

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :  
 :  
 v. : Crim. No. 88-484-1  
 :  
 CARLOS ALBERTO DIAZ-GOMEZ :  
 a/k/a CARLOS DIAZ :

**MEMORANDUM AND ORDER**

BECHTLE, J.

December , 2000

Presently before the court is defendant Carlos Alberto Diaz-Gomez's Motion to Dismiss Superseding Indictment Pursuant to Fed. R. Crim. P. 12(b)(1) and the Government's Response thereto. For the reasons set forth below, the court will deny the motion.

**I. BACKGROUND**

On September 7, 1988, agents of the United States Customs Service ("Customs") and Drug Enforcement Agency ("DEA") in Philadelphia intercepted a shipment of cocaine originating from Buenos Aires, Argentina. (Government's Mem. of Law in Resp. to Def.'s Mot. to Dismiss ("Gov.'s Resp.") at 1.) According to the Government, the co-signee of the shipment was Andes Trading Company, a New York partnership of Carlos Alberto Diaz-Gomez<sup>1</sup> ("Diaz" or "Defendant") and Roberto Alcaino,<sup>2</sup> a co-defendant. Id. at 2. The DEA notified Argentine authorities, who arrested Defendant on the same day that Alcaino was arrested in New York.<sup>3</sup>

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<sup>1</sup> A.K.A. Carlos Diaz

<sup>2</sup> A.K.A. Roberto Alcaino-Baez.

<sup>3</sup> The Argentine charges against Defendant translate as something similar to "contraband simple aggravated due to the

(Def.'s Mem. of Law in Supp. of Mot. to Dismiss Superseding Indictment Pursuant to Fed. R. Crim. P. 12(b)(1) ("Def.'s Mot. to Dismiss") at 2 & Ex. B; Gov.'s Resp. at 2.) Alcaino was indicted in the United States on October 6, 1998 for illegally importing cocaine. (Def.'s Mot. to Dismiss Ex. C; Gov.'s Resp. at 2.)

In late October of 1988, Assistant United States Attorney Ewald Zittlau ("AUSA Zittlau"), the prosecutor in this case, traveled to Buenos Aires, Argentina along with DEA Special Agent Frank Marrero and Customs Special Agent Julio Velez. (Gov.'s Resp. at 2.) While there, they met with Argentine authorities to review evidence seized by the Argentina federal police and determine what evidence could be used in the United States' investigation and prosecution regarding the importation of cocaine into Philadelphia. Id. They also obtained background information about three persons arrested in Argentina in connection with the cocaine shipment. Id. Among the Argentine Authorities that they met with were: Argentine federal judge Luis Gustavo Losado, the presiding judge in Defendant's Argentine trial; Argentina Federal Police Commisario Ruben Escalante; and Juan Isola of Argentine Customs. Id. Later that month, Judge

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intervention of more than three (3) persons dealing with narcotics destined unequivocally to be commercialized in the exterior based on the resulting fact of improper exportation of more than a ton of cocaine chloro-hydrate." (Def.'s Mot. to Dismiss Ex. D.) Given the obvious difficulty involved in interpreting Argentine law, the court declines to base any part of its ruling on Blockberger grounds, i.e. that double jeopardy cannot attach where one charge requires proof of an element that the other charge does not. See Blockburger v. United States, 284 U.S. 299, 304 (1932) (stating rule).

Losado and Commisario Escalante visited the United States for the same purpose.

In November 1988, Judge Losado issued Letters Rogatory to the United States requesting that the testimony of various witnesses in the United States be taken on behalf of Argentine authorities and that samples of physical evidence seized in the United States be provided to the Argentines. Id. Subsequently, AUSA Zittlau applied to be appointed commissioner to obtain the evidence requested by Argentina. Id. at 3-4. However, United States Magistrate Judge William F. Hall, Jr. was appointed to obtain the evidence. Id. at 4. In February and April of 1989, Magistrate Hall, pursuant to questioning by AUSA Zittlau, took the questioning of witnesses as requested by the Letters Rogatory. Id.

On August 31, 1989, Defendant was indicted in the United States on charges of: conspiracy in violation of 21 U.S.C. § 963; importation of cocaine under 21 U.S.C. §§ 952(a), 960(a)(1) & (b)(1)(B); and aiding and abetting in violation of 18 U.S.C. § 2. (Def.'s Mot. to Dismiss at 1 & Ex. A.) Specifically, the indictment charges that Defendant participated in a scheme to ship cocaine from Argentina by sea to the United States between January 1987 and September 1988. Id. Ex. A.

In early September 1989, AUSA Zittlau submitted an extradition request to Argentina for Defendant and two other individuals. Id. Ex. L; Gov.'s Resp. at 4. Argentina denied the request because, under a treaty with the United States, Argentina

was not required to extradite its own nationals. (Gov.'s Resp. at 4.)

It is not clear when Defendant was convicted in the Argentine proceedings. In any event, Defendant received a sentence of fourteen years in prison, which was later reduced to twelve years. (Def.'s Mot. to Dismiss at 3.) According to the Government, Defendant served his sentence from the date of arrest until September 14, 1994. (Gov.'s Resp. at 5.) Defendant states that he was not released until November 26, 1995. (Def.'s Mot. to Dismiss at 3.)

Defendant asserts that, after his release, he spent four months in Belgium assisting the United States Government in its investigation of other drug activities. Id. at 4-5. According to the Government, Defendant unexpectedly appeared at the DEA office in Belgium and met with DEA Special Agent Keith Leighton on April 5 and 6, 1999 to provide drug-related information. (Gov.'s Resp. at 5.) Leighton, after running a records check and communicating with DEA's Philadelphia office, subsequently determined that Defendant was a fugitive. Id. According to the evidence proffered by the Government at the evidentiary hearing on the instant motion, DEA had no contact with Defendant and only general reports of his whereabouts until learning in August 1999 that he was in Ecuador. That month, Defendant was arrested in Ecuador for possession of a false passport. (Def.'s Mot. to Dismiss at 5; Gov.'s Resp. at 5.)

DEA Agent Paul Richart traveled to Ecuador to seek

Defendant's extradition to the United States. (Gov.'s Resp. at 5.) This request was denied. Id. However, on August 25, 2000, the Ecuadorian government expelled Defendant to Colombia because it determined that Defendant had illegally entered Ecuador from Colombia. Id. Upon arriving in Colombia, Defendant was provisionally arrested and then extradited to the United States on October 12, 2000 at the request of AUSA Zittlau. Id.

An evidentiary hearing on the instant motion was held on December 7, 2000, at which time the court heard the testimony of DEA Special Agents Leighton, Richart, Marrero, Ricardo Ramos and Ernest Batista, and Customs Special Agent Velez.

## **II. LEGAL STANDARD**

Rule 12(b)(1) of the Federal Rules of Criminal Procedure requires that all "defects in the institution of the prosecution" be raised by pretrial motion. Fed. R. Crim. P. 12(b)(1); United States v. Voigt, 89 F.3d 1050, 1067 (3d Cir. 1996). The Rule cautions that, in ruling on a motion to dismiss the indictment, the trial court should consider only those objections that are "capable of determination without the trial of the general issue." United States v. Donsky, 825 F.2d 746, 751 (3d Cir. 1987). The allegations of the indictment are assumed to be true. United States v. Kemmel, 160 F. Supp. 718, 721 (M.D. Pa. 1958).

### III. DISCUSSION

The instant motion alleges: (1) that the present proceeding is a "sham" prosecution in violation of the Double Jeopardy Clause because of the prior prosecution and conviction in Argentina involving the same conduct; and (2) prosecutorial vindictiveness in violation of the Due Process Clause.<sup>4</sup>

#### A. **Double Jeopardy**

In general, prosecutions of a defendant by separate sovereigns, no matter how similar in character, do not violate the Fifth Amendment's Double Jeopardy Clause. United States v. Trammell, 133 F.3d 1343, 1349 (10<sup>th</sup> Cir. 1998); United States v. Guzman, 85 F.3d 823, 826 (1<sup>st</sup> Cir. 1996). However, in Bartkus v. Illinois, the Supreme Court appeared to carve out an exception to this rule, stating that the double jeopardy clause may be violated where a sovereign has brought its prosecution merely as a "tool" of the other, making the second prosecution a "sham and cover" for the first. Bartkus, 359 U.S. 121, 123-24 (1959); United States v. Berry, 164 F.3d 845, 846-47 (3d Cir. 1999); Trammell, 133 F.3d at 1349. To the extent that the federal courts of appeals have recognized the Bartkus exception, they have construed it narrowly.<sup>5</sup> The exception applies only where

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<sup>4</sup> The Fifth Amendment to the United States Constitution provides, in relevant part, that "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

<sup>5</sup> The Third Circuit has recognized the potential existence of an exception to the dual sovereignty rule under

"one sovereign so thoroughly dominates or manipulates the prosecutorial machinery of another that the latter retains little or no volition in its own proceedings." Guzman, 85 F.3d at 827 (citing United States v. Baptista-Rodriguez, 17 F.3d 1354, 1361 (11<sup>th</sup> Cir. 1994); United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, 954 F.2d 29, 38 (2d Cir. 1992); Raymer, 941 F.2d at 1037; In re Kunstler, 914 F.2d 505, 517 (4<sup>th</sup> Cir. 1990); United States v. Liddy, 542 F.2d 76, 79 (D.C. Cir. 1976)).

The law is unsettled with regard to a defendant's burden of proof under the Bartkus exception. Some courts intimate that the defendant bears the burden of proving that one sovereign dominated the other's acts. See, e.g., Trammell, 133 F.3d at 1349; Raymer, 941 F.2d at 1037; Liddy, 542 F.2d at 79. Others have held that the defendant need only demonstrate prima facie evidence of a sham prosecution, at which point the burden shifts to the government to prove that one sovereign was not the tool of the other. Guzman, 85 F.3d at 827; Baptista-Rodriguez, 17 F.3d

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Bartkus, but has never applied it to overturn a second prosecution. Berry, 164 F.3d at 847 (citing United States v. Bell, 113 F.3d 1345, 1351 n.6 (3d Cir. 1997)). Since the Bartkus decision, the court is aware of only one federal case in which the exception has been applied to grant relief; United States v. Belcher, 762 F. Supp. 666, 670-71 (W.D. Va. 1991). A number of courts have questioned its continued validity. See Trammell, 133 F.3d at 1349-50 (noting that exception has never been applied by that court to grant relief); United States v. Raymer, 941 F.2d 1031, 1037 (10<sup>th</sup> Cir. 1991) (noting that exception "might" exist); United States v. Paiz, 905 F.2d 1014, 1024 (7<sup>th</sup> Cir. 1990) (doubting existence of exception and noting that courts have uniformly rejected its use).

at 1360.

The court concludes that even if there is a valid exception to the dual sovereign rule under Bartkus, and regardless of which burden of proof applies, the instant prosecution is not barred by the double jeopardy clause. There is nothing in the record suggesting that the United States so thoroughly dominated the Argentine investigation and prosecution of Defendant that Argentina could be said to have retained little or no control over its own proceedings. At most, the evidence proffered at the evidentiary hearing demonstrated a high degree of cooperation and coordination between the United States and Argentina in their respective investigations of the cocaine shipping scheme. To be sure, DEA agents were present during arrests and searches executed by Argentine authorities, and also provided information that was presumably important to the Argentine investigations. However, the evidence established that any activities undertaken by agents of the United States in Argentina were done solely at the discretion of the Argentine government. Furthermore, although defense counsel attributes importance to the fact that AUSA Zittlau aided in obtaining evidence for the Argentine government in the United States, this was done at the request of the Argentine government pursuant to United States law. See 28 U.S.C. § 1782 (providing procedure for assistance to foreign tribunals). There is nothing unusual about this procedure.<sup>6</sup> The

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<sup>6</sup> The court notes, and defense counsel acknowledged at the evidentiary hearing on the instant motion, that cooperative

fact that this evidence may have been used by the Argentine government in its prosecution of Defendant is irrelevant. Thus, even if Defendant's evidence could be said to establish a prima facie case that the instant prosecution is a "sham," the government has proven that Argentina did not act as a "tool" of the United States when it prosecuted Defendant. Accordingly, double jeopardy does not apply to bar the instant prosecution.

#### **B. Prosecutorial Vindictiveness**

The defendant bears the burden of proving prosecutorial vindictiveness. United States v. Paramo, 998 F.2d 1212, 1220 (3d Cir. 1993) (citing United States v. Schoolcraft, 879 F.2d 64, 68 (3d Cir. 1989)). There are two ways that a defendant can prove vindictiveness. First, a defendant may proffer evidence of a prosecutor's retaliatory motive to prove actual vindictiveness. Id. Second, under some circumstances, a defendant may prove facts that give rise to a presumption of vindictiveness. Id. The presumption is a prophylactic rule designed to protect a defendant's due process rights, and applies where there exists a "realistic likelihood of 'vindictiveness'". Id. (quoting Blackledge v. Perry, 417 U.S. 21, 27 (1974)). If the defendant establishes a realistic likelihood of vindictiveness, the government "still has an opportunity to proffer legitimate, objective reasons for its conduct." Id.; United States v. Esposito, 968 F.2d 300, 305 (3d Cir. 1992). Where the

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investigatory efforts such as these are commendable. See Guzman, 85 F.3d at 826-828 (commending such efforts).

government's conduct is attributable to legitimate reasons, the presumption of vindictiveness will not apply. Paramo, 998 F.2d at 1220; Esposito, 968 F.2d at 305.

There is no evidence in the record of actual vindictiveness, nor is there sufficient evidence to give rise to a presumption of vindictiveness.

First, the court finds little merit in Defendant's argument that the timing of the Government's efforts to apprehend and extradite him to the United States demonstrates vindictiveness (or a presumption thereof) in retaliation for Defendant's alleged decision to stop cooperating with the DEA in drug-related investigations. The uncontested fact is that the instant charges were filed in 1989, soon after the Government was able to gather evidence against Defendant. This is not a situation where charges were filed after a defendant ceased cooperating with law enforcement, which might under some circumstances warrant a presumption of vindictiveness.

Additionally, the court finds the testimony of DEA Special Agents Leighton and Richart credible. Leighton testified that although he ran a record check after he met with Defendant at the DEA's Brussels office, he requested information from the DEA's Philadelphia office about whether Defendant's arrest warrant was still active. However, Leighton did not receive an affirmative response until after his last contact with Defendant. Richart testified that upon receiving notice that Defendant had surfaced in Europe, he began the process of putting together a submission

to the Belgian government requesting that Defendant be arrested for the purpose of extradition to the United States. That process was aborted when Richart was notified that Defendant was in Ecuador. This testimony adequately explains why the Government did not seek Defendant's provisional arrest and extradition until August of 1999. Thus, even if the timing of Defendant's arrest could give rise to a presumption of vindictiveness, the government has overcome that presumption with legitimate, objective reasons for its conduct.

Second, the court finds no merit in Defendant's argument that AUSA Zittlau's failure to mention Defendant's conviction in Argentina or the terms of the extradition treaty between Argentina and the United States in his extradition request to the Colombian Government evidences bad faith.<sup>7</sup> According to Defendant, AUSA Zittlau's "blatant omissions" constitute a bad faith misrepresentation of circumstances relevant to the extradition request. The court doubts the relevance of these circumstances to an extradition request made to the Colombian

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<sup>7</sup> The treaty states in relevant part:

1. Extradition shall not be granted in any of the following circumstances:

(a) when the person whose surrender is sought is being proceeded against or has been tried and discharged or punished in the territory of the requested Party for the offense for which his extradition is requested.

Treaty on Extradition Between the United States of America and the Republic of Argentina, Jan. 21, 1972, art. 7, ¶ 1(a), U.S.-Arg., 23 U.S.T. 3503, 3510.

government. Even if the circumstances were somehow relevant, the court fails to see how AUSA Zittlau had a duty to mention them.

It appears to the court that the efforts of AUSA Zittlau and other agents of the United States in seeking Defendant's extradition were only an attempt to carry out their jobs, rather than a vindictive effort to retaliate against Defendant.<sup>8</sup> Accordingly, Defendant has not established that the instant prosecution is vindictive.

#### IV. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss Superseding Indictment Pursuant to Fed. R. Crim. P. 12(b)(1) will be denied.

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<sup>8</sup> Presumably, all of the United States government's agents who participated in Defendant's apprehension and prosecution took an oath to uphold the laws of the United States.

