UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES	:	14 Cr. 057 (BAH)
v.	:	
AUGUSTIN FLORES APODACA	:	

Defendant.

DEFENDANT AUGUSTIN FLORES-APODACA MOTION *IN LIMINE* TO PRECLUDE INTRODUCTION OF POST-ARREST TITLE III INTERCEPTS

INTRODUCTION

Defendant Augustin Flores-Apodaca respectfully moves this Court to preclude the introduction of the Title III intercepts against him at the trial of this case. The defendant is charged with: (1) a drug trafficking conspiracy that allegedly existed from January 2000 until May 2012; and (2) a possessory weapons offense that allegedly took place from July 2010 until May 2012. Augustin was arrested in Mexico on July 24, 2012 and the wiretap did not commence until February 2013 – after the time frame of the charges contained in the Indictment against him. Even assuming *arguendo* that the drug conspiracy continued after his arrest, by the time the wiretap was initiated, there is a presumption that he had withdrawn from the conspiracy. See United States v. Escobar, 842 F.Supp. 1519, 1528 (E.D.N.Y. 1994)("rebuttable presumption" that defendant's arrest constitutes withdrawal from conspiracy).

The Government's own evidence confirms this presumption. The prosecution acknowledges that the defendant was not intercepted during the twenty-three month wiretap investigation. Likewise, the prosecution has not alleged any other action in furtherance of the conspiracy taken by defendant Augustin Flores-Apodaca after his incarceration. Accordingly, the contents of the wiretap intercepts are inadmissible hearsay and cannot be introduced against him.

Bourjaily v United States, 483 U.S. 171. 175-176 (1987)(before co-conspirator statement can be admitted at trial, the district court must find by a preponderance of the evidence that: (1) a conspiracy existed; (2) that the defendant and declarant were members of that conspiracy and; (3) that the statement was made in furtherance of that conspiracy.

FACTUAL BACKGROUND

Defendant Augustin Flores-Apodaca is charged in a two count Indictment with: (1) Conspiracy to distribute various controlled substances, knowing and intending that they would be unlawfully imported into the United States; and (2) Possession of A Firearm In Furtherance of a drug trafficking offense. The Government's evidence with respect to this defendant focuses on three drugs seizures: (1) two pounds of methamphetamine on September 1, 2010 in Utah; (2) thirty-three pounds of methamphetamine and four kilograms of cocaine seized on September 2, 2010 in Washington state; and (3) 2,800 kilograms of marijuana seized in Nogales, Mexico on June 10, 2011. The Government has implied that it will present the testimony of several cooperating witnesses who discussed these drug shipments with Augustin, as well as some consensually recorded telephone conversations and some limited blackberry communications that allegedly connect him to these events. All of these events took place before his arrest in Mexico on July 24, 2012. At the time of his arrest, the defendant was taken to a remote location, where he was beaten and tortured so badly that he ultimately lost vision in his right eye and suffered injuries to his head, jaw, and thorax. The Mexican police made death threats against the defendant's family and that his wife and mother would be raped by the police officers.

The Government thereafter commenced a long-term wiretap investigation against what it defined as that "Meza-Flores Drug Trafficking Organization." The interceptions began in February 2013 and continued through January 2015. During the course of the wiretap,

communications from approximately fifty-nine blackberry devices were intercepted. The Government has provided the defense with more than twelve thousand intercepted written communications and none of them are alleged to have been written by, or on behalf of, defendant Augustin Flores-Apodaca.

LEGAL ANALYSIS

Under federal law, a conspiracy exists when two or more persons agree to commit some unlawful purpose. Ocasio v. United States, 136 S.Ct. 1423, 1429 (2016). Every member of a conspiracy becomes responsible for the acts and declarations of his confederates made during the course of, and in furtherance of, the joint criminal venture. Pinkerton v. United States, 328 U.S. 640, 646 (1946). This principle is embodied in Federal Rule of Criminal Evidence 801(d)(2)(E), which provides that statements made by a co-conspirator during the course of, and in furtherance of a conspiracy are not hearsay and are admissible against other members of the conspiracy.

Such statements, however, are not admissible against a defendant who has withdrawn from a conspiracy. See Smith v. United States, 568 U.S. 106, 111 (2013)("[w]ithdrawal terminates the defendant's liability for post-withdrawal acts of his co-conspirators . . . . "). While the defendant bears the burden of producing evidence to support such withdrawal, United States v. Sitzmann, 74 F.Supp.3d 96, 106 (D.D.C. 2014), there is a presumption that incarceration ends a co-conspirator's participation. United States v. Escobar, 842 F.Supp. 1519, 1528 (E.D.N.Y. 1994). In United States v. Hoskins, 2011 WL 3359634 at p. 2 (E.D.Mich), the Court noted that "the arrest of a conspirator is normally decisive" as to withdrawal from the conspiracy.

This rule finds its basis in common sense notions of how criminal organizations operate. The Court of Appeals in United States v. Borelli, 336 F.2d 376, 390 (2d Cir. 1964) wryly observed the "unlikelihood of the other conspirators relying for further aid on a person known to

be confined for the very offense in which they were engaging makes such confinement a sufficient 'affirmative act' to sustain the defense of withdrawal." Once the defendant adduces evidence to support the presumption, the Court may then analyze "the evidence presented by the Government to show the continued participation by the defendant after incarceration." United States v. Hemstead, 2017 WL 401938 at p.2 (D.Conn)(internal quotations omitted).

In this case, it is undisputed that the defendant was arrested in July of 2012. The Government has never adduced any information to the defense – or otherwise suggested - that any evidence exists which would demonstrate defendant Augustin Flores-Apodaca's continuing participation in the conspiracy after his arrest. To the contrary, the Government acknowledges that he was not intercepted during the Title III interception – and indeed, the prosecution has stated that it did not intend to use the intercepted communications against him if he was the sole defendant in the case. The Government has not alleged any other post-arrest actions by the defendant in furtherance of the alleged drug conspiracy. Given the defendants' torture and the threats made against him family, there is additional reason to believe that he withdrew from any alleged conspiracy and that the Title III intercepts are not admissible against him at the trial. [1]

CONCLUSION

For all of these reasons, defendant Augustin Flores-Apodaca respectfully moves this

[1] The defendant's withdrawal from the conspiracy would likewise prevent the introduction against him of any other co-conspirator acts or declarations made after the date of his arrest.

Court to grant this motion to preclude the Government from introducing the contents of the Title III wiretap against him.

An appropriate draft Order is attached hereto.

Respectfully submitted,

Robert Feitel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendants' Motion In Limine To Prevent the Government from using the Title III wiretaps against him were 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