame of the offense, the Indictment must charge him with the extraterritorial possession of a firearm.

FACTUAL BACKGROUND

In preparation for the filing of motions in this case, undersigned counsel undertook a thorough review of the charges against their respective clients and the information provided in discovery. As a result of this review, counsel recognized that the weapons offenses brought against each defendant were extremely vague and impossible to defend against. The crimes are alleged to have taken place over a significant amount of time: two years as to defendant Augustin Flores-Apodaca and nine years for defendant Panfilo Flores-Apodaca. Moreover, the firearm counts reference the drug trafficking conspiracies charged in Count One of the respective Indictments, which are alleged to have taken place in "Mexico, the United States, and elsewhere," thus making it impossible for the defense to know where and/or when the alleged crimes took place. In addition, although the Indictments allege that the defendants did "use, carry, and brandish" a firearm, there is no further specification as to these different means. The Indictment likewise fails to identify the type of weapon allegedly possessed by each defendant.

In order to prepare a defense to the charges, on June 16, 2017, counsel for defendant Augustin Flores-Apodaca and counsel for defendant Panfio Flores-Apodaca each wrote to the prosecutors in this case, requesting specific details about the weapons charges. A copy of those letters are attached hereto as Exhibit 1 and 2. As of the date of the filing of this motion, the defense has received no response to the requests.

LEGAL ANALYSIS

1. TITLE 18, UNITED STATES CODE SECTION 924(C) DOES NOT APPLY EXTRATERRITORIALLY

The starting point for any analysis of the extraterritorial application of the statute charged in this case is with its plain language. 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). By its express terms, Title 18, United States Code Section 924(c) does not authorize its extraterritorial application. This general principle applies with particular force to the facts of this case.

In Morrison v. Australia National Bank, 561 U.S. 247 (2010), the Supreme Court concluded that the provisions of the Securities Exchange Act did not apply to transactions that occurred outside the United States. The Court began its analysis by recognizing the long-standing principle that unless a statute says otherwise, it is meant to "apply only within the territorial jurisdiction of the United States." 561 U.S. at 255. The court reviewed and analyzed prior Circuit court precedent that had permitted the extraterritorial application of U.S. securities law and concluded that the criticisms of the inconsistent results

> seems to us justified. The results of judicial-speculation-made-law – divining what Congress would have if it would have thought of the situation before the Court – demonstrate the wisdom of the presumption against extraterritoriality. Rather than guess anew in each case, **we apply the presumption in all cases**, preserving a stable background against which Congress can legislate with predicable results.

Id. at 261 (emphasis added). The Court found that the plain language of the statute did not

authorize extraterritorial application of the law and dismissed the case.

This principle was applied in the Supreme Court's subsequent pronouncement in Kiobel v. Royal Dutich Petroleum Co., 133 S. Ct. 1659 (2013), which concluded that the Alien Tort Statute ("ATS") did not create a cause of action for alleged violations of international law concerning torture when the acts took place in a foreign nation. In reaching this decision, the Court again relied upon the "presumption" against extraterritorial application of federal statutes. The Court noted that even if the ATS created a cause of action for violation of international law, it was limited to acts that occurred within the territory of the United States and that there was "no support for the proposition that Congress expected causes of action to be brought under the statute for violations of the law of nations occurring abroad." Kiobel, 133 S.Ct. at 1667.

This principle was also the basis of the Supreme Court's ruling in RJR Nabisco v. European Community, 136 S.Ct. 2090 (2016) which considered whether the private cause of action contained in the Racketeer Influenced and Corrupt Organizations Act ("RICO") had extraterritorial application. The Court ultimately ruled that the act did not apply in the circumstances presented, but identified the following two step analysis for making the determination:

> At the first step, we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially. We must ask this question regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction. If the statute is not extraterritorial, then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's "focus." If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but **if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.**

RJR Nabisco, Inc. v. European Community, 136 S. Ct. at 2101(emphasis added).

The foregoing analysis applies with equal force to the analysis of whether a federal criminal statute has extraterritorial application. United States v. Vilar, 729 F.3d 62, 71 (2d Cir. 2013)("the Government is incorrect when it asserts the presumption against extraterritoriality for civil statutes . . . simply does not apply in the criminal context"). Accord United States v. Chau Fan Xu, 706 F.3d 965 (9th Cir. 2013)(analysis of extraterritorial application of criminal RICO statute is governed by Supreme Court holding in *Morrison v. National Australia Bank*).

In United States v. All Assets Held at Bank Julius, Civil Action No. 04-0798 (D.D.C., April 17, 2017)(Friedman, J), the district court applied the analysis in *Morrison* to conclude that the Hobbs Act did not have extraterritorial application when none of the alleged extortion took place in the United States.

As the following section demonstrates, the application of these rules to the crime of possession of a firearm in furtherance of a drug trafficking offense clearly demonstrates that it does not have extraterritorial application.

Title 18 United States Code Section 924(c)

The relevant portions of 924(c), are as follows:

924(c)(1)(A) . . . any person who, during and in relation to any drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence . . .

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentence to a term of imprisonment of not less than seven years;

924(c)(1)(B) If the firearm possessed by a person convicted of a violation of this subsection--

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

By its express terms, the statute does not make any specific reference to the possession of a firearm outside of the United States. Thus, there is no "clear, affirmative indication" that Congress intended the statute to apply extraterritorially. Moreover, under the analytical framework set forth in *RJR Nabisco*, the "relevant focus" of the crime – the possession of a firearm – took place in a foreign country and thus, the application of the statute to the defendants' conduct in this case would be an "impermissible extraterritorial application." A fulsome discussion as to why 18 United States Code Section 924(c) should not apply extraterritorially appears in a law review article entitled *Taking The Presumption Against Extraterritoriality Seriously In Criminal Cases After Morrison and Kiobel*, 72 Loyola University Law Journal (2013). A copy of the relevant section is attached hereto as Exhibit 3. [2]

Based upon the Supreme Court's controlling trilogy of cases, under the facts presented in this case, Count Two of the Indictments against defendant Augustin and Panfilo Flores-Apodaca must be dismissed.

[2] Notwithstanding the Supreme Court's decisions in *Morrison*, *Kiobel*, and *RJR Nabisco*, the district court in United States v. Abu Khatallah, 151 F.Supp.2d 115 (D.D.C. 2015) concluded that the charge of possession of a firearm during a crime of violence, had extraterritorial application. 151 F.Supp.2d at 122-23. The district court relied upon the Supreme Court's decision in United States v. Bowman, 260 U.S. 94 (1922) to conclude that the test for determining whether a criminal statute had extraterritorial effect was different from the issue presented in civil causes of action. The district court reasoned that such overseas application was satisfied when a criminal offense punishes conduct that: (1) directly harms the United States government; and (2) enough foreseeable overseas applications existed at the time of its enactment to warrant the inference that Congress intended it to apply to acts committed outside the United States. Id. at 129. Based upon this analytical framework the district court denied the motions to dismiss.

With all due regard for the district court's reasoning in *Abu Khatallah,* that decision is not binding on this Court. See Camreta v. Green, 563 U.S. 692, 709, n.7 (2011)(decisions of district court not binding on other district court judges in the same or other districts). The reasoning of *Abu Khatallah* is inconsistent with the Supreme Court's explicit holding in *Morrison* that the presumption against extraterritoriality applies to "all" cases and the test for determining extraterritorial application articulated in *RJ Nabisco.* The alleged possession of firearms in the charges against these defendants involve acts taken outside the territory of the United States.

2. COUNT TWO OF THE INDICTMENTS FAIL TO PROVIDE THE DEFENDANTS WITH SUFFICIENT NOTICE OF THE CHARGES AGAINST THEM

Federal Rule of Criminal Procedure 7(c)(1) states that an Indictment must be a "plain, concise, and definite written statement of the essential facts constituting the offense charged." Due process requires that a defendant have sufficient notice of the charges against him in order to prepare a defense. Russell v. United States, 369 U.S. 749, 761 (1962). An indictment must provide the defendant sufficient detail to allow him to prepare a defense, to defend against a subsequent prosecution for the same offense, and to ensure that he is prosecuted based upon the facts presented to the grand jury. See, e.g., Stirone v. United States, 361 U.S. 212, 218 (1960). The failure to craft an Indictment that comports with these basic constitutional guarantees is subject to dismissal.

In United States v. Hillie, 2017 WL 61930 (D.D.C), the district court reviewed the sufficiency of an indictment charging the defendant with multiple counts of child pornography and child sex abuse. The defendant moved to dismiss, claiming that there was an insufficient description of "when and where" the offenses allegedly took place because the only location identified in the Indictment was the District of Columbia and the counts charged alleged criminal conduct taking place over the course of three years. Hillie, at p.6. The Government opposed the motion, claiming that an Indictment is sufficient if it sets forth the "elements of the offense and sufficiently apprises the defendant of the charges." Id. at p.7. The Government also argued that the appropriate remedy if there was a need for greater specificity in the Indictment was the issuance of a bill of particulars. Id.

The district court resoundingly rejected these arguments. It concluded that:

> The indictment at issue here clearly fails to satisfy these basic constitutionally mandated principles. To recap, each of the child pornography-related counts that the government has filed against Hillie (Counts One through Seven of the indictment) provides only a verbatim recitation of the language of the criminal statute, devoid of any facts regarding the circumstances of Hillie's behavior and adorned only with the broadest possible references to time and place. Based on the indictment, one knows only that Hillie did something involving visual depictions of sexually explicit conduct of a minor "in the District of Columbia" during periods of time that span two to three years, and that the government has chosen to charge this alleged criminal activity (whatever it is) in a series of separate counts that appear to differ based solely on the overlapping time frames that relate to each count. The indictment is barren of factual averments regarding the what, where, or how of Hillie's conduct, and thus, a non-clairvoyant reader cannot possibly ascertain the substance of the government's accusations from the face of the charging instrument.

Id. at 9.

The district court also rejected the Government's argument that a bill of particulars could salvage the Indictment. The district court found that the Indictment was so deficient as to the manner and means and details of the offense charged that it was facially invalid and it was not possible to determine what conduct the grand jury had relied upon in returning the charge. "[T]he indictment defect at issue here goes beyond mere confusion about the evidentiary basis for the charges brought, and instead, relates to core constitutional concerns about the grand jury's actual findings." Id. at 16.

In this case, the charges against each respective defendant alleging a violation of 18 United States Code Section 924(c) are likewise facially defective. The counts contain only a boilerplate recitation of the criminal statute. The Indictments alleges conduct that took place during a multi-year time frame, in unspecified international locations, and there is no precision as to what weapons were possessed or whether the defendants "used, carried or brandished" the firearm(s). The defendants' good faith efforts to obtain this information from the Government were unsuccessful. It is inconsistent with due process to place the burden of obtaining sufficient

facts to defend a criminal case on the defense. That responsibility belongs to the prosecution. The defendants should not be forced to guess at their alleged criminal conduct in preparation for the upcoming trial. Under the totality of circumstances presented herein, dismissal of the firearm counts is an appropriate remedy.

CONCLUSION

For all of the reasons set forth in this memorandum, defendants Augustin and Panfilo Flores-Apodaca request that the motion to dismiss Count Two of their respective Indictments be granted.

Respectfully submitted,

Robert Feitel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendants' Motion To Dismiss Count Two of the Indictments was filed via ECF and sent to Jason Ruiz and Michael Waits, Narcotic and Dangerous Drug Section, 2 Constitution Square, N.W. Washington, D.C., and to Joseph King, counsel for co-defendant Panfilo Flores-Apodaca, this day 28th of June 2017.

Robert Feitel

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Robert Feitel