

APPENDIX 1

	<u>Pages</u>
Opinion of the 9 th Circuit	A-001-015

859 F.3d 690
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Cesar Paolo UBALDO, aka [Arvi](#), aka Cesar Paolo
Inciong Ubaldo, Defendant–Appellant.

No. 14-50093

|
Argued and Submitted August 3, 2016 Pasadena,
California

|
Filed June 9, 2017

Synopsis

Background: Defendant was convicted in the United States District Court for the Central District of California, No. 2:12-cr-00037-RGK-2, [R. Gary Klausner, J.](#), of illegally importing weapons into the United States, and he appealed.

Holdings: The Court of Appeals, [Rawlinson](#), Circuit Judge, held that:

^[1] criminal statutes that prohibited importation of weapons into the United States, by their very nature, targeted conduct that almost always originated outside the United States, and thus applied extraterritorially;

^[2] evidence was sufficient to support defendants' convictions of knowingly and willfully aiding and abetting or engaging in actions causing harm to the United States by importing weapons into the United States;

^[3] defendant's e-mail messages to agent did not have to be suppressed on theory that search warrant application for e-mails contained false and misleading statements;

^[4] district court did not clearly err in finding that FBI agent had not acted in bad faith in failing to preserve his outgoing e-mail messages to defendant, and in declining to dismiss indictment based on this failure to preserve evidence;

^[5] district court acted within its discretion when it elected to issue a curative instruction, rather than to grant a

mistrial, for government's purported violation of Federal Rule of Criminal Procedure; and

^[6] district court did not abuse its discretion in admitting other bad acts evidence.

Affirmed.

West Headnotes (28)

^[1] **Criminal Law**
 [Review De Novo](#)

Court of Appeals reviews de novo a district court's denial of motion for acquittal based on sufficiency of evidence.

[Cases that cite this headnote](#)

^[2] **Criminal Law**
 [Construction in favor of government, state, or prosecution](#)
Criminal Law
 [Reasonable doubt](#)

There is sufficient evidence to support conviction if, viewing evidence in light most favorable to prosecution, any rational trier of fact could have found essential elements of crime beyond a reasonable doubt.

[Cases that cite this headnote](#)

^[3] **Criminal Law**
 [Review De Novo](#)

Court of Appeals reviews de novo a district court's decision regarding the extraterritorial reach of statute.

[Cases that cite this headnote](#)

abuse of discretion.

Cases that cite this headnote

- [4] **Criminal Law**
🔑 Review De Novo
Criminal Law
🔑 Indictment and information
Criminal Law
🔑 Evidence wrongfully obtained

District court's denial of motion to suppress, or of motion to dismiss indictment, is reviewed de novo; however, the factual findings underlying the denial are reviewed for clear error.

Cases that cite this headnote

- [5] **Indictment and Information**
🔑 Hearing and determination

On motion to dismiss indictment, evidence is viewed in light most favorable to prosecution.

Cases that cite this headnote

- [6] **Criminal Law**
🔑 Preliminary proceedings
Criminal Law
🔑 Issues related to jury trial

Rulings on motions for mistrial and discovery issues are reviewed for abuse of discretion.

Cases that cite this headnote

- [7] **Criminal Law**
🔑 Instructions
Criminal Law
🔑 Reception and Admissibility of Evidence

District court's evidentiary rulings and its formulation of jury instructions are reviewed for

- [8] **Criminal Law**
🔑 Review De Novo

Claims of alleged misstatements of law in district court's instructions are reviewed de novo.

Cases that cite this headnote

- [9] **Statutes**
🔑 Extraterritorial operation

On challenge to alleged extraterritorial application of statute, courts must begin with presumption that United States statutes do not apply to foreign conduct and then engage in two-step analysis, under which they first must determine whether this presumption against extraterritorial application has been rebutted by clear and affirmative indication in statute; only if presumption is not rebutted, and if court finds that statute does not apply extraterritorially, must court then proceed to second step of analysis and determine whether the case at hand involves a domestic application of statute by analyzing the statute's focus.

1 Cases that cite this headnote

- [10] **War and National Emergency**
🔑 Offenses and prosecutions
Weapons
🔑 Construction

Criminal statutes that prohibited importation of weapons into the United States, by their very nature, targeted conduct that almost always originated outside the United States, and thus applied extraterritorially; presumption against extraterritoriality was rebutted by provisions of

statutes and by legislative history accompanying these statutes. 18 U.S.C.A. § 922(l); 22 U.S.C.A. § 2778(b)(2).

1 Cases that cite this headnote

[11] **Criminal Law**
🔑Aiding, abetting, or other participation in offense

Defendant may be convicted of knowingly and willfully aiding and abetting or engaging in actions causing harm to the United States, even if he did not complete substantive offense. 18 U.S.C.A. § 2(b).

Cases that cite this headnote

[12] **War and National Emergency**
🔑Offenses and prosecutions
Weapons
🔑Interstate or foreign commerce

Evidence that one of defendants earned thousands of dollars by procuring high-powered firearms and selling them to undercover FBI agent, who informed him that he would smuggle guns into Mexico through California, and that the other defendant arranged meetings for these weapons sales and put agent in contact with Philippine customs official who could assist in smuggling the weapons out of the country, with knowledge that weapons would be smuggled into Mexico via California, was sufficient to support defendants' convictions of knowingly and willfully aiding and abetting or engaging in actions causing harm to the United States, though it was the FBI, and not defendants, that handled actual shipping, though defendants did not direct FBI agents to ship weapons to the United States, and though FBI agents could not violate substantive criminal statutes. 18 U.S.C.A. § 2(b).

Cases that cite this headnote

[13] **War and National Emergency**

🔑Offenses and prosecutions

Weapons

🔑Parties to crime; aiding and abetting

Defendants did not have to take active role in actually transporting or shipping illicit weapons into the United States in order to be convicted of knowingly and willfully aiding and abetting or engaging in actions causing harm to the United States by facilitating weapons importation scheme; rather, jury could convict defendants, and they could be held criminally responsible for harms that flowed naturally or were a direct result of their conduct, if they knowingly and willfully caused weapons to be transported to the United States. 18 U.S.C.A. § 2(b).

Cases that cite this headnote

[14] **Criminal Law**
🔑Aiding, abetting, or other participation in offense

Defendant may be convicted of knowingly and willfully aiding and abetting or engaging in actions causing harm to the United States, even if he did not commit all the elements of offense, but instead caused the commission of indispensable element of offense by an innocent agent who lacked criminal intent or capacity. 18 U.S.C.A. § 2(b).

Cases that cite this headnote

[15] **Criminal Law**
🔑Affidavit or complaint; probable cause

Defendant seeking to suppress evidence based on allegedly faulty search warrant must demonstrate that the government intentionally included false information in affidavit supporting the warrant, and that there would not have been probable cause without the

challenged statements. [U.S. Const. Amend. 4](#).

[Cases that cite this headnote](#)

[16]

Criminal Law

🔑 [Warrant requirements; probable cause](#)

In prosecution of defendant for illegally importing, into the United States, weapons that undercover FBI agent had purported to purchase for Mexican drug cartel, defendant's e-mail messages to agent did not have to be suppressed on theory that search warrant application for e-mails contained false and misleading statements regarding final destination of these weapons, and regarding his knowledge that weapons would be transported to Mexico after first being imported into the United States; defendant failed to present evidence sufficient to establish that affidavit contained any materially false or misleading statements. [U.S. Const. Amend. 4](#); [18 U.S.C.A. § 922\(l\)](#); [22 U.S.C.A. § 2778\(b\)\(2\)](#).

[Cases that cite this headnote](#)

[17]

Constitutional Law

🔑 [Duty to preserve](#)

Government violates defendant's due process rights when it destroys potentially exculpatory evidence in bad faith. [U.S. Const. Amend. 5](#).

[Cases that cite this headnote](#)

[18]

Criminal Law

🔑 [Excuse or justification for destruction or loss](#)

In prosecution of defendant for illegally importing, into the United States, weapons that undercover FBI agent had purported to purchase for Mexican drug cartel, district court did not clearly err in finding that FBI agent had not acted in bad faith in failing to preserve his

outgoing e-mail messages to defendant, and in declining to dismiss indictment based on this failure to preserve evidence; agent testified that he was under impression that his cell phone automatically stored outgoing messages, and thus preserved only incoming messages that he received from defendant, and agent had attempted to retrieve his outgoing messages by sending his cell phone to the FBI technology department. [18 U.S.C.A. § 922\(l\)](#); [22 U.S.C.A. § 2778\(b\)\(2\)](#).

[Cases that cite this headnote](#)

[19]

Criminal Law

🔑 [Failure to produce information](#)

On motion for mistrial based on government's misconduct in allegedly not allowing defendant to inspect evidence material to his defense, district court may exercise its discretion to issue a curative instruction rather than granting a mistrial. [Fed. R. Crim. P. 16](#).

[Cases that cite this headnote](#)

[20]

Criminal Law

🔑 [Failure to produce information](#)

District court acted within its discretion when it elected to issue a curative instruction, rather than to grant a mistrial, for government's purported violation of Federal Rule of Criminal Procedure in failing to disclose a report indicating that letter which defendant offered into evidence had been forged; while defendant argued that report was material and that he would have never offered the letter into evidence had he known that it was forged, district court could address problem by ordering the letter withdrawn as evidence and instructing jury "to give no consideration to that letter or any testimony regarding the letter or its content." [Fed. R. Crim. P. 16](#).

[Cases that cite this headnote](#)

[21] **Criminal Law**
🔑Purposes for Admitting Evidence of Other Misconduct

While other bad acts evidence may not be offered to show that a person acted in accordance with his prior bad acts, such evidence may be admitted to show defendant's intent, plan, knowledge or absence of mistake. Fed. R. Evid. 404(b).

Cases that cite this headnote

[22] **Criminal Law**
🔑Evidence

District court's determination as to whether danger of unfair prejudice substantially outweighs the probative value of evidence is entitled to great deference on appeal. Fed. R. Evid. 403.

Cases that cite this headnote

[23] **Criminal Law**
🔑Weapons and explosives

In prosecution of defendant for illegally importing weapons into the United States, district court did not abuse its discretion in admitting other bad acts evidence regarding defendant's previous smuggling of mislabeled rifle scopes as relevant to show his intent, plan, knowledge or absence of mistake, and as having probative value that was not outweighed by danger of unfair prejudice. 18 U.S.C.A. § 922(l); 22 U.S.C.A. § 2778(b)(2); Fed. R. Evid. 403, 404(b).

Cases that cite this headnote

[24] **Criminal Law**
🔑Conduct of Trial in General

In prosecution of defendants for illegally importing weapons into the United States, any error in allowing weapons to remain on display in courtroom was harmless beyond reasonable doubt in view of overwhelming evidence of defendants' guilt. 18 U.S.C.A. § 922(l); 22 U.S.C.A. § 2778(b)(2).

1 Cases that cite this headnote

[25] **Criminal Law**
🔑Duty of judge in general
Criminal Law
🔑Confused or misleading instructions

District court's formulation of jury instructions must adequately cover the applicable law and must not be misleading.

Cases that cite this headnote

[26] **Criminal Law**
🔑Construction and Effect of Charge as a Whole

Court of Appeals review jury instructions as whole when determining if there was instructional error.

Cases that cite this headnote

[27] **Criminal Law**
🔑Elements and Incidents of Offense, and Defenses in General

In prosecution of defendants for knowingly and willfully aiding and abetting or engaging in actions causing harm to the United States, district court properly instructed jury on "causation," as meaning to put in motion or cause commission of indispensable element of

offense; district court’s inclusion of the phrase “aided and abetted” in its causation instruction was unlikely to mislead jury in view of balance of instruction, which correctly guided jury’s deliberations. 18 U.S.C.A. § 2(b).

Cases that cite this headnote

[28]

Criminal Law

🔑 Reading or quoting statutes

Jury instructions that tracked the language of statute that defendants were charged with violating and controlling case law discussing elements of offense were not incomplete or improper.

Cases that cite this headnote

***694** Appeal from the United States District Court for the Central District of California, R. Gary Klausner, District Judge, Presiding, D.C. No. 2:12-cr-00037-RGK-2

Attorneys and Law Firms

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Before: **Diarmuid F. O’Scannlain**, **Johnnie B. Rawlinson**, and **Consuelo M. Callahan**, Circuit Judges.

OPINION

RAWLINSON, Circuit Judge:

Cesar Ubaldo (Ubaldo) appeals his conviction after he was found guilty by a jury of illegally importing weapons into the United States in violation of 18 U.S.C. §§ 371, 922(l), 924(a)(1)(C), and 22 U.S.C. §§ 2778(b)(2).¹ Ubaldo makes the following arguments on appeal:

1. The substantive offenses charged, violations of § 992(l) and § 2778(b), do not apply extraterritorially.
2. The evidence was insufficient to establish that Ubaldo caused the illegal ***695** importation of weapons into the United States.
3. His motion to suppress should have been granted because the search warrant was obtained through presentation of a false and misleading affidavit.
4. The prosecution violated **Federal Rule of Criminal Procedure 16** by withholding material evidence.
5. The district court admitted improper character evidence and unduly prejudicial evidence.
6. The district court should have dismissed the indictment because the undercover agent failed to preserve text messages related to the investigation.
7. The district court committed instructional error by improperly instructing the jury on willfulness and causation; failing to instruct the jury that Defendants could not be convicted for acting as brokers; and improperly instructing the jury that Defendants could be convicted on an aiding and abetting theory.

We are not persuaded that any reversible error occurred, and we affirm.

I. BACKGROUND

A. Statement of Facts

In 2010, the United States Federal Bureau of Investigation (FBI) initiated an investigation into illegal arms smuggling from the Philippines into the United States. Special Agent Charles Ro (Agent Ro) was sent to the Philippines as an undercover agent. He used the name Richard Hahn and posed as a representative of organizations looking to acquire weapons illegally.

Agent Ro was put into contact with Josh Hahn (Hahn), a broker for weapons suppliers. Hahn introduced Agent Ro to Roland Dasias (Dasias), who later sold Agent Ro twelve Bushmaster Rifles. After Dasias refused to do any

further business with Agent Ro, Hahn introduced Agent Ro to Cesar Ubaldo, also known as Arvi. Agent Ro told Hahn that he was seeking to purchase high-powered weapons for the Mexican Mafia and Mexican drug cartels. Ubaldo stated that he could acquire military vests and high-powered weapons, some of which would come from Camp Crame—a Philippine National Police military base. Ubaldo followed up by emailing Agent Ro a list of firearms his contacts had available for purchase.

Agent Ro returned to the United States soon thereafter, but stayed in contact with Ubaldo about a potential weapons sale. They scheduled a meeting in the Philippines sometime during the week of February 20, 2011. At the meeting, Agent Ro purchased an M82 rifle for \$30,000.

The following day, Syjuco called Agent Ro and offered to sell him an M14 assault rifle. Syjuco also informed Agent Ro that he could obtain more M82 rifles, as well as Rocket Propelled Grenades (RPGs) and plastic explosives from Camp Crame.

Agent Ro assured Ubaldo and Syjuco that he could safely store the weapons in the Philippines, but would need help transporting the weapons out of the Philippines. He stated that once the weapons bypassed Philippines Customs, he could smuggle them into California, and from there into Mexico. Ubaldo connected Agent Ro with Arjyl Revereza (Revereza), a contact in Philippine Customs. Syjuco confirmed that Revereza would ensure the weapons bypassed Philippine Customs.

Agent Ro returned to the United States, but remained in contact with Defendants via phone and email. Syjuco emailed his available inventory to Agent Ro. Agent Ro replied that he would be back in the Philippines in early May, and they could discuss *696 further sales at that time. Before arriving, Agent Ro ordered a mortar launcher, a grenade launcher, ten AK-47 assault rifles, and ten grenades.

After these purchases were completed, Agent Ro discussed shipping with Defendants and Revereza. Agent Ro had previously described arranging for a shipping container to arrive at a warehouse for transport to California. Agent Ro agreed to take care of the shipping paperwork, but reiterated the importance of bypassing customs. Revereza advised Agent Ro to label the arms in the container as furniture.

On May 12, 2012, Agent Ro and a few other undercover agents met with Syjuco to prepare the weapons for shipping. Syjuco and his bodyguard helped load the

weapons into Agent Ro's vehicle. Syjuco then helped package and transport the weapons to the location of the shipping container. Agent Ro's surveillance team captured Syjuco on video loading the weapons into the shipping container. Agent Ro and other agents filled out a Bill of Lading, completed the shipping documents, labeled the goods as furniture destined for California, and forwarded the Bill of Lading to Revereza.²

Before the container was shipped, FBI agents removed the grenades, the plastic explosives, and the weapons' firing pins. The agents then repackaged the weapons, *sans* firing pins, and placed tracking devices on the container. On May 18, 2011, Revereza informed Agent Ro that the container had successfully made it onto the ship. Later, Syjuco sent Agent Ro a text message to see if the shipping was going as planned.

The ship was originally scheduled to travel from the Philippines to Singapore to California. However, the ship was rerouted through China. Special Agent Dennis Lao, the agent overseeing the case, notified FBI agents in China that the container was passing through. Agent Lao also notified United States Customs in California that the ship would be arriving with a container holding inoperable weapons that were part of an ongoing investigation. The container arrived in the United States on June 7, 2011.

B. Procedural History

Defendants were charged with conspiracy in violation of 18 U.S.C. § 371³ (count 1), and causing the illegal importation of weapons into the United States in violation of 18 U.S.C. §§ 2,⁴ 922(l),⁵ 924(a)(1)(C),⁶ *697 and 22 U.S.C. § 2778(b)(2) (counts 2–5).⁷

1. Motion To Dismiss Indictment: Failure To Preserve Messages Sent By Agent Ro

Syjuco filed a motion to dismiss the indictment based on Agent Ro's failure to preserve text messages he sent to Defendants and Revereza during the investigation. In May 2011, Agent Ro lost his telephone and purchased a new one. After the investigation was completed, Agent Ro photographed all the incoming messages he received from Defendants and Revereza, but not the messages he sent. The FBI laboratory apparently attempted to retrieve the sent messages from the telephone, but were unable to do so.

The district court denied Syjuco’s motion for failure to present sufficient evidence that “the Government engaged in intentional destruction of evidence.” On reconsideration, the district court reaffirmed its earlier ruling, finding that Defendants failed to establish that Agent Ro acted in bad faith. The district court granted Defendants’ alternative request for a curative instruction permitting the jury to infer that the outgoing messages contained information against the government’s interest.

2. Motion To Suppress Ubaldo’s Emails

Ubaldo filed a motion to suppress emails the government obtained from his account on the basis that the warrant application contained false and misleading statements. In particular, Ubaldo asserted that Agent Ro falsely represented informing Ubaldo that the weapons purchased would be shipped to the United States. The district court denied the motion because, based on Agent Ro’s and Agent Lao’s testimony, Ubaldo failed to establish that the statements were false or misleading.

3. Trial: Defendants’ Evidentiary Challenges

On the first day of trial, Defendants moved *in limine* to prevent the government from presenting any testimony regarding the purpose of the weapons and from displaying the weapons in court. Defendants argued that the evidence was substantially more prejudicial than probative and should be excluded under [Federal Rule of Evidence 403](#). Defendants also argued against the presentation of evidence related to Ubaldo’s attempts to smuggle rifle scopes into the Philippines, describing the evidence as improper character evidence under [Federal Rule of Evidence 404\(b\)](#).

The district court ruled in the government’s favor, finding that testimony about the source of the weapons, the use of the weapons, and display of the weapons during trial was not unduly prejudicial given that the weapons were at the heart of the *698 trial. The district court also permitted introduction of the evidence detailing Ubaldo’s attempt to smuggle rifle scopes, declaring the evidence “relevant to Ubaldo’s state of mind, knowledge, and intent.” However, the district court tempered its ruling by noting its intent to instruct the jury that this evidence could be considered solely to determine Ubaldo’s intent.

During the course of the trial, Ubaldo filed a motion to

dismiss the indictment on the basis that the government engaged in prosecutorial misconduct. A government witness, Patrick Tinling, testified that he discovered Ubaldo’s correspondence about smuggling rifles scopes. In response, Ubaldo’s counsel sought to establish that Ubaldo actually directed the shipper to label the rifle scopes according to the factory specifications, and introduced emails to that effect. Ubaldo’s counsel also introduced an email stating that the rifle shipment was delayed for innocuous reasons. On redirect, Tinling stated that the email explaining the delay was forged. Ubaldo’s counsel argued that the charges should be dismissed because the government engaged in misconduct, never disclosing that the document was forged.

The district court denied the motion. But, to cure any potential prejudice, the district court removed the letter from evidence and instructed the jury to disregard the letter and any testimony related to it.

4. Post-Trial Motion For Acquittal: Sufficiency of the Evidence

Syjuco filed a motion for acquittal based on insufficient evidence. Syjuco argued that no reasonable jury could find that Defendants imported, aided and abetted the importation of, or caused the importation of weapons into the United States. Defendants maintained that the evidence was not sufficient to support a conviction for importing the weapons into the United States, because government agents “alone brought the weapons into the United States.” Defendants also contended that the evidence was insufficient to support an aiding and abetting conviction because government agents lacked the required *mens rea*. Finally, Defendants argued that the lack of evidence that they willfully directed the importation of the weapons precluded a finding that they “caused” importation of the weapons. The district court denied the motion, finding that a reasonable jury could convict Defendants on the evidence presented.

5. Jury Instructions and Verdict

Prior to instructing the jury, the district court held a status conference to address the parties’ arguments concerning jury instructions. As relevant here, the parties submitted proposed instructions on aiding and abetting. Defendants suggested that the district court instruct the jury that:

In order to be found guilty of willfully “causing” a federal agent to import defense articles and firearms from the Philippines into the United States, the government must prove (1) that the defendants “caused” the federal agent to import those items into the United States, and (2) that the defendants did so “willfully.”

The word “cause” as used in these instructions means to direct another person to act [and] the government must prove ... the defendants directed that agent to import those items into the United States....

The district court ultimately gave the following instruction:

...

In order for the defendants to be found guilty of “importing” defense articles and firearms into the United States, the government must prove to you, beyond *699 a reasonable doubt, that the defendants brought or aided and abetted the bringing of those items into the United States.

It is not sufficient for the government to prove that the defendants merely exported those items from the Philippines.

...

A defendant may be found guilty of the crimes charged ... even if the defendant personally did not commit the acts or acts constituting the crimes, but only aided and abetted in their commission.

That is, whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal. However, the government need not prove that someone other than the defendant was guilty of the substantive crime. A person who causes the commission of an offense is punishable as a principal even though the person who completes the wrongful act violates no criminal statute because of lack of criminal intent or capacity. One who puts in motion or causes the commission of an indispensable element of an offense by an innocent agent or instrumentality is guilty as a principal.

The district court declined to instruct the jury that Defendants could not be convicted if they merely acted as brokers, because the government never offered a broker theory of liability. The jury convicted Defendants.

6. Motion for Acquittal and for a New Trial: Extraterritorial Jurisdiction and Instructional Error

Defendants filed a motion for acquittal based on lack of extraterritorial jurisdiction and a motion for a new trial based on instructional error. They asserted that Congress did not intend for [18 U.S.C. § 922\(l\)](#) and [22 U.S.C. § 2778\(b\)\(2\)](#) to apply to foreign persons whose actions occurred in a foreign country. They also contended that the aiding and abetting language in the jury instructions converted the case into one involving brokering or mere facilitation.

The district court denied both motions. The district court determined that the statutory language, statutory context, and legislative history demonstrated that Congress sought to capture conduct that occurred outside the United States, irrespective of the actor’s citizenship. The district court also found that the aiding and abetting language in the jury instruction did not convert the case into a brokering case because the jury was instructed that Defendants had to willfully cause the importation, not merely facilitate it.

Ubaldo filed a timely appeal challenging his conviction.

II. STANDARDS OF REVIEW

^[1] ^[2] We apply *de novo* review to a district court’s decision denying a motion for acquittal based on sufficiency of the evidence. See [United States v. Gonzalez](#), 528 F.3d 1207, 1211 (9th Cir. 2008). “There is sufficient evidence to support a conviction if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* (citation omitted).

^[3] We also apply *de novo* review when reviewing a district court’s decision regarding the extraterritorial reach of a statute. See [United States v. Clark](#), 435 F.3d 1100, 1106 (9th Cir. 2006).

^[4] ^[5] Further, *de novo* review is applied to the denial of a motion to suppress and of a motion to dismiss an indictment. See *700 [United States v. Fries](#), 781 F.3d 1137, 1146 (9th Cir. 2015) (motion to suppress); [United States v. Black](#), 733 F.3d 294, 301 (9th Cir. 2013) (motion to dismiss indictment). But, the “factual findings underlying the denial” are reviewed for clear error. [Fries](#), 781 F.3d at 1146 (citation and alteration omitted). And, on a motion to dismiss an indictment, the evidence is viewed in the light most favorable to the prosecution. See

[Black](#), 733 F.3d at 301.

^[6] Rulings on motions for a mistrial and discovery issues are reviewed for an abuse of discretion. See [United States v. Cardenas-Mendoza](#), 579 F.3d 1024, 1029–30 (9th Cir. 2009).

^[7] ^[8] A district court’s evidentiary rulings and its formulation of jury instructions are also reviewed for an abuse of discretion. See [Fries](#), 781 F.3d at 1146. Alleged misstatements of law in the district court’s instructions, however, are reviewed *de novo*. See [id.](#)

III. DISCUSSION

A. Motion for Acquittal: Extraterritorial Application of 18 U.S.C. § 992(l) and 22 U.S.C. § 2778(b)(2)

Ubaldo contends that these statutes may not be applied to persons outside the United States because the statutes lack an expressed intention of extraterritorial application to rebut the presumption against extraterritorial application of United States statutes. He further contends that the legislative history of the statutes reflects an express intent that the statutes apply only within the territory of the United States.

^[9] The Supreme Court recently addressed the issue of extraterritorial application of a statute in [RJR Nabisco, Inc. v. European Community](#), —U.S. —, 136 S.Ct. 2090, 2096, 195 L.Ed.2d 476 (2016), a case dealing with extraterritorial application of the Racketeer Influenced and Corrupt Organizations Act (RICO). The Supreme Court clarified that courts must begin with the presumption that United States statutes do not apply to foreign conduct. See [id.](#) at 2100. It explained that a two-step framework must be applied to determine if that presumption has been overcome. See [id.](#) at 2101. Such framework treats the presumption against extraterritoriality as a substantive canon of construction. Daniel Sullivan & Kevin Benish, *Statutory Interpretation and the Morrison Presumption Against Extraterritoriality*, 85 U.S.L.W. 1290 (March 23, 2017).

First, the court must determine whether the presumption against extraterritorial application has been rebutted by “clear [and] affirmative indication” in the statute. [Id.](#) Second, if a determination is made that the statute does not apply extraterritorially, the court must determine whether the case at hand “involves a domestic application of the statute” by analyzing the “focus” of the statute. [Id.](#) If the presumption is rebutted at step one, there is no need to proceed to the second step of the analysis. See [id.](#) The

Court held that certain of RICO’s substantive provisions apply extraterritorially because the language of those provisions expressly references conduct that occurs outside the United States. See [id.](#) at 2101–02. Having made that ruling, the Supreme Court did not proceed to step two of the analysis. See [id.](#) at 2103.

^[10] For similar reasons, § 922(l) and § 2778(b)(2) overcome the presumption against extraterritoriality. See [RJR](#), 136 S.Ct. at 2100–02. Analogous to the substantive RICO statutes at issue in [RJR](#), illegally importing weapons into the United States by its very nature targets conduct that almost always originates outside the United States. See [id.](#) at 2101–02. As we noted some time ago, “smuggling by its very nature involves foreign countries, and ... always requires some action in a foreign country.” [Brulay v. United States](#), 383 F.2d 345, 350 (9th Cir. 1967). The fact that illegally importing weapons into the United States almost always requires some conduct in a foreign country distinguishes it from most other crimes, such as murder. See [Kiobel v. Royal Dutch Petroleum Co.](#), 569 U.S. 108, 133 S.Ct. 1659, 1665, 185 L.Ed.2d 671 (2013).

In addition, the legislative history of the statutes reflects an intent to capture conduct occurring outside the United States. See [H.R. Rep. No. 94–1144 at 23](#) (1976), *reprinted in* 1976 U.S.C.C.A.N. 1378, 1399 (declaring “that it shall be the policy of the United States to exert leadership in the world community to bring about arrangements for reducing the international trade in implements of war and to lessen the danger of outbreak of regional conflict and the burdens of armaments, U.S. programs for or procedures governing the export, sale, and grant of arms and munitions to foreign countries and international organizations shall be administered in a manner which will carry out this policy”); [H.R. Rep. No. 90–1577 at 6](#) (1968), *reprinted in* 1968 U.S.C.C.A.N. 4410, 4411 (expressing a purpose “to strengthen Federal controls over interstate and foreign commerce in firearms”).

We conclude that the presumption against extraterritoriality has been rebutted by the provisions within the statute and the legislative history accompanying the statute. Therefore, we need not and do not proceed to the second step of the applicable analysis. See [RJR](#), 136 S.Ct. at 2101.

B. Motion For Acquittal: Sufficiency of the Evidence

^[11] Federal law prohibits “any person” from “knowingly ... import [ing]” weapons, firearms, and explosives into the United States without government approval. See 18

U.S.C. § 922(i); 22 U.S.C. § 2778(b)(2); 22 C.F.R. § 121.1. A more general criminal statute allows prosecution for “knowingly” and “willfully” aiding and abetting or engaging in actions causing harm to the United States. See 18 U.S.C. § 2(b). Under § 2(b), a defendant may be prosecuted even if he did not complete the substantive offense. See *id.*; see also *United States v. Armstrong*, 909 F.2d 1238, 1241 (9th Cir. 1990), *as amended*.

^[12] Defendants assert that the evidence was insufficient to support their convictions because they were not involved in the actual importation of the weapons; selling the weapons was not the but-for cause of the later importation; they did not direct the agents to ship the items; and the government agents broke the chain of causation because government agents cannot illegally import weapons. Viewing the evidence in the light most favorable to the government, this claim is meritless.

^[13] As mentioned, under § 2(b), Defendants were not required to take an active role in actually transporting or shipping the illicit weapons to the United States. See 18 U.S.C. § 2(b). Rather, the jury could convict Defendants if they “knowingly” and “willfully” caused the weapons to be transported to the United States. *Id.* Indeed, Defendants could be held criminally responsible for harms that flowed naturally or were a direct result of their conduct. See *United States v. Causey*, 835 F.2d 1289, 1292 (9th Cir. 1987) (clarifying that § 2(b) was added “to remove all doubt that one who ... assists in the illegal enterprise ... is guilty as a principal”) (alteration, ellipsis, and internal quotation marks omitted). Under the governing law, Defendants’ role was sufficient to support their conviction under § 2(b). See *id.*

***702** The government presented evidence that Syjuco earned thousands of dollars by procuring high-powered weapons and selling them to an undercover agent, who informed him that he would smuggle the guns into Mexico through California. The government also presented evidence that Ubaldo arranged the meetings for weapons sales, put Agent Ro in contact with a Philippine customs official who could help smuggle the weapons out of the country, and was aware that the weapons would be smuggled into Mexico via California. Considering those facts, a reasonable jury could find that Defendants knowingly and willfully caused illicit weapons to be imported into the United States because the importation of the weapons flowed naturally from their conduct. See *Causey*, 835 F.2d at 1292.

In the alternative, Defendants rely on *Burrage v. United States*, —U.S. —, 134 S.Ct. 881, 887–88, 187 L.Ed.2d 715 (2014), arguing that the government failed to produce

sufficient evidence that the weapons sales were a but-for cause of the importation. However, the facts in this case are consistent with the Supreme Court’s reasoning in *Burrage* because Defendants entered the transaction knowing the outcome—that Agent Ro would transport the weapons to California. See *id.* at 888 (holding that “conduct is the cause of a result if it is an antecedent but for which the result would not have occurred”) (citation, alteration and internal quotation marks omitted). In sum, Agent Ro would not have been able to import the weapons into the United States if Defendants never sold them to him. See *United States v. Collins*, 109 F.3d 1413, 1419 (9th Cir. 1997) (reasoning that “[t]he act of an intermediary does not break the chain of causation”) (citation and internal quotation marks omitted).

^[14] The result does not change because the FBI handled the shipping, because Defendants did not direct the agents to ship the weapons to the United States, or because, as a matter of law, FBI agents cannot violate the substantive statutes. We have held that, under § 2(b), a defendant may be convicted, even if he did not commit all the elements of the offense, but “cause[d] the commission of an indispensable element of the offense by an innocent agent ... [who] lack[s] ... criminal intent or capacity.” *Causey*, 835 F.2d at 1292 (emphasis omitted); see also *United States v. Ezeta*, 752 F.3d 1182, 1185–86 & n.3 (9th Cir. 2014) (citing *Causey* in affirming a defendant’s conviction for fraud even though he did not “exercise[] dominion and control over the unlawfully obtained funds”); *United States v. Wise*, 221 F.3d 140, 151 (5th Cir. 2000) (“[A]n aiding and abetting conviction for a completed substantive offense may stand even if the principal is a government agent with no guilty intent and therefore no substantive crime actually was committed....”) (citation omitted).

In a similar case, the United States Court of Appeals for the Second Circuit rejected the argument Ubaldo raises here. See *United States v. Jordan*, 927 F.2d 53, 55–56 (2d Cir. 1991). In *Jordan*, the defendant was charged with causing the illegal importation of narcotics into the United States. See *id.* at 54. Jordan coordinated a plan for Savaneeya Batton to travel to Thailand to purchase heroin to deliver to a courier for transport to the United States. See *id.* at 54–55. Batton completed the purchase in Thailand and gave the heroin to the courier, an undercover Drug Enforcement Administration agent, who transported it to the United States. See *id.*

On appeal, the Second Circuit affirmed Batton’s conviction under 18 U.S.C. § 2(b). See *id.* at 55–56. Batton argued that she ***703** could not be liable for causing the importation because a government agent

completed the importation. See *id.* at 55. The court held that:

The fact that the undercover agent was willing to be used as the instrument of her criminal activity, in order to apprehend her and her confederates, does not detract in any way from her criminal responsibility. She is as liable for the offense of importation as she would be if she had surreptitiously slipped the heroin into the handbag of an unsuspecting passenger.

Id.

C. Motion to Suppress: False and Misleading Statements in Warrant Affidavit

^[15]When a defendant seeks to suppress evidence due to a faulty search warrant, he must demonstrate that the government intentionally included false information in the affidavit supporting the warrant, and that there would not have been probable cause without the challenged statements. See *United States v. Tham*, 960 F.2d 1391, 1395 (9th Cir. 1992), *as amended*.

^[16]The search warrant application for Ubaldo's emails was supported by an affidavit from Agent Lao explaining that Agent Ro, described in the affidavit as "FBI Undercover Employee," spoke with Ubaldo about smuggling weapons into the United States. Ubaldo contends that this affidavit contained false and misleading statements regarding the final destination of the weapons and regarding his knowledge that the weapons would be imported into the United States. He also contends that Agent Lao failed to disclose that he was relaying secondhand information. He submits that the warrant application would have been denied without these allegedly false and misleading statements. The district court held a *Franks*⁶ hearing on these claims, and denied Ubaldo's motion to suppress the evidence obtained from execution of the search warrant.

The evidence in the record supports the district court's finding. See *United States v. Martinez-Garcia*, 397 F.3d 1205, 1215 (9th Cir. 2005) (reviewing the district court's *Franks* ruling for clear error). Defendants simply failed to present evidence sufficient to establish that Agent Lao made materially false and misleading statements. The district court heard testimony and evidence from the parties regarding the allegedly false and misleading

statements, and credited Agent Lao's testimony. That credibility determination is entitled to substantial deference. See *United States v. Becerra-Garcia*, 397 F.3d 1167, 1172 (9th Cir. 2005). The motion to suppress was properly denied.

D. Motion To Dismiss The Indictment: Failure To Preserve Evidence

^[17]The government violates a defendant's due process rights when it destroys potentially exculpatory evidence in bad faith. See *United States v. Estrada*, 453 F.3d 1208, 1212–13 (9th Cir. 2006). In determining whether there was a violation warranting dismissal of the indictment, the evidence must be viewed in the government's favor. See *Black*, 733 F.3d at 301.

^[18]Ubaldo posits that the district court should have dismissed the indictment due to Agent Ro's bad faith in failing to preserve the text messages he sent. Ubaldo asserts that Agent Ro intentionally deleted the outgoing messages because they were exculpatory and preserved the incoming messages because they were inculpatory. *704 Although the district court concluded that Ubaldo failed to establish that Agent Ro acted in bad faith, the district court nevertheless agreed to instruct the jury that it could view Agent Ro's conduct as evidence that the outgoing text messages were against the government's interest.

The district court did not clearly err in finding that Ubaldo failed to establish bad faith. See *United States v. Sivilla*, 714 F.3d 1168, 1170–72 (9th Cir. 2013) (reviewing the district court's determination for clear error). At the hearing held to resolve this issue, Agent Ro testified that he lost many of the sent messages because he lost his cell phone in May, 2011. He was under the impression that his cell phone automatically stored the outgoing messages; therefore, Agent Ro only deleted outgoing messages that he considered unimportant. Agent Ro also attempted to retrieve his outgoing messages by sending his cell phone to the FBI technology department, but the messages could not be retrieved. See *Estrada*, 453 F.3d at 1213 (holding that a defendant failed to show bad faith when the government attempted to retrieve the lost evidence).

E. Motion for a Mistrial: Withholding Material Evidence

^[19]Federal Rule of Criminal Procedure 16 requires the government, upon request, to permit a defendant to inspect any evidence that is material to his defense. See *Cardenas-Mendoza*, 579 F.3d at 1030. In determining

whether or not to grant a mistrial based on prosecutorial misconduct of this nature, the district court may exercise its discretion to issue a curative instruction rather than granting a mistrial. See *id.*

^[20]Ubaldo asserts that the government failed to disclose a report showing that a letter regarding mislabeled rifle scopes was forged. He argues that the report was material and prejudicial because he would have never offered the letter into evidence if he had known it was forged, and that the district court's curative instruction did not adequately purge the jury's negative impression of the evidence.

The district court acted within its discretion when it elected to issue a curative instruction rather than granting a mistrial for the purported violation of Rule 16. See *Cardenas-Mendoza*, 579 F.3d at 1029–30. Not only did the court order the letter withdrawn as evidence, the jury was instructed “to give no consideration to that letter or any testimony regarding the letter or its content.” It is strongly presumed that the jury followed the court's instruction, see *United States v. Johnson*, 767 F.3d 815, 824 (9th Cir. 2014), and no evidence in the record rebuts that presumption. Accordingly, we conclude that no reversible error occurred.

F. Evidentiary Objections: Federal Rules of Evidence 404(b) and 403.

^[21]Federal Rule of Evidence 404(b)(1)³ bars the admission of evidence offered to show that a person acted in accordance with prior “bad acts.” See *United States v. Decinces*, 808 F.3d 785, 790 (9th Cir. 2015). But, a district court may admit the evidence to show a defendant's “intent, plan, knowledge or absence of mistake.” *Id.* (citation omitted); see also *Fed. R. Evid. 404(b)(2)* (2013).

^[22] *705 Federal Rule of Evidence 403³⁰ bars the admission of evidence when the danger of unfair prejudice substantially outweighs the probative value of the evidence. See *United States v. Lloyd*, 807 F.3d 1128, 1151 (9th Cir. 2015). “A district court's Rule 403 determination is subject to great deference, because the considerations arising under Rule 403 are susceptible only to case-by-case determinations, requiring examination of the surrounding facts, circumstances, and issues.” *Id.* at 1152 (citation and internal quotation marks omitted).

Ubaldo asserts that the admission of emails showing that he previously attempted to mislabel rifle scopes to bypass Philippine customs violated Rule 404(b). He maintains that the evidence was irrelevant to the charged offenses,

was unduly prejudicial, and did not conform to the rule's definition of a prior bad act. He also contends that the district court violated Rule 403 by allowing a government witness to testify about the capabilities of the weapons; terrorist use of the weapons; the destructive power of the weapons; and the origin of the weapons in an area of the Philippines frequented by terrorists. Finally, he challenges the district court's decision to allow the weapons introduced into evidence to remain on display in the courtroom.

^[23]We do not agree that the district court abused its discretion in admitting the evidence regarding Ubaldo's previous smuggling conduct because it was relevant to show his “intent, plan, knowledge or absence of mistake.” *Decinces*, 808 F.3d at 790 (citation omitted). Nor did the district court abuse its discretion in allowing the government to introduce testimony regarding the capabilities, usage, and source of the weapons. See *Lloyd*, 807 F.3d at 1152. Given “the surrounding facts, circumstances, and issues” of the case, it was reasonable for the district court to find that the testimony was not unduly prejudicial because it could help prove that Defendants knew the weapons would be shipped to the United States for illicit purposes. *Id.*

^[24]Ubaldo cites no case authority supporting his argument that it was reversible error for the district court to allow the weapons introduced into evidence to remain on display in the courtroom. In any event, any error in allowing the weapons to remain on display was harmless beyond a reasonable doubt in view of the overwhelming evidence of guilt in the record. See *United States v. Ganoe*, 538 F.3d 1117, 1127 (9th Cir. 2008).

G. Motion for a New Trial: Jury Instructions

^[25] ^[26]A district court's formulation of jury instructions must adequately cover the applicable law and must not be misleading. See *Lloyd*, 807 F.3d at 1164. We review the instructions as a whole when determining if there was instructional error. See *id.*

Ubaldo asserts that the district court improperly instructed the jury on causation under 18 U.S.C. § 2(b) by using the phrase “aid and abet” interchangeably with “cause,” and likely confused the jury by using the vague phrase “puts in motion.” Additionally, Ubaldo contends that the district court erred by failing to give a more in-depth instruction on willfulness and by failing to explain that Defendants could not be convicted for merely brokering *706 the transactions. We are not persuaded.

^[27]The instructions given adequately covered the law

regarding the elements necessary to find Defendants guilty of causing the importation of weapons into the United States under § 2(b) and were consistent with our ruling in *Causey*. See *Causey*, 835 F.2d at 1292 (holding that a violation of § 2(b) occurs when an individual “puts in motion or ... causes the commission of an indispensable element of the offense”) (emphasis added). Defendants were criminally liable for willfully violating § 2(b) because they “put[] in motion or assist[ed] in ... the commission of an indispensable element of the offense.” *Id.* The district court’s inclusion of the phrase “aided and abetted” in the § 2(b) causation instruction was unlikely to mislead the jury in view of the balance of the instruction that correctly guided the jury deliberations. See *Lloyd*, 807 F.3d at 1164–65 (considering the instructions as a whole in concluding that error occurred).

^[28] Finally, there is no merit to Defendants’ contentions that the district court’s willfulness instruction was incomplete, or potentially allowed the jury to convict Defendants for merely facilitating or brokering the deals. As previously stated, the district court’s instructions tracked this Court’s holding in *Causey*, and tracked the language of the statute. See *Causey*, 835 F.2d at 1292 (describing the aiding and abetting statute as prohibiting willful acts); see also *United States v. Garcia*, 729 F.3d 1171, 1177 (9th Cir. 2013) (noting that “an instruction tracking a statute is generally not erroneous”) (citation omitted); *Lloyd*, 807 F.3d at 1165 (holding that the district court did not err in instructing the jury, even though the defendant requested a more expansive instruction on

recklessness). As acknowledged by Defendants, they were not charged under the Brokering Amendment of the statute. Consequently no instruction addressing brokering was warranted. See *Avila v. Los Angeles Police Dep’t*, 758 F.3d 1096, 1101 (9th Cir. 2014) (“There must be a sufficient evidentiary foundation to support giving [a jury] instruction.”) (citation omitted).

IV. CONCLUSION

The district court correctly determined that, considering the language of the legislation and the history of the legislation, the weapons importation statutes, §§ 922(l) and 2778(b)(2), apply extraterritorially. Applying the aiding and abetting statute to Defendants’ conduct, the district court properly rejected the challenge to the sufficiency of the evidence to support the jury’s verdict. Finally, the evidentiary rulings and jury instruction formulations were all comfortably within the district court’s discretion.

AFFIRMED.

All Citations

859 F.3d 690, 103 Fed. R. Evid. Serv. 878, 17 Cal. Daily Op. Serv. 5428, 2017 Daily Journal D.A.R. 5480

Footnotes

- ¹ Ubaldo’s appeal was joined with an appeal by his co-defendant, Sergio Syjuco (Syjuco). Syjuco subsequently withdrew his appeal. Nevertheless, because the parties adopted each other’s arguments and because Syjuco was a co-conspirator, this opinion refers to Syjuco and Ubaldo collectively as “Defendants.”
- ² After helping package the weapons, Syjuco sold Agent Ro four ballistic-proof vests he obtained from his supplier in Singapore. These vests were placed in the container as well.
- ³ 18 U.S.C. § 371 provides in pertinent part:
If two or more persons conspire either to commit any offense against the United States ... in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both....
- ⁴ 18 U.S.C. § 2 provides:
(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.
- ⁵ 18 U.S.C. § 922 (l) provides in pertinent part:
[I]t shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof any firearm or ammunition; and it shall be unlawful for any person knowingly to receive any firearm or ammunition which has been imported or brought into the United States or any possession thereof in violation of the provisions of this chapter.

- 6 18 U.S.C. § 924(a)(1)(C) provides in pertinent part:
 [W]hoever—
 knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation
 of [section 922\(l\)](#) ... shall be fined under this title, imprisoned not more than five years, or both.
- 7 22 U.S.C. § 2778(b)(2) provides in pertinent part:
 (2) Except as otherwise specifically provided in regulations issued under subsection (a)(1) of this section, no defense
 articles or defense services designated by the President under subsection (a)(1) of this section may be exported or
 imported without a license for such export or import, issued in accordance with this chapter and regulations issued
 under this chapter, except that no license shall be required for exports or imports made by or for an agency of the
 United States Government ...
- 8 [Franks v. Delaware](#), 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).
- 9 At the time of Ubaldo's trial, [Rule 404\(b\)\(1\)](#) provided: "Evidence of a crime, wrong, or other act is not admissible to
 prove a person's character in order to show that on a particular occasion the person acted in accordance with the
 character." [Fed. R. Evid. 404\(b\)\(1\)](#) (2013).
- 10 [Rule 403](#) provided: "The court may exclude relevant evidence if its probative value is substantially outweighed by a
 danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay,
 wasting time, or needlessly presenting cumulative evidence." [Fed. R. Evid. 403](#) (2013).

A P P E N D I X 2

Pages

Petition for Rehearing Denied by 9th Circuit

A-016

FILED

UNITED STATES COURT OF APPEALS

AUG 24 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CESAR PAOLO UBALDO, AKA Arvi,
AKA Cesar Paolo Inciong Ubaldo,

Defendant-Appellant.

No. 14-50093

D.C. No.

2:12-cr-00037-RGK-2

Central District of California,
Los Angeles

ORDER

Before: O'SCANNLAIN, RAWLINSON, and CALLAHAN, Circuit Judges.

The panel has voted to deny the Petition for Rehearing. Judges Rawlinson and Callahan voted, and Judge O'Scannlain recommended, to reject the Suggestion for Rehearing En Banc.

The full court has been advised of the Suggestion for Rehearing En Banc, and no judge of the court has requested a vote.

Appellant's Petition for Rehearing, filed on July 25, 2017, is DENIED, and the Suggestion for Rehearing En Banc is REJECTED.

A P P E N D I X 3

Pages

District Court Orders Denying Motion to Dismiss
For Extraordinariness and Requesting Further
Briefing on Issue

A-017-034

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No.	CR12-00037-RT	Date	October 22, 2013
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Present: The Honorable	Robert J. Timlin, United States District Judge
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Interpreter	
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Patricia Gomez

Deputy Clerk

Court Reporter/Recorder

Margaret Vierbuchen

Kim Dammers

Assistant U.S. Attorney

U.S.A. v. Defendant(s):Present Cust. BondAttorneys for Defendants:Present App. Ret.

Sergio Syjuco

X

John Littrell

X

Cesar Ubaldo

X

David McLane

X

Arjyl Revereza

X

George Buehler

X

Proceedings: (IN CHAMBERS) ORDER DENYING DEFENDANT SYJUCO'S MOTION FOR A NEW TRIAL

Defendant Sergio Syjuco ("Syjuco") filed a motion for new trial (Docket Entry #354), and Defendants Arjyl Revereza ("Revereza") and Cesar Ubaldo ("Ubaldo") join in the motion.¹ The court has read and considered the defendant's motion, the government's opposition to the motion, defendant's reply, and all admissible exhibits. The court also heard oral argument. Based on such consideration, the court rules as follows:

I. INTRODUCTION

Defendant Syjuco moves for a new trial on the ground that the court committed clear error in its jury instructions. Syjuco contends that the court erred in two ways: first, the jury was instructed that it could find Syjuco guilty as an aider and abetter under 18 U.S.C. § 2(a) ("Section 2(a)") even though the evidence at trial did not support that theory of liability. Second, according to Syjuco, the court incorrectly instructed the jury as to a theory of liability under 18 U.S.C. § 2(b) ("Section 2(b)") for "willfully causing the act to be done," because it referred to "aiding and abetting." According to Syjuco, because the government argued in its closing argument to the jury that Syjuco and the other defendants were liable not as principals but as aiders and

¹This motion is directed to defendant's request for a new trial as to each of Counts Two, Three, Four, and Five, not to Count One of the indictment which alleges conspiracy to violate the Arms Export Control Act ("AECA"). Consequently, if the motion is granted in favor of the defendants as to any of Counts Two, Three, Four, or Five, or all of them, such a ruling does not affect the verdict of guilty as to Count One as to each defendant. In other words, the guilty verdict against each defendant as to Count One is not affected by the instant motion.

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abettors, these instructions determined the outcome, and therefore, the court should order a new trial.

Syjuco's argument is one that covers familiar ground, as the court heard extensive argument regarding this issue during the jury instruction conference with the court and again before closing arguments began when Syjuco's counsel raised it for a second time. The court is well-aware of Syjuco's objections to jury instructions nos. 25, 28, and 29, which he raises again here, as the court considered them at the time and found them to be without merit and overruled them.

III. STANDARD OF REVIEW

Federal Rules of Criminal Procedure, Rule 33 states that, "upon the defendant's motion, the court may vacate the judgment and grant a new trial if the interest of justice so requires." To determine whether a new trial is warranted because of an alleged error in jury instructions, the court must decide "whether the instructions – taken as a whole and viewed in the context of the entire trial– were misleading or confusing, or inadequately guided the jury's deliberations, or improperly intruded on the fact finding process." *United States v. Warren*, 25 F.3d 890, 898 (9th Cir. 1994).

IV. FACTUAL BACKGROUND

The government stated during trial that it was not pursuing a theory of liability under Section 2(a) because the principal in this case is an informant who lacked the requisite intent to commit the underlying offense. Instead, the government would be arguing for liability under Section 2(b). Therefore, the court declined to give the government's initial proposed instruction, Ninth Circuit Model Jury Instruction 5.1 as to aider and abettor liability, because it only addressed Section 2(a) liability.

The court gave Instruction 28, an instruction defining liability under Section 2(b):

"A defendant may be found guilty of the crimes charged in Counts Two, Three, Four, or Five of the Indictment, even if the defendant personally did not commit the act or acts constituting the crimes, but only aided and abetted in their commission.

That is, whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal. However, the government need not prove that someone other than the defendant was guilty of the substantive crime. A person who causes the commission of an offense is punishable as a principal even though the person who completes the wrongful act violates no criminal statute because of lack of criminal intent or capacity. One who puts in motion or causes the commission of an indispensable element of an offense by an innocent agent or instrumentality is guilty as a principal."

In Jury Instruction 25, the instruction defining the elements of the substantive offense "Importing Defense Articles Without a License," the jury was instructed that the defendants could be found guilty if the government proved that they "knowingly imported or aided and abetted the importing into the United States of a defense article." In Jury Instruction 29, defining the crime of "illegal importation of a firearm or ammunition," the jury was instructed that the defendants could be found guilty if the government proved that they "knowingly imported or aided and abetted the importing of a firearm into the United States."

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Defendants Syjuco and Revereza were convicted by the jury on all five counts. Defendant Ubaldo was charged with and convicted of Counts One, Four, and Five.

V. DISCUSSION

A. Liability under 18 U.S.C. § 2

18 U.S.C. § 2 eliminates the common law distinction between “principal” and “accessory” and makes one who aids and abets or causes the commission of a crime punishable as a principal. “Under section 2, aiding and abetting is not a separate offense; instead the section makes punishable as a principal one who aids or abets another in the commission of a substantive offense.” *United States v. Causey*, 835 F.2d 1289, 1291 (9th Cir. 1987) (quotation marks omitted).

There are two parts to Section 2, and all indictments must be read in effect as if the alternatives provided in Section 2 were embodied in each count thereof. *United States v. Armstrong*, 909 F.2d 1238, 1241 (9th Cir. 1989). “Under section 2(a), the government must prove that someone committed the substantive crime, although the failure to prosecute or to obtain a prior conviction of that individual does not preclude the conviction of the aider and abettor. *Causey*, 835 F.2d at 1291 (citing *United States v. Ruffin*, 613 F.2d 408, 412 (2d Cir. 1979). “Under section 2(b), however, the government need not prove that someone other than the defendant was guilty of the substantive crime. A person who causes the commission of an offense is punishable as a principal even though the person who completes the wrongful act violates no criminal statute because of lack of criminal intent or capacity. Section 2(b) punishes the individual who causes a criminal act, because no crime would take place without his or her participation.” *Id.*

Although the words “aid and abet” are only contained in Section 2(a), courts refer to 18 U.S.C. § 2 generally as the “aiding and abetting” statute, and also refer to liability under Section 2(b) as “aiding and abetting.” See *Causey*, 835 F.2d at 1292 (“Under section 2, aiding and abetting is not a separate offense.”); *United States v. Johnson*, 132 F.3d 1279, 1285 (9th Cir. 1997) (“A defendant can be convicted as an aider and abettor even if he causes an innocent intermediary who lacks criminal intent to commit the ultimate offense”); *United States v. Rendon-Agudelo*, 476 Fed. Appx. 685 (9th Cir. June 5, 2012) (“When the government charges a defendant with aiding and abetting under 18 U.S.C. § 2(b), ‘the government need not prove that someone other than the defendant was guilty of the substantive crime.’”); *United States v. Rashwan*, 328 F.3d 160 (4th Cir. 2003) (“[Defendant] aided and abetted [under Section 2(b) the production of false identification documents by providing false information to the DMV with the specific intent that the agency would then produce a false identification document for him.”). Perhaps even more telling is the fact that Congress, when amending Section 2(b) in 1951 to insure that a person who manipulates another may not escape criminal responsibility because the manipulator lacked capacity, referred to Section 2(b) liability as “aiding and abetting.” *Ruffin*, 613 F.2d at 414. The Senate Report accompanying the proposed amendment explained the changes to Section 2(b): “This section is intended to clarify and make certain the intent to punish *aiders and abettors* of committing the specific violation which they are charged to have *aided and abetted*.” *Id.* (citing 1952 U.S.Code Cong. Serv. 2578) .

B. Instructions 25 and 29

Defendant Syjuco contends that the court erred by including the phrase “aiding and abetting” in the substantive offense jury instructions, because it “put the jury in a position to have to interpret what the words

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‘aiding and abetting’ meant, without an instruction defining those terms, and in a case where the facts didn’t support the theory.’” Inclusion of the term “aiding and abetting” in these instructions ‘gave the jury the option of finding the defendants guilty of ‘aiding and abetting’ even though those terms were not defined.”

Syjuco’s argument in essence is that, by including the term “aiding and abetting,” the court allowed the jury to convict the defendants based on a theory of Section 2(a) liability, where the facts did not support the theory. This contention is simply wrong for several reasons: To begin with, the court did in fact define “aiding and abetting” in Instruction 28, the Section 2(b) liability instruction. The definition provided to the jury was that an aider and abettor was one who willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal.

Furthermore, the court did not instruct the jury regarding liability under Section 2(a). The jury was unaware of the elements required to prove aiding and abetting liability under Section 2(a), as the court declined to read Ninth Circuit Model Jury Instruction 5.1, and only had the definition contained in Instruction 28 for Section 2(b) liability. Syjuco’s contention that the jury was required to apply an aiding and abetting theory of liability where the facts did not support the theory presupposes that the jury was aware of what Section 2(a) liability even meant. The jury did not. “The law presumes that jurors carefully follow the instructions given to them.” *Caudle v. Bristow Optical Co., Inc.*, 224 F.3d 1014, 1023 (9th Cir. 2000).

Based on the foregoing, the court will deny the motion for new trial on this ground.

C. Instruction 28: Section 2(b) liability

Syjuco contends that Instruction No. 28 was incorrect, misleading and confusing for four reasons. First, Syjuco repeats the argument made with regard to Instructions No. 25 and 29, that the phrase “aiding and abetting” is used and not defined. Again, this argument ignores the actual language of Instruction No. 28:

“A defendant may be found guilty of the crimes charged in Counts Two, Three, Four, or Five of the Indictment, even if the defendant personally did not commit the act or acts constituting the crimes, but only aided and abetted in their commission.

That is, whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal. However, the government need not prove that someone other than the defendant was guilty of the substantive crime. A person who causes the commission of an offense is punishable as a principal even though the person who completes the wrongful act violates no criminal statute because of lack of criminal intent or capacity. One who puts in motion or causes the commission of an indispensable element of an offense by an innocent agent or instrumentality is guilty as a principal.”

The first sentence of the instruction instructs the jury that they may find the defendants guilty of a crime if they aided and abetted. It is followed by a second paragraph defining Section 2(b) liability, which begins with the phrase “That is.” The idiom “that is” is defined as “introducing an explanation of the preceding word, phrase, or statement.” Oxford English Dictionary (Oxford University Press 2013). Therefore, the plain meaning of the instruction was that the words “aiding and abetting” as used in the first paragraph were defined in the second paragraph. Therefore, as the jury was instructed, they could find the defendants guilty of aiding and abetting, if they satisfied the elements of Section 2(b) liability as defined in the second paragraph of the

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instruction.

The second argument Syjuco makes is that the definition of “aiding and abetting” given is not accurate, because it is Section 2(b) liability. Again, this argument is based on the incorrect premise that “aider and abettor” liability only refers to liability under Section 2(a). However, this argument is wrong under the law. The Ninth Circuit, when explaining Section 2(b) liability, has held that “when the government charges the defendant with aiding and abetting under [Section] 2(b), the government need not prove that someone other than the defendant was guilty of the substantive crime.” *Rendon-Agudelo*, 476 Fed. Appx. 685 (9th Cir. 2012). Instruction 28 was a charge on aiding and abetting under Section 2(b), which the Ninth Circuit has explicitly recognized.

Third, Syjuco contends that the instruction also failed to correctly define liability under Section 2(b), because it stated that the government need not prove that someone other than the defendant was guilty of the substantive crime. It is black letter law that, under Section 2(b), “[a] defendant can be convicted as an aider and abettor even if he causes an innocent intermediary who lacks criminal intent to commit the ultimate offense.” *United States v. Johnson*, 132 F.3d 1279, 1285 (9th Cir. 1997); see also *United States v. Rendon-Agudelo*, 476 Fed. Appx. 685 (9th Cir. June 5, 2012) (“When the government charges a defendant with aiding and abetting under 18 U.S.C. § 2(b), ‘the government need not prove that someone other than the defendant was guilty of the substantive crime.’” Syjuco’s sole complaint about instructing the jury for purposes of Section 2(b) liability that the government does not need to prove that someone other than the defendant is guilty of the substantive crime is that it is not true for purposes of Section 2(a) liability. He contends that the jury would have somehow been confused and found the defendants guilty for aiding and abetting, as defined in Section 2(a), with no person guilty of the substantive crime. This argument simply ignores the fact that the only definition of aiding and abetting given to the jury was that of Section 2(b) liability. To buttress that argument, he falls back on the idea that the jury would have used the “ordinary definition” of aiding and abetting, because it was undefined. This ignores the fact that, after a guilty verdict, “The law presumes that jurors carefully follow the instructions given to them,” and not applied their own definitions to terms defined within those instructions. *Caudle*, 224 F.3d at 1023 (9th Cir. 2000).

Finally, Syjuco takes issue with the Section 2(b) liability instruction containing the sentence “one who puts in motion or causes the commission of an indispensable element of an offense by an innocent agent or instrumentality is guilty as a principal.” Syjuco argues that the instruction was erroneous because it was not limited to the statutory language “willfully causes.” However, this is too narrow a reading of the statute and is inconsistent with case law in the Ninth Circuit and other circuits. See *Causey*, 853 F.2d at 1292 (“one who puts into motion or assists the illegal enterprise”); see *Rendon-Agudelo*, 476 Fed. App’x. at 686; *United States v. Zidell*, 323 F.3d 412 (6th Cir. 2002); (Section 2(b) applies to “one who sets an illegal course in motion”).

Based on the foregoing, the court finds Instruction 28 to be an accurate and clear statement of the law regarding aiding and abetting liability under Section 2(b), and therefore will deny Syjuco’s motion for a new trial.

C. JUROR DECLARATIONS

Syjuco asks the court to consider two juror declarations and a memo by Federal Public Defender

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investigators summarizing their conversation with two jurors, and offers them in order to establish the prejudice of an erroneous jury instruction. “The juror declarations in this case are offered to prove only that the jury did in fact follow the instructions they were given, and that the legally flawed jury instruction determined the outcome of the case.”

Under Fed. R. Evid. 606(b), “a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberation or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury’s attention or whether any outside influence was improperly brought to bear upon any juror.” The juror’s declarations and the memo fail, on their face, to demonstrate the “extraneous prejudicial information” or “outside influence” required for admissibility of juror testimony under Fed. R. Evid. 606(b). “Juror testimony is admissible only concerning facts bearing on extraneous influences on the deliberation, in the sense of overt acts of jury tampering.” *United States v. Falsia*, 724 F.2d 1339, 1343 (9th Cir. 1983) (quoting *United States v. Pimentel*, 654 F.2d 538, 542 (9th Cir. 1981)(emphasis in original). The declarations here focus entirely on internal jury discussions; indeed Syjuco admits that he offers them precisely to prove the jury’s reliance on the aiding and abetting instructions. Therefore, this court concludes that the submitted declarations and memo are inadmissible under Rule 606(b), and the court grants the government’s request to strike both declarations and the memo from the record. Further, the court has disregarded that material and given no consideration to it.

Defendant Syjuco’s motion for a new trial is **DENIED**.

IT IS SO ORDERED.

Initials of Deputy PG
Clerk

:

cc:

UNITED STATES DISTRICT COURT
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Case No. CR12-00037-RT

Date October 22, 2013

Present: The Honorable Robert J. Timlin, United States District Judge

Interpreter

Patricia Gomez

*Deputy Clerk**Court Reporter/Recorder*

Margaret Vierbuchen

Kim S. Dammers

Assistant U.S. Attorney

<u>U.S.A. v. Defendant(s):</u>	<u>Present</u>	<u>Cust.</u>	<u>Bond</u>	<u>Attorneys for Defendants:</u>	<u>Present</u>	<u>App.</u>	<u>Ret.</u>
Sergio Syjuco		X		John Littrell		X	
Cesar Ubaldo		X		David McLane		X	
Arjyl Revereza		X		George Buehler		X	

(IN CHAMBERS) ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT OF
ACQUITTAL ON THE GROUND THAT THERE IS NO JURISDICTION UNDER THE
ARMS EXPORT CONTROL ACT AND UNDER 18 U.S.C. § 922(l) OVER THE CONDUCT

Proceedings: THE GOVERNMENT PURPORTED TO PROVE AT TRIAL [356].

Before the court is defendant Arjyl Revereza's ("Revereza") motion for judgment of acquittal on the ground that there is no jurisdiction under the Arms Export Control Act ("AECA") and under 18 U.S.C. § 922(l) ("Section 922(l)") over the conduct the government purported to prove at the trial (the "Motion"). Docket No. 356. Defendants Sergio Syjuco ("Syjuco") and Cesar Ubaldo ("Ubaldo") have both joined in the Motion (all three defendants collectively, "Defendants"). Docket Nos. 359 and 367. After considering the Motion, the government's opposition (Docket No. 366), Revereza's reply (Docket No. 374), Ubaldo's reply (Docket No. 378), the additional briefing supplied by the parties at this court's request (Docket Nos. 390, 392, 393), and the parties' oral argument, the court rules as follows:

I. Introduction

After a jury trial, Revereza and Syjuco were convicted on all counts of a five-count indictment charging them with a conspiracy to import defense articles and firearms into the United States in violation of 18 U.S.C. § 371, the AECA, and Section 922(l), two substantive counts of importing defense articles into the United States without the required licenses in violation of the AECA, and two substantive counts of importing firearms into the United States in violation of Section 922(l). Defendant Ubaldo was convicted on all three counts in the indictment which included him, i.e., the conspiracy charge, an AECA charge, and a Section 922(l) charge. Docket No. 305-307. Undisputed facts at trial showed that Defendants were citizens and residents of the Republic of the Philippines at all relevant times and that all their conduct as alleged in the indictment and proved during trial physically occurred in the Philippines.

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Defendants now move for acquittal on each count of the indictment for which they were found guilty, contending that the AECA and Section 922(l) cannot be applied to them extraterritorially as non-citizens of the United States whose conduct relevant to the charges in the indictment occurred wholly within the Philippines. The parties do not dispute that neither statute includes an *express* provision applying it extraterritorially to individuals like the instant Defendants. Without such an express provision, Defendants argue that under the Supreme Court's decision in *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), this court must conclude that Congress did not intend either the AECA or Section 922(l) to apply to foreign persons who physically act entirely within their own countries. In addition, they argue that the AECA expressly precludes extraterritorial jurisdiction over them as non-citizens who engaged solely in "brokering activities" within the Philippines, conduct which is excluded from prosecution under the Brokering Amendment to the AECA.¹

II. Discussion

A. Extraterritoriality of Criminal Statutes Generally

1. The *Morrison* Framework

First, the court does not agree that the Supreme Court's decision in *Morrison* demonstrates that, here, the government engaged in a prohibited extraterritorial application of the AECA and Section 922(l) as to Defendants. In *Morrison*, the Supreme Court held that the Securities and Exchange Act of 1934 ("SEA") did not apply extraterritorially to allow a civil lawsuit by foreign plaintiffs against foreign and American defendants for misconduct in connection with securities traded on a foreign exchange. 130 S.Ct. at 2875, 2883. In so ruling, the Supreme Court referred to the "longstanding principle of American Law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Id.* at 2877 (internal citation and quotations omitted). Because of this longstanding principle, the Court noted that it must presume a statute only applies domestically "unless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect." *Id.* (internal citation and quotation omitted). Thus, the Supreme Court concluded that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Id.* at 2878. However, a "clear indication" from Congress as to extraterritoriality does not "require[] that a statute say 'this law applies abroad.'" *Id.* at 2883. Instead, the statute's terms and "context can be consulted as well." *Id.*

Here, the court agrees with the government that statutory text and context show that the AECA and Section 922(l) can be applied extraterritorially. Turning to the AECA, as the governments points out, its prefatory language refers to an international focus: "In furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and the export of defense articles and defense services. . . ." 22 U.S.C. § 2778(a); *see also* 22 C.F.R. § 126.1(a) (supporting international focus of the AECA by highlighting "the policy of the United States to deny licenses and other approvals for exports and

¹ The court overrules the government's timeliness objection to the instant motion under Fed. R. Crim. P. 34. *Cf. Morrison*, 130 S.Ct. at 2877 (treating evaluation of the extraterritorial reach of a statute as a merits question rather than one of traditional subject matter jurisdiction, albeit in a civil setting). Moreover, much of Defendants' Motion focuses on the sufficiency of the evidence at trial, making it more properly characterized as brought under Fed. R. Crim. P. 29.

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imports of defense articles and defense services destined for or originating in certain countries”). Its legislative history also focuses on international relations. *See, e.g.*, H.R. Rep. No. 94-1144 at 23 (1976) (in discussing the AECA, stating “that it shall be the policy of the United States to exert leadership in the world community to bring about arrangements for reducing the international trade in implements of war and to lessen the danger of outbreak of regional conflict and the burdens of armaments, U.S. programs for or procedures governing the export, sale, and grant of arms and munitions to foreign countries and international organizations shall be administered in a manner which will carry out this policy.”). In other words, these provisions contemplate the regulation of conduct which occurs, at least in part, in foreign countries.

In addition, 22 U.S.C. § 2778(c) provides that “[a]ny person who willfully violates any provision of this section. . . shall upon conviction be fined for each violation not more than \$1,000,000 or imprisoned not more than 20 years, or both.” (emphasis added). The corresponding codes of federal regulation likewise state that “[n]o person may knowingly or willfully cause, or aid, abet, counsel, demand, induce, procure, or permit the commission of, any act prohibited by, or the omission of any act required by, 22 U.S.C. § 2778. . . .” (emphasis added). Those codes of federal regulation go on to explain that “[i]f a provision in this subchapter does not refer exclusively to a foreign person (§ 120.16) or U.S. person (§ 120.15), then it refers to both.” 22 C.F.R. § 120.14 (emphasis added). Thus, in addition to focusing on international relations and transactions with foreign countries, the AECA appears to contemplate the prosecution of foreign individuals because of its statement, without reference to citizenship, that “any person” can violate its terms. *See also* 22 C.F.R. § 120.1(c) (noting that a foreign person may not obtain a license or other approval under the AECA except in limited circumstances).

Similarly, the legislative history of Section 922(l) also suggests an intention to regulate conduct occurring in foreign commerce. *See, e.g.*, H.R. Rep. No. 90-1577 at 4411 (1968) (describing the principle purpose of the Gun Control Act of 1968 as follows: “to strengthen Federal controls over interstate and *foreign commerce* in firearms and to assist the States effectively to regulate firearms traffic within their borders.”) (emphasis added). In particular, legislative history articulates that “[t]he main purpose of the import restrictions is to arrest the present flood of imports of surplus military weapons and low-priced *foreign-made* firearms generally, since these types of important weapons have caused major law enforcement problems.” *Id.* at 4415 (emphasis added). As this broad purpose suggests, the harm Congress was legislating against – importation of dangerous weapons – necessarily implicates conduct occurring abroad. And here, too, the definition of “any person” under Section 922(l) is not limited to United States citizens. 18 U.S.C. § 921(a)(1); *cf. Blue Shield of Va. v. McCready*, 457 U.S. 465, 472-73 (1982) (in light of broad protections afforded under statute, giving phrase “any person” its “‘naturally broad and inclusive meaning.’”) (citation omitted). As a result, the court concludes that both the AECA and Section 922(l) provide a clear indication that their importation regulations are meant to be applied extraterritorially. Therefore, the prosecution of Defendants under those statutory provisions is appropriate.

Moreover, though *Morrison* first directs the court *generally* to evaluate whether Congress intended a particular statute to apply abroad, that does not end the inquiry. Instead, under *Morrison*’s second step, the court must then determine whether the domestic territorial activity implicated in the particular case at hand, if any, is the “‘focus’ of congressional concern” in enacting the statute. If so, then the use of the statute to address such conduct – even if that statute otherwise cannot be applied extraterritorially – is allowed. *Morrison*, 130 S. Ct. at 2884; *see also id.* at 2884 n.9. “The *Morrison* Court further defined the concept of statutory focus in terms of the ‘objects of the statute’s solicitude’ and ‘th[e] transactions that the statute seeks to regulate.’”

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United States v. Chao Fan Xu, 706 F.3d 965, 975 (9th Cir. 2013) (quoting *Morrison*, 130 S. Ct. at 2884) (after holding that RICO does not apply extraterritorially under the first step of *Morrison*, recognizing that the circuit court, under *Morrison*'s second step, still had to "determine whether under the circumstances of this case RICO can be lawfully applied to any, or all, of Defendants' conduct—foreign or domestic.")

For example, in *Morrison*, while the securities at issue were traded on a foreign exchange, Petitioners pointed out that defendants engaged in certain deceptive conduct and misleading public statements within the territorial United States related to the securities transactions. 130 S. Ct. at 2883-84. However, the Court ruled that the focus of the SEA is to regulate transactions in securities on *domestic* exchanges rather than generally to punish deceptive conduct. *Id.* at 2884. As a result, because the only domestic activity in the case was not the focus of the SEA, the SEA could not be applied to the defendants. *Id.* at 2884-85, 2888. Similarly, in *Chao Han Xu*, the Ninth Circuit determined, based on its evaluation of statutory language and legislative history, that RICO's focus is on patterns of racketeering activities that violate United States law. 706 F.3d at 977-78. In that particular case, the government charged the defendants, Chinese nationals, with racketeering activity consisting of the embezzlement of money from the Bank of China occurring in China and Hong Kong and immigration fraud after the Chinese nationals fled to the United States with their ill-gotten funds. *Id.* at 978. Because the first pattern of racketeering activity occurred wholly within China and involved defrauding that country's bank, the RICO prosecutions could not stand as to that entirely foreign conduct in violation of foreign laws. However, the Ninth Circuit affirmed the RICO convictions based on the immigration fraud which occurred within the United States because that challenged conduct – immigration fraud on the United States – was the focus of RICO's statutory proscription. *Id.* at 978-79.

Here, the court agrees with the government that the focus of congressional concern in enacting the AECA and Section 922(l) as well as the domestic territorial activity at the center of this case are one and the same: the unregulated importation of certain weapons and defense articles into the United States. The legislative history and statutory text of the AECA and Section 922(l), as discussed above, support a conclusion that the prohibited importation of certain weapons into the United States is the focus of both statutory provisions under which Defendants were prosecuted. Moreover, the court agrees with the government that the domestic territorial activity here – the importation of the weapons and defense articles into Long Beach, California – can be tied to Defendants as the jury found, at a minimum, that Defendants willfully caused such importation into the United States, even if they did not step on United States soil. *See, e.g.*, Docket No. 321, Jury Instructions at 25-31.

In other words, this is not a case where illegal weapons were being shipped between two foreign countries without United States as an intended destination and only incidental conduct, such as meetings about sending guns between two foreign countries, occurring within the territorial United States; those facts would make this case more like *Morrison*. Instead, the Defendants here were found to have knowingly imported weapons *into the United States*, without proper authorization or required licenses. The ultimate physical act of sending prohibited weapons into the United States – which Defendants were found to have caused beyond a reasonable doubt – was directed at the United States and was the focus of congressional concern in enacting both importation statutes under which Defendants were prosecuted, regardless of whether the underlying conduct and weapons originated in the Philippines. *Cf. Moncini, infra*; 18 U.S.C. § 3237(a) (Any offense involving . . . the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such . . . imported object or person moves."). Thus, for these additional reasons, the

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court further finds that *Morrison* supports the prosecution of Defendants under the AECA and Section 922(l).

2. The Bowman Framework

Second, while the Ninth Circuit has not squarely addressed this issue, a number of circuit and district courts have found that *Morrison*'s two-step analysis for evaluating the extraterritorial application of United States statutes does not apply in the criminal setting. Instead, those courts turn to the Supreme Court's decision in *United States v. Bowman*, 260 U.S. 94 (1922), which was not expressly overruled by *Morrison*.² See, e.g., *United States v. Weingarten*, 632 F.3d 60, 64-65 (2d Cir. 2011) (though acknowledging *Morrison*, noting that there was "reason to doubt that the presumption against extraterritoriality applied" to crime at issue in reliance on *Bowman* analysis in which "'Congress is presumed to intend extraterritorial application of criminal statutes where the nature of the crime does not depend on the locality of the defendants' acts and where restricting the statute to United States territory would severely diminish the statute's effectiveness.'" (citation omitted)); *United States v. Singhal*, 876 F. Supp. 2d 82, 96-97 (D.D.C. 2012) (referring to reliance on *Morrison* in criminal setting as "misguided" and turning to *Bowman* for guidance); *United States v. Carson*, ___ F. Supp. 2d ___, 2011 WL 7416975, * (C.D. Cal. Sept. 20, 2011) (J., Selna) (acknowledging *Morrison* but reasoning that "*Bowman* must be followed until the Supreme Court overrules it.").

While the court otherwise finds that Defendants' prosecution and convictions can stand under *Morrison*, it is also persuaded that *Bowman* actually controls this case. *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" (citation omitted)).

The Ninth Circuit has treated *Bowman* as allowing for the extraterritorial application of criminal statutes by looking to "the nature of the offenses and Congress' other legislative efforts to eliminate the type of crime involved." *United States v. Vasquez-Velasco*, 15 F.3d 833, 839 (9th Cir. 1994) (internal quotations and citation omitted). In particular, "[w]here the *locus* of the conduct is not relevant to the end sought by the enactment of the statute, and the statute prohibits conduct that obstructs the functioning of the United States government, it is reasonable to infer congressional intent to reach crimes committed abroad." *Id.* (internal alterations, quotations and citations omitted) (emphasis in original); see also *Bowman*, 260 U.S. at 98 (presumption against extraterritoriality "should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud, wherever perpetrated. . . .").

For example, the Ninth Circuit has stated that "[l]imiting the jurisdiction of drug smuggling statutes to activities that occur within the United States would severely undermine their scope and effective operation because drug smuggling by its very nature involves foreign countries, and . . . the accomplishment of the crime always requires some action in a foreign country." *Vasquez-Velasco*, 15 F.3d at 839 n.4 (internal quotations

² *Chao Fan Xu, supra*, the most recent Ninth Circuit decision using *Morrison*'s framework in the criminal setting failed to address *Bowman*.

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and citation omitted); *see also United States v. Larsen*, 952 F.2d 1099, 1101 (9th Cir. 1991) (holding that under *Bowman*, illegal drug trafficking statute could be applied extraterritorially because conduct “statute is designed to prevent[] regularly involves the importation of drugs from international sources.”); *United States v. Castillo-Felix*, 539 F.2d 9, (9th Cir. 1975) (under *Bowman*, upholding defendant’s conviction for counterfeiting alien registration cards and inducing unlawful entry into the United States of Mexican citizens where conduct occurred, *inter alia*, in Mexico). Indeed, the Second Circuit recently relied on *Bowman* to uphold the convictions of non-citizens acting entirely abroad in conspiring to kill U.S. officers and employees, even where such charges arose because of a sting operation completed by the United States government entirely abroad. *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011).

This court is persuaded that, under the *Bowman* framework, the AECA and Section 922(l) can apply extraterritorially to the conduct of Defendants, resulting in their convictions. As already noted, the AECA expressly refers to an international focus in stating that the President is authorized to control the import and export of defense articles “[i]n furtherance of world peace and the security and foreign policy of the United States. . . .” 22 U.S.C. § 2778(a)(1). In addition, because Section 922(l) expressly focuses on the importation of defense articles into the United States, it – like the drug smuggling statutes repeatedly held by the Ninth Circuit to apply extraterritorially – necessarily implicates conduct occurring on foreign soil, whether that conduct is completed by United States citizens or non-citizens. Indeed, such defense articles must be obtained on foreign soil before the crime of importation into the United States can take place and securing such weapons will also likely involve significant participation by non-citizens.

In addition, the crime of illegally importing weapons is not logically dependent on where geographically an individual effectuates that crime because, as was the case here, an individual can secure the importation of weapons into the United States through actions entirely abroad or by physically accompanying such weapons across the United States border. In other words (and using the language of the Ninth Circuit), the “end” sought by the enactment of these statutes is to prevent certain weapons from being imported into the United States without authorization, and it seemingly is immaterial whether individuals effectuate unregulated importation wholly abroad or by personally setting foot on United States soil. Much like the drug smuggling cases cited by the government, limiting the jurisdiction of the AECA and Section 922(l) to activities that occur within the territorial United States – including requiring that non-citizens like Defendants physically accompany a shipment of illegal weapons across the United States border before they can be prosecuted – would severely undermine the scope and effective operation of these statutes because the unregulated importation of guns into the United States “by its very nature” requires activities in foreign countries. *See Chua Han Mow v. United States*, 730 F.2d 1308, 1311-12 (9th Cir. 1984) (finding extraterritorial jurisdiction over Malaysian citizen who acted entirely within Malaysia for charges of conspiracy to import heroin into the United States and distribution of heroin for importation into the United States);³ *cf. United States v. Moncini*, 882 F.2d 401, 403 (9th Cir.

³ This court recognizes that the drug importation statute in *Chua Han Mow* expressly stated that the statute was “intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States.” 730 F.2d at 1311; 21 U.S.C. § 959(c). However, the court still finds it significant that the Ninth Circuit read that statutory provision to apply to the conduct of non-citizens even though that “express” grant of extraterritorial jurisdiction did not clearly state that the statute was meant to be applied to non-citizens and citizens alike when acting abroad. The circuit court’s willingness to allow the

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1989) (finding jurisdiction over Italian citizen and resident for mailing child pornography from Italy to United States due to the continuing nature of the offense). Thus, Defendants' attempt to distinguish the *Bowman* line of case law is unpersuasive.

3. Additional Concerns Regarding the Extraterritorial Application of Criminal Laws

While Defendants' briefing does not expressly refer to "due process" concerns, their repeated emphasis in this motion and others on their status as non-citizens acting entirely abroad also causes the court to point out that it likewise would conclude that their prosecution under the AECA and Section 922(l) comports with due process under the Fifth Amendment to the United States Constitution. Due process requires that a sufficient nexus exist between the defendants and the United States so that extraterritorial application of the statutes is not arbitrary or fundamentally unfair. *United States v. Davis*, 905 F.2d 245, 248-49 (9th Cir. 1990). "Where [a . . .] transaction is aimed at causing criminal acts within the United States, there is a sufficient basis for the United States to exercise its jurisdiction." *Id.* at 249 (internal citation and quotations omitted); *see also United States v. Shi*, 525 F.3d 709, 722 n.4 (9th Cir. 2008) ("Such nexus would be established, for example, if the foreign defendant's extraterritorial conduct is purposefully aimed at the United States."). Here, because the Defendants were found by a jury to have willfully caused the importation of defense articles and firearms into the United States in contravention of United States law, a sufficient jurisdictional nexus exists between the Defendants and the United States to uphold their convictions.

In addition, as the government points out in its briefing, the extraterritorial application of penal laws to Defendants must also comport with international law. Five general principles allow for the exercise of extraterritorial authority under international law: 1) the territorial principle, 2) the national principle, 3) the protective principle, 4) the universal principle, and 5) the passive personal principle. *Chua Han Mow*, 730 F.2d at 1311. Here, the court is satisfied that the territorial and protective principles justify Defendants' prosecution. First, the "objective" territorial principle allows for jurisdiction where an individual intends to create

prosecution of a non-citizen there persuades this court that a distinction based on citizenship here is not warranted where the extraterritorial conduct involved was otherwise knowingly directed at the United States.

Moreover, while the Ninth Circuit refrained from reaching the extraterritorial jurisdiction argument in *Moncini*, this court finds it instructive that the Ninth Circuit let stand the prosecution of an Italian citizen and resident for mailing child pornography into the United States from Italy. 882 F.2d at 404 ("We conclude that Moncini's deposit of mail in Italy, intended for delivery to the United States, resulted in acts within the territory of the United States when the mail entered and traveled within the United States, so that the district court's exercise of territorial jurisdiction was proper."); *see also Al Kassar, supra* (finding extraterritorial jurisdiction over non-citizens for acts completed entirely abroad); *see also United States v. Hijazi*, 845 F. Supp. 2d 874, 886-87 (C.D. Ill. 2011) (notwithstanding *Morrison*, applying federal fraud statute to overseas actions of Lebanese citizen and resident of Kuwait under *Bowman*; in recognition of defendant's non-citizen status, stating that: "The Court nonetheless agrees with the Government that the import of *Bowman* does not hinge on the nationality of the defendant but rather on the particular harm a statute means to prevent: fraud targeted at the United States itself.")

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detrimental effect in the United States and engages in acts outside the United States which result in such effect. *Id.* at 1312. This principle, applicable in drug importation cases, seemingly justifies jurisdiction in this analogous defense articles and firearms importation context. Likewise, the protective principle allows for a sovereign to control its own borders, which are compromised by weapons importation as well as drug smuggling. *Id.* Thus, both the territorial and protective principles justify Defendants' prosecution.

B. The AECA's Brokering Amendment and the Aiding and Abetting Jury Instruction

In addition to making broad arguments under *Morrison* applicable to both the AECA and Section 922(l), Defendants also assert a specific argument under the AECA and its so-called "Brokering Amendment." In particular, they point out that the AECA expressly precludes the prosecution of foreign individuals who engage in "brokering activities" on foreign soil. *United States v. Yakou*, 428 F.3d 241, 244 (D.C. Cir. 2005). The government responds that Defendants were not charged with or convicted of engaging in illegal brokering activities and that the jury properly convicted them of importing defense articles without a license, a provision of the AECA which has no exception for the activities of foreign brokers.

1. The Brokering Amendment Generally

As the government points out, subsection (b) of 22 U.S.C. § 2778 requires those who engage in the business of importing defense articles into the United States to register with the United States government, 22 U.S.C. § 2778(b)(1), and also prohibits individuals from importing defense articles into the United States without a required license, 22 U.S.C. § 2778(b)(2). The Brokering Amendment is found only within subsection (b)(1)'s registration requirement at 22 U.S.C. § 2778(b)(1)(A)(ii). It defines brokering activities as including "the financing, transportation, freight forwarding, or taking of any other action that facilitates the manufacture, export, or import of a defense article. . . ." 22 U.S.C. § 2778(b)(1)(A)(ii)(II), and requires those who engage in the business of brokering activities related to the importation of defense articles also to register with the United States government and to obtain a license to engage in such business. 22 U.S.C. §§ 2778(b)(1)(A)(ii)(I)-(III). Subsection (b)(2), in contrast, makes no mention of whether a person engages in the business of importing defense articles or the business of brokering activities, but simply states that any importation of defense articles must be completed with a required license.

As Defendants point out and as held by the D.C. Circuit in *Yakou*, the Brokering Amendment precludes the prosecution under 22 U.S.C. § 2778(b)(1)(A)(ii) of foreign individuals who have engaged in brokering activities solely outside the territorial United States. *Yakou*, 428 F.3d at 243-44; 22 C.F.R. § 129.3(a) (stating that AECA's registration requirements for brokers extend to "any U.S. person, wherever located, and any foreign person located in the United States or otherwise subject to the jurisdiction of the United States"). But, in *Yakou*, the court expressly pointed out that the government did not claim that the indictment charged the defendant with a violation of 22 U.S.C. § 2778(b)(2) – as charged here – and therefore the court refrained from addressing whether a prosecution under that provision of the statute would have been proper. 428 F.3d at 246.

Defendants attempt avoid this limitation in *Yakou*'s ruling by arguing that the conduct proved at trial demonstrates that, at most, they were brokers who merely "facilitated" the importation of defense articles into the United States, and therefore, it was improper for them to be prosecuted directly under subsection (b)(2) for importing such articles without a required license. In arguing that the government should not have been allowed to prosecute them under 22 U.S.C. § 2778(b)(2), Defendants essentially make an insufficiency of the

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evidence argument related to their convictions. However, their argument is wholly underdeveloped; for example, Defendants do not even cite to trial transcripts in support of their factual assertions about what was “proven” at trial.

When evaluating the sufficiency of the evidence, this court must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Here (and as addressed by the court when ruling on certain of Defendants’ other post-trial motions), the jury was properly instructed as to the elements of a violation of 22 U.S.C. § 2778(b)(2). See Docket No. 321, Jury Instructions at 25-28. Moreover, based on Defendants’ own representations as to the evidence at trial and this court’s own recollection of such evidence, the court finds that a rational trier of fact could have found Defendants liable for importing (and conspiring to import) defense articles into the United States without the required license. 22 C.F.R. § 127.1(e) (“No person may knowingly or *willfully cause*, or aid, abet, counsel, demand, induce, procure, or permit the commission of, any act prohibited by . . . 22 U.S.C. § 2278. . . .”) (emphasis added).

2. The Aiding and Abetting Jury Instruction

Defendants also assert that the government, in effect, converted this case into an improper prosecution under the Brokering Amendment because it sought to hold Defendants liable for importing defense articles under an aiding and abetting theory, specifically 18 U.S.C. § 2(b). In other words, they argue that “aiding and abetting” an importation of defense articles without a license necessarily constitutes the “facilitation” of importation as defined in the Brokering Amendment. However, the court rejects this argument. First, the court has repeatedly addressed and found proper in this case – both during trial and in ruling on Defendants’ related post-trial motions – the use of 18 U.S.C. § 2(b)’s “willfully causing” language as a means for the government to prove that Defendants imported defense articles into the United States without a license. The court will not repeat the substance of those rulings here.

Second, *Yakou*’s ruling that an “aiding and abetting” theory of liability cannot be used to evade the limitations of the Brokering Amendment does not apply to this case. 428 F.3d at 252-54. The *Yakou* court, again, was only dealing with a prosecution under the Brokering Amendment and held that, if the AECA expressly precludes a direct prosecution of a foreign national under the Brokering Amendment, the government cannot otherwise prosecute a foreign national for aiding and abetting a violation of the Brokering Amendment. Here, Defendants were not prosecuted under the Brokering Amendment, and this court has otherwise found that, under *Morrison* and *Bowman*, the provision of AECA under which Defendants were prosecuted can be applied extraterritorially.

Moreover, in *Yakou*, the government applied 18 U.S.C. § 2(a)’s theory of aiding and abetting liability, in contrast to 18 U.S.C. § 2(b) being used here. *Id.* at 251. In other words, the *Yakou* Court’s evaluation of 18 U.S.C. § 2(a) does not lend support to Defendants’ argument that the form of aiding and abetting contemplated by 18 U.S.C. § 2(b) – i.e., “willfully causing” an importation to occur – is coterminous with simply facilitating an importation. As the Ninth Circuit has stated, “Section 2(b) punishes the individual who *causes* a criminal act, because no crime would take place without his or her participation.” *United States v. Causey*, 835 F.2d 1289, 1292 (9th Cir. 1987) (emphasis in original). Thus, the court will not treat a jury finding that Defendants “willfully caused” the importation of defense articles into the United States as only showing that they merely “facilitated” an importation. See, e.g., *Oxford English Dictionary* (Oxford University Press, 3d ed. September

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2009) (defining facilitate as “to make (an action, process, etc.) easy or easier. . . ;” also defining facilitate as “to assist (a person)”).

Because the court finds no error in asserting the use of 18 U.S.C. § 2(b) in conjunction with a prosecution under 22 U.S.C. § 2778(b)(2), the court likewise rejects any argument that the government “worked” an unconstitutional amendment of the indictment that resulted in a prosecution of Defendants under the Brokering Amendment. The court further notes that the indictment in this case expressly cited 18 U.S.C. § 2, thereby undermining Defendants’ assertion that they had no notice of this theory of liability.

III. Conclusion

For the foregoing reasons, Defendants’ Motion is denied.

IT IS SO ORDERED.

Initials of Deputy Clerk PG

cc:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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Case No. CR12-00037-RT

Date July 29, 2013

Present: The Honorable Robert J. Timlin, United States District Judge

Interpreter

Patricia Gomez

Deputy Clerk

Court Reporter/Recorder

Margaret Vierbuchen
Kim S. Dammers

Assistant U.S. Attorney

U.S.A. v. Defendant(s):	Present	Cust.	Bond	Attorneys for Defendants:	Present	App.	Ret.
Sergio Syjuco		X		John Littrell		X	
Cesar Ubaldo		X		David McLane		X	
Arjyl Revereza		X		George Buehler		X	

(IN CHAMBERS) ORDER RE ADDITIONAL BRIEFING ON DEFENDANTS' MOTION FOR JUDGMENT OF ACQUITTAL ON THE GROUND THAT THERE IS NO JURISDICTION UNDER THE ARMS EXPORT CONTROL ACT AND UNDER 18 U.S.C. § 922(l) OVER THE CONDUCT THE GOVERNMENT PURPORTED TO PROVE AT TRIAL

Proceedings:

The court is considering defendant Arjyl Revereza's motion, joined by defendants Sergio Syjuco and Cesar Ubaldo, for judgment of acquittal on the ground that there is no jurisdiction under the Arms Export Control Act ("AECA") and under 18 U.S.C. § 922(l) ("Section 922(l)") over the conduct the government purported to prove at the trial (the "Motion"). Docket Nos. 356, 359, and 367. Upon reviewing the parties' briefing, the court requests further briefing by them on the following issues:

1) Does *United States v. Bowman*, 260 U.S. 94 (1922), still control the court's determination of whether the AECA and Section 922(l) can be applied extraterritorially in light of the Supreme Court's decision in *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010)?

2) Assuming *Morrison*'s analysis controls this court's determination of whether the AECA and Section 922(l) apply extraterritorially, has Congress provided a "clear indication" through, for example, the statutory text and context that both the AECA and Section 922(l) can be applied to non-citizens whose criminal conduct occurs wholly on foreign soil?

3) From this court's reading of *Morrison*, it appears that a general determination that a statute does not apply extraterritorially does not end the jurisdictional inquiry. Instead, the court may have to turn to the circumstances of the case before it and evaluate whether the domestic activity implicated in the case is the "focus" of congressional concern in enacting the particular statute. 130 S. Ct. at 2884 (*see generally* roman

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numeral IV.A of *Morrison* starting at 2883); *see also United States v. Chao Fan Xu*, 706 F.3d 965, 975 (9th Cir. 2013). Are Defendants here tied to “domestic activity” that can be characterized as the “focus of congressional concern” in enacting the AECA and Section 922(l) such that, even if the court were generally to conclude that the AECA and 922(l) do not have extraterritorial reach, the court should nonetheless conclude that Defendants were properly prosecuted under those statutes?

The court directs the government to file a response to the above questions by no later than August, 2 2013, at 9:00 a.m. Defendant Revereza is directed to file a reply to the government’s response by no later than August 7, 2013, at 6:00 p.m.

IT IS SO ORDERED.

Initials of Deputy Clerk PG

cc:

A P P E N D I X 4

Pages

Extracted Pages From Opening Brief

A-035-062

**U.S. COURT OF APPEALS DOCKET NOS. 14-50090, 14-50093
CONSOLIDATED**

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

SERGIO SANTIAGO DE LEON SYJUCO and CESAR PAOLO UBALDO,
Defendants-Appellants

On Appeal from the United States District Court
For the Central District of California
D. Ct. Case No. 12-CR-00037-RGK
[The Honorable R. Gary Klausner]

APPELLANT CESAR PAOLO UBALDO'S OPENING BRIEF

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UNITED STATES, AND WOULD HAVE SUPPORTED AN ENTRAPMENT DEFENSE.

II.

STATEMENT OF THE CASE

A. STATEMENT OF JURISDICTION

This appeal is from convictions for conspiracy, in violation of 18 U.S.C. § 371, importing defense articles from the Philippines to the United States without a license, in violation of 22 U.S.C. § 2778, and illegal importation of weapons from the Philippines to the United States without authorization, in violation of 18 U.S.C. § 922(l). The district court had jurisdiction pursuant to 18 U.S.C. § 3231, and this Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. 3742(a). Mr. Ubaldo was sentenced on February 26, 2014, CR 458, and filed a timely notice of appeal on February 28, 2014, CR 463.

B. COURSE OF PROCEEDINGS

An arrest warrant and complaint charging Mr. Ubadlo, Sergio Syjuco and Arjyl Revereza was filed on December 8, 2011, CR 1. All three made their initial appearance on January 6, 2012, CR 6, 12, 19, and all were ordered detained. CR 8, 15, 22. An indictment was filed on January 12, 2012, CR 26. The defendants were arraigned on February 6, 2012. CR 35.

On September 18, 2012, the defendants filed a motion to dismiss the

indictment for manufactured jurisdiction. CR 72. On November 2, 2012, the Court denied the motion to dismiss for manufactured jurisdiction, CR 149, and the Court denied reconsideration of the motion on January 14, 2013, CR 207. On October 17, 2012, Defendant Syjuco filed a motion to dismiss for destruction of evidence, CR 111, which the Court denied on November 2, 2012, CR 150.

On October 18, 2012, the government filed a notice of intent to offer Rule 404(b) evidence, CR 116. On October 22, 2012, Mr. Ubaldo filed a *Franks* motion to suppress, CR 121, and on January 14, 2013, the Court ordered a *Franks* evidentiary hearing, CR 208. On December 28, 2012, Defendant Arjyl Revereza filed a motion for reconsideration of the order denying the motion to dismiss based on the destruction of exculpatory evidence, CR 195, and the Court granted the motion for reconsideration and set the motion for hearing. CR 221. On January 11, 2013, the Court held a motion hearing on the motion for reconsider ruling on the motion to dismiss due to manufactured jurisdiction, the renewed motion to dismiss based on destruction of evidence, and the motion for a *Franks* hearing. CR 206. On January 14, 2013, the Court granted the motion for a *Franks* hearing, CR 210, and granted the government's 404(b) motion against Mr. Ubaldo. CR 209.

Over a 3 day period, on January 24, 25, and 28, 2013, the Court held a *Franks* evidentiary hearing, and denied the motion. CR 232, 234, 235. On January 28, 2013, the Court held an evidentiary hearing on the motion to dismiss due to the

destruction of evidence; the Court denied the motion but ordered a spoliation instruction due to the agent's negligence in not preserving the evidence (text messages). CR 240, 255.

On January 29, 2013, the first day of trial, the defense moved in limine to preclude the government from discussing the purpose of the weapons, the reasons why the weapons were on the munitions list, and displaying the weapons in court throughout the trial. RT (1/29/2013) 80-91; RT (1/20/2013) 18-26. The Court denied the motion. CR 243. RT (1/30/2013) 26. On January 30, 2013, the Court permitted an amended indictment removing overt acts of the conspiracy past June 7, 2011, when the shipment of weapons arrived in the United States, on the ground it was a separate conspiracy. RT (1/30/2013) 80-82. Thereafter, jury selection began. RT (1/30/2013) 103.

Opening statements and the presentation of evidence commenced on February 5, 2013. CR 248; RT (2/5/2013) 84. After eleven days of evidence, closing arguments were delivered on February 25 and 26, 2013. CR 179, 280. The court held a jury instruction conference on February 22, 2013, CR 278, where the parties disagreed on the use of the "aiding and abetting" wording. Deliberations commenced on February 26, 2012 and lasted for four days, with jury returning a verdict of guilty as to all counts and defendants on March 4, 2013. CR 294.

On February 26, 2014, the district court sentenced Mr. Ubaldo to 60 months.

CR 456.

After the trial, the defendants brought a motion for a new trial due to instructional error on aiding and abetting, and a motion to dismiss the substantive counts due to the lack of extraterritorial jurisdiction; the Court denied both motions. CR 408, CR 409.

C. BAIL STATUS OF DEFENDANT

Mr. Ubaldo is presently in custody serving his 60 month sentence. His projected release date is April 6, 2016.

III.

STATEMENT OF FACTS

A. THE INDICTMENT

The indictment, CR 25, alleged a conspiracy by three Philippine nationals, Sergio Syjuco, Cesar (“Arvi”) Ubaldo, and Arjyl Revereza, to unlawfully import weapons into the United States. Counts Two through Five of the indictment required that the government prove that the defendants knowingly imported weapons into the United States. *See* 22 U.S.C. §§ 2778(b)(2) & (c); 18 U.S.C. §§ 922(l) and 924(a)(1)(C). Count One required that the government prove that the defendant agreed to knowingly and unlawfully import weapons in the United States. 18 U.S.C. § 371; 22 U.S.C. § 2778(b)(2) & (c); 18 U.S.C. §§ 922(l) & 924(a)(1)(C).

ASE reside . . .”, and counsel for Syjuco moved for a mistrial, RT (2/6/2013) 171 which was denied; (4) Weapons expert Holloway testified that insurgents where he served in Afghanistan and Iraq “love to get ahold of weapons like these,” RT (2/8/2013) 47; (5) Agent Ro when discussing canisters for masks, some of the protection equipment on material Ubaldo sent Ro, stated that “I think they’re the canister for the mask for the filters . . . Just in case when you have a **nuclear biological chemical** attack,” RT (2/11/2013) 111-112; (6) in closing, at the very beginning, the government emphasized the dangerousness of the weapons and who were types of people, insurgents, who would use them, the government emphasized the purpose of the weapons, “.50 caliber weapon. He told you that the longest sniper confirmed kill on the weapon was well over a mile and a half . . . an AK 47 used by armies and insurgents all over the world”

E. THE EVIDENCE AT TRIAL CONCERNING EXTRATERRITORIAL JURISDICTION, AND WILLFULLY CAUSING AN ACT TO BE DONE, WHERE THE GOVERNMENT SHIPPED THE WEAPONS

The three defendants, Syjuco, Ubaldo and Revereza, did not leave the country until after the conspiracy was complete and they arrived in the United States after being lured by the undercover agent to come to the United States so that they could be arrested and additional evidence gathered. The weapons, which included serious weapons, a safety harbor .50 caliber rifle, a H & Arms Co. M14 assault rifle, a single shot grenade launcher, a 60 millimeter mortar launcher, a

rocket propelled grenade launcher, and an automatic AK-47 rifle, were procured after the undercover, Ro, had first targeted another individual, Roland Dacias, who provided 12 bushmaster rifles but refused to deal with the undercover. The undercover was then introduced to Mr. Ubaldo, who introduced the undercover to Syjuco, who sold the weapons, and to Revereza, the Philippine customs agent, who took money from the agent and supposedly was helping with the shipment of the weapons. This case involved a sting operation conducted by FBI agents in the Philippines against 3 Philippine nationals.

The FBI targeted these defendants, and wine and dined them. According to Ro's testimony, he paid for everything, including alcohol and female companionship at the KTV clubs. RT (2/8/2013) 181-183; RT (2/11/2013) 80-82. Ubaldo testified he could not afford these clubs, and all three testified that the undercover paid for prostitutes for them. RT (2/15/2013) 56-69 (Syjuco testimony, including that the undercover sent him a text, "how is the girl?"); RT (2/19/2013) 138-141 (Ubaldo testimony); RT (2/21/2013) 149-150 (Revereza testimony, including that the undercover texted Revereza about sex with the KTV girls.

There was no evidence produced at trial that the defendants ever illegally shipped weapons to the United States, or ever illegally shipped out of the Philippines, or into the Philippines, weapons. Defendants Syjuco and Ubaldo presented entrapment defenses, and all three defendants presented evidence that

they could not be guilty since they did not willfully cause the weapons to be shipped to the United States under 18 U.S.C § 2(b).

Despite their convictions, the evidence at trial established the following concerning the shipment of the weapons:

- The undercover agent had Syjuco pack the weapons to create evidence. RT (2/8/2013)17;
- Syjuco did not know about the container, the agents got the container. RT (2/8/2013) 29-30; RT (2/12/2013) 191-92.
- When asked why not have Syjuco to arrange the shipment of the container, the agent responded, “he did not have the ability.” RT (2/8/2013) 31-32;
- Exhibits 1263 (the customs form) and 1264 (the packing list) were filled out by the undercover, not the defendants, RT (2/8/2013) 34-35; (2/11/2013) 90-91; Ex. 1401;
- All the shipping documents were prepared by agent Ro or agent Lao, not the defendants, including the documents necessary for the shipment, the export declaration, the packing list saying personal items so it would avoid detection at the Manila port, the bill of lading, the export declaration, and the import declaration. Lao admitted the FBI prepared every single piece of paperwork necessary for the shipment. RT

(2/12/2013) 191-92, 216-18; RT (2/13/2013) 14-15;

- Ubaldo never got the bill of lading; he was not involved in the logistics of the shipment. RT (2/8/2013) 176-177;
- Syjuco was directed by the undercover to pack the weapons in the hotel in order to gather evidence against him, RT (2/12/2013) 206-07;
- The FBI agents unpacked the container, and repacked the container with the weapons, RT (2/12/2013) 207;
- Agent Lao took precautions to ensure the shipment was not seized in transit to the United States, RT (2/12/2013) 212-213; even calling the FBI Legat in China when he found out the route had changed and the weapons were in China, to ensure their transport into the United States, RT (2/12/2013) 213, 223;
- The government alleged that defendant Revereza, the customs official who worked at the airport, not the ports, facilitated the shipment.

Besides definitively proving he took bribes, there was no evidence presented that he did anything to further the shipment. The items were declared personal, and the government had prepared the packing slip, invoice and export declaration. According to Jemina Sy-Flores, the government's own witness and an official with the Phillipine customs office, one only need the packing slip, invoice and export declaration to

ship. RT (2/8/2013) 72-74, 89-92. She testified that the shipper was Richard Han, the undercover, and because the shipment was declared personal items, there was no need for x-ray or quarantine to inspect the items. Ms. Sy-Flores determined in her own investigation that Revereza was not involved at all in processing the shipment. RT (2/8/13) 93.

At trial, during a jury instruction conference, defendants objected to the instruction given by the Court that the defendants could be guilty of the offenses if they aided and abetted the importation of weapons. *See* Jury Instruction Conference, RT (2/22/2013) 1-194. During closing arguments, the government argued that the defendants could be found guilty if they aided and abetted the transportation the weapons. On August 13, 2013, the defense brought post-trial motions that the case should be dismissed due to the instructions on aiding and abetting, that the defendants could not aid and abet an agent under 18 U.S.C. 2(a), so the jury had to be instructed that they willfully caused the transport, which constituted error. RT (8/13/2013). The motion was denied by the Court. CR 408.

The Court also denied the motion that the defendants could not be convicted of the substantive crimes of willful importation into the United States because there was no extraterritorial jurisdiction. CR 407.

IV.

SUMMARY OF ARGUMENT

This case reflects the overzealousness of the government, by both investigators and prosecutors, in the War on Terrorism. The government team hyped the claim, without real evidence and over defense objection, that somehow these weapons were connected to terrorists, and that these weapons were weapons of mass destruction, even going so far to connect Mr. Ubaldo, who sold protection equipment, as having masks that could be used in a chemical, biological and nuclear attack. The government sent an FBI team from West Covina, halfway around the world, to the Philippines, to catch some bad guys, terrorists and weapons traffickers.

The problem was that the first target, Roland Dacias, who sold the agent the 12 bushmaster rifles, stopped dealing with the undercover agent. Thus, after spending 72,000 dollars on 12 rifles without any success in arresting Dacias, the government went after three individuals whom they had no evidence were weapons traffickers before conducting a sting operation against them. To gain access, they plied the defendants with booze, brothels (KTV clubs), and money, paying for everything. Mr. Ubaldo did introduce the agent to someone he knew might have access to weapons, Mr. Syjuko, and to an acquaintance, Mr. Revereza, whom he thought could help the undercover. He negotiated the sale of the .50 caliber

weapon on behalf of Mr. Syjuco, introduced the undercover to Revereza, sold him 4 vests, and that is all he did.

The evidence at trial firmly established that none of the three defendants did anything to ship the weapons. The agents obtained the container, filled out all the necessary paperwork, including the export documents for the shipment to leave the Philippines, and the import documents to the United States. Even after the weapons were packed, the agents unpacked the container, and then packed it again. The agents created evidence by having Mr. Syjuco pack the weapons, and load them in the container. The agents insured the weapons would arrive in the United States, by contacting the FBI Legat in China to ensure the weapons made it to the United States.

Thus, this trial reflects the government's overreach to pluck three Philippine nationals, lure them to the United States so they could prosecute them, and portray them as big time weapons dealers when they were not. Ubaldo had no criminal record; there was no evidence that he ever imported weapons into the Philippines or ever exported weapons from the Philippines, let alone ever sold weapons before being ensnared by the FBI. The government not only overreached factually, but legally. As will be demonstrated in this brief, there was no extraterritorial jurisdiction to prosecute them for importing weapons without a license under both substantive statutes. The government also overreached by arguing that they could

be held legally responsible under 18 U.S.C. § (2)(b), claiming they willfully caused the importation of the weapons, when arguing they were aiders and abettors. The Court erred in its legal instructions for Section 2(b) liability, and the government took advantage of it in closing.

The trial also was unfair and prejudicial in several respects that constitute reversible error: allowing the government to put on evidence about the purpose of the weapons; allowing the weapons to sit in court for two weeks before the jury; allowing 404(b) evidence on the scopes which was error; putting on evidence of turtle smuggling which had nothing to do with the case and for which the government gave no notice; sandbagging the defense through prosecutorial misconduct concerning the scopes testimony; not dismissing the case based on the missing text messages where only the defendants texts were preserved, not the government's texts, which were allowed into evidence despite the intentional failure to preserve them by the government; and allowing Ubaldo's emails into evidence despite the reckless false statements by the case agent that provided probable cause for the emails omission. Those emails were key evidence that allowed the government to argue Ubaldo knew the weapons were going to the United States since he forwarded the emails. Without those emails, there would be much weaker evidence of knowledge by Ubaldo. Combining all these errors added up to an unfair trial that denied the defendants due process of law. If we are to say

that we are a beacon for the world in guaranteeing justice, this trial would not be a shining example.

V.

ARGUMENT

A. THE DISTRICT COURT ERRED IN RULING THAT 22 U.S.C. § 2778 AND 18 U.S.C. § 922(l) COULD APPLY TO THE DEFENDANTS' CONDUCT IN THE PHILIPPINES AND IN REFUSING TO INSTRUCT THE JURY THAT THE DEFENDANTS COULD NOT BE CONVICTED IF THEY HAD MERELY ACTED AS BROKERS.

1. Reviewability and Standard of Review

Defense counsel argued at several points in the proceedings that foreign citizens with no connection to the United States who are merely acting as brokers outside the United States cannot be convicted under 22 U.S.C. § 2778 and 18 U.S.C. § 922(l). First, defense counsel requested an instruction to this effect. CR 275. Second, defendants argued that a judgment of acquittal should be entered because the evidence was insufficient to show anything more. CR 356, 374, 378, 392, 393. The proposed jury instruction and the motion were based on an argument that 22 U.S.C. § 2778 and 18 U.S.C. § 922(l) do not apply extraterritorially. *See id.*

The district court rejected the defense arguments. In a lengthy 10-page order denying the post-trial motion for judgment of acquittal, it ruled that the statutes did apply to the extraterritorial conduct here. CR 407. Such rulings on the extraterritorial application of criminal statutes are reviewed de novo. *United States*

v. *Chao Fan Xu*, 706 F.3d 965, 974 (9th Cir. 2013).

2. **There Was Insufficient Evidence to Support a Conviction Because 22 U.S.C. § 2778 and 18 U.S.C. § 922(l) Do Not Apply to Extraterritorial Conduct Such as the Brokering Activity Here, at Least When Engaged in by Foreign Citizens with No Connection to the United States.**³

- a. **Unless contrary intent appears, there is a presumption that United States statutes apply only within the territory of the United States, and no contrary intent appears here.**

The Supreme Court recently reaffirmed – in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010) – the “long-standing principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” *Id.* at 255 (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (hereinafter “*Aramco*”) and *Foley Bros., Inc. v. Falardo*, 336 U.S. 281, 285 (1949)). As further explained:

This principle . . . rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters. (Citations omitted.) Thus, “unless there is the affirmative intention of the Congress clearly expressed” to give a statute extraterritorial effect,

³ The arguments which follow require the conspiracy count to fall along with the substantive counts, because “the offenses of being an accessory after the fact, aiding and abetting, and conspiracy, all . . . have been deemed to confer extraterritorial jurisdiction to the same extent as the offenses that underlie them.” *United States v. Hill*, 279 F.3d 731, 739 (9th Cir. 2002); *see also United States v. Layton*, 855 F.2d 1388, 1395 (9th Cir. 1988) (collecting cases) (cited in *Hill*, 279 F.3d at 739 n.26).

“we must presume it is primarily concerned with domestic conditions.” *Aramco, supra*, at 248 (internal quotation marks omitted). The canon or presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law (citation omitted). When a statute gives no clear indication of an extraterritorial application, it has none.

Morrison, 561 U.S. at 255.

There is no clear indication in either 22 U.S.C. § 2778 or 18 U.S.C. § 922(l) of an intent to apply the statute extraterritorially. Indeed, in the case of 22 U.S.C. § 2778, there is affirmative evidence it was intended not to apply extraterritorially, at least as to foreign citizens with no connection to the United States. Section 2778 includes what is known as the “Brokering Amendment,” which “expanded the scope of [§ 2778’s] registration and licensing requirements to cover ‘every person . . . who engages in the business of brokering activities with respect to the manufacture, export, import, or transfer of’ the articles and services on the [United States] Munitions List.” *United States v. Yakou*, 428 F.3d 241, 243 (D.C. Cir. 2005).⁴ The legislative history of this amendment and the regulations implementing it expressly address the question of extraterritorial jurisdiction. The committee report on the bill states it was intended to apply only to “U.S. persons

⁴ “Brokering activities” are broadly defined to include “the financing, transportation, freight forwarding, or taking of any other action that facilitates the manufacture, export, or import of a defense article or defense service.” 22 U.S.C. § 2778(b)(1)(A)(ii)(II).

(and foreign persons located in the U.S.).” H.R. Rep. No. 104-519, at 11 (1996), reprinted in 1996 U.S.C.C.A.N. 1118, 1128. Consistent with this, the implementing regulations make the licensing and registration requirements for brokering activities applicable only to “any U.S. person, wherever located, and any foreign person located in the United States or otherwise subject to the jurisdiction of the United States.” 22 C.F.R. § 129.3(a). A “U.S. person” is a citizen or national of the United States, a lawful permanent resident, an alien who is lawfully admitted for permanent or temporary residence, a refugee, or someone granted asylum. 22 C.F.R. § 120.15.

The significance of such express consideration of extraterritorial jurisdiction in one part of a statute is made clear by the Supreme Court’s analysis of a similar situation in *Morrison*. The specific statutory provision being considered there was § 10(b) of the Securities and Exchange Act. *See Morrison*, 561 U.S. at 250. Just the silence of that provision by itself triggered the presumption against extraterritorial jurisdiction, as the Court noted. *See id.* at 262. But the presumption was reinforced by the fact that other provisions in the Act were not silent. The Court pointed to two such provisions: first, § 30(b) of the Act, which the Court noted “does mention the Act’s extraterritorial application,” *id.* at 263 (emphasis in original); and, second, § 30(a) of the Act, which the Court noted “contains what § 10(b) lacks: a clear statement of extraterritorial effect,” *id.* at 265. The Court then

explained, “when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms.” *Id.* at 265.

Exactly the same reasoning applies here. The legislative history and regulations implementing the Broker Amendment contain an express discussion of extraterritorial jurisdiction – which excludes foreign citizens like Mr. Ubaldo and his codefendants who cannot be characterized as “U.S. persons.” What *Morrison* said about the Securities and Exchange Act is therefore true here: “when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms.”⁵

b. An exception to the presumption against extraterritorial application of statutes, which was recognized in *United States v. Bowman*, 260 U.S. 94 (1922), does not apply here.

There is an exception to the presumption against extraterritorial application of United States statutes which the Supreme Court recognized for a certain class of criminal statutes in *United States v. Bowman*, 260 U.S. 94 (1922):

⁵ This reasoning also establishes that an argument made by the government below – that the defendants were not charged under the Broker Amendment, but were charged under another provision in subsection (b)(2) of § 2778 – carries no weight. The statutory language expressly addressing extraterritorial jurisdiction which the Court considered in *Morrison* was also in different statutory provisions than the one directly at issue in the case. Just as that made no difference in *Morrison*, it makes no difference here.

[The presumption against extraterritorial jurisdiction] should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents. Some such offenses can only be committed within the territorial jurisdiction of the government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for fraud as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.

Id. at 98. The Court went on to give several examples, including:

1. A consul knowingly certifying a false invoice, which would probably take place in a foreign country.
2. Forging or altering a ship's papers, which would probably take place at sea.
3. Enticing desertions from the naval service, which would most likely be done on the high seas or in a foreign port.
4. Bribing a United States officer of the civil, military, or naval service, which could include bribes offered to a consul, ambassador, or army or naval officer in a foreign country or on the high seas.
5. Willfully doing or aiding any act relating to the bringing in, custody, sale or other disposition of property captured as a prize, with intent to defraud, delay or injure the United States or any captor or claimant of such property, which would often occur at sea.
6. Stealing, embezzling, or knowingly applying for one's own use property of the United States furnished or to be used for

military or naval service, which could be in the custody of army or naval officers either in foreign countries, in foreign ports, or on the high seas.

Id. at 98-100.

Bowman then added the statute before the Court there, which was the crime of making a fraudulent claim upon the United States or any corporation in which the United States is a stockholder. The Court explained:

What is true of these sections in this regard is true of section 35, under which this indictment was drawn. . . .

It is directed generally against whoever presents a false claim against the United States, knowing it to be such, to any officer of the civil, military or naval service or to any department thereof, or any corporation in which the United States is a stockholder, or whoever connives at the same by the use of any cheating device, or whoever enters a conspiracy to do these things. The section was amended in 1918 to include a corporation in which the United States owns stock. This was evidently intended to protect the Emergency Fleet Corporation in which the United States was the sole stockholder, from fraud of this character. That corporation was expected to engage in, and did engage in, a most extensive ocean transportation business, and its ships were seen in every great port of the world open during the war. The same section of the statute protects the arms, ammunition, stores, and property of the Army and Navy from fraudulent devices of a similar character. We cannot suppose that when Congress enacted the statute or amended it, they did not have in mind that a wide field for such frauds upon the government was in private and public vessels of the United States on the high seas and in foreign ports and beyond the land jurisdiction of the United States, and therefore intended to include them in the section.

Id. at 101-02.

This rationale has no application here. The offense charged here –

importation into the United States – can never be committed on the high seas or in another country. Importing by definition requires an act within the United States, namely, the physical transfer of goods across the border into the United States. The statute here is thus nothing like the examples given in *Bowman*.

c. The district court erred in its analysis in multiple respects.

The district court engaged in a lengthy, in-depth analysis of the extraterritorial jurisdiction issue, which led it to reject the defense argument. CR 407. It erred in multiple respects along the way, however.

First, the district court erred in seemingly concluding that *Morrison* “does not apply in the criminal setting.” CR 407, Order at 5. To begin, only one of the cases cited by the court actually suggests this. Order at 5; *Compare United States v. Singhal*, 876 F. Supp. 2d 82, 97 (D.D.C. 2012) (cited by court, asserting cases defendant cited “have not extended *Morrison*’s reasoning to a criminal case such as this one”), with *United States v. Weingarten*, 632 F.3d 60, 65-66 (2d Cir. 2011) (cited by court, first applying *Morrison*, but then concluding that presumption against extraterritoriality may not apply because of *Bowman* exception) and *United States v. Carson*, No. SACR 09-00077-JVS, 2011 WL 7416975, at *7 (C.D. Cal. Sept. 20, 2011) (cited by court, simply concluding that *Bowman* exception survives after *Morrison*). And in any event, this Court has taken a contrary view; it directly applied *Morrison* in a recent criminal case. See *United States v. Chan Fan Xu*, 706

F.3d 965, 974-75 (9th Cir. 2013).

Second, the district court erred in its interpretation of § 2778’s “prefatory language,” [Order at 2], and related regulations and legislative history. It is true that the statute states that it is “[i]n furtherance of world peace and security and foreign policy of the United States.” [Order at 2] (quoting 22 U.S.C. § 2778(a)); *see also* [Order at 2-3] (quoting 22 C.F.R. § 126.1(a)) and H.R. Rep. No. 94-1144, at 23, 1976 U.S.C.C.A.N. 1378, 1399). But countries generally further world peace and their security and foreign policy—at least in their statutes —by controlling the actions of their own citizens. Section 2778 promotes world peace and foreign policy goals by preventing United States citizens and others in the United States from exporting arms. It promotes domestic security by controlling the importation of arms by those same people. It does not need to reach out to the conduct of any and every ancillary person involved in any and every ancillary way in any and every foreign country.

Third, the district court erred in giving weight to the words “any person” in § 2778 and § 922(g)(1). *See* Order at 3. The Supreme Court considered the word “any” in interpreting another provision of § 922—the provision in subsection (g) prohibiting possession of a firearm by a person “convicted in any court” of a felony—in *Small v. United States*, 544 U.S. 385 (2005). In rejecting a government argument that the word “any” must include foreign courts in addition to domestic

courts, the Court explained:

The word “any” considered alone cannot answer this question. In ordinary life, a speaker who says, “I’ll see any film,” may or may not mean to include films shown in another city. In law, a legislature that uses the statutory phrase “‘any person’” may or may not mean to include “‘persons’” outside “the jurisdiction of the state.” *See, e.g., United States v. Palmer*, 3 Wheat. 610, 631 (1818) (Marshall, C.J.) (“[G]eneral words,” such as the word “‘any,’” must “be limited” in their application “to those objects to which the legislature intended to apply them”); *Nixon v. Missouri Municipal League*, 541 U.S. 125, 132 (2004); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994) *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 15-16 (1981) ; *Flora v. United States*, 362 U.S. 145, 149, (1960).

Small, 544 U.S. at 388(case quotations omitted).

The *Small* opinion also made a point pertinent to the question of extraterritorial jurisdiction generally, by “find[ing] help in the ‘common sense notion that Congress generally legislates with domestic concerns in mind.’” *Id.* It then went on to note: “This notion has led the Court to adopt the legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application.” *Id.* at 388-89.⁶

Fourth, the district court erred in placing weight on references in the

⁶ The regulations quoted in the district court order which define “person” broadly, *see* Order at 3, are not helpful because they are circular. While 22 C.F.R. § 120.1(e) does broadly refer to “[n]o person,” it then goes on to refer to “any act prohibited by . . . 22 U.S.C. § 2778.” *Id.* This leaves unanswered the question of

legislative history of § 922(l) to “foreign commerce.” Reliance on this sort of language was expressly rejected by the Supreme Court in *Morrison*.

[The government] point[s] to the definition of “interstate commerce,” a term used in § 10(b), which includes “trade, commerce, transportation, or communication . . . between any foreign country and any State.” 15 U.S.C. § 78c(a)(17). But “we have repeatedly held that even statutes that contain broad language in their definitions of ‘commerce’ that expressly referred to ‘foreign commerce’ do not apply abroad.” *Aramco*, 499 U.S., at 251; *see id.*, at 251-52 (discussing cases). The general reference to foreign commerce in the definition of “interstate commerce” does not defeat the presumption against extraterritoriality.

Morrison, 561 U.S. at 263 (emphasis in original).

Fifth, the district court erred in reading this Court’s post-*Morrison* opinion in *United States v. Chao Fan Xu*, 706 F.3d 965 (9th Cir. 2013), as supporting its conclusion. The RICO convictions in *Chao Fan Xu* were affirmed based on that part of the defendant’s conduct—immigration fraud—which “occurred within the United States.” Order at 4; *Chao Fan Xu*, 706 F.3d at 978-79. But the conduct of Mr. Ubaldo and his codefendants did not occur within the United States. It occurred completely outside the United States. That makes it analogous not to the immigration fraud in *Chao Fan Xu*, which this Court found was subject to the RICO statute because it was within the United States, but to the other part of the

what acts—and in particular what acts by whom—are “prohibited by . . . 22 U.S.C. § 2778.”

defendant's conduct—a bank fraud in China—which this Court found was not subject to the RICO statute because it was outside the United States. 706 F.3d at 978.

Finally, the district court erred in treating several cases cited by the government—*United States v. Vasquez-Velasco*, 15 F.3d 833 (9th Cir. 1994); *United States v. Larsen*, 952 F.2d 1099 (9th Cir. 1991); *United States v. Moncini*, 882 F.2d 401 (9th Cir. 1989); *Chua Han Mow v. United States*, 730 F.2d 1308 (9th Cir. 1984); and *United States v. Castillo-Felix*, 539 F.2d 9 (9th Cir. 1975)—as controlling. All of these cases are distinguishable.

Vasquez-Velasco and *Castillo-Felix* fit rather readily within the *Bowman* exception. *Vasquez-Velasco* involved the killing of tourists under the mistaken belief they were DEA agents, which, like the killing of an actual DEA agent, is a harm to the United States no matter where it takes place. 15 F.3d at 840-41 (*citing United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991)).⁷ *Castillo-Felix* involved the counterfeiting of United States identification documents and encouraging unlawful entry, which similarly harms United States interests no

⁷ *Vasquez-Velasco* was simply an extension of *Felix-Gutierrez*, which involved the killing of an actual DEA agent. 940 F.2d at 1204; *see also United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011) (applying *Bowman* exception to conspiracy to kill United States officers and employees abroad) (cited in Order at 6).

matter where the conduct takes place. 539 F.2d at 11.

Larsen and *Chua Han Mow* are distinguishable because there was evidence of an affirmative congressional intent to apply the statutes there extraterritorially. In *Chua Han Mow*, there was a direct statement in the statute that it should be applied extraterritorially. 730 F.2d at 1311 (citing 21 U.S.C. § 959). In *Larsen*, the statute was part of the Comprehensive Drug Abuse Prevention and Control Act of 1970 and there was legislative history suggesting “the power to control illegal drug trafficking on the high seas was an essential incident to Congress’ intent to halt drug abuse in the United States.” 952 F.2d at 1100 (citing *United States v. Baker*, 609 F.2d 134, 137 (5th Cir. 1980) and *Baker*’s references to the act and committee report for the act).

The last case, *Moncini*, involved conduct that was not just extraterritorial, because the defendant personally mailed a package that left the foreign country from which he mailed it, and he then entered and traveled within the United States. 882 F.2d at 403. As the court explained, “*Moncini*’s deposit of mail in Italy, intended for delivery to the United States, resulted in acts within the territory of the United States when the mail entered and traveled within the United States.” *Id.* at 404.

The case which is more on point is *United States v. Yakou*, 428 F.3d 241 (D.C. Cir. 2005). The court found the evidence insufficient to support a § 2778

conviction in that case because the defendant was (1) merely a broker and (2) did not have the “U.S. person” status that triggers application of the Brokering Amendment. *See id.* And the court further held—in reasoning equally applicable here—that “[t]he aiding and abetting statute . . . is not so broad as to expand the extraterritorial reach of the underlying statute.” *Id.* at 252. This makes the fact that *Yakou* involved a prosecution under subsection (b)(1)(A) of § 2778 rather than a prosecution under subsection (b)(2) of § 2778 a distinction without a difference. That is because the only way to bring the brokering activities of Mr. Ubaldo and his codefendants within (b)(2) is through an aiding and abetting theory of some sort.⁸

3. **Assuming Arguendo that the Defendant Could Have Been Found by a Jury to Have “Caused” Importation of the Firearms in Some Way Other than Merely Brokering the Deal, the Jury Should Have Been Instructed that Merely Acting as a Broker Was Insufficient.**

In a final section of its order in which it expressly addressed the Brokering Amendment and discussed the aiding and abetting instruction, the district court noted its instructions had required the jury to find Mr. Ubaldo and his codefendants

⁸ As noted in codefendant Syjuco’s opening brief, which Mr. Ubaldo joins in full pursuant to Rule 28 (i) of the Federal Rules of Appellate Procedure, the government proceeded here under the subsection (b) prong of the federal aiding and abetting statute, which criminalizes causing an otherwise innocent person to do

“willfully caused” importation of defense articles. *See* Order at 9. The court then suggested this meant Mr. Ubaldo and his codefendants had done something more than “merely ‘facilitat[ing]’ the importation of defense articles.” Order at 8.

There are three problems with this rationale. First, nothing in the instruction on “willfully causing” told the jury that “causing” meant something more than facilitating, so it is speculative to say the jury found something more. Second, the evidence did not establish anything more than facilitating, so any implicit jury finding of something more was not supported by sufficient evidence. Indeed, even one of the prosecutors in her closing argument, stated that they could be found guilty under 2(b) “where everybody does a little part of it. That’s what being an aider and abet[or] means....” RT (2/25/2012) 38-39. Third, there is at the very least sufficient ambiguity that it was error to reject the proposed defense instruction on brokering. The ambiguity in the “willfully causing” instruction made it critical that the jury know brokering was not enough. The failure to so instruct the jury created instructional error that requires a new trial even if there was sufficient evidence that might have allowed the jury to find something more than brokering.⁹

an act “which if directly performed by him or another would be an offense against the United States.” 18 U.S.C. § 2(b).

⁹ The remedy if the Court agrees the evidence was insufficient to support such a finding would not be the grant of a new trial, but entry of a judgment of acquittal. *See United States v. IMM*, 747 F.3d 754, 771 (9th Cir. 2014).

A P P E N D I X 5

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Case no. 14-50090
Case no. 14-50093
CONSOLIDATED

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

SERGIO SANTIAGO DE LEON SYJUCO and CESAR PAOLO UBALDO,
Defendants-Appellants

Appeal from the United States District Court
For the Central District of California
Honorable R. Gary Klausner
Lower Court Case no. 12-CR-00037-RGK

DEFENDANT/APPELLANT'S REPLY BRIEF

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As conceded by the government, if there is no extraterritorial jurisdiction under 22 U.S.C. 2778 and 18 U.S.C. 922(l), the entire indictment fails and even the conspiracy count should be dismissed. (Govt. Ans. Brf., fn.8 p. 52). The convictions should be reversed and judgment of acquittals entered on all counts, because as set forth below and in Ubaldo's opening brief, 22 U.S.C. 2778 and 18 U.S.C. 922(l) do not apply to Philippine nationals engaged in brokering activities with no connection to the United States. The evidence at trial showed the defendants were not concerned with where the weapons went; only did what they were told to do with regard to the shipment; sold them weapons which were illegal activity in the Philippines; and had nothing to do with the shipment. The long reach of the United States does not reach such internal conduct, especially as the result of a sting operation.

Not only did the government overreach legally and factually, they overreached in the conduct of the case which requires reversal on all Counts. This was a case that went to trial on January 29, 2013, just one month after the Newtown shootings when the whole country was on edge and wrapped up in a debate about gun control and semiautomatic weapons. The government denied defendants a fair trial, and the cumulative errors, including the inadequate jury instructions, require reversal. The government overreached by applying for a search warrant for defendant Ubaldo's emails based on outrageous lies by the

route, arranging the logistics, that would be causing the shipment to be done, they did none of that. There has to be some connection to the actual importation to commit the crimes, which there was not here. By framing the instructions as aiding and abetting, and by the prosecution taking advantage of it by arguing that the mere providing of weapons was equated with willfully causing the importation, establishes the instructions were erroneous and prejudiced the defense. Counts 4 and 5 should be reversed.

B. 22 U.S.C. § 2778 AND 18 U.S.C. §922(l) DO NOT APPLY EXTRATERRITORIALLY.

The government's main argument for extraterritorial application of 22 U.S.C. §2778 and 18 U.S.C. §922(l) is that unlawful importation, and/or smuggling, necessarily requires conduct on foreign soil. This is true, and so unlawful importation, and/or smuggling, is not *solely* domestic like some criminal activity. But unlawful importation, and/or smuggling, differs from other conduct to which the *Bowman* exception has been applied, in that it cannot be *solely* international either. *Compare United States v. Bowman*, 260 U.S. 94, 98-100 (1922) (giving examples of, inter alia, consul knowingly certifying false invoice, which would probably take place in foreign country; forging or altering ship's papers, which would probably take place at sea; enticing desertions from naval service, which would probably take place at sea or in foreign port; bribing United

States officer, which could take place in foreign country or at sea; and stealing or embezzling military property, which could take place in foreign country or at sea). When the crime of unlawful importation and/or smuggling is committed, *some* person has to cross the border with the goods or cause the goods to cross the border. Unlawful importation and/or smuggling thus falls in a sort of middle ground – a crime which always involves some international conduct but also always involves some domestic conduct.

This is important because it means the criminal activity can and will be reached without extraterritorial application of a statute. It may be that there are individual tangential participants who cannot be reached without extraterritorial application. But it will never be the case – except in a completely fabricated sting operation like this one -- that *no* participant can be reached without extraterritorial application. There will always be some participants who can be reached without extraterritorial application; indeed, it probably will be most. And the participants reached will generally include the most culpable participants, for it is the ultimate act of importation which is the fundamental wrong. And the physical presence of those participants in the United States is not the test; rather it is whether they intentionally caused acts in this country. *See, e.g., United States v. Moncini*, 882 F.2d 401, 404 (9th Cir. 1989) (describing conduct that was not extraterritorial as including “Moncini’s deposit of mail in Italy, intended for delivery to the United

States, [which] resulted in acts within the territory of the United States when the mail entered and traveled within the United States.” *Id.* at 404.

What this means is that Congress has a decision to make when it enacts an unlawful importation and/or smuggling statute. It must decide whether it wants to reach every single tangential participant or just the most culpable participants who cause the actual importation. Congress might want to enact a broad statute which sweeps in every single tangential participant. But it might want to enact a more narrow statute which focuses on the more culpable participants. Given the two reasonable choices which Congress can make, it is appropriate to apply the normal statutory presumption – against extraterritorial application – and require Congress to say when it wants extraterritorial application.

This Court’s importation/smuggling cases are generally consistent with this. In *Chua Han Mow v. United States*, 730 F.2d 1308 (9th Cir. 1984), there was a direct statement in the drug smuggling statute at issue that it should be applied extraterritorially. *See id.* at 1311 (citing 21 U.S.C. § 959). In *United States v. Larsen*, 952 F.2d 1099 (9th Cir. 1991), the drug smuggling statute at issue was part of the Comprehensive Drug Abuse Prevention and Control Act of 1970 and there was legislative history suggesting “the power to control illegal drug trafficking on the high seas was an essential incident to Congress’ intent to halt drug abuse in the United States.” *Id.*, 952 F.2d at 1100 (citing *United States v. Baker*, 609 F.2d 134,

137 (5th Cir. 1980) and *Baker's* reference to the Comprehensive Drug Abuse Prevention and Control Act of 1970 and the committee report on the Act). The case of *Brulay v. United States*, 383 F.2d 345 (9th Cir. 1967) which is quoted in the government's brief did speak more broadly at one point, *see id.* at 350 (stating smuggling statute applied extraterritorially because "smuggling by its very nature involves foreign countries, and since the accomplishment of the crime always require some action in a foreign country"), but it is an older case and added the caveat that the statute applied extraterritorially "at least as to citizens of the United States," *id.* Another case cited in the government's brief -- *United States v. Vasquez-Velasco*, 15 F.3d 833 (9th Cir. 1994) -- spoke similarly of drug smuggling statutes, *see id.* at 839 n.4, but (1) extraterritorial application of the specific drug smuggling statutes is supported by express statements about extraterritorial application, as noted above, and (2) the actual crime in *Vasquez-Velasco* was not smuggling, but the murder of American tourists believed to be DEA agents, *see id.* at 840-41. In a third Ninth Circuit case cited by the government -- *United States v. Liang*, 224 F.3d 1057 (9th Cir. 2000) -- the offense conduct was only partially extraterritorial, because it "*began* in the high seas and *continued* into the territory of Guam." *Id.* at 1060 (emphasis in original). All the court said about extraterritorial application of the statute there -- in dictum -- was that the nature of the offense -- alien smuggling -- "may" dictate extraterritorial application. *Id.* And

the court acknowledged a prior opinion which expressly held the contrary. *See id.* (citing *Yenkichi Ito v. United States*, 64 F.2d 73 (9th Cir. 1933)).¹

There is more than just the presumption against extraterritorial application here, moreover. There is also the legislative history of the §2778 provision known as the "Brokering Amendment," which indicates Congress expressly considered extraterritorial application in this other provision of the statute. *See* H.R. Rep. No.

¹ Two out-of-circuit cases cited by the government – *Tianrui Group Co., Ltd. v. Int'l Trade Comm'n*, 661 F.3d 1322 (Fed. Cir. 2011) and *United States v. Plummer*, 221 F.3d 1298 (11th Cir. 2000) – are also distinguishable. *Plummer* is distinguishable because the offense there, which was *attempted* smuggling,

does not by definition require conduct on U.S. territory. A defendant may just as readily form the requisite intent, and take a substantial step toward bringing the prohibited goods to shore, from outside U.S. territory as inside. Section 545's attempt provision is the type of law that falls into *Bowman's* second category, ...

Plummer, 221 F.3d at 1306. *Tianrui Group* is distinguishable because the civil unfair competition claim made there did not involve completely extraterritorial conduct. As the court explained:

[T]he Commission has not applied section 337 to sanction purely extraterritorial conduct; the foreign "unfair" activity at issue in this case is relevant only to the extent that it results in the importation of goods into this country causing domestic injury. In light of the statute's focus on the act of importation and the resulting domestic injury, the Commission's order does not purport to regulate purely foreign conduct.

Tianrui Group, 661 F.3d at 1329.

104-519, at 11 (1996) (indicating bill intended to apply only to “U.S. persons (and foreign persons located in the U.S.”), *reprinted in* 1996 U.S.C.C.A.N. 1118, 1128, *quoted in* Appellant's Opening Brief, at 25-26. Just as a similar contrasting silence and express mention of extraterritorial application reinforced the conclusion Congress did not intend extraterritorial application of the statute in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010),² it reinforces the conclusion that Congress did not intend extraterritorial application here. *See* Appellant's Opening Brief, at 26-27.³

² It is true the express consideration of extraterritorial application of the other provision in *Morrison* was in another section of the statute itself while the express consideration here was in the legislative history -- and then in regulations recognizing Congress's intent. That at most goes to weight, however. The legislative history might not carry the day by itself, but it certainly adds to the presumption. *See, e.g., Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 704 (1995) (finding “further support” in legislative history); *In re First T.D. & Investment, Inc.*, 253 F.3d 520 (9th Cir. 2001) (also noting legislative history provides “further support” for conclusion); *American Rivers v. Federal Energy Regulatory Comm’n*, 201 F.3d 1186 (9th Cir. 2000) (noting legislative history “mirrors” plain language of statute and “reconfirms” what Congress intended).

³ The government is correct that this argument applies directly only to § 2278, not § 922(l). Still, two statutes aimed at the same wrong – here, importation of weapons – ought to be construed consistently. And there is a separate statutory context argument to be made as to § 922(l). Section 922 also contains § 922(g), which was construed by the Supreme Court in *Small v. United States*, 544 U.S. 385 (2005). The Supreme Court held in *Small*, based in part on the presumption

The defense did ask for at the jury instruction conference a brokering instruction that would make clear, as set forth in *United States v. Yakou*, 428 F.3d 241 (D.C.Cir. 2005), to support a finding that there could be no 2778 violation because Ubaldo was at best a broker and did not have the U.S Person designation. As set forth in the opening brief, Ubaldo Op. brf. P.p. 35-36, the government's argument that the case involved a violation under 2778(b)(2) instead of (b)(1)(A)(ii), the brokering amendment, is a distinction without a difference. The Court should have given the instruction, and it was timely, since it was presented at the jury instruction conference.

Unlike *Moncini*, there is no extraterritorial jurisdiction because the defendants did not cause the importation of the weapons into the United States with the intention of delivery of the weapons in the United States. It was the agents: they arranged the shipment and told Syjuco to pack the container. That was it. The defendants provided the weapons, there is no evidence the customs agent, Revereza, did anything to cause the shipment to the United States. Thus, the statutes, 18 U.S.C. §922(l) and 22 U.S.C. §2778 do not apply extraterritorially to

against extraterritorial application of statutes, that "any court" language in §922(g) was limited to domestic courts. *See Small*, 544 U.S. at 387-88. This narrower focus of another subsection in the same statute is, by analogy to the reasoning of *Morrison*, suggestive of a narrower focus of §922(l).

the conduct in this case where defendants sold some weapons to the agents, and the agents arranged the shipment of the weapons to the United States.

C. THE DISTRICT COURT IMPROPERLY DENIED THE FRANKS MOTION.

The search warrant affidavit made it clear that Ubaldo was engaging in illegal weapons sale in the Philippines. But that was not the issue for granting the search warrant: there had to be probable cause that Ubaldo knew the weapons were coming to the United States. While the affiant, Agent Lao, believed that to be true, he falsified the statements in the affidavit so that there could be probable cause to issue the search warrant. There could be no other explanation. The government's thrust is that despite the fact the search warrant affidavit contained falsehoods, they were not "intentional or reckless" because they were not "illogical or implausible." Govt. Ans. Brf. 60.

However, as established in Ubaldo's opening brief, Ubaldo Op. brf. pp. 38-43, the agent Lao admitted prior to writing the affidavit he reviewed the email correspondence between the undercover agent Ro and Syjuco and Ubaldo, and also debriefed the undercover agent Ro, so there could be no plausible basis for saying in emails there was a connection to the United States to establish knowledge to justify issuance of the search warrant: ¶24: the government claimed that the undercover told Ubaldo on February 22, 2011, that the weapons

A P P E N D I X 6

Pages

Indictment

A-073-093

FILED

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U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

February 2011 Grand Jury

CR 12 00037

UNITED STATES OF AMERICA,

Plaintiff,

v.

SERGIO SANTIAGO DE LEON

SYJUCO,

aka "Yogi,"

CESAR PAOLO INCIONG UBALDO,

aka "Arvi," and

ARJYL REVEREZA,

Defendants.

No. CR -

I N D I C T M E N T

[18 U.S.C. § 371: Conspiracy;
22 U.S.C. § 2778: Importation
of Defense Articles Without a
License; 18 U.S.C.
§§ 922(l), 924(a)(1)(C):
Importation of Firearms; 18
U.S.C. § 2: Aiding and
Abetting; 18 U.S.C. §§ 924(d),
981(a)(1)(C) & 28 U.S.C.
§ 2461(c): Criminal Forfeiture]

The Grand Jury charges:

INTRODUCTORY ALLEGATIONS

At all times relevant to this Indictment,

1. Defendant SERGIO SANTIAGO DE LEON SYJUCO, also known as ("aka") "Yogi" ("SYJUCO"), was a citizen and resident of the Republic of the Philippines.

2. Defendant CESAR PAOLO INCIONG UBALDO, aka "Arvi" ("UBALDO"), was a citizen and resident of the Republic of the Philippines.

3. Defendant ARJYL REVEREZA ("REVEREZA") was a citizen and resident of the Republic of the Philippines and an employee with the Philippine Bureau of Customs.

ARMS EXPORT CONTROL ACT

4. The import and export of arms, ammunition, implements of war, and defense articles and services into and out of the United States is governed by the Arms Export Control Act ("AECA"), Title 22, United States Code, Section 2778.

5. The AECA authorizes the President of the United States to, among other things, control the import and export of "defense articles" to further the national security and foreign policy interests of the United States. The AECA authorizes the President to designate items as "defense articles," require licenses for the import and export of such articles, and promulgate regulations for the import and export of such articles. The authority to regulate the export of defense articles from the United States has been delegated by the President to the Department of State, Directorate of Defense Controls ("DDTC"). A temporary import, the bringing into the United States of a defense article that is merely in transit to

1 another foreign destination, is effectively treated as an export
2 and therefore controlled by DDTC. Title 22, Code of Federal
3 Regulations, Sections 120-130 and Section 120.18. The authority
4 to regulate permanent imports of defense articles has been
5 delegated to the Department of Justice, Bureau of Alcohol,
6 Tobacco, Firearms and Explosives ("ATF"). Title 27, Code of
7 Federal Regulations, Sections 447, 478, 479, and 555.

8 6. Generally, "defense articles" are those items that are
9 specifically designed, developed, configured, adapted, or
10 modified for military application. Title 22, Code of Federal
11 Regulations, Section 120.2. The list of defense articles
12 controlled for export purposes, known as the United States
13 Munitions List ("USML"), is published at Title 22, Code of
14 Federal Regulations, Section 121.1. The list of defense articles
15 controlled for import purposes, known as the United States
16 Munitions Import List ("USMIL"), is published at Title 27, Code
17 of Federal Regulations, Section 447.21. The USML, with few
18 exceptions, was adopted by ATF as the USMIL.

19 7. The USML and USMIL set forth categories of defense
20 articles subject to import and export licensing controls,
21 including rockets, bombs, explosives, ammunition, firearms, close
22 assault weapons, combat shotguns, guns over .50 caliber,
23 components of such firearms and weapons, and body armor
24 specifically designed, modified or equipped for military use.

25 8. Persons desiring to permanently import into the United
26 States defense articles specified on the USMIL must first
27 register with ATF and obtain individual import licenses for each
28 shipment prior to the import, as set forth in Title 27, Code of

1 Federal Regulations, Sections 447, 478, 479, and 555. It is
2 illegal to import or attempt to import into the United States
3 defense articles on the USMIL without a license.

4 9. Persons desiring to export defense articles from the
5 United States, including the temporary import of defense articles
6 that are merely in transit to a foreign destination, must first
7 register with the DDTC and obtain a license before transit of the
8 defense articles, as set forth in Title 22, Code of Federal
9 Regulations, Section 120.18.

10 10. At all times relevant to this Indictment, .223 caliber
11 rifles, .50 caliber sniper rifles, 7.62mm assault rifles, single-
12 shot grenade launchers, 60mm mortar launchers, rocket propelled
13 grenades, automatic AK-47 rifles, Level III and Level IV body
14 armor, 40mm grenade launcher rounds, 60mm mortar launcher rounds,
15 and fragmentation grenades were designated as defense articles on
16 the USML. With the exception of the body armor, these items were
17 also designated as defense articles on the USMIL. The permanent
18 and temporary import into the United States of these defense
19 articles required a license.

20 11. At no time did defendants SYJUCO, UBALDO, or REVEREZA
21 apply for or receive a license from ATF or DDTC to import or
22 temporarily import defense articles into the United States.

23 Importation of a Firearm - 18 U.S.C. § 922(1)

24 12. The term "firearm" means: (1) any weapon which will or
25 is designed to or may readily be converted to expel a projectile
26 by the action of an explosive; (2) the frame or receiver of any
27 such weapon; or (3) any destructive device. "Destructive device"
28 is defined as any explosive, including a grenade or rocket having

1 a propellant charge of more than four ounces, or any type of
2 weapon which will, or which may be readily converted to, expel a
3 projectile by the action of an explosive or other propellant, and
4 which has any barrel with a bore of more than one-half inch in
5 diameter.

6 13. Title 18, United States Code, Section 922(1) requires
7 that persons desiring to import firearms into the United States
8 have authorization from the Attorney General under Title 18,
9 United States Code, Section 925(d). The Attorney General has
10 delegated this approval responsibility to ATF, pursuant to Title
11 28, Code of Federal Regulations, Section 0.130(a)(1).
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COUNT ONE

[18 U.S.C. §§ 371]

1. Paragraphs One through Thirteen of the Introductory Allegations are re-alleged and incorporated by reference as though fully set forth herein.

2. Beginning in or about June 2010, and continuing to on or about January 5, 2012, in Los Angeles County, within the Central District of California, and elsewhere, defendants SYJUCO, UBALDO, and REVEREZA, and others known and unknown to the Grand Jury, knowingly and intentionally conspired and agreed with each other to commit certain offenses against the United States, in violation of Title 18, United States Code, Section 371, to wit:

a. to knowingly and willfully import and cause to be imported from the Republic of the Philippines into the United States defense articles, that is,

- (i) 12 fully automatic Bushmaster M4 .223 caliber rifles, bearing serial numbers L437780, L437720, L437783, L437645, 1233210, 4674300, 0010734, 1011231, 2211056, 4111522, 3100995, 1170555;
- (ii) One Safety Harbor Firearms, Inc. .50 caliber sniper rifle, Model SHF R50, bearing serial number 0606A;
- (iii) One H&R Arms Co. M14 7.62mm assault rifle, bearing serial number 881672;
- (iv) One single-shot grenade launcher;
- (v) One M224 60mm lightweight mortar launcher, serial number obliterated;
- (vi) One rocket propelled grenade (RPG-7) launcher,

1 bearing serial number 8907 1984;
2 (vii) One automatic AK-47 rifle, with serial number
3 obliterated;
4 (viii) Nine M203 40mm grenade launcher rounds;
5 (ix) Two M224 60mm lightweight mortar launcher rounds;
6 and
7 (x) Two MK2 fragmentation grenades,
8 without having first obtained a necessary license or written
9 authorization from the ATF, in violation of Title 22, United
10 States Code, Section 2778, and Title 27, Code of Federal
11 Regulations, Section 447.
12 b. to knowingly and willfully temporarily import and cause
13 the temporary import into the United States from the Republic of
14 the Philippines defense articles, that is,
15 (i) 12 fully automatic Bushmaster M4 .223 caliber
16 rifles, bearing serial numbers L437780, L437720,
17 L437783, L437645, 1233210, 4674300, 0010734,
18 1011231, 2211056, 4111522, 3100995, 1170555;
19 (ii) One Safety Harbor Firearms, Inc. .50 caliber
20 sniper rifle, Model SHF R50, bearing serial number
21 0606A;
22 (iii) One H&R Arms Co. M14 7.62mm assault rifle, bearing
23 serial number 881672;
24 (iv) One single-shot grenade launcher;
25 (v) One M224 60mm lightweight mortar launcher, serial
26 number obliterated;
27 (vi) One rocket propelled grenade (RPG-7) launcher,
28 bearing serial number 8907 1984;

- 1 (vii) One automatic AK-47 rifle, with serial number
- 2 obliterated;
- 3 (viii) Three Level IV body armor;
- 4 (ix) One Level III body armor;
- 5 (x) Nine M203 40mm grenade launcher rounds;
- 6 (xi) Two M224 60mm lightweight mortar launcher rounds;
- 7 and

8 (xii) Two MK2 fragmentation grenades,
9 without having first obtained a necessary license or written
10 authorization from the DDTC in violation of Title 22, United
11 States Code, Section 2778, and Title 22, Code of Federal
12 Regulations, Sections 120-130.

13 c. to knowingly import the aforementioned firearms into
14 the United States without authorization from the United States
15 Attorney General, in violation of Title 18, United States Code,
16 Section 922(1).

17 A. MEANS BY WHICH THE OBJECTS OF THE CONSPIRACY WERE TO BE
18 ACCOMPLISHED

19 The objects of the conspiracy were to be accomplished in
20 substance as follows:

- 21 1. Defendants SYJUCO, UBALDO, and others, would arrange
- 22 for individuals to purchase defense articles in the Republic of
- 23 the Philippines.
- 24 2. Defendants SYJUCO, UBALDO, and REVEREZA, and others,
- 25 would arrange for the defense articles to be exported out of the
- 26 Philippines and imported into the United States without obtaining
- 27 the proper licenses for such importation and believing that the
- 28 weapons were destined for Mexican drug cartels operating in the

1 United States and Mexico.

2 3. Defendants SYJUCO, UBALDO, and REVEREZA, and others,
3 would arrange for the defense articles to clear Philippine
4 customs without detection knowing that the shipping documents
5 omitted material facts by only stating that used personal effects
6 and personal items of furniture were in the shipment.

7 4. Defendants SYJUCO, UBALDO, and REVEREZA, and others,
8 would arrange to receive payments in United States currency for
9 the sale of the defense articles and for their facilitation in
10 the import into the United States of those defense articles.

11 B. OVERT ACTS

12 In furtherance of the conspiracy, and to accomplish the
13 objects of the conspiracy, defendants SYJUCO, UBALDO, and
14 REVEREZA, and others known and unknown to the Grand Jury,
15 committed various overt acts, on or about the following dates,
16 within the Central District of California and elsewhere,
17 including but not limited to the following:

18 1. On August 23, 2010, in the Philippines, an unindicted
19 co-conspirator met with an undercover law enforcement agent
20 ("UC"), who represented himself as a firearms trafficker looking
21 to purchase weapons for a Mexican drug trafficking organization
22 and to ship the weapons from the Philippines to the United
23 States.

24 2. On October 1, 2010, in the Philippines, unindicted co-
25 conspirators sold to the UC 12 fully automatic Bushmaster M4 .223
26 caliber rifles bearing serial numbers L437780, L437720, L437783,
27 L437645, 1233210, 4674300, 0010734, 1011231, 2211056, 4111522,
28 3100995, and 1170555.

1 3. On November 16, 2010, in the Philippines, defendant
2 UBALDO offered to put the UC in contact with other suppliers of
3 high-powered firearms and indicated that he had a partner in
4 Singapore who had body armor and other protection equipment
5 available for sale.

6 4. On November 20, 2010, in the Philippines, defendant
7 UBALDO and unindicted co-conspirators showed to the UC an M4
8 rifle that they had available for sale.

9 5. On December 17, 2010, by e-mail to the UC, defendant
10 UBALDO asked if the UC could "dispose of 1000 pieces of the Level
11 IV vests."

12 6. On December 26, 2010, by e-mail to the UC, defendant
13 UBALDO and an unindicted co-conspirator indicated that they had
14 an M249 machine gun and an M60 machine gun they were willing to
15 sell to the UC.

16 7. On January 10, 2011, by e-mail to the UC, defendant
17 UBALDO provided the UC with a detailed inventory of weapons that
18 UBALDO had available for sale that week, including fully
19 automatic and high caliber firearms.

20 8. On February 22, 2011, in the Philippines, defendant
21 UBALDO and unindicted co-conspirators met with the UC, discussed
22 weapons they had available for sale, and offered to introduce the
23 UC to defendant REVEREZA, who they indicated was a corrupt
24 Philippine customs official who could facilitate shipping weapons
25 from the Philippines to the United States.

26 9. On February 23, 2011, in the Philippines, defendants
27 SYJUCO and UBALDO sold a Safety Harbor Firearms, Inc. .50 caliber
28 sniper rifle bearing serial number 0606A to the UC in exchange

1 for \$30,000 in United States currency.

2 10. On February 25, 2011, in the Philippines, defendant
3 SYJUCO sold an H&R Arms Co. fully automatic M14 7.62mm assault
4 rifle bearing serial number 881672 to the UC in exchange for
5 \$9,800 in United States currency.

6 11. On February 25, 2011, in the Philippines, defendant
7 SYJUCO told the UC that defendant SYJUCO could acquire other
8 weapons and explosives to sell to the UC, including rocket
9 propelled grenades, M249 machine guns, M82 rifles, grenades, and
10 claymore mines.

11 12. On April 25, 2011, in the Philippines, defendant SYJUCO
12 received a wire transfer of \$25,000 from the UC's bank account in
13 the United States into a Philippines bank account that defendant
14 SYJUCO had opened under a false name in preparation for the UC's
15 initial deposit for the upcoming weapons deal.

16 13. On May 9, 2011, defendants SYJUCO, UBALDO, and REVEREZA
17 met with the UC in the Philippines to discuss the pending weapons
18 deal and export of firearms, destructive devices, and body armor
19 to the United States.

20 14. On May 12, 2011, in the Philippines, defendant SYJUCO
21 and an unindicted co-conspirator transferred the following
22 firearms and destructive devices into the UC's vehicle: one
23 single-shot grenade launcher; one M224 60mm lightweight mortar
24 launcher, with serial number obliterated; one rocket propelled
25 grenade (RPG-7) launcher bearing serial number 8907 1984; one
26 automatic AK-47 rifle, with serial number obliterated; nine M203
27 40mm grenade rounds; two 60mm lightweight mortar launcher rounds;
28 and two MK2 fragmentation grenades.

1 15. On May 12, 2011, defendant SYJUCO and an unindicted co-
2 conspirator arranged to meet with the UC at a hotel room in the
3 Philippines and helped to pack the various firearms and
4 destructive devices purchased by the UC in the Philippines into
5 boxes for shipment to the United States, including the single-
6 shot grenade launcher, the M224 60mm lightweight mortar launcher,
7 the rocket propelled grenade (RPG-7) launcher, the automatic AK-
8 47 rifle, the M203 40mm grenade rounds, the 60mm lightweight
9 mortar launcher rounds, the MK2 fragmentation grenades, the 12
10 .223 caliber Bushmaster M4 rifles, the Safety Harbor Firearms,
11 Inc. .50 caliber sniper rifle, and the H&R Arms Co. M14 7.62mm
12 assault rifle.

13 16. On May 12, 2011, in the Philippines, defendant SYJUCO
14 accepted \$10,000 in United States currency from the UC as a
15 second partial payment for the firearms and destructive devices.

16 17. On May 12, 2011, in the Philippines, defendant SYJUCO
17 and an unindicted co-conspirator assisted in loading the firearms
18 and destructive devices into a shipping container, which already
19 contained furniture as the cover load, for export to the United
20 States.

21 18. On May 12, 2011, in the Philippines, defendant SYJUCO
22 accepted \$8,920 in United States currency from the UC reflecting
23 final payment for the firearms and destructive devices.

24 19. On May 12, 2011, defendant REVEREZA instructed the UC
25 to send defendant REVEREZA an email with a bill of lading knowing
26 that the bill of lading omitted the declaration that weapons were
27 in the shipment and only stated the shipment contents as
28 furniture.

1 20. On May 12, 2011, defendant UBALDO contacted the UC to
2 inquire whether the weapons deal had gone according to plan.

3 21. On May 13, 2011, defendant UBALDO arranged for the UC
4 to meet with an unindicted co-conspirator in Singapore to discuss
5 the UC's purchase of four Level IV body armor for import into the
6 United States.

7 22. On May 13, 2011, defendant SYJUCO met the UC at the
8 airport in Manila, Philippines with one Level III and three Level
9 IV body armor in defendant SYJUCO's vehicle, which defendant
10 SYJUCO knew were to be shipped to the United States with the
11 other weapons.

12 23. On May 13, 2011, in the Philippines, defendant UBALDO
13 accepted \$4,400 in United States currency from the UC as payment
14 for the one Level III and four Level IV body armor that were to
15 be shipped to the United States.

16 24. On May 16, 2011, in the Philippines, defendant REVEREZA
17 accepted \$2,400 in United States currency from the UC, which
18 defendant REVEREZA had demanded as the first part of a payment
19 for his efforts to ensure that the container of defense articles,
20 falsely declared as only used personal effects and furniture, was
21 successfully imported from the Philippines to the United States
22 without detection of the defense articles by other Philippine
23 Customs officials.

24 25. On May 17, 2011, in the Philippines, defendant REVEREZA
25 accepted an additional \$3,000 in United States currency from the
26 UC, which defendant REVEREZA had demanded as further payment to
27 facilitate the import of the defense articles from the
28 Philippines to the United States.

1 26. On May 17, 2011, defendant REVEREZA arranged for the
2 shipping container destined for the United States to pass through
3 Philippine customs' x-ray and other detection equipment without
4 detection of the defense articles.

5 27. On May 18, 2011, defendants SYJUCO, UBALDO, and
6 REVEREZA caused the shipping container of defense articles,
7 including the various firearms and body armor, to depart from the
8 Philippines port on a ship bound for the United States and which
9 arrived at the port in Long Beach, California on June 7, 2011.

10 28. On May 18, 2011, in the Philippines, defendant REVEREZA
11 accepted \$3,000 in United States currency from the UC, which
12 defendant REVEREZA had demanded as final payment for arranging
13 for the shipment of defense articles to clear Philippine customs
14 without detection.

15 29. On September 28, 2011, in the Philippines, defendants
16 SYJUCO and UBALDO introduced the UC to an unindicted co-
17 conspirator, with access to a military munitions facility, who
18 provided to the UC a list of weapons available for sale.

19 30. On January 4, 2012, defendants SYJUCO, UBALDO, and
20 REVEREZA traveled from the Philippines to Los Angeles, California
21 for the purpose of meeting with the UC to negotiate a future
22 weapons deal.

COUNT TWO

[22 U.S.C. §§ 2778(b)(2) & (c); 27 C.F.R. § 447; 18 U.S.C. § 2]

1. Paragraphs One through Thirteen of the Introductory Allegations are re-alleged and incorporated by reference as though fully set forth herein.

2. On or about June 7, 2011, in Los Angeles County, within the Central District of California, and elsewhere, defendants SYJUCO and REVEREZA, while aiding and abetting one another and others known and unknown to the Grand Jury, did knowingly and willfully import, cause the import, and attempt to import from the Republic of the Philippines to the United States defense articles on the USMIL, that is, 12 fully automatic Bushmaster M4 .223 caliber rifles, bearing serial numbers L437780, L437720, L437783, L437645, 1233210, 4674300, 0010734, 1011231, 2211056, 4111522, 3100995, and 1170555, without having first obtained the required license and written authorization from the ATF.

COUNT THREE

[18 U.S.C. §§ 922(1), 924(a)(1)(C), and 2]

1. Paragraphs One through Thirteen of the Introductory Allegations are re-alleged and incorporated by reference as though fully set forth herein.

2. On or about June 7, 2011, in Los Angeles County, within the Central District of California, and elsewhere, defendants SYJUCO and REVEREZA, while aiding and abetting one another and others known and unknown to the Grand Jury, did knowingly and without authorization by the Attorney General as provided in Title 18, United States Code, Section 925(d), import and bring into the United States, firearms, that is, 12 fully automatic Bushmaster M4 .223 caliber rifles, bearing serial numbers L437780, L437720, L437783, L437645, 1233210, 4674300, 0010734, 1011231, 2211056, 4111522, 3100995, and 1170555.

COUNT FOUR

[22 U.S.C. §§ 2778(b)(2) & (c); 27 C.F.R. § 447; 18 U.S.C. § 2]

1 Paragraphs One through Thirteen of the Introductory
2 Allegations are re-alleged and incorporated by reference as
3 though fully set forth herein.

4 2. On or about June 7, 2011, in Los Angeles County, within
5 the Central District of California, and elsewhere, defendants
6 SYJUCO, UBALDO, and REVEREZA, while aiding and abetting one
7 another and others known and unknown to the Grand Jury, did
8 knowingly and willfully import, cause the import, and attempt to
9 import from the Republic of the Philippines to the United States
10 defense articles on the USMIL, that is,

11 (a) One Safety Harbor Firearms, Inc. .50 caliber
12 sniper rifle, Model SHF R50, bearing serial number
13 0606A;

14 (b) One H&R Arms Co. M14 7.62mm assault rifle, bearing
15 serial number 881672;

16 (c) One single-shot grenade launcher;

17 (d) One M224 60mm lightweight mortar launcher, serial
18 number obliterated;

19 (e) One rocket propelled grenade (RPG-7) launcher,
20 bearing serial number 8907 1984; and

21 (f) One automatic AK-47 rifle, serial number
22 obliterated,

23 without having first obtained the required license and written
24 authorization from the ATF.

COUNT FIVE

[18 U.S.C. §§ 922(1), 924(a)(1)(C), and 2]

1. Paragraphs One through Thirteen of the Introductory Allegations are re-alleged and incorporated by reference as though fully set forth herein.

2. On or about June 7, 2011, in Los Angeles County, within the Central District of California, and elsewhere, defendants SYJUCO, UBALDO, and REVEREZA, while aiding and abetting one another and others known and unknown to the Grand Jury, did knowingly and without authorization by the Attorney General as provided in Title 18, United States Code, Section 925(d), import and bring into the United States, firearms, that is,

- (a) One Safety Harbor Firearms, Inc. .50 caliber sniper rifle, Model SHF R50, bearing serial number 0606A;
- (b) One H&R Arms Co. M14 7.62mm assault rifle, bearing serial number 881672;
- (c) One single-shot grenade launcher;
- (d) One M224 60mm lightweight mortar launcher, serial number obliterated;
- (e) One rocket propelled grenade (RPG-7) launcher, bearing serial number 8907 1984; and
- (f) One automatic AK-47 rifle, serial number obliterated.

FORFEITURE ALLEGATIONS

[18 U.S.C. §§ 924(d), 981(a)(1)(C) & 28 U.S.C. § 2461(c)]

1. The allegations contained in Counts One through Five of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeitures pursuant to Title 18, United States Code, Sections 924(d) and 981(a)(1)(C) and Title 28, United States Code, Section 2461(c).

2. Upon conviction of the offenses in violation of Title 18, United States Code, Section 922(l) set forth in Counts One, Three, and Five of this Indictment, defendants SYJUCO, UBALDO, and REVEREZA shall forfeit to the United States of America, pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461(c), any property, real or personal, which constitutes or is derived from proceeds traceable to the offenses, including, but not limited to: a sum of money equal to \$96,520 in United States currency, representing the total amount of gross proceeds obtained as a result of the offenses.

3. Each defendant convicted of one or more of the offenses in violation of Title 22, United States Code, Section 2778 or Title 18, United States Code, Section 922(l) set forth in Counts One and Five of this Indictment shall forfeit to the United States, pursuant to Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c), any firearm involved in or used in the knowing commission of such offense.

4. If any of the property described above, as a result of any act or omission of the defendants:

a. cannot be located upon the exercise of due

1 diligence;
2 b. has been transferred or sold to, or deposited
3 with, a third party;
4 c. has been placed beyond the jurisdiction of the
5 court;
6 d. has been substantially diminished in value; or
7 e. has been commingled with other property which
8 cannot be divided without difficulty,
9 the United States of America shall be entitled to forfeiture of
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1 substitute property pursuant to Title 21, United States Code,
2 Section 853(p), as incorporated by Title 28, United States Code,
3 Section 2461(c).

4
5 A TRUE BILL

6
7 151
8 Foreperson

9 LANNY BREUER
10 Assistant Attorney General

11 ANDRÉ BIROTTE JR.
12 United States Attorney

13 *Donmy C. Kim*

Dep. Chief, Crim. Div. FOR

14 ROBERT E. DUGDALE
15 Assistant United States Attorney
Chief, Criminal Division

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17 BEONG-SOO KIM
18 Assistant United States Attorney
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20 ARIEL A. NEUMAN
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23 MARGARET HONRATH
24 MARGARET VIERBUCHEN
25 Trial Attorneys
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