UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT AUGUSTIN FLORES-APODACA'S
MOTION TO STRIKE IMPROPER ALIASES

INTRODUCTION

Defendant Augustin Flores Apodaca respectfully moves this Court to strike from the Indictment and the transcripts of recorded conversations (prepared by the Government) the references to the defendant with the aliases "El Nino;" "El Barbon;" and/or "El Ingeniero." As set forth herein, the assignment by the Government of an alias to defendant Augustin Flores-Apodaca is unfairly prejudicial and not supported by the evidence in this case. This Court has the authority to strike the aliases from both the Indictment and the transcripts.

RELEVANT FACTS

The Superseding Indictment in this case charges defendant Augustin Flores-Apodaca with one count of being a member of an international drug conspiracy and one count of possession of a firearm in relation to a drug trafficking offense. Immediately below his true name in the caption of the Indictment and in each of the two counts the following alleged aliases are noted:

El Nino (the boy)
El Barbon (the bearded one)
El Ingeniro (the engineer)

Similarly, the Government has provided the defense with draft transcripts of consensually recorded phone conversations with cooperating witnesses. The transcripts assign the alias "El Nino" to the defendant. Based upon counsel's review of the discovery in this case, there is no reason to believe that any of these names constitute an "alias" for the defendant.

LEGAL ANALYSIS

Federal Rule of Criminal Procedure 7(d) provides that upon defendant's motion the Court may strike surplusage from an Indictment. Courts generally disapprove of including aliases in the indictment as an ordinary course and have held that their use should be curbed. See United States v. Wilkerson, 456 F.2d 57, 59 (6th Cir. 1972). An alias may be used when the Government intends to introduce evidence that an alias exists and the use of that alias is necessary to identify the defendant in connection with the acts charged in the indictment. United States v. Clark, 541 F.2d 1016, 1018 (4th Cir. 1976). If the Government is unable to demonstrate the relevancy of an alias, it may be stricken from the indictment. Id. at 1018; See also United States v. Ramos, 839 F. Supp. 781, 788 (D. Kan. 1993)(striking aliases from the defendant's indictment in a pretrial motion because the Government did not show that the aliases were used in a way to identify the defendant in connection with the acts); United States v. Ramos, 839 F.Supp. 781, 788 (D.Kan.1993)(the Court struck the aliases from the defendant's indictment because the Government did not show that the aliases were used in a way to identify the defendant in connection with the acts committed in the case).

The Improper Use Of Aliases In The Indictment

In this case, it does not appear that defendant Augustin Flores-Apodaca used or was known by the aliases contained in the Indictment. Likewise, the Government cannot claim that the inclusion of the aliases in the Indictment is necessary to identify the defendant or that they

are necessary to connect him to the charged criminal offenses. It is the practice in this jurisdiction to leave a copy of the Indictment with the jurors during deliberation, which would create a significant potential for unfair prejudice if the aliases remain included in the document. See, e.g., United States v. Roy, 473 F.3d 1232 (D.C. Cir. 2007)(unredacted Indictment containing reference to defendant' two prior felony convictions mistakenly sent to jury during deliberations). Therefore, the aliases should be struck from the Indictment.

The Improper Use Of Aliases In Draft Transcripts

The Government has provided the defense with draft transcripts of approximately four recorded conversations of phone calls allegedly made between defendant Augustin Flores-Apodaca and cooperating witnesses. The transcripts each contain a "heading" that identifies one of the participants as: ***Augustin Flores Apodaca aka Nino.*** For example, the draft transcript of a conversation dated September 8, 2010 includes the reference in the heading to the alias "El Nino," but that name is never mentioned in the conversation. A review of the other draft transcripts reveals that defendant Augustin Flores-Apodaca is not referred to as "El Nino" during any of the conversations. [1]

Rather, it appears that this so called "alias" is the Government's own invention, since there is no evidence that anyone involved in the alleged conspiracy knew him as *El Nino*. Accordingly, the Government should not be permitted to include any of the so-called "aliases" as a reference to the defendant in the written transcripts.

Federal Rule of Evidence 403 specifically authorizes this Court to preclude the introduction of evidence when its probative value is outweighed by the danger of unfair

[1] Each of the tapes also contains an introductory statement by an FBI agent asserting that the recorded conversation will be between a confidential "source" and Augustin Flores-Apodaca, also known as "El Nino, El Barbon and El Ingeniero." The Government has previously agreed to delete this statement from the final transcripts and to excise that portion of the recording before it is introduced into evidence at the trial of this case.

prejudice. The probative value of the alleged alias is *de minimis*, but the mere suggestion by the Government that the defendant used or was known by the alias *El Nino* (or any other alias) is unfairly prejudicial as it suggests some nefarious need for a secret or hidden name by the defendant to hide his true identity from law enforcement.[2] In the alternative, a jury might improperly conclude that the alias was relevant to membership in the charged conspiracy. The Government's unilateral inclusion of the alias *El Nino* in the draft transcripts is without any basis in the evidence of this case and should be stricken.

CONCLUSION

For all of these reasons, defendant Augustin Flores-Apodaca respectfully moves this Court to grant this motion and to strike the improper aliases from the Indictment and from any transcripts provided to the jury during the trial of this case. An appropriate draft Order is attached hereto.

Respectfully submitted,

Robert Feitel

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[2] There is a difference between a defendant's nickname and an alias. The Government apparently assumes in every case that any reference to a defendant other than by his true name is somehow worthy of being designated as an "alias," with all of its attendant negative connotation. For example, in a conversation that allegedly took place on February 13, 2012 between the defendant and a government informant, the informant refers to the defendant as "ingeniero" or engineer. Since the defendant had training as a civil engineer, the use of the honorific is in the nature of a title, not an alias.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendants' Motion To Strike Improper Aliases 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