UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLOMBIA

UNITED STATES OF AMERICA,

14 CR. 0057 (BAH)

v.

AGUSTIN FLORES APODACA

AND

PANFILO FLORES APODACA

Defendants.
_____/

DEFENDANT AUGUSTIN AND PANFILO FLORES APODACA
JOINT MOTION FOR PRETRIAL HEARING OF ADMISSIBLITY
OF ALLEGED CO-CONSPIRATOR STATEMENTS

The Defendants, Agustin Flores Apodaca and Panfilo Flores Apodaca respectfully move this Court to conduct a hearing in order to make a pre-trial determination as to the duration and participation of each defendant in the alleged conspiracy and to determine the admissibility of any statements of alleged co-conspirators pursuant to Fed. R. Evid. 801(d)(2)(E).

FACTS

Augustin Flores Apodaca

On May 2, 2012, the government filed a two count indictment charging the defendant Augustin Flores Apodaca with: (1) one count of Conspiracy from January 2000 until May 2012, to distribute various controlled substances, knowing and intending that they would be imported into the United States, in violation of 21 U.S.C. §§ 959, 960 and 963; and (2) one count of Possession Of A Firearm During in Relation to One or More Drug Trafficking Crimes, in violation of varied subsections of 18 United States Code, Sections 924 and 2.

On July 20, 2012, based upon a United States request, Augustin was arrested in Mexico, where he was tortured by Mexican authorities, resulting in the loss of eyesight in one eye, loss of hearing, and other permanent injuries. The Defendant was incarcerated in Mexican prisons for more than 3 years and in 2015 was finally extradited to the United States.

Panfilo Flores Apodaca

Panfilo Flores Apodaca, was separately indicted in this District almost two years later on March 13, 2014. His Indictment contains similar, but not identical, charges to those brought against Augustin. Thus, Panfilo is charged with: one count of Conspiracy from January 200 until March 2014, to distribute various controlled substances, knowing and intending that they would be imported into the United States, in violation of 21 U.S.C. §§ 959, 960 and 963; and (2) one count of Possession Of A Firearm During in Relation to One or More Drug Trafficking Crimes, in violation of varied subsections of 18 United States Code, Sections 924 and 2.

Panfilo was arrested in Mexico and thereafter extradited to the United States. This Court ordered joinder of the brothers' cases for trial, which is currently scheduled to commence September 2017. *Id*. Minute Order January 6, 2017.

The Alleged Conspiracy

The extradition materials for both defendants focus on the same alleged series 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 suggests that it will present the testimony of several cooperating witnesses with knowledge of these events. In addition, with respect to Augustin Flores Apodaca,

the Government has several consensually recorded conversations and some limited blackberry communications that allegedly connect him to the drug seizures. All of the evidence directly concerning Augustin Flores Apodaca, however, related to events that took place before his arrest in July 2012.

With respect to Panfilo Flores Apodaca, the evidence is equally truncated. The Government has been conducting a full-scale investigation of what it refers to as the MEZA-FLORES DRUG TRAFFICKING ORGANIZATION since 2009, which included the use of confidential informants, surveillance, consensually recorded conversations and other law enforcement techniques. Based upon counsel's review of discovery, it appears that these witnesses – who were cooperating with the Government as early as 2009 – did not mention Panfilo Flores Apodaca's alleged involvement in the drug conspiracy until almost three years later.[1] Thus, while the Government allegedly has a cooperating witness who will testify that Panfilo was involved in drug trafficking beginning in approximately 2009, the majority of the evidence against him consists of the blackberry communications that were intercepted between February 2013 and January 2015.

Finally, even though each defendant is charged in a drug conspiracy that allegedly commenced in the year 2000, the Government has not provided any discovery concerning events that took place before 2010. For all of these reasons, a pre-trial hearing to determine the time frame of the conspiracy and the admissibility of alleged co-conspirator statements is warranted in this case.

[1] Defendant Panfilo Flores Apodaca was not indicted until 2014 – two years after his brother.

LEGAL ANALYSIS

Membership In The Charged Drug Conspiracy

In order to establish a defendant's membership in a criminal conspiracy, the Government must prove that the conspiracy existed and that the defendant undertook some act to join the conspiracy with knowledge of its objectives. See , e.g., *United States v. Childress*, 746 F.Supp. 1122, 1127-30 (D.D.C. 1990). Moreover, mere knowledge is insufficient to establish membership in a conspiracy. *In Re Vitamins Antitrust Litigation*, 320 F.Supp.2d 1, 16 (D.C. 2004). Moreover, "[m]ere foreseeability is not enough: someone who belongs to a drug conspiracy may well be able to foresee that his co-venturers, in addition to acting in furtherance of his agreement with them, will be conducting drug transactions of their own on the side, but he is not automatically accountable for all of those side deals. United States v. Saro, 24 F.3d 283, 288 (D.C. 1994). It is the scope of the agreement with his co-conspirators and the agreement to join that criminal activity that establishes vicarious liability under conspiracy law. United States v. Childress, 746 F.Supp. 1122, 1126 (D.D.C. 1990).

Thus, with respect to drug trafficking charges at issue in this case, the Government must show that each defendant joined a conspiracy to knowingly or intentionally distribute cocaine with the knowledge or intent that it would be imported into the United States.

Pre-Trial Determination of Co-Conspirator Statements

Federal law creates an exception to the rule against hearsay for statements made during and in furtherance of a conspiracy. Thus, Federal Rule of Evidence 801 (d)(2)(E) provides that a statement is not hearsay if it is offered against a party and is a statement made by a co-conspirator or party during the course of and in furtherance of the conspiracy. The co-

conspirator or party must have made the statement "in the course of and in furtherance of the conspiracy." *See Bourjaily v. United States*, 483 U.S. 171 (1987).

Before the statement is admissible at trial, however, 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. *Bourjaily v United States*, 483 U.S. 171. 175-176 (1987). In making this determination, the district court must find "independent evidence of the conspiracy apart from the statement, although the content of the statement itself can also be considered in determining whether such independent evidence exists". United States v Gatling, 96 F.3d 1511, 1520 (D.C. Cir. 1996). It is "better practice" is for the trial court to make these determinations before the statements are presented to the jury. *United States v Jackson*, 627 F.2d 1198, 1218 (D.C. Cir. 1980). The reason why this practice is preferable is obvious; there is a danger that the co-conspirator statements will be improperly admitted and result in prejudice to the defendant and a possible mistrial. See *United States v. Ferra*, 900 F.2d 1057, 1059 (7th Cir. 1990)("a court ought not routinely build into the case a feature that will force the defendant to move for mistrial in order to make a simple objection to the admission of evidence").

In this case, there are substantial reasons to conduct such a pre-trial hearing. First, the Government needs to establish how it intends to prove a conspiracy against these defendants that allegedly began in 2000, when the only evidence that has been provided to the defense consists of events that took place ten years later.

Second, there is reason to doubt that the Government can connect defendant Panfilo Flores Apodaca to the two drug seizures in the United States in September of 2010 and/or the marijuana seizure in Mexico in June 2011. Although the Government has recorded conversations

that allegedly involve defendant Augustin Flores Apodaca speaking with informants, there is no mention in any of the conversations of Panfilo's involvement in these matters. As previously noted, none of the Government's witnesses mention Panfilo's alleged involvement until years later.

Third, defendant Augustin Flores Apodaca's arrest in July of 2012 constituted his withdrawal from the conspiracy and thus, no statements made thereafter could be admissible against him. See *Escobar v. United States*, 842 F.Supp. 1519 (E.D.N.Y. 1994). This legal issue is addressed at greater length in defendant Augustin Flores Apodaca's *Motion In Limine*, which is being contemporaneously filed with the Court.

Finally, the materials submitted by the Government in support of both defendants' extradition to the United States make repeated reference to the alleged relationship between these defendants and a group identified as the BELTRAN LEYVA DRUG TRAFFICKING ORGANIZATION ("BLDTO"). Alfredo Beltran Leyva, an alleged member of this organization was charged in this jurisdiction and was recently sentenced to life in jail by Judge Leon in case 12 Cr. 184. The Government has not provided any specific discovery concerning the BLDTO and the defense does not believe that any activity by that separate criminal organization would be admissible at the trial of this case. In order to proceed to trial with certainty concerning these matters, however, a pretrial hearing would be necessary.

CONCLUSION

For all of these reasons, the defense requests that this Court conduct a pre-trial hearing as to the admissibility of co-conspirator statements. [2]

Respectfully submitted,

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[2] In the alternative, at least one judge in this district has noted with approval, the practice of requiring the Government to submit a "written proffer setting forth its basis for the admissibility of any coconspirator statements that the government intends to introduce at trial." See United States v. Bazezew, 783 F.Supp.2d 160, 166 n.8 (D.D.C. 2011).

CERTIFICATE OF CM/ECF SERVICE

I HEREBY CERTIFY that on, June 28, 2017, I filed with the Court's ECF System, the attached motion for a Pretrial Determination of the Admissiblity of Co-Conspirator Statements to Jason Ruiz and Michael Waits, Trial Attorneys, Narcotic and Dangerous Drug Section, and to Joseph King, counsel for co-defendant Panfilo Flores Apodaca

Robert Feitel

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