

CA NO. 91-50342

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	D.C. No. CR 87-422 (F) -ER
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Central District of
	)	California
JAVIER VASQUEZ-VELASCO,	)	
	)	
Defendant-Appellant,	)	
_____	)	

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

The Honorable Edward Rafeedie  
United States District Court Judge

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER COUNTS ONE AND TWO OF THE SIXTH SUPERSEDING INDICTMENT.

II. WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY DENYING APPELLANT'S MOTION TO SEVER COUNTS ONE AND TWO FROM THE REMAINING COUNTS IN THE SIXTH SUPERSEDING INDICTMENT.

III. WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY IMPOSING A SENTENCE ON APPELLANT IN EXCESS OF A TEN- YEAR TERM.

I.

**STATEMENT OF JURISDICTION**

The District Court had jurisdiction because the indictment charged appellant Javier Vasquez-Velasco ["Vasquez"] with an offense under Title 18 of the United States Code. [ECR]<sup>1</sup>

The Court of Appeals has jurisdiction over this case pursuant to 28 U.S.C. 1291, permitting courts of appeal jurisdiction over appeals from final decisions of the United States District Courts. On May 23, 1991, the District Court sentenced Appellant Vasquez to two consecutive life terms. [CR 1503]. Judgment was thereupon entered, commencing the 10-day period for filing a notice of appeal. Berman v. United States, 302 U.S. 211, 212 (1937). A timely notice of appeal was filed on May 28, 1991. [CR 1504]

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<sup>1</sup> See the Indictment which is part of the Excerpt of Record.

As used in this brief, the phrase, "CR", refers to the Clerk's Record, which is contained in the Excerpt of Record that has been filed together with the appellant's opening brief. The number immediately following the designation "CR" represents the numerical designation in the computer printout of the Clerk's Record where the reference can be found.

The phrase, "ECR", refers to the Excerpt of Record. The number immediately following represents the page number in the Excerpt of Record where the reference can be found.

The phrase, "RT", refers to the Reporter's Transcript, followed by the date of the proceeding and page reference. As a courtesy to the Court, the Excerpt of Record contains copies of all "RT" references cited in this brief.

## II.

### STATEMENT OF THE CASE

#### **A. Nature Of The Case**

This appeal arises out of the second "Camarena" trial, in which suspects were tried on charges based on the February 1985 kidnapping and murder of DEA agent Enrique Camarena ("Camarena") and DEA informant Alfredo Zavala ("Zavala"). The first trial was held in 1988 before the same district court judge and pursuant to the same district court docket number (but under an earlier superseding indictment) as to defendants Raul Lopez Alvarez, Rene Verdugo Urquidez, and Jesus Felix Gutierrez. Each of their appeals has resulted in separate, published Ninth Circuit opinions.

The trial involving appellant Javier Vasquez-Velasco ("Appellant Vasquez") commenced in May 1990.<sup>2</sup> In that trial, a total of four defendants were tried on charges contained in the Sixth Superseding Indictment ("Indictment").<sup>3</sup> In addition to Appellant Vasquez, the other defendants on trial were: Ruben Zuno-Arce ("Zuno"), Juan Ramon Matta-Ballesteros ("Matta"), and Juan Jose Bernabe-

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<sup>2</sup> Trial commenced on May 15, 1990 and was submitted to the jury on July 16, 1990. (CR 1051, 1246)

<sup>3</sup> The subject indictment is contained within the Excerpt of Record which has been filed together with this brief.

Ramirez ("Bernabe").

Appellant Vasquez occupied a legal position distinct from defendants Zuno, Matta and Bernabe in that Vasquez was only charged in counts one and two of the Indictment. These two counts charged Vasquez under 18 U.S.C. 1959 with aiding and abetting a racketeering enterprise in the commission of two murders which occurred in the same incident on January 30, 1985 in Guadalajara, Mexico. According to the government, the murders involved victims John Walker ("Walker") and Alberto Radelat ("Radelat"), who were killed after they entered the La Langosta restaurant and stumbled upon a gathering being hosted by leading drug traffickers. At trial, the government characterized Walker and Radelat as tourists in Guadalajara at the time of their deaths, who had no connection or affiliation with any agency of the U.S. government. Indeed, while Walker was a U.S. citizen, Radelat was only a resident alien.

None of the other defendants on trial was charged in either count one or two. All of them were charged with, and tried on, various counts in the Indictment pertaining specifically to the kidnapping and/or murder of Camarena and Zavala. The government sought to justify the joinder of the Walker/Radelat murders with the Camarena/Zavala murders by contending that each pair of murders was committed by the "Guadalajara narcotics cartel" for a single purpose, to wit, to intimidate and retaliate against the DEA for its

enforcement efforts in Mexico, and that Walker and Radelat were mistaken for DEA agents. (Indictment at paragraph 18, page 5; RT 5/15/90, at 19-20, 23, 24)<sup>4</sup>

The jury found all of the defendants guilty.<sup>5</sup> Appellant was the last of the four defendants to be found guilty by the jury, which returned its verdicts as to him on August 6, 1990. (CR 1325) On May 23, 1991, Appellant Vasquez was sentenced by the District Court to two consecutive life terms. (CR 1503)

#### **B. Bail Status of Mr. Vasquez**

Mr. Vasquez is presently in custody. He was taken into custody on or about October 11, 1989, the date he was indicted.<sup>6</sup> He has been in custody on a continual basis since his arrest.

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<sup>4</sup> This citation is to the government's opening statement to the jury. The same theme had been argued to the District Court in opposition to a motion to sever filed by Appellant Vasquez prior to trial. (CR 696)

<sup>5</sup> Defendant Zuno was subsequently granted a new trial and was recently found guilty by jury at the conclusion of the retrial.

<sup>6</sup> Vasquez was arrested pursuant to the fourth superseding indictment. (CR 607) In December 1989, two months after his arrest, the fifth superseding indictment was filed which added Zuno as a defendant. (CR 666) In February 1990, the sixth superseding indictment was filed which added Matta as a defendant. (CR 761) As noted earlier, the trial was conducted on the charges contained in the sixth superseding indictment.



### III.

#### STATEMENT OF FACTS

In December 1984, Alberto Radelat was a legal resident alien in the United States. (RT 5/23/90, at 47)<sup>7</sup> On December 29, he travelled to Guadalajara, Mexico, on vacation to visit his friend, John Walker. (RT 5/23/90, at 48)<sup>8</sup> Radelat was a photographer, and both he and Walker shared a common interest in photography. (RT 5/23/90, at 48)

During the 1983 year, Walker and his wife, Mary Evelyn, lived with their two children in St. Paul, Minnesota. (RT 5/23/90, at 79, 82)<sup>9</sup> In November 1983, the entire family went to live in Mexico. (RT 5/23/90, at 82, 83) John<sup>10</sup> was a reporter by trade and had been working on a novel, but he had had difficulty finding the time to complete the work. (RT 5/23/90, at 82) Because the Mexican peso was low in relation to the U.S. dollar at that time, it was cheap for

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<sup>7</sup> Testimony of Felipe Radelat, Alberto's father.

<sup>8</sup> See also paragraph 10 of the Indictment, at page 4, which states that "At all times referred to in this Sixth Superseding Indictment, Alberto Radelat was a United States permanent resident alien temporarily residing in Guadalajara, Jalisco, Mexico."

<sup>9</sup> Testimony of Mary Evelyn Walker.

<sup>10</sup> To avoid confusion resulting from last-name references, John Walker will be referenced by his first name when events are being discussed which involve both him and his wife. At all other times, he will be referenced as "Walker".

an American to live in Mexico (RT 5/23/90, at 82), and it therefore seemed suitable to go down to Mexico to concentrate on finishing the novel. Moreover, Mary had a strong interest in learning Spanish because she was eager to take advantage of the high demand in the U.S. for bilingual school teachers. (RT 5/23/90, at 82)

They first stayed in Cuernavaca, Mexico, then moved to the small town of Durango, where they stayed with friends. (RT 5/23/90, at 83) They had obtained tourist visas to reside in Mexico legally. (RT 5/23/90, at 86) Because the local school in Durango was filled to capacity and could not accommodate their children, the family moved to Guadalajara at the suggestion of the town's school director. (RT 5/23/90, at 83) They arrived in Guadalajara in January 1984. (RT 5/23/90, at 83) Mary began teaching English and taking courses in Spanish at the Cultural Institute in Guadalajara, and John worked night and day towards finishing his novel. (RT 5/23/90, at 84) In April 1984, John went home to Minnesota to research certain facts for his novel and returned to Guadalajara to rejoin his family a month later. (RT 5/23/90, at 84-85)

In late 1984, Mary and the children returned to Minnesota, while John stayed behind in Guadalajara to continue working on his book. (RT 5/23/90, at 85) John continued to reside pursuant to his tourist visa. (RT

5/23/90, at 86)<sup>11</sup> It was during this time period that Radelat came down to visit with him.<sup>12</sup>

Radelat was scheduled to fly back to the U.S. from Guadalajara on February 1, 1985. (RT 5/23/90, at 49) On the night of January 30, Walker took Radelat out to dinner as a farewell gesture. (RT 5/23/90, at 51) According to the government, the two went to the La Langosta restaurant in Guadalajara.

At trial, the government presented one, and only one, witness, Enrique Placencia-Aguilar ("Placencia"), who purported to be an eyewitness to the events at the La Langosta restaurant on the night January 30, 1985 which led up to the deaths of Walker and Radelat. Placencia testified to the following facts. In January 1985, he drove to the La Langosta restaurant in a van together with a group of associates. (RT 6/22/90, at 58-59) The group got out of the van, went to the entrance of the restaurant and looked inside. Placencia saw Rafael Caro Quintero ("Caro"), a known drug dealer in Guadalajara, seated at one of the tables, together with other known drug dealers from the same city. (RT 6/22/90, at 60, 69) In all, there were

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<sup>11</sup> In its closing argument, the government reiterated its position that Radelat was vacationing in Mexico at the time of his alleged murder. (RT 7/11/90, at 60-61).

<sup>12</sup> See paragraph 9 of the Indictment, at page 4, which states that "At all times referred to in this Sixth Superseding Indictment, John Walker was a United States citizen temporarily residing in Guadalajara, Jalisco, Mexico."

approximately 50 people gathered at various tables in the restaurant. (RT 6/22/90, at 64) Caro shouted to Placencia and his group to come inside. They did so, and a table was set up for them. (RT 6/22/90, at 61) Placencia testified that defendant/appellant Vasquez was seated at a nearby table. (RT 6/22/90, at 70)

Later that evening, as Placencia and his group were leaving the restaurant, he saw two male individuals approaching the entrance of the restaurant from the sidewalk. (RT 6/22/90, at 82) Shortly after the two individuals entered the restaurant, Placencia approached the entrance, looked in from the outside, and observed the two men being beaten. (RT 6/22/90, at 86) Placencia proceeded to testify that appellant Vasquez was in a group of men who carried one of the two male individuals to a storage room in the rear of the restaurant. (RT 6/22/90, at 88-96) Placencia did not observe anything that may have happened in the storage room; nor did he witness the alleged deaths of Walker or Radelat. (RT 6/22/90, at 106-107) Moreover, at trial Placencia did not identify the two males in question as Walker or Radelat; he did not refer to them by name during his testimony, nor did the prosecutor show him photographs. (RT 6/22/90, at 99-100)

#### IV.

##### STANDARD OF REVIEW

1. The Ninth Circuit has de novo review authority over the issue of whether the District Court had jurisdiction to try the appellant. United States vs. Peralta, 941 F.2d 1003, 1010 (9th Cir. 1991); United States vs. Felix-Gutierrez, 940 F.2d 1200, 1203 (9th Cir. 1991) [Camarena case; same district court case number as instant appeal, but different underlying facts].

2. The Ninth Circuit applies the "abuse of discretion" standard to denials of motions to sever. United States vs. Felix-Gutierrez, 940 F.2d 1200, 1209 (9th Cir. 1991); United States vs. Marsh, 894 F.2d 1035, 1040 (9th Cir. 1989).

3. Whether the District Court properly interpreted federal sentencing laws is a question of law which is reviewed de novo. United States vs. Keene, 933 F.2d 711, 712 (9th Cir. 1991) (sentencing guidelines case).

V.

ARGUMENT

**A. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY DENYING APPELLANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

Appellant's written pretrial motion to dismiss for lack of jurisdiction was denied by the District Court on June 26, 1990, during a hearing on defense motions that immediately followed the government's resting of its case-in-chief. (RT 6/26/90, at 26)

1. Salient Facts In Support of Argument

The government concedes that the killings charged in counts one and two occurred outside the territorial limits of the United States. Moreover, the government's evidence at trial established that the two victims at the restaurant were murdered by non-U.S. citizens; indeed, the government has emphatically maintained that Mexican nationals who were members of the so-called Guadalajara narcotics cartel were responsible for the murders. The government did not establish at trial that Appellant Vasquez is an American citizen or even a legal resident.

The only connection between the two alleged murders and the United States is a tenuous one at best: that one of the victims, Walker, was an American citizen. Radelat was merely a permanent resident alien. Moreover, Walker and Radelat were not in Mexico for any purpose that related to the United

States or its government.

In stark contrast to Walker and Radelat, agent Camarena and Mr. Zavala were acting directly under color of U.S. authority at the time of their murders. The government's case-in-chief established the following facts: at the time of his abduction, Camarena was a DEA agent assigned to the DEA's office in Guadalajara. (RT 5/15/90, at 107)<sup>13</sup> Zavala was a DEA informant in Mexico who had been assisting the DEA since 1977 -- i.e., for eight years by the time of his abduction. (RT 5/15/90, at 112) By profession, Zavala was pilot for the Mexican government's Office of Secretariat of Agriculture and Water. (RT 5/15/90, at 113) Through this line of work, he had access to information of value to the DEA, specifically geographical locations of opium fields, the movement of aircraft that were hangered at the Guadalajara airport, and the identity of people associated with those aircraft. (RT 5/15/90, at 113-114) On at least three occasions, Zavala was hired by the DEA to fly U.S. agents over locations to verify the presence of opium poppy fields. Funds were authorized through the DEA for these flights. (RT 5/15/90, at 114) Moreover, while serving as an informant, Zavala was supervised by DEA agents in the Guadalajara office; and he was being supervised by agent Camarena at the time both men were abducted in February 1985. (RT 5/15/90, at 114)

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<sup>13</sup> Testimony of James Kuykendall, who was the resident agent in charge of the DEA office in Guadalajara at the time of Camarena's abduction. (RT 5/15/90, at 106-107)

As mere tourists who were in Guadalajara for purely personal reasons, Walker and Radelat bore no similarity to either Camarena or Zavala.

The Indictment alleges that the Walker/Radelat murders were part of a "series of actions the purpose and intent of which was to retaliate against the DEA, its agents and informants, in Mexico, and to learn the nature and extent of the DEA's knowledge of the membership and operations of the cartel."<sup>14</sup> Moreover, in his opening statement, the government prosecutor had promised the jury that the evidence would show that Walker and Radelat had been mistaken for DEA agents, thus connecting their alleged murders to Camarena and Zavala by showing an ongoing effort by drug traffickers in Guadalajara to kill U.S. DEA agents. (RT 5/15/90, at 19-20, 24)<sup>15</sup> But no proof was ever presented at trial to substantiate either the allegations in the indictment or the prosecutor's representation to the jury.

## 2. Summary Of Appellant's Contentions

Based on the references to the trial record discussed above and the law set forth in the following section, this Court should conclude that the District Court lacked subject matter jurisdiction over counts one and two of the Indictment,

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<sup>14</sup> Indictment at paragraph 18, page 5.

<sup>15</sup> See Indictment at paragraph 18, page 5, and specifically subparagraph (c) on lines 22-24 of page 5.

because:

- (1) The alleged murders occurred on foreign soil;
- (2) The alleged perpetrators of the subject homicides, including Appellant Vasquez, were citizens of the foreign country in which the crimes occurred;
- (3) Only one of the two victims (Walker) was a U.S. citizen;
- (4) Neither Walker nor Radelat was in any way acting under the aegis of the U.S. government at the time of the alleged murders;
- (5) Both Walker and Radelat were present in Mexico during the time in question for purely personal reasons;
- (6) The alleged murders of Walker/Radelat did not threaten the security of the United States or interfere with its governmental operations;
- (7) The alleged murders did not have, and were not intended to have, a detrimental effect on the United States;<sup>16</sup>
- (6) The statute at issue, 18 U.S.C. 1959, contains no provision or language evidencing a Congressional intent to confer extra-territorial jurisdiction

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<sup>16</sup> The government's failure to substantiate the allegations in paragraph 18 of the Indictment as to the Walker/Radelat murders, or to prove that Walker/Radelat were killed because they were mistaken for DEA agents, as promised by the government in its opening statement, are the key factors here.

over the offenses charged in counts one and two.

3. Jurisdiction Under International Law

a. General Standards

There are five traditional bases of jurisdiction over extra-territorial crimes under international law:

1. Territorial, wherein jurisdiction is based on the place where the offense was committed;

2. National, wherein jurisdiction is based on the nationality of the offender;

3. Protective, wherein jurisdiction is based on whether the national interest is injured;

4. Passive Personal, wherein jurisdiction is based on the nationality of the victim.

5. Universal, which amounts to physical custody of the offender.

Chua Han Mow v. United States, 730 F.2d 1308, 1311 (9th Cir. 1984), citing United States v. Smith, 680 F.2d 255, 257 (1st. Cir. 1982). See generally, Restatement Third, Foreign Relations Law, Section 402 [Bases of Jurisdiction To Prescribe], Comments (c) through (g), at pages 238-240.

Where the alleged perpetrator of the criminal act in the foreign country is an American citizen, there is no

jurisdictional problem, because a country may supervise and regulate the acts of its citizens both within and without its territory. United States v. King, 552 F.2d 833, 851 (9th Cir.), cert. denied, 430 U.S. 966 (1976); Rocha v. United States, 288 F.2d 545, 548 (9th Cir. 1961).

However, where as here, the alleged perpetrator is a foreigner, different considerations apply. As acknowledged by the Fifth Circuit in United States v. Columba-Colella, 604 F.2d 356 (5th Cir. 1979),

[w]hen an allegedly criminal act is performed by an alien on foreign soil, courts in the United States have long held that if jurisdiction is to be extended over the act, it must be supported by either the **protective** or the **objective territorial** principle.

Id. at 358.

The Columba-Colella court proceeded to describe and differentiate between the two principles as follows:

Under the protective theory, which does not bear on the resolution of the case before us, a country's legislature is competent to enact laws and, assuming physical power over the defendant, its courts have jurisdiction to enforce criminal laws wherever and by whomever the act is performed that **threatens the country's security or directly interferes with its governmental operations.** A

state/nation is competent, for example, to punish one who has successfully defrauded its treasury, no matter where the fraudulent scheme was perpetrated. [citations omitted] [emphasis added]

The objective territorial theory looks not to interfere with governmental interests but to objective effects within the sovereign state. The theory requires that before a state may attach criminal consequences to an extraterritorial act, **the act must be intended to have an effect within the state.** [emphasis added]

604 F.2d at 358.

In reference to the objective territorial theory, the Columba-Colella court quoted the following excerpt from Justice Holmes' opinion in Strassheim v. Daily, 221 U.S. 280, 284-85 (1911), which discusses the doctrine in the context of interstate extradition:

Acts done outside a jurisdiction, but intended to produce and producing effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.

In line with the foregoing analyses, more recent cases have applied the territorial principle in drug smuggling cases where the actual, or planned, importation of narcotics into

the United States was deemed to impose a detrimental effect in the country. E.g., Chua Han Mow, supra. ["Chua intended to create a detrimental effect in the United States and committed acts which resulted in such an effect when the heroin unlawfully entered the country." 730 F.2d at 1312.].

b. Standards Applied To The Facts

Appellant Vasquez has not been shown by government to be a United States citizen. Moreover, the government has not shown that Vasquez threatened the security of this country or interfered with its government function, for purposes of applying the protective principle. Nor can it be said that the alleged Walker/Radelat murders caused, or were intended to cause, any type of detrimental effect in the United States within the meaning of the objective territorial principle.

Again, as noted earlier, the government failed to prove the allegations in the Indictment that the Walker/Radelat murders were part of a "series of actions the purpose and intent of which was to retaliate against the DEA, its agents and informants, in Mexico, and to learn the nature and extent of the DEA's knowledge of the membership and operations of the cartel."<sup>17</sup> The government also failed to live up to its promise in the opening statement that it would prove that Walker and Radelat had been murdered because they were mistaken for DEA agents. These failings by the government

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<sup>17</sup> Indictment at paragraph 18, at page 5.

caused fatal jurisdictional defects to result. Based on the facts presented at trial, Walker and Radelat were merely tourists in Guadalajara: Walker was there temporarily to finish a book, and Radelat was there briefly to visit his friend, Walker. Such facts hardly come close to satisfying the jurisdictional standards discussed above. Cf. United States v. Benitez, 741 F.2d 1312, 1316 (11th Cir. 1984) [jurisdiction found under protective principle where victims were U.S. government agents].

Consequently, subject matter jurisdiction under counts one and two of the Indictment cannot be found under principles of international law.

#### 4. Jurisdiction Under Domestic Law

The seminal rulings of the Supreme Court in United States v. Bowman, 260 U.S. 94 (1922) and its progeny have established the fundamental principle that Congress has the power to punish crimes committed overseas, but it must evince such an intent with clarity:

If punishment . . . is extended to include those [acts] committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute and failure to do so will negate the purpose of Congress in this regard." 260 U.S. at 98.

Accord: United States v. Yunis, 681 F. Supp. 896, 903 (D.D.C.

1988) [Barrington Parker, J.].

Consistent with the Bowman analysis, the Ninth Circuit has expressly adopted the general rule among the circuits that there is a presumption against extraterritorial application of federal criminal statutes, absent evidence of a contrary Congressional intent. United States v. Cotton, 471 F.2d 744, 750 (9th Cir. 1973). Because 18 U.S.C. 1959 contains no language of any kind that would confer extra-territorial application of jurisdiction to U.S. courts, this court lacks jurisdiction over Appellant Vasquez for the crimes alleged in counts one and two.

It is important to emphasize that Congress has never hesitated to incorporate language into a statute conferring extra-territorial jurisdiction whenever Congress has deemed it appropriate to do so. Indeed, the Bowman court expressly acknowledged that "Congress [has] always expressly indicated [extraterritorial jurisdiction] when it intended that its laws should be operative on the high seas." 260 U.S. at 97.

Within the past nine years, Congress has enacted three statutes that expressly provide for extra-territorial jurisdiction: the Hostage Taking Act, 18 U.S.C. 1203<sup>18</sup>; the Destruction of U.S. Aircraft Act, 18 U.S.C. 32<sup>19</sup>; and the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986, 18

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<sup>18</sup> Effective October 12, 1984.

<sup>19</sup> Amended October 12, 1984.

U.S.C. 2331.<sup>20</sup> These statutes confirm that Congress has never hesitated to make known its intention to provide for extra-territorial application of criminal sanctions.

Importantly, the statute under which Appellant Vasquez was charged in counts one and two -- 18 U.S.C. 1959 -- was originally enacted as 18 U.S.C. 1952B, effective October 12, 1984 and subsequently redesignated as section 1959 in 1988. Thus, the statute has been borne and amended within the same preceding time period in which the above-referenced three statutes were either enacted or amended; yet in contrast to those three statutes, no language of any kind has been incorporated into section 1959 that would provide for its extra-territorial application.

Consequently, subject matter jurisdiction under counts one and two of the Indictment cannot be found under principles of domestic law.

Based on the foregoing arguments, the convictions of Appellant Vasquez under counts one and two of the Indictment should be reversed and both counts dismissed for lack of jurisdiction.

**B. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY DENYING APPELLANT'S PRETRIAL MOTION FOR SEVERANCE OF COUNTS ONE AND TWO**

Appellant's written pretrial motion to sever counts one

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<sup>20</sup> Effective August 27, 1986.

and two from the Indictment was filed on or about January 12, 1990 and was denied by the District Court at a pretrial hearing. Defense counsel collectively renewed their severance motions prior to the Court's instructions to the jury. (RT 7/11/90, at 41)

1. Joinder Of Defendants Under Rule 8(b) Is Improper Unless The Defendants Are Alleged To Have Participated In The Same Series Of Acts Or Transactions.

Rule 8(b) of the Federal Rules of Criminal Procedure ["F.R.Crim.P."] sets forth the standard for joinder of two or more defendants in the same Indictment:

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be in each count.

The rule is designed to promote judicial economy and efficiency by avoiding multiple trials where that can be done without substantial prejudice to the right of defendants to a fair trial. Bruton v. United States, 231 U.S. 123, 131 n.6

(1968).

A failure to meet the requirements of Rule 8(b) constitutes misjoinder as a matter of law. United States v. Hatcher, 680 F. 2d 438, 440 (6th Cir. 1982). The determination whether joinder is proper under Rule 8(b) is to be based solely on the face of the indictment. United States v. Grassi, 616 F.2d 1295, 1302 (5th Cir.), cert. denied, 449 U.S. 956 (1980); United States v. Leach, 613 F.2d 1295, 1299 (5th Cir. 1980).

In short, where offenses charged in a single indictment are dissimilar, or are not part of the same act or transaction or the same series of acts or transactions constituting an offense, they should be severed for trial. United States v. Forrest, 623 F.2d 1107, 1114 (5th Cir.), cert denied, 449 U.S. 924 (1980); United States v. Duzac, 622 F.2d 911, 913 (5th Cir.), cert. denied, 449 U.S. 1012 (1980). The determination of whether multiple offenses joined in an indictment constitute a "series of acts or transactions" depends upon the degree to which they are related. The acts or transactions are only similar enough to be joined if "substantially the same facts must be adduced to prove each of the joined offenses." United States v. Satterfield, 548 F.2d 1341, 1344 (9th Cir. 1977), cert. denied, 439 U.S. 840 (1978).

The government's case against Appellant Vasquez failed to satisfy the legal requirements for joinder under Rule 8(b). While on its face the Indictment purported to show that the

Walker/Radelat and Camarena/Zavala killings were related, the government's proof at trial never lived up to either the allegations in count one and two, or to the assertions in the government's opening statement, which claimed that all of the killings at issue were part of an ongoing scheme to intimidate and retaliate against the DEA. Indeed, the government's evidence at trial showed no connection at all between the Walker/Radelat killings and Camarena/Zavala killings.

Thus, because the government failed to show that the Walker/Radelat killings were part of the same series of acts or transactions which pertained to the Camarena/Zavala killings, a severance should have been granted. If the District Court acted properly in denying the severance motion prior to trial based on the representations in the Indictment, the court should have severed Vasquez from the other defendants at the close of all the evidence. It was error for the District Court to send Vasquez' case to the jury.

2. Even If Joinder Under Rule 8 Were Proper, Severance Of Counts 1 And 2 Under Rule 14 Should Have Been Granted To Avoid Substantial Prejudice To Appellant Vasquez

Even if counts are properly joined to satisfy Rule 8(b), a severance may be ordered by the court to avert prejudice resulting from the joinder. United States v. Davis, 663 F.2d 824, 832 (9th Cir. 1981); United States v. Werner, 620 F.2d 922, 928 (2d Cir. 1980). The court's authority derives from F.R.Crim.P. 14, which provides in pertinent part that

"[i]f it appears that a defendant . . . is prejudiced by a joinder of offenses . . . in an indictment or information or by such joinder for trial together, the court may order an election or separate trial of counts, grant a severance of defendants, or provide whatever other relief justice requires."

Like Rule 8, Rule 14 is designed to promote judicial economy and efficiency and to avoid a multiplicity of trials. But Rule 14 upholds these objectives only to the extent that they can be achieved without substantial prejudice to the defendant's right to a fair trial. Bruton v. United States, 391 U.S. 123, 131 n.6 (1968).

An important element of a fair trial is the principle that guilt is both individual and personal in nature. Indeed,

fundamental to the guarantees of the Fifth and Sixth Amendments is the right of an accused to an individualized determination of his own guilt or innocence on the merits of the competent evidence pertaining only to him. Bruton, 391 U.S. at 131 n.6; Blumenthal v. United States, 332 U.S. 539, 559-60 (1948).

Accordingly, a defendant charged with others has "the right not to be tried en masse for the conglomeration of distinct and separate offenses committed by others." Kotteakos v. United States, 328 U.S. 750, 775 (1946).

The court's authority under Rule 14 is discretionary. Opper v. United States, 348 U.S. 84, 95 (1954). However, this discretion is not absolute. United States v. Martinez, 486 F.2d 15, 23 (5th Cir. 1973).

The circumstances causing prejudice to a defendant from the joinder of offenses include those in which the jury would conceivably use the evidence of one offense to infer a criminal disposition of the defendant and find him guilty of the other offense. United States v. Matta, 740 F.2d 629 (8th Cir. 1984) (severance proper where jury could not be expected to compartmentalize evidence against co-defendant). The seriousness of this risk was acknowledged by the Supreme Court as early as 1949 when it commented, in Justice Jackson's majority opinion in Krulewitch v. United States, 336 U.S. 440, 454 (1949), that

"[i]t is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together."

Accord: United States v. Burreson, 643 F.2d 1334, 1347 (9th Cir.), cert. denied, 454 U.S. 830 (1981); United States v. Brady, 579 F.2d 1121, 1128 (9th Cir.), cert. denied, 439 U.S. 1074 (1979).

Accordingly, motions for severance have been granted under Rule 14 in cases where, as here, the moving defendant was not alleged in the indictment to be connected to offenses charged in other counts against other defendants. United States v. Butler, 494 F.2d 1246 (10th Cir. 1974); United States v. Balistrieri, 346 F. Supp. 336 (D.C. Wisc. 1972); United States v. Talenfeld, 199 F. Supp. 108 (D.C. Pa. 1960).

The Ninth Circuit has recognized the necessity of granting a severance motion where the moving defendant would be greatly prejudiced by evidence that pertains to his co-defendants only. E.g., United States v. Donaway, 447 F.2d 940 (9th Cir. 1971).

The government's evidence at trial as to Appellant Vasquez clearly satisfied the requirements of Rule 14. The evidence pertaining to the kidnapping, torture and killings of Camarena and Zavala were gruesome and emotionally moving, most notably manifested when the government played to the jury the

audio-taped recording of Camarena's interrogation by his captors. Appellant Vasquez had nothing whatsoever to do with these events, and the recording had nothing to do with counts one or two. Yet Vasquez had to sit in the courtroom with the other defendants while this evidence was presented. Similarly gruesome was the the evidence pertaining to the location and forensic analysis of Camarena's body.

When all was said and done, the same jury which assessed guilt as to the Camarena/Zavala charges also rendered judgment against Appellant Vasquez as to the charges pertaining to Walker/Radelat. Because Vasquez was in no way connected to the Camarena/Zavala killings, and because the government failed to establish that the two pairs of killings were connected to one another, it was error for the District Court to have denied Vasquez' motion for severance under Rule 14.

Based on the arguments presented above, if this Court rejects Appellant's argument based on lack of jurisdiction, his conviction should nevertheless be reversed and a new trial granted.

**C. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY IMPOSING A SENTENCE IN EXCESS OF TEN YEARS**

1. Introduction

On August 6, 1990, the jury convicted Appellant Vasquez of the charges set forth in counts one and two of the

Indictment. Each count is based on 18 U.S.C. 1959. The court instructed the jury that a conviction under section 1959 could be based on any one of three separate legal theories: being a direct participant in the offense, an aider/abettor, or a conspirator. The instruction in question stated in pertinent part as follows:

In order to establish the offenses charged in counts **1, 2,** 3 and 4 of the Indictment, the following essential elements must be established beyond a reasonable doubt:

\* \* \*

Fourth: either the defendant participated in the commission of the violent act as charged or the defendant aided and abetted in the commission of the violent acts as charged or that the defendant **conspired** in the commission of the violent acts as charged. [emphasis added]

(RT 7/16/90, at 14-15) The government did not submit a special verdict form. Only a general verdict on each count was returned. Accordingly, it cannot be determined from the jury's verdicts what specific legal theory the jury relied on in rendering its verdicts against Appellant Vasquez.

From a sentencing standpoint, this uncertainty is critical because the different theories presented to the jury carry significantly different sentencing consequences. Appellant Vasquez contends that the uncertainty should be resolved as a matter of law by imposing the lesser sentence provided for under the applicable theories.

2. Liability For Conspiracy To Commit Murder Under 18 U.S.C. 1959 Carries A Maximum Ten-Year Term, While Being A Principal Carries Up To Life Imprisonment

18 U.S.C. 1959 enumerates significantly different sentencing outcomes depending on the specific legal theory supporting the conviction. In pertinent part, the statute reads as follows:

(a) (1) for murder or kidnapping, by imprisonment for any term of years or for life or a fine of not more than \$50,000, or both;

\* \* \*

(a) (5) for attempting or conspiring to commit murder or kidnapping, by imprisonment for not more than ten years or a fine of not more than \$10,000, or both(.

3. In The Absence Of A Special Verdict, The District Court Should Have Imposed The Lesser Sentence Under Section 1959(a) (5)

In the absence of a special verdict, there was no way for District Court Judge Rafeedie to know whether the jury deemed Appellant Vasquez to be a principal or a conspirator in regard to the offenses charged in counts one and two.

The government failed to present any evidence establishing direct participation by Vasquez in the subject murders. Witness Placencia was the only witness called by the government who testified about the events at the La Langosta restaurant, and by his own admission, the most that he witnessed was an assault on the two victims. He did not witness any murders and did not see what happened to the two victims after they were taken to a rear storage room in the restaurant. (RT 6/22/90, at 106-107) The government did not establish who actually killed either of the two victims, and the only testimony given by Placencia regarding Appellant Vasquez was that he was part of a group of men who were beating one of the two victims and carrying him to the rear of the restaurant.

On the record before this Court, it cannot be determined under what theory the verdicts against Appellant Vasquez were reached. In this context, the fundamental error committed by the District Court is that, in imposing life terms on each count of conviction, the District Court assumed that the jury

had found Appellant Vasquez to be a principal in the commission of the subject offenses.<sup>21</sup> It is constitutionally improper for the sentencing court to second-guess the jury's reasoning. Ladner v. United States, 79 S. Ct. 209, 214 (1958). The uncertainty caused by the absence of a special verdict mandates resentencing within the ten-year limitation of subsection (a) (5) of 18 U.S.C. 1959.

While there are no cases on issue under section 1959, valid analogies supporting appellant's position can be made to other areas of federal criminal law. For example, courts have repeatedly held that in drug cases, where the defendant is charged with conspiracy to distribute more than one type of drug (e.g., cocaine and marijuana), each of which carries significantly different sentences, the defendant must be given the benefit of the less harsh sentence in the absence of a special verdict that specifies the drug on which the jury based its conviction. United States vs. Orozco-Prada, 732 F.2d 1076, 1083-84 (2d Cir. 1984), citing with approval, United States vs. Quicksey, 525 F.2d 337, 341 (4th Cir. 1975), cert. denied, 423 U.S. 1087 (1976), and Brown vs. United States, 299 F.2d 438, 440 (D.C.Cir.), cert denied, 370 U.S. 946 (1962).<sup>22</sup> See, United States vs. Owens, 904 F.2d 411, 414-

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<sup>21</sup> Appellant Vasquez raised the ten-year limit in his written sentencing memorandum to the District Court. The Court rejected the argument and imposed the life terms. (CR 1492, 1503)

<sup>22</sup> Appellant has found one district court opinion where the court read Brown as requiring a sentencing judge faced with a

415 (8th Cir. 1990), citing Orozco-Prada with approval. See also, United States vs. Noah, 475 F.2d 688, 693 & n.7 (9th Cir.), cert. denied, 414 U.S. 821 (1973).

A similar argument applies to cases involving federal criminal statutes that contain both felony and misdemeanor provisions. For example, under 18 U.S.C. 659, pertaining to interstate theft, the distinction between a felony and misdemeanor is based on the value of the items stolen/transported, to wit, whether the value exceeds \$100. In those cases where the defendant is convicted but no dollar value to the goods has been fixed by the jury, the sentencing judge must construe the charge as a misdemeanor and thus give the defendant the benefit of the lesser sentence. United States vs. Scanzello, 832 F.2d 18 (3d Cir. 1987) (government failed to prove value was in excess of \$100; felony conviction reversed and remanded for resentencing as misdemeanor); Packnett vs. United States, 503 F.2d 949 (5th Cir. 1974); Theriault vs. United States, 434 F.2d 212 (5th Cir. 1970).

Thus, Appellant Vasquez should have been sentenced to the

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conviction on a count that charged the violation of more than one statute to impose a sentence under the statute providing the least severe punishment. United States vs. Amato, 367 F.Supp. 547, 549 (S.D.N.Y. 1973), cited in Orozco-Prada, 732 F.2d at 1084. While the facts in Amato are distinguishable in that counts one and two of the subject Indictment are based only on one statute (18 U.S.C. 1959), the reasoning is analogous to the present situation: just as in Amato it could not be determined which statute served as the basis of conviction, here it cannot be determined which legal theory under section 1959 served as the basis of appellant's conviction. In both circumstances, the least severe punishment must be imposed.

lesser penalty provided under subsection (a) (5) of 18 U.S.C. 1959 regarding conspiracy liability.

For the foregoing reasons, if this Court affirms Appellant Vasquez' convictions, his sentences should be reversed and the judgment vacated, with a remand to the District Court to re-sentence Appellant to a term not to exceed ten years on each count.

**CONCLUSION**

1. The conviction of Appellant Vasquez should be vacated and counts one and two of the Indictment dismissed for lack of subject matter jurisdiction.

2. Alternatively, the convictions should be reversed and the case remanded back to the District Court for a new trial.

3. If the convictions are affirmed, the sentences should be vacated and remanded back to the District Court for resentencing with directions to sentence within the limitations imposed by 18 U.S.C. 1959 for conspiracy convictions.

**STATEMENT OF RELATED CASES**

There are three related cases involving appeals of Vasquez' co-defendants from the same district court trial: Juan Ramon Matta-Ballesteros, Juan Jose Bernabe-Ramirez, and Ruben Zuno-Arce.

DATED: May 21, 1993

Respectfully Submitted,

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(by CJA appointment)