

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO:07-20999-CR-LENARD/GARBER

UNITED STATES OF AMERICA,

Plaintiff,

v.

FRANKLIN DURAN,

Defendant.

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MOTION TO DISMISS
FOR OUTRAGEOUS GOVERNMENT CONDUCT

Defendant, Franklin Duran (“Duran”), by and through his undersigned counsel, hereby moves to dismiss the indictment against him based upon the fact that the evidence adduced during the government’s case-in-chief, has established, as a matter of law, that the government’s conduct during this investigation was so outrageous as to violate the Due Process Clause of the Fifth Amendment to the United States Constitution.

When the government’s conduct during an investigation is sufficiently outrageous, the courts will not allow the government to prosecute offenses developed through that conduct, *United States v. Pedraza*, 27 F.3d 1515, 1521 (10th Cir. 1994); *United States v. Mosley*, 965 F.2d 906, 908 (10th Cir. 1992), because prosecution in such a case would offend the Due Process Clause of the Fifth Amendment to the United States Constitution. *Id.* The defense of outrageous conduct is distinct from the defense of entrapment in that the entrapment defenses looks to the state of mind of the defendant to determine whether

he was predisposed to commit the crime for which he is prosecuted. See *Jacobson v. United States*, 503 U.S. 540 (1992). The outrageous conduct defense, in contrast, looks at the government's behavior. See, *United States v. Gamble*, 737 F.2d 853, 858 (10th Cir. 1984); *United States v. Mosley*, 965 F.2d at 909.

The outrageous conduct defense was first enunciated in *United States v. Russell*, 411 U.S. 423 (1973): “[W]e may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction” *Id* at 431-32 (citing *Rochin v. California*, 342 U.S. 1654 (1952)). Several years later, in *Hampton v. United States*, 425 U.S. 484 (1976), a majority of justices left open the possibility that an outrageous conduct defense based on the Due Process Clause might be invoked successfully even if the entrapment defense is unavailable because of predisposition. *Id* at 495 (Powell, J., with Blackman, J., concurring). *Id* at 496-97 (Brennan, J., with Stewart & Marshall, J.J. dissenting).

Since the decision in *Hampton* was announced, every federal circuit to have considered the question, including this one, have recognized the viability of the outrageous conduct defense. See, e.g., *United States v. Capo*, 693 F.2d 1330, 1336 (11th Cir.) *cert.denied* 460 U.S. 1092 *modified on other grounds sub nom United States v. Lisenby*, 716 F.2d 1355 (11th Cir. 1983); *United States v. Jacobson*, 916 F.2d 467, 469 (8th Cir. 1990) (*en banc*), *rev'd on other grounds*, 503 U.S. 540; *United States v. Nichols*, 877 F.2d 825, 827 (10th Cir. 1989); *United States v. Simpson*, 813 F.2d 1462, 1464-65 (9th Cir.) *cert denied* 484 U.S. 898 (1987); *United States v. Arteaga*, 807 F.2d 424, 426 (5th Cir. 1986);

United States v. Kelly, 707 F.2d 1460 (D.C. Cir.) *cert denied* 464 U.S. 908 (1983); *United States v. Myers*, 692 F.2d 823, 837 (2d Cir. 1982) *cert denied* 461 U.S. 961 (1983); *United States v. Jannotti*, 673 F.2d 578, 607 (3d Cir.) (*en banc*) *cert denied*, 457 U.S. 1106 (1982); *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978); *United States v. Johnson*, 565 F.2d 179, 182 (1st Cir. 1977), *cert denied*, 434 U.S. 1075 (1978); *United States v. Quintana*, 508 F.2d 867, 878 (7th Cir. 1975).

The federal courts have not defined the requirements of the outrageous conduct defense with any degree of precision. Rather, their inquiry appears to revolve around the totality of the circumstances in any given case. *United States v. Bogart*, 783 F.2d at 1428, 1438 (9th Cir. 1986) *vacated, in part on other grounds sub nom, United States v. Wingender*, 790 F.2d 802 (9th Cir. 1986); *United States v. Pedraza*, 27 F.3d at 1521. As the name of the defense implies, to warrant dismissal of an indictment, the government's conduct with respect to that indictment must be outrageous. Outrageousness must be determined by reference to the "the universal sense of justice." See *Russell*, 411 U.S. at 432 (quoting *Kinsella v. United States ex rel Singleton* 361 U.S. 234, 246 (1960)); *United States v. Mosely*, 965 F.2d at 910. The test for whether official conduct reaches a constitutionally impermissible level turns from the totality of the circumstances with no single factor controlling. *United States v. Tobias*, 662 F.2d 381, 387 (5th Cir. 1981)(Unit B); *United States v. Capo*, 693 F.2d at 1336.

Though the test for dismissing a case based upon outrageous government conduct is a stringent one, the courts have not hesitated to do so when the government conduct has been particularly outrageous. See *United States v. Twigg*, 588 F.2d 373, 381 (3d Cir.

1978) (upholding outrageous conduct defense); *United States v. Marshank*, 777 F.Supp. 1507, 1524 (N.D. Cal. 1991) (same); *United States v. Gardner*, 658 F.Supp. 1573 (W.D.Pa. 1987); *United States v. Batres-Santolino*, 521 F.Supp. 744, 753 (N.D. Cal. 1981); *United States v. Bogart*, 783 F.2d 1428 (9th Cir. 1986) (remanding for fact finding to determine whether government conduct was sufficiently outrageous to warrant dismissal); *United States v. Lard*, 734 F.2d 1290, 1296 (8th Cir. 1984); *Greene v. United States*, 454 F.2d 783, 787 (9th Cir. 1971); *United States v. Silva*, 180 F.Supp. 557, 559-60 (S.D.N.Y. 1959) (directing verdict for defendant on grounds of government conduct, although not using “outrageous conduct” label). This is one of those cases.

This case may be unique in the annals of American jurisprudence, since as far as counsel is aware, it is the first time that agents of the United States government deliberately set out to engage in extortion and blackmail of a foreign government in order to create the crime for which Franklin Duran stands accused. The testimony of Antonini demonstrates government misconduct in this case which far surpasses that in any other reported decision.

This clearly appears in the transcript of his testimony on September 25, 2008. Antonini testified that from roughly mid-September to December 11, 2007, on instructions from the FBI, he was putting pressure on the Venezuelan government to pay him \$2 million (TR 172), as well as to provide him with documents he could use to claim the money that was seized in Argentina (TR 177). He testified that pursuant to FBI instructions, he had conversations with the Venezuelan Consul, Antonio Borgo, in which he specifically threatened Borgo that if he did not get paid, he was going to create a scandal (TR 170).

In September, 2007, Antonini sent a letter to the President of Venezuela which was drafted for him by the FBI. In that letter Antonini, after first referring to his extortionate demands on Venezuelan Consul Hernandez-Borgo, told President Chavez he would be willing to take responsibility for the \$800,000 and demanded \$2 million as compensation. (TR 159-160). Antonini testified that the FBI instructed him to make the people in Venezuela to whom he spoke know very clearly that if he did not get the money, Antonini was going to speak to the press or speak to the FBI and that they would know, in no uncertain terms, that if Antonini did not get the payment, "the shit was going to hit the fan." (TR 164). Antonini conveyed these threats to other members of the Venezuelan government, including the head of DISIP, General Rangel Silva (TR 177). Thus, Antonini at the instruction of and with the assistance of the FBI engaged in direct acts of extortion of the President of a sovereign nation, that nation's consul general in Miami, and the head of its intelligence source. No reported case comes even close to this level of outrageous government conduct.

There is no question that Antonini's conduct amounted to extortion under Florida law. Section 836.05 Florida Statutes (2007), which defines the Florida crime of extortion, a second degree felony, states, in relevant part:

Whoever, either verbally or by written or printed communication, maliciously threatens to accuse another of any crime or offense, or by such communication maliciously threatens an injury to the person, property or reputation of another, or maliciously threatens to expose another to disgrace, or to expose any secret affecting another... with intent thereby to extort money or any pecuniary advantage whatsoever, or with intent to compel the person so threatened, or any other person, to do any act or refrain from doing any act against his or her will, shall be guilty of a felony of the second degree....

Not only was Antonini attempting to extort a foreign government, but as the testimony makes clear, it was Antonini's threats and coercion that was directly responsible for Franklin Duran's involvement and subsequent arrest on December 11, 2007. When Duran first was in contact with Antonini, shortly after the seizure of the \$800,000 in Argentina became a matter of public knowledge and created a media storm in South America, it was because Duran was concerned over the ramifications this publicity would have for him and his company and for Antonini, whom Duran considered a friend. Antonini admitted that in response to his initial request for money, the defendant Duran had offered to give him money without any involvement of the government of Venezuela and it was Antonini who, at the FBI's insistence, told Duran that he wanted to "make sure that the money comes from the government of Venezuela." (TR 142-143). Antonini testified that the FBI instructed him to make it very clear to Franklin Duran that he was not to pay the money, that the money was to come from the Venezuelan government (TR 147).

Antonini's testimony also makes it clear that Franklin Duran was targeted by the FBI and that he used every means at his disposal to solicit Duran to become his intermediary with the government of Venezuela. Indeed, as Antonini admitted, the extortion letter to the Venezuelan government, which was prepared by the FBI, was sent some days after Franklin Duran had told Antonini not to talk to him again (TR 170).

There is no question that the crimes with which Franklin Duran is charged, acting as an unregistered agent of the government of Venezuela and conspiring with others to act as an unregistered agent of the government of Venezuela, were entirely created by Antonini, acting under the direct control of and pursuant to explicit instructions from the

FBI. Were it not for the fact that Antonini was extorting the Venezuelan government to pay him \$2 million and provide him with documents which he could use to claim ownership of the \$800,000 seized in Argentina, this case would not exist. Were it not for the fact that Franklin Duran was ultimately targeted by Antonini and Maionica to deliver the documents and the Venezuelan cash, Duran would not be charged as a defendant.

It is respectfully submitted that the conduct engaged in by the United States government in this case – extortion and blackmail directed not merely at a foreign government, but directly at a foreign head of state, in order to induce that government to pay Antonini, an agent of the United States Government, “hush money” and provide him with false documentation, which ultimately induced Franklin Duran to act as his go-between – constitutes the most outrageous and egregious government misconduct one can imagine. This Court should not countenance this kind of government conduct and should dismiss the charges against Franklin Duran.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** on October 2, 2008, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify the foregoing document is being served this day on all counsel of record identified on the attached service list in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in another authorized manner for those counsel or parties not authorized to receive electronically Notices of Electronic Filing.

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