

CA NO. 91-50342

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

APPELLANT'S REPLY BRIEF

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

The Honorable Edward Rafeedie
United States District Court Judge

GREGORY NICOLAYSEN
FEDERAL LITIGATORS GROUP, INC.
8530 Wilshire Blvd., Ste. 404
Beverly Hills, CA. 90211
(310) 854-5135

Attorney For Defendant-Appellant,
Javier Vasquez-Velasco
(by appointment under CJA)

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I.

THE CASES CITED BY THE GOVERNMENT

FAIL TO ESTABLISH A BASIS FOR

SUBJECT MATTER JURISDICTION

In an effort to persuade this Court that the District Court had subject matter jurisdiction over this case, the government cites and relies on the following cases: United States vs. Felix-Gutierrez, 940 F.2d 1200 (9th Cir.), cert. denied, 113 S.Ct. 2332 (1993); United States vs. Layton, 855 F.2d 1388 (9th Cir.), cert. denied, 109 S.Ct. 1178 (1989); United States vs. Cotton, 471 F.2d 744 (9th Cir.), cert. denied, 411 U.S. 936 (1973); and Stegeman vs. United States, 425 F.2d 984 (9th Cir.), cert. denied, 400 U.S. 837 (1970). As discussed below, each of these cases is inapposite to the facts of this case and fails to demonstrate a basis for subject matter jurisdiction.

A. United States vs. Felix-Gutierrez

(1) Opening Statement

Felix-Gutierrez is one of four published Ninth Circuit opinions arising out of the underlying district court action entitled, United States vs. Caro Quintero, et. al., CR 87-422-ER¹, each of which addressed the issue of jurisdiction.² However, the unique facts pertaining to the Walker/Radelat murders set Appellant Vasquez

¹ In addition to Gutierrez, *supra*, see United States vs. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir.), vacated, 112 S.Ct. 2986 (1992); United States vs. Lopez-Alvarez, 970 F.2d 583 (9th Cir.), cert. denied, 113 S.Ct. 504 (1992), and United States vs. Alvarez-Machain, 112 S.Ct. 2188 (1992).

² In Lopez-Alvarez, the appellant merely incorporated the arguments raised by Felix-Gutierrez. 970 F.2d at 596. Verdugo and Machain focused exclusively on personal, rather than subject matter, jurisdiction.

apart from all of the other defendants tried in the case to date. The jurisdictional challenge raised in this appeal presents a matter of first impression which cannot be resolved on the basis of prior rulings. Accordingly, as discussed below, the government's reliance on Felix-Gutierrez in its opposing brief is misplaced.

(2) General Standards On Jurisdiction

In defining the framework of the analysis on the issue of subject matter jurisdiction, the Ninth Circuit cited to the seminal Supreme Court ruling in United States vs. Bowman, 260 U.S. 94 (1922)³, and the prior Ninth Circuit ruling in United States vs. Chua Han Mow, 730 F.2d 1308 (9th Cir. 1984), cert. denied, 470 U.S. 1031 (1985)⁴, as follows:

Courts look to Congressional intent, express or implied, to determine whether a given statute should have extraterritorial application. [citations omitted] Moreover, courts generally look to international law principles to ensure that an extraterritorial application of United States laws is "reasonable." [citation omitted]

940 F.2d at 1204. Both as to Congressional intent and international law, the ruling in Felix-Gutierrez turns on the unique and narrow circumstances applicable to the kidnap/torture/murder of a drug enforcement agent in a foreign country and the national interests of the United States in prosecuting such crimes.

³ Cited in appellant's opening brief at pages 18-19.

⁴ Cited in appellant's opening brief at pages 14, 17.

(3) Congressional Intent

Recognizing that the victim was a federal agent and that the agent was engaged in a line of work on behalf of the U.S. government, i.e., drug enforcement, which invariably extended beyond the territorial boundaries of the United States, the Court inferred Congressional intent to give extra-territorial application to the charge against Felix-Gutierrez:

We noted in Brulay vs. United States [citation omitted] that drug "smuggling by its very nature involves foreign countries, and ... the accomplishment of the crime always requires some action in a foreign country...." It follows that United States agents involved in the investigations of international organizations seeking to smuggle drugs into the United States will, when foreign governments are willing to cooperate, conduct a portion of their activities outside the United States. We have no doubt that whether the kidnapping and murder of such federal agents constitutes an offense against the United States is not dependent upon the locus of the act. We think it clear that Congress intended to apply statutes proscribing the kidnapping and murder of DEA agents extraterritorially. United States vs. Layton, 855 F.2d [1388], at 1395. [quotation omitted].

940 F.2d at 1204. The Court further addressed the issue of legislative intent as follows:

[W]e will infer Congressional intent to provide for extraterritorial jurisdiction for crimes that are not dependent on the locality in which they were committed "but are enacted because of the right of the Government to defend itself against obstruction, or fraud, wherever perpetrated ...[citing United States vs. Bowman, 260 U.S. 94, 98 (1922)]" Id.

Thus, the finding of jurisdiction in Felix-Gutierrez is predicated on the Court's view of Congress' intent to protect federal agents in their law enforcement work outside the United States, and thereby protect the legitimate interests of the U.S. government in combatting drug smuggling. In this light, the Court cites United States vs. Benitez, 741 F.2d 1312, 1317 (11th Cir. 1984) ("assault and attempted murder of DEA agents is exactly the type of crime that Congress must have intended to apply extraterritorially."). 940 F.2d at 1204.

Viewed in this context, Felix-Gutierrez does not support a finding of subject matter jurisdiction as to Appellant. As tourists, and particularly with only one being a U.S. citizen, John Walker and Alberto Radelat were neither law enforcement officers, nor were they furthering the interests of the U.S. government. The grounds discussed in Felix-Gutierrez for inferring Congressional intent to apply a criminal statute extraterritorially therefore have no bearing as to Appellant.

Moreover, the Court's discussion of Congressional intent was directed at the specific statute under which Felix-Gutierrez was charged and convicted. Unlike Appellant here, Felix was not charged under 18 U.S.C. 1959 but rather under 18 U.S.C. 3 (accessory after the fact). In this regard, the Court held that

Limiting jurisdiction to the territorial bounds of the United States would greatly curtail the scope and usefulness of the accessory after the fact statute in cases in which extraterritorial crimes occur. 904 F.2d at 1205.

(4) International Law

Beyond the issue of Congressional intent, the Court applied the same reasoning in finding that subject matter jurisdiction existed under international law:

Felix's actions created a significant detrimental effect in the United States and adversely affected the national interest. In helping to prevent the United States from apprehending Caro-Quintero, Felix directly hindered United States efforts to prosecute an alleged murderer of a government agent.

Furthermore, that agent was a United States citizen.

904 F.2d at 1205. As with the Congressional intent analysis, the pivotal factor is that the victim was a federal agent, thus causing Felix-Gutierrez to inflict a detriment directly on the United States through his interference with efforts to apprehend the agent's murderers. No such national interests apply to Walker or Radelat. Indeed, the Court even went so far as to observe that the victim-agent, Camarena, was a U.S. Citizen -- a criterion which Radelat did not meet.

For the reasons discussed above, the government's reliance on Felix-Gutierrez in its opposing brief is misplaced.

B. United States vs. Layton

Layton is clearly distinguishable from this case for the simple reason that it involved the killing of a U.S. Congressman overseas. Clearly, a criminal act of this nature imposes a serious detriment on the United States, thus conferring a strong interest on the U.S. government to apprehend and prosecute the murderers. The government's obvious interest in prosecuting this type of crime is expressly reflected in the language of the statute under which Layton was prosecuted, 18 U.S.C. 351, which expressly provides for extra-territorial jurisdiction.⁵

The circumstances in Layton are the diametrical opposite of those here, where the statute in question (18 U.S.C. 1959) is silent on the issue of subject matter jurisdiction, and where the victims of the murders in question (Walker and Radelat) were tourists and only one was a U.S. citizen. See, e.g., Kline vs. Republic Of El Salvador, 603 F.Supp. 1313, 1320 (D.C. 1985)(In the context of 18 U.S.C. 1116, the court commented that "[t]here is no allegation and no reason for believing, that Michael Kline, a tourist, was an 'internationally protected person' within the meaning of that statute.").

C. United States vs. Cotton

The government's reliance on Cotton demonstrates a failure to recognize the distinctions between different types of jurisdiction. What is at issue on this appeal is subject matter jurisdiction, i.e., the power of the court to try the offense charged in the indictment. There is no issue by this appeal as to personal jurisdiction over Appellant; he was living in the Los Angeles area at the time of his arrest and was arrested after he voluntarily responded to a request by the D.E.A.

⁵ Section 351(i) provides:
"There is extraterritorial jurisdiction over the conduct prohibited by this section."

for an interview.

Cotton deals solely with challenges to personal jurisdiction, specifically whether the means by which the prosecuting state obtained physical power over the defendant violated a federal right. In that case, the Ninth Circuit upheld the finding of personal jurisdiction notwithstanding the abduction/kidnapping of the defendant. For a number of years, the operative standard has been the Ker-Frisbie doctrine, which addresses the issue of personal jurisdiction in terms of the manner in which a defendant is brought within the court's physical control. See, United States vs. Edwin Wilson, 565 F.Supp. 1416, 1422 (S.D.N.Y. 1983), aff'd, 732 F.2d 404 (2d Cir. 1984).

Accordingly, Cotton is cited by courts principally in the context of the Ker-Frisbie doctrine. In this very criminal prosecution involving agent Camarena, other defendants have raised that doctrine in disputing personal jurisdiction. See, United States vs. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991). Other Ninth Circuit cases citing Cotton in discussing Ker-Frisbie include: United States vs. Valot, 625 F.2d 308 (9th Cir. 1980); United States vs. Lovato, 520 F.2d 1270 (9th Cir. 1975).

Ker-Frisbie is not, however, a doctrine applicable where the challenge is to subject matter, as opposed to personal, jurisdiction. Because Appellant does not raise questions of personal jurisdiction, Cotton and its progeny are not dispositive of the issues on this appeal.

D. Stegeman vs. United States

Finally, the government's reliance on the Stegeman case is entirely misplaced. That case dealt with the fraudulent transfer and concealment of assets in bankruptcy. Because the victim of the crime was a branch of the U.S.

government and the crime, by its nature, threatened the integrity of the bankruptcy court system, a broad reach of jurisdictional power was deemed appropriate. See United States vs. Melton, 763 F.2d 401, 401-402 (11th Cir. 1985); United States vs. Baker, 609 F.2d 134, 137 (5th Cir. 1980).

Without diminishing the severity of the crime, the murders of tourists in Mexico is not analogous in significance to fraud perpetrated upon the federal courts, in terms of the impact of the crime upon the U.S. government and the degree of interest that the government would therefore have in prosecuting. Thus, the ruling in Stegeman turns on factors which are completely distinguishable from the facts of this case.

II.

TO APPLY 18 U.S.C. 1959 EXTRATERRITORIALLY ON THE FACTS OF THIS CASE WOULD EXCEED THE BOUNDS OF CONGRESSIONAL INTENT AND VIOLATE DUE PROCESS BY BEING ARBITRARY AND FUNDAMENTALLY UNFAIR

A. Opening Statement

In United States vs. Davis, 905 F.2d 245, 248-249 (9th Cir. 1990), the Ninth Circuit defined the two-pronged analysis on extraterritorial application as follows:

We require Congress make clear its intent to give extraterritorial effect to its statutes. [citation omitted]

And secondly, as a matter of constitutional law, we require that application of the statute to the acts in question not violate the due process clause of the fifth amendment. [citation omitted]

905 F.2d at 248. In Davis, the defendant had been charged under 46 U.S.C. app. 1903(h)(Supp. IV 1986) [the Maritime Drug Law Enforcement Act] with conspiracy and possession of marijuana on a vessel on the high seas. In applying the two-pronged analysis, the Court found that by the express language of the statute, Congress did intent to apply the statute extraterritorially. Turning to the constitutional issue, the Court emphasized the importance of examining defendant Davis' specific conduct in determining whether extraterritorial application of the statute comported with due process.

In this case, Congress explicitly stated that it intended the Maritime Drug Law Enforcement Act to apply extraterritorially. [citation omitted] Therefore, the only issue we must consider is whether application of the (statute) to Davis' conduct would violate due process. In order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States [citation omitted], so that such application would not be arbitrary or fundamentally unfair.

905 F.2d at 248.

In reference to the general practice among courts of applying principles of international law in the extraterritorial jurisdiction analysis, the Court made the following important comments:

International law principles, standing on their own, do not create substantive rights or affirmative defenses for litigants in United States courts. [citation omitted]

905 F.2d at 248 n. 1.

International law principles may be useful as a rough guide of whether a sufficient nexus exists between the defendant and the United States so that application of the statute in question would not violate due process. [citation omitted] However, danger exists that emphasis on international law principles will cause us to lose sight of the ultimate question: would application of the statute to the defendant be arbitrary or fundamentally unfair? [emphasis added]

905 F.2d at 248-249 n. 2.

Judged by these standards, to apply 18 U.S.C. 1959 extraterritorially as to the facts pertaining specifically to Appellant's conduct would exceed any reasonable interpretation of Congressional intent and would violate due process as an arbitrary and fundamentally unfair exercise of power. These points are discussed below.

B. Congressional Intent

(1) There Is A Presumption Against Extraterritorial

Application Where The Statute Is Silent As To Congressional Intent

The statute in question here, 18 U.S.C. 1959, contains no reference to extraterritorial application. In the absence of such language, a presumption against extraterritorial application of the statute applies. United States vs. Larsen, 952 F.2d 1099, 1100 (9th Cir. 1991); Felix-Gutierrez, 940 F.2d at 1205; Benitez, supra, 741 F.2d at 1316. This presumption has also been acknowledged by courts outside the Ninth Circuit. [E.g., United States vs. Mitchell, 553 F.2d 996 (5th Cir. 1977); United States vs. Noriega, 746 F.Supp. 1506, 1515 (S.D.Fla. 1990)], and it reflects the interpretive policy enunciated in Bowman, where the Court stated that if a statute's prohibitions are

to be extended to [apply to 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 negative the purpose of Congress in this regard.
260 U.S. at 98.

Accord: Davis, supra, 905 F.2d at 248 (9th Cir.) ("We require Congress make clear its intent to give extraterritorial effect to its statutes.").

(2) If Congress Wants A Statute To Apply Extraterritorially, It Does Not Hesitate To Say So Either In The Statute Or In The Legislative History

While Congress is under no obligation to expressly authorize extraterritorial jurisdiction in the body of a statute [United States vs. King, 552 F.2d 833, 851 (9th Cir. 1976)], the Congressional practice has been to openly communicate its intent whenever a purpose exists to warrant extraterritorial

application of a statute. In accordance with the Supreme Court's comments in Bowman, Congress has, on many occasions, expressly provided for extraterritorial jurisdiction in the body of numerous criminal statutes. 18 U.S.C. 351(i)⁶; 18 U.S.C. 1116(c)⁷; 18 U.S.C. 1512(g)⁸; 18 U.S.C. 1513(b)⁹; 18 U.S.C. 1751(k)¹⁰; 18 U.S.C. 1956(f)¹¹; 50 U.S.C. 421, 424¹²; 46 U.S.C. app. 1903(h)[Supp IV 1986]¹³. See, also,

⁶ See Layton, 855 F.2d at 1394-95.

⁷ Section 1116(c) provides in pertinent part:

"If the victim of an offense under subsection (a) is an internationally protected person, the United States may exercise jurisdiction over the offense if the alleged offender is present within the United States, irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender."

⁸ Section 1512(g) provides:

"There is extraterritorial Federal jurisdiction over an offense under this section."

⁹ Section 1513(b) provides:

"There is extraterritorial Federal jurisdiction over an offense under this section."

¹⁰ Section 1751(k) provides:

"There is extraterritorial jurisdiction over the conduct prohibited by this section."

¹¹ Section 1956(f) provides in pertinent part:

"There is extraterritorial jurisdiction over the conduct prohibited by this section if -- "

¹² See P.L. 103-55, approved July 28, 1993 [Title 50 U.S.C.A. (War And National Defense), Chapter 15 (National Security), Subchapter IV (Protection Of Certain National Security Information):

s 424. EXTRATERRITORIAL JURISDICTION

There is jurisdiction over an offense under section 421 of this title committed outside the United States if the individual committing the offense is a citizen of the United States or an alien lawfully admitted to the United States for permanent residence (as defined in section 1101(a)(20) of Title 8).

¹³ The statute provides:

"This section is intended to reach acts of possession, manufacture or distribution outside the territorial jurisdiction of the United States." See United States vs. Davis, 905 F.2d 245, 248 (9th Cir. 1990).

18 U.S.C. 3042; 18 U.S.C. 3183, 3187.

In other instances, where a statute may not expressly provide for extraterritorial jurisdiction, Congressional intent may be evident from a plainreading of the statute. E.g., 18 U.S.C. 32¹⁴; 18 U.S.C. 1203¹⁵; 18 U.S.C. 2332(c), 2333¹⁶; 21 U.S.C. 959¹⁷.

Moreover, a statute which lacks express language as to its extraterritorial application may nonetheless contain express references to such in its legislative history, thus evincing a Congressional intent on either side of the issue. E.g., 18 U.S.C. 1344 (bank fraud)¹⁸; Mutual Security Act of 1954 (P.L. 83-665)¹⁹. This

¹⁴ Section 32(b)(4) contemplates that the crimes enumerated in the statute may be committed outside the United States by stating, "if the offender is later found in the United States(.)" Congress' expectation that the offenses might be committed in foreign territory is apparent from subsection (a)(1) ["...or any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce;"]. See also subsection (b)(1), which places no geographical restrictions on where the "act of violence" may occur. See United States vs. Yunis, 681 F.Supp. 896, 898-899 (D.C. 1985), aff'd, 924 F.2d 1086 (D.C.Cir. 1990). See also, 924 F.2d at 1090.

¹⁵ Yunis, 681 F.Supp. at 904.

¹⁶ Section 2332(c) begins with the clause, "Whoever outside the United States engages in physical violence --." The statute is part of Chapter 113A of Title 18, which proscribes acts of terrorism against U.S.nationals. See Extraterritorial jurisdiction over acts of terrorism committed abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986. 72 Cornell L.Rev. 599 (1987).

¹⁷ Section 959(c) provides as follows:

This section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States. Any person who violates this section shall be tried in the United States district court at the point of entry where such person enters the United States, or in the United States District Court for the District of Columbia. See Chua Han Maw, 730 F.2d at 1311.

¹⁸ 18 U.S.C. 1344 was enacted as part of the Comprehensive Crime Control Act of 1984 ("Act") [P.L. 98-473, Title II, Section 1108(a)]. The following excerpt is taken from the legislative history of the Act, and can be found in S. Rep. No. 98-225, Congressional Record Volume 130 (1984): "Since the use of bogus or "shell" offshore banks has increasingly become a means of perpetrating major frauds on domestic banks and the considerable delay in collections between domestic and foreign banks makes manipulation of foreign financial transactions an attractive mode of defrauding banks within the United States, it is intended that there exist

Congressional practice is a wide-ranging one which applies far beyond the narrow context of criminal legislation. E.g., Humane Methods of Slaughter Act of 1978 (P.L. 95-445)²⁰; Consular Courts -- Morocco (P.L. 84-856)²¹.

(3) Section 1959 And Its Legislative History Are Silent On The Subject Of Extraterritorial Application

There is nothing in the legislative history of 18 U.S.C. 1959, or its predecessor statute, 1952B, which in any way addresses the issue of extraterritorial jurisdiction. Interestingly, the legislative history contains extensive discussion about where the line should be drawn between federal jurisdiction and state/local jurisdiction, within the context of domestic enforcement. S.Rep. 225, 98th Cong. 1st Session 304-07 (1983, 1984); U.S. Cong. Code & Admin. News 3182, 3483-90. Thus, Congress was alert to the issue of the scope of federal subject matter jurisdiction within the territorial limits of the United States; yet Congress chose not to address the subject of extraterritorial application.

Because the statute is silent on this point, the presumption against

extraterritorial jurisdiction over the offense." On Westlaw (LH database), this language is contained on page 668 of 927 for S.Rep. 98-225.

¹⁹ "Section 968 of Title 18 ... is repealed. This section deals with control of exports of war materials to Latin countries in which the United States exercises extraterritorial jurisdiction ..." Senate Report No. 83-1799, July 13, 1954 (To accompany H.R. 9678).

²⁰ "In addition to obliging foreign meat processors to observe American norms on the treatment of animals about to be slaughtered, Section 3 would in effect broaden...the existing requirement that foreign packers submit to inspection in their own countries by U.S. officials. This would be an exercise of extraterritorial jurisdiction which would very likely give rise to strong opposition on the part of our trading partners." [emphasis added] House Report (Agriculture Committee), No. 95-1336, July 10, 1978 (To accompany H.R. 1464), Congressional Record Volume 124 (1978).

²¹ "It is the purpose of this resolution to provide Congressional approval for action by the executive branch in renouncing certain rights of extra-territorial jurisdiction enjoyed by the United States over its nationals...in Morocco." Senate Report No. 84-2274, June 19, 1956 (To accompany S.J. Res. 165)

extraterritorial application applies. This Court is therefore "faced with finding the construction that Congress intended." Larsen, 952 F.2d at 1100, quoting from Cotton, 471 F.2d at 750. As stated by the Second Circuit, "[i]n the absence of contrary congressional direction, we interpret the language in accordance with its ordinary meaning." United States vs. Concepcion, 983 F.2d 369, 380 (2d Cir. 1992), citing Moskal vs. United States, 498 U.S. 103, 108 (1990).

The ordinary meaning of 18 U.S.C. 1959 militates against extraterritorial application where, as here, the crime at issue is the murder of American tourists, particularly where at least one of the victims is not even a U.S. citizen but a registered alien. These circumstances represent the diametrical opposite to the murder of a federal drug agent. If every tourist in another country -- citizen or not -- were to be covered by the jurisdictional reach of federal criminal statutes, the entire body of criteria for determining extraterritorial jurisdiction would be reduced to a legal fiction. The murder of a federal agent bears heavily on the national interests of the U.S. government; the murder of a tourist does not and should be handled by the local authorities in the region where the murder occurred.

In drawing the jurisdictional line, this Court should be mindful of the Supreme Court's admonition in Bowman, that acts giving rise to questions of criminal jurisdiction should not be given a strained or forced construction. 260 U.S. at 102. See United States vs. Stewart, 727 F.Supp. 1068, 1069 (No.D.Tx. 1989).

Thus, while the presumption against extraterritorial application is not an irrebutable one, the exception applies only to those statutes which have been "enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated...." Bowman, 260 U.S. at 98. Thus, in

Lopez-Alvarez, supra, this Court cited to the exception in Bowman and found that Congress had intended to give extraterritorial application to 18 U.S.C. 1952B, thus authorizing the District Court to try defendant Raul Lopez-Alvarez for the kidnap/torture/murder of agent Camarena. But, as in Felix-Gutierrez, this holding rested squarely on the U.S. government's clear interest in apprehending and prosecuting alleged murderers of one of its drug agents.²²

This governmental interest simply does not apply where the victim is a tourist. The issue of Congressional intent as to section 1959 has never been assessed by any court where the victims were merely tourists, and to resolve the issue in the government's favor would undermine the policies and standards articulated in prior opinions.

Accordingly, this Court should conclude that the District Court lacked subject matter jurisdiction over the specific crimes charged against Appellant, on the ground that Congress did not intend for section 1959 to apply extraterritorially to the murder of tourists in a foreign country, particularly where one of the victims was not even a U.S. citizen.

²² Unlike Felix-Gutierrez, Lopez-Alvarez was charged under 18 U.S.C. 1952B with racketeering offenses in relation to the killing of agent Camarena. 970 F.2d at 586. The Court commented that the District Court had subject matter jurisdiction based on the Felix-Gutierrez opinion, in which the Court had expressly found jurisdiction not only as to the accessory-after-the-fact offense, but also as to the "underlying crime" -- i.e., the abduction and murder." Id. at 596, citing Felix-Gutierrez, 940 F.2d at 1206. Importantly, the focus of the jurisdictional analysis was confined to the special circumstance of a federal agent's abduction and murder and thus is easily distinguishable from the murder of a tourist.

C. Constitutional Law: Due Process

(1) The Government Has Failed To Demonstrate A Nexus Between The United States And Appellant's Conduct To Warrant Extraterritorial Application Of 18 U.S.C. 1959

In its opposition brief, the government implicitly concedes that subject matter jurisdiction would be lacking if Walker and Radelat were merely tourists murdered in a foreign country. To overcome this problem, the government seeks to augment the victims' status by connecting them to the U.S. government so that jurisdiction could be found within the analytical framework of Felix-Gutierrez and Lopez-Alvarez. The government hopes to convince this court that the record adequately supports the government's theory at trial that Appellant and the others who allegedly killed the tourists actually mistook them for DEA agents.²³ The government's argument on the evidence is totally unpersuasive.

The government relies on three sources in the trial record: (1) the testimony of government witness Hector Cervantes-Santos; (2) the pre-arrest statements of Appellant which were introduced through the testimony of government witness Abel Reynoso; (3) and, quite surprisingly, a document introduced by Appellant's defense counsel, Exhibit P. (Opposing brief at pages 12-13) Each of these citations to the record will be discussed separately below.

Importantly, the government does not reference in its opposing brief the testimony of the one and sole alleged eyewitness to the Walker/Radelat murders, Enrique Placencia-Aguilar. The reason is simple: Placencia did not support the government's theory. Nowhere in his testimony did Placencia state that the two

²³ During opening and closing arguments, government counsel repeatedly referenced the central theme of the Walker/Radelat murders by asserting that the victims were mistaken for DEA agents. [Opening: RT 5/15/90, at p. 39. Closing: RT 7/11/90, at p. 60.]

victims were mistaken for DEA agents -- or that they were even suspected of being connected to the U.S. government! Thus, the government's sole percipient witness at trial fails to contribute any foundational evidence to support the government's jurisdictional argument. That leaves the government with nothing but uncorroborated hearsay, as well as a defense exhibit which the government discredited in its closing argument to the jury but now wants this court to adopt as reliable.

(a) Testimony Of Hector Cervantes-Santos

Witness Hector Cervantes-Santos ("Cervantes") was not at the La Langosta restaurant on the occasion of the murders. The government did not even try to present him to the jury as someone with first-hand knowledge of those events. (RT 5/24/90, pp. 29-39)

In regard to the murders, the government used Cervantes to testify about statements regarding the murders which were made to him at the residence of drug lord Javier Barba-Hernandez ("Barba"). Thus, all testimony given by Cervantes about the murders is based solely on what he was told by other people, i.e., co-conspirator statements.

Cervantes testified that on a date in January 1985 (he could not be more specific), Barba left his residence for the La Langosta restaurant with Appellant, his brother, and his nephew, Antonio-Vasquez Ochoa ("Ochoa"). Cervantes stayed behind at the house. (RT 5/24/90, at p. 31) Later that night, Barba returned to the house with Ochoa. Both had blood on them. (RT 5/24/90, at pp. 32-33)

On direct examination by the government, Cervantes gave the following and only testimony regarding the murder victims:

Q: After Barba Hernandez arrives at the house, does he give any instructions?

A: Well, no. He just arrives and tells me what happened.

Q: What did Barba tell you?

[objection by defense counsel]

Q: What did Barba tell you?

A: That some gringos had been spying on them at the restaurant where all the people were.

Q: What else did he tell you?

A: That one had died and that the other one of the gringos was still alive.

(RT 5/24/90 at pp. 33-34)

Q: Now, did Antonio Vasquez Ochoa make any statements to you, Mr. Cervantes?

[objection by defense counsel]

A: Yes, he said that some damn gringos -- they had caught them spying, and that they had beaten the shit out of them.

[RT 5/24/90, at p. 35]

This testimony hardly lays a foundation for subject matter jurisdiction. First, Cervantes is testifying as to second-hand information, i.e., what Barba and Ochoa purportedly observed at La Langosta.

Second, the reference to "gringos" -- a slang expression for Americans -- is so vague and generic that it hardly shows any connection to the U.S. government,

certainly not to the DEA or any federal law enforcement agency.

Third, Barba's and Ochoa's alleged perception that these individuals were "spying" lacks foundation. Although admissible at trial as a co-conspirator statement, this testimony hardly demonstrates that the victims were believed to be DEA agents spying on drug dealers, or that they were killed based on such a belief.

(b) Pre-Arrest Statements By Appellant

In its opposing brief, the government misrepresents the trial record as to pre-arrest statements by Appellant, by citing only to the direct examination of DEA agent Abel Reynoso and failing to reference key admissions elicited during cross. By withholding key testimony in its citation to the record, the government improperly seeks to embellish the record in its favor.

Agent Reynoso testified during the government's case-in-chief that he had interviewed Appellant on several occasions in July 1989, two months prior to Appellant's arrest on the superseding indictment.²⁴ One of the meetings -- which took place on July 14, 1989 -- was tape-recorded. (RT 5/30/90, at pp. 173-174) Reynoso covered many subjects during the interviews, and Appellant discussed the activities of his family members, principally his brothers Eliseo and Antonio, who had worked closely with drug lord Barba prior to their deaths. (RT 5/30/90, at pp. 175-177)

On direct examination, Reynoso tried to bolster the government's foundation for jurisdiction by stating that Appellant had told him that the drug

²⁴ Appellant was indicted in the fourth superseding indictment on or about October 11, 1989 and arrested at that time. Prior to the indictment being issued, appellant had been interviewed a number of times by agent Reynoso, and some of the sessions had been tape-recorded. The government also prepared transcripts of these recordings. These recorded interviews were a principal focus of Reynoso's direct and cross-examination. (RT 5/30/90, at 113-116; 173-174)

traffickers at La Langosta had "confused these two individuals for possibly DEA agents." (RT 5/30/90, at p. 160) Reynoso obviously knew that he was misrepresenting Appellant's statements; he immediately back-pedaled by stating: "He didn't use exactly 'DEA agent', but he used something related to DEA." (RT 5/30/90, at p. 160)

But this was not good enough to set the record straight. On cross-examination, defense counsel referred Reynoso back to the transcripts of the tape-recorded discussions with Appellant. (RT 5/30/90, at pp. 178-179) The transcripts spoke for themselves, and Reynoso had to concede the point that Appellant never mentioned anything even close to the DEA or any federal law enforcement agency.

First, Reynoso acknowledged that Appellant never admitted having had any first-hand knowledge about what happened at the La Langosta restaurant on the night of the killings. Appellant advised Reynoso that "other people had commented about that particular incident, and that (Appellant) had heard some things about it(.)" (RT 5/30/90, at p. 179-180) Appellant believed that his brothers, Eliseo and Antonio, were at the restaurant on the date in question, but he wasn't sure. (RT 5/30/90, at p. 181, 199) All of Appellant's references to the event during his conversations with agent Reynoso were based on what his brothers had told him. (RT 5/30/90, at pp. 183, 198). Thus, there are no confessions or admissions by Appellant that could serve as a basis for subject matter jurisdiction.

Second, contrary to his testimony on direct examination, Reynoso had no choice but to admit on cross-examination that during the interview session, Appellant had not said anything to him about the victims being U.S. agents. The colloquy went as follows, with specific references to the transcript of the interview,

which Reynoso had in front of him on the witness stand²⁵:

Q. Do you remember Javier telling you that Eliseo had told him that two -- in fact, two gabachos [phonetic] -- I guess Americans, in slang -- had come into the restaurant?

A. That is correct, sir.

Q. And Javier Vasquez told you that Eliseo had told him that those two Americans looked suspicious.

Do you remember him saying that to you?

A. Yes sir.²⁶

Q. And that as a result, Eliseo and others caught them. Do you remember Javier saying that to you?

A. Yes, sir.

Q. And Eliseo told Javier, and Javier told you, that Eliseo was interrogating them with other people.

Do you remember that?

A. Yes, sir.

Q. In fact, Javier told you that Eliseo had explained to him that the interrogators there at the restaurant had almost pressured the two Americans into admitting they were police.

Do you remember Javier describing that

²⁵ See RT 5/30/90, at page 199, lines 24-25. Each time defense counsel referred to an interview session, agent Reynoso had the transcript of the interview in front of him.

²⁶ The transcript is defective as to spacing (not as to content), in that the next question by counsel is contained within the framework of the witness' answer. See RT 5/30/90, at p. 200, line 24. To avoid confusion, counsel has made the correction in formatting this excerpt. However, no change of any kind as to testimony has been made.

information that Eliseo had given to them?

A. Yes, sir.

(RT 5/30/90, at pp. 200-201)

As with the testimony by witness Cervantes, the statements made by Appellant are not only uncorroborated hearsay (albeit admissible), they are vague and generic in their characterization of the victims. As with the term "gringo", there are millions of people who could fit the reference "gabacho." Moreover, even if it were true that the two victims stated they were police while under torture, that does not establish that they were killed because they were mistaken for being police.

Thus, the testimony of Reynoso as to pre-arrest statements by Appellant fails to lay a foundation for establishing that it was the intent of the murderers at La Langosta to kill a DEA agent, as the government contends.

(c) Defense Exhibit P

Perhaps the most glaring indication of the deficiency in the government's case for jurisdiction is its reliance on a defense exhibit, Exhibit P.²⁷

The government's reliance on this exhibit represents an almost comical about-face in the position the government has taken in regard to this exhibit. As part of his defense, Appellant offered Exhibit P, and it was received by the Court, pursuant to Federal Rule of Evidence 804(b)(3) as a statement by an unavailable

²⁷ Appellant contends that the District Court erred in denying his motion to dismiss for lack of subject matter jurisdiction on June 26, 1990, immediately after the government rested its case-in-chief. Thus, Exhibit P should not even be considered in the jurisdictional analysis because it was introduced by the defense after the court had already denied the motion. The Court revisited Appellant's jurisdiction motion and denied it again on July 10, 1990, following the close of all the evidence. (RT 7/10/90, at pp. 33-38) Whether considered by this Court or not, Exhibit P hardly substantiates the government's position on the jurisdiction issue; thus, whether the court does or does not consider this exhibit is of little, if any, consequence in the overall analysis.

witness, an individual named Luis Gonzalez-Ontiveros.²⁸ ("Gonzalez") (RT 7/10/90, at pp. 38-44; 59)

Briefly, by way of background: the exhibit is a telex cable by DEA agent Robert Castillo from the DEA's Mexico City office which summarized a confession made by Mr. Gonzalez during his interrogation by Mexican police regarding the La Langosta incident. In the confession, Gonzalez purports to admit his complicity in the Walker/Radelat murders and, as such, impeaches government witness Enrique Placencia-Aguilar by directly contradicting Placencia's testimony of his actions with Gonzalez at the La Langosta restaurant. The statement attributes to Gonzalez the representation that the two "gringos" were mistaken for DEA.

How odd that the government now comes before the Ninth Circuit seeking to have this Court adopt Gonzalez' statements as a reliable basis on which to find the requisite "nexus" under United States vs. Davis for subject matter jurisdiction. At the same time that Appellant's counsel offered Exhibit P, the government countered with its own exhibit, Exhibit 190, which purported to contain none other than Gonzalez' subsequent recantation of the confession contained in Exhibit P. The recantation asserts that the confession had been elicited under torture and thus was not true. The District Court admitted Defense Exhibit P and Government Exhibit 190 at the same time. (RT 7/10/90, at p. 44; 59)

The government's attack on Exhibit P went much further. During closing argument, government counsel strenuously discredited the exhibit as "worthless", as reflected in the following excerpts:

Exhibit P: Mr. Nicolaysen spent a significant time, if

²⁸ The transcripts occasionally refer to Exhibit P erroneously as Exhibit B, most likely due to the court reporter's confusion phonetically over the similar sound of the two letters.

not all of it, on this telex prepared by Robert Castillo and that he sent to headquarters after he sat in on a questioning of this Gonzalez Ontiveros.

*** * ***

Well, let's set the record straight here. Yes, Mr. Nicolaysen's correct: I made no mention of Exhibit P. And the reason is, is because that piece of paper is not worth the piece of paper that it's written on. It has absolutely no credibility, and I'll tell you why.... -- And here's the million dollar point: he was tortured and he was beaten. And if that's the case, anything that that man says has no credibility.

I mean, come on: if you're beaten, tortured, blindfolded and your hands tied behind your back, you're going to say whatever that M.F.J.P.²⁹ commandante wants to hear.

Indeed, you know there's proof of that, because I'd ask you to look at Government's Exhibit 190. Write it down: 190. That's the recantation of that same witness, Gonzalez.

*** * ***

Exhibit P, what Mr. Nicolaysen relied on so heavily and so strongly, is worthless. And that's why I didn't even bring it to your attention. I'm not here to misguide you, to ask you to rely on documents that

²⁹ Mexican Federal Judicial Police.

have no credibility. I wouldn't be doing my job otherwise.

I ask you to take Exhibit P, read it, compare it to government's exhibit 190, and then throw both aside, because Gonzalez was tortured.

(RT 7/10/90, pp. 116-118)

It is hard to imagine how the government can justify asking this Court to adopt Exhibit P for jurisdictional purposes without being candid enough with this Court to acknowledge the introduction of its own rebuttal exhibit 190, and the strident denunciation of Exhibit P which the prosecutor advanced to the jury during closing argument.

In sum, the government fails to cite to evidence in the trial record which establishes the requisite "nexus" between Appellant's conduct and the United States to warrant the extraterritorial application of 18 U.S.C. 1959 with respect to the charges against Appellant.

(2) Even Under International Law, Extraterritorial Jurisdiction Should Not Apply Here Because The Murders of Tourists Did Not Impose A Detriment On The United States

Regardless of which principle of international law is cited to³⁰, those courts which have applied a criminal statute extraterritorially have acknowledged that by the very nature of the offense, there exists a clear governmental interest to defend against a detriment imposed on the United States and/or world community by the

³⁰ As discussed in Appellant's opening brief (pages 14 - 16), five recognized principles of international law are generally cited to in the analysis of extraterritorial jurisdiction: territorial, national, protective, universal, and passive personal.

criminal conduct at issue. These statutes include: (1) the federal drug laws [21 U.S.C. 841, 846 and 952]. Larsen, 952 F.2d at 1100³¹; Noriega, 746 F.Supp. at 1515; (2) the Aircraft Piracy Act [18 U.S.C. 32] and the Hostage Taking Act [18 U.S.C. 1203]. Yunis, 681 F.Supp. at 899-903³²; (3) the Arms Export Control Act [22 U.S.C. 2778]. United States vs. Evans, 667 F.Supp. 974, 981 (S.D.N.Y. 1987); (4) the espionage laws [18 U.S.C. 792, 793]. United States vs. Zehe, 601 F.Supp. 196, 197-98 (D.Mass. 1985).

In sharp contrast, no such detriment to either the United States government or world community at large is imposed by the nature of the offense for which Appellant was convicted: the killing of tourists in Mexico. Cf. United States vs. Fernandez, 496 F.2d 1294, 1296 (5 Cir. 1974)(U.S. court had subject matter jurisdiction to try defendant for crime of possessing/uttering stolen U.S. Treasury checks, despite fact that crime was committed in Mexico, because the offense "prevent(ed) the normal disbursement of Social Security Funds to those lawfully entitled to receive such funds".), cited in United States vs. Columba-Colella, 604 F.2d 356, 359 (5th Cir. 1979); United States v. Pizzaruzzo, 388 F.2d 8 (2d Cir.), cert. denied, 392 U.S. 936 (1968)(subject matter jurisdiction existed to try alien who knowingly supplied false information to U.S. official in the course of obtaining a U.S. passport in an American consulate overseas, because "the alien intended to

³¹ In Larsen, the Ninth Circuit adopted prior rulings in other circuits which held that drug smuggling that is intended for distribution within the territorial United States is "intended to produce detrimental effects" in this country. The government has a clear interest in defending itself against such activity, thus making it appropriate to apply the drug statutes extraterritorially. 952 F.2d at 1100.

³² In Yunis, the Court observed that in prosecuting violations of the Aircraft Piracy Act and the Hostage Taking Act that occur in a foreign country, "... the United States (is) acting on behalf of the world community to punish alleged offenders of crimes that threaten the very foundation of world order,..." 681 F.Supp. at 903. The court further observed that "both hostage taking and aircraft piracy have been defined as offenses against the law of nations." Id. at 903.

and did directly interfere with one of the functions of the United States government."), cited in Columba-Colella, supra, 604 F.2d at 359.

Thus, the government's position on this appeal flies directly in the face of published case law. Consequently, this Court should find that the District Court lacked subject matter jurisdiction in regard to the charges against Appellant and should therefore dismiss those charges.

III.

APPELLANT DILIGENTLY PURSUED HIS SEVERANCE MOTION AND THUS DID NOT WAIVE HIS RIGHT TO RAISE THE ISSUE ON APPEAL

The government contends that Appellant has waived his severance claim on appeal by not expressly renewing the motion at the close of all the evidence. In making this argument, the government is seeking to avoid the merits of the severance claim which weigh strongly in Appellant's favor.

This Court recently held in United States vs. Cuozzo, 962 F.2d 945, 950 (9th Cir. 1991) that the rule requiring renewal

is not "an inflexible one; waiver may be absent when the motion accompanies the introduction of evidence deemed prejudicial and a renewal at the close of all evidence would constitute an unnecessary formality."

[citation omitted]

In the case at bar, Appellant filed a lengthy pretrial severance motion, which was denied; and the renewals by counsel prior to the court's instruction to the jury could be deemed to have been made collectively on behalf of all defendants. [RT 7/11/90, at 41]. Moreover, the government introduced a great

deal of evidence regarding the kidnap/torture/murder of agent Camarena which had no bearing on the charges against Appellant, but which were clearly prejudicial to him. A clear example is the tape-recorded torture of Camarena which was played to the jury. Accordingly, the government's waiver argument should be rejected.

Moreover, for all the reasons discussed previously in regard to the government's failure to establish a nexus between Appellant's conduct and the United States, this Court should, at the very least, reverse the District Court's denial of Appellant's severance motion. The only conceivable basis for trying the two groups of murders (Walker/Radelat and Camarena/Zavala) together in one trial is the theory that Walker/Radelat were mistaken for DEA agents. Because the government has failed to lay a proper foundation for this theory, then if this Court denies Appellant's jurisdiction claim, he should clearly have a new trial where the evidence is limited to the Walker/Radelat murders, without any of the prejudicial spillover from the Camarena phase of the case. Fairness requires at least that much.

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Respectfully Submitted,

GREGORY NICOLAYSEN
Counsel for Appellant,
Javier Vasquez-Velasco