U.S. Department of Justice

United States Attorney
Eastern District of New York

271 Cadman Plaza East
Brooklyn, New York 11201

JPL/MRG
F. #2019R01460

February 20, 2024

By ECF and E-mail

The Honorable Eric N. Vitaliano
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Javier Aguilar
Criminal Docket No. 20-390 (ENV)

Dear Judge Vitaliano:

The government writes in response to the defendant's letter motion seeking "partial judgment of acquittal" or a jury instruction regarding an affirmative defense. See ECF Dkt. No. 316 ("Def. Ltr."). The Court should deny the motion.

As an initial matter, the motion for acquittal is procedurally improper. Defendant seeks "partial judgment of acquittal" as to some, but not all, of the specified unlawful activity alleged as part of the offense charged in Count Three of the Redacted Indictment. Def. Ltr. at 1. But Federal Rule of Criminal Procedure 29 permits a defendant to move for "acquittal of an[] offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a) (emphasis added). It does not permit a motion for acquittal as to part of an offense. The "offense" charged in Count Three of the Redacted Indictment is a money laundering conspiracy in relation to both Mexico- and Ecuador-related conduct, and the defendant does not make any attempt to argue that there is insufficient evidence to sustain a conviction as to the Ecuador-related conduct. Thus, there are no grounds to grant acquittal as to the charged offense. The defendant does not cite, and the government is not aware of, any case in which a court has entered a "partial judgment" as to one specified unlawful activity, but not as to others.[1] That is not surprising. The defendant's

[1] Indeed, if a specified unlawful activity were an "offense" within the meaning of the Federal Rules, then the defendant would not be entitled to an acquittal at all, "partial" or otherwise. Motions for "failure to state an offense" must be raised before trial. Fed. R. Crim. P. 12(b)(3)(B)(v), but the defendant has never so much as attempted to show "good cause" for his failure to raise his theory that the indictment fails to state an offense under Article 222(II) before

request for a judgment of acquittal here is akin to seeking partial acquittal because one of the alleged means of committing an offense was not proven, but others were. Indictments routinely charge multiple means of committing an offense in a single charge. Even when each and every alleged means is not proven at trial, the relief the defendant seeks is not the remedy. Instead, simply not instructing the jury on this specified unlawful activity, as the Court presumably intends to do, is sufficient.

The defendant's arguments in support of both acquittal and his requested jury instruction are likewise incorrect. The affirmative defense the defendant invokes is available only where a payment "was lawful under the written laws and regulations of the foreign official's country." 15 U.S.C. § 78dd-2(c)(1). Thus, the defendant is raising an affirmative defense that concerns not just Article 222(II) of the Federal Criminal Code, but the entire corpus of Mexican criminal, administrative and constitutional law, and he is doing so for the first time after the close of evidence. For that reason alone, the defense is untimely and should barred. See Fed. R. Crim. P. 26.1 (requiring that a "party intending to raise an issue of foreign law must provide the court and all parties with reasonable written notice").

In addition to being untimely, the defendant has provided no evidence or other authority that it was legal under Mexico's "written laws" to pay bribes to help Vitol win the contracts in question. Notably, despite the defendant's extensive reliance on the declaration of a Mexican law expert in support of his other legal arguments, the defendant has not supplied the Court with any similar support for the proposition that the written laws of Mexico permitted him to bribe PPI officials. Cf. United States v. Gonzalez, 407 F.3d 118, 122 (2d Cir. 2005) ("A defendant is entitled to an instruction on an affirmative defense only if the defense has 'a foundation in the evidence'"). The defendant relies on this Court's recent decision, but it does not provide a sufficient basis for the affirmative defense. This Court ruled only that the defendant did not violate Article 222(II) of the Federal Criminal Code, but the affirmative defense is available only where a payment "was lawful under the written laws" of the country in question (civil or criminal), 15 U.S.C. § 78dd-2(c)(1) (emphasis added), not just where it is not an offense under one of the country's criminal laws.

Indeed, the defendant has himself repeatedly argued that the interpretation of Mexican criminal law that he urged the Court to adopt "does not give private actors free rein to engage in corruption." ECF Dkt. No. 312 at 4; see id. (calling the government's contrary argument "a figment of its imagination"). That, he argued, is because "Article 212 . . . is not the only law that proscribes bribery," and "PPI employees are subject to the same criminal, civil, and employment sanctions that apply to all private-company employees who steal from or defraud their employers by engaging in bribery, embezzlement, or other forms of corrupt conduct." ECF Dkt. No. 290 at 4;[2] see also ECF Dkt. No. 312 at 4 (defendant's argument that Article 109 of the

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trial. See Fed. R. Crim. P. 12(c) ("If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely.").

[2] The affirmative defense requires the defendant to show the "payment" was lawful, which it could not be if—as the defendant has argued—it was unlawful for PPI employees to accept it. The defendant could also be prosecuted himself for aiding-and-abetting PPI

Mexican Constitution "addresses" any concern that his interpretation of Article 212 would legalize corruption); Mex. Const. Art. 109(IV) (discussing administrative penalties, including "economic sanctions" and "restoration of damages to the Treasury").[3] Having "prevail[ed] in one phase of a case on an argument," the defendant cannot now rely "on a contradictory argument to prevail in another phase." New Hampshire v. Maine, 532 U.S. 742, 749 (2001).

Further, whatever Mexican law might provide generally about payments to PPI officials, the specific payments to Espinosa and Guzman at issue here were not lawful. In one of the very ethane contracts for which he paid bribes, for example, the defendant (who signed on behalf of Vitol) warranted that "neither [Vitol], its partners, or employees have committed . . . bribery [in connection with] Petróleos Mexicanos, its Subsidiary Production Companies, [or] affiliates." GX 5161-T at 9 (emphasis added). He further warranted that "during the procedure to establish and execute this Contract, [Vitol] committed no Acts of Corruption, nor is it aware that any such acts have taken place with respect to this Contract." Id. at 10. Thus, the payments that defendant made to Espinosa and Guzman were prohibited by the very government contract that the defendant signed. They cannot therefore have been "lawful under the written laws" of Mexico. See also Banco de Mexico v. Orient Fisheries, Inc., 680 F. Supp. 2d 1132, 1145 (C.D. Cal. 2010) (noting that the Mexican Civil Code prohibits "deception in contracting"); Mexican General Law on Administrative Responsibilities, Art. 69 (prohibiting the "simulation of compliance" with procurement rules).

In any event, to invoke this defense, a defendant must affirmatively show that written law permits the payment in question, which, again, the defendant has made no effort to do, beyond citing this Court's ruling on one criminal law. The conference report on the 1988 bill that added this defense to the FCPA expressly stated that the "Conferees wish to make clear that the absence of written laws in a foreign official's country would not by itself be sufficient to satisfy this defense." H.R. Conf. Rep. 100-576, 922, 1988 U.S.C.C.A.N. 1547, 1955. The defendant suggests that the Court should disregard the conference report because the conferees agreed to delete provisions of the draft House bill that required the payments to be "expressly permitted under a[] law or regulation." See Def. Ltr. 2. This Court should not follow that suggestion. First, as a general matter, a "conference report is . . . the most reliable evidence in legislative history . . . because it represents the final statement of the terms agreed to by both houses." Slayton v. Am. Exp. Co., 604 F.3d 758, 771 (2d Cir. 2010); see RJR Nabisco, Inc. v. United States, 955 F.2d 1457, 1462-63 (11th Cir. 1992) (collecting authorities). Moreover, the conference report here is particularly persuasive because the drafting decision on which the defendant relies was made by the conferees and they explained it: as they said in the report, they were rejecting the House's proposed language, but doing so with the express understanding that a mere absence of written laws would still not satisfy the defense under the final language they were adopting.

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employees to commit such a crime. See Federal Criminal Code, Art.13(III)-(VI) (making criminally liable those who carry out a crime jointly or willfully cause or help another to commit a crime).

[3] For an English translation, see https://www.constituteproject.org/constitution/Mexico_2015.

Contrary to the defense's apparent suggestion, the conferees were not acting irrationally: the "absence of written laws," standing alone, may be (and is) insufficient to invoke the affirmative defense, even if the defense does not go so far as to require that written laws and regulations "expressly permit" a payment (as would have been required under the House bill). For example, short of pointing to a written law expressly permitting the payment, a defendant should still be required to provide court decisions, treatises, academic authorities, or statements of government authorities affirmatively opining that the payments in question are lawful under the country's laws. The defendant makes no effort to provide such authorities, and he should not be permitted to do so now for the first time after the close of evidence in the case and on the eve of summations. Instead, he relies only on this Court's ruling as to one criminal law and his eleventh-hour claim that there are no other written laws in all of Mexico that prohibit the conduct at issue in this case (in spite of his prior claims that such laws do, in fact, exist). He therefore is not entitled to an instruction on the defense.[4]

What is more, defendant's logic would require the government to prove in every FCPA prosecution not only a violation of the FCPA, but also a violation of foreign law. That result would be untenable and inconsistent with the purpose of the FCPA. It is for that reason that the court in Ng Lap Seng rejected a request for a similar instruction as "impractical" and

[4] Defendant claims to be "in the same circumstances" as the defendant who wished to raise an affirmative defense in United States v. Johnson, 968 F.2d 208 (2d Cir. 1992). The defendant in Johnson, however, did not raise his affirmative defense on the eve of summation and, what is more, raised a defense that implicated only U.S. law. See Fed. R. Crim. P. 26.1 (requiring "reasonable written notice" of intent to raise foreign law issues).

"inconsistent with the plain meaning" of the FCPA. See Ng Lap Seng, S5 15 Cr. 706 (VSB) (S.D.N.Y.), Trial Tr. 715-16 (attached as Exhibit A). This Court should do the same here.

Respectfully submitted,

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Enclosure

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