IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	Criminal No. 09-CR-206
	)	
v.	)	
	)	
DINORAH COBOS,	)	
RAYMOND AZAR,	)	
SIMA SALAZAR GROUP	)	
d/b/a SSG OFFSHORE PLC,	)	
d/b/a SSG,	)	
d/b/a SALAZAR CO.,	)	
d/b/a SALAZARCO,	)	
d/b/a SIMA INTERNATIONAL,	)	
d/b/a PRO-SIMA,	)	
d/b/a PRO-SIMA INTERNATIONAL,	)	
	)	
Defendants.	)	

RESPONSE OF THE UNITED STATES TO DEFENDANTS' MOTIONS TO DISMISS THE INDICTMENT ON THE BASIS OF GOVERNMENT MISCONDUCT

The United States, by and through its undersigned attorneys, hereby responds to defendant Raymond Azar's and defendant Dinorah Cobos's respective Motions To Dismiss the Indictment on the Basis of Government Misconduct. ("Motions To Dismiss") (Dkts. 57, 58). According to long-standing Supreme Court precedent, a district court may not dismiss an indictment based on the manner in which the defendants were brought before it. *United States v. Alvarez-Machain*, 504 U.S. 655, 660-62 (1992) (collecting cases). Thus, as a matter of law, defendants' Motions To Dismiss must be denied. Moreover, the federal agents carrying out the expulsion of the defendants followed a routine procedure for the international transfer of prisoners by airplane and did nothing improper, much less anything to shock the conscience. For this additional reason, defendants' Motions To Dismiss should be denied.

ARGUMENT

Torture of any kind is legally and morally reprehensible, and evidence obtained thereby has no place in the American system of justice. The United States categorically rejects defendants' claims of abusive treatment during their expulsion from Afghanistan. As set forth in the Response of the United States to Defendant Raymond Azar's Motion To Suppress Statements and the three affidavits appended thereto, which are incorporated herein by reference, during their expulsion from Afghanistan, defendants were treated professionally; offered food, water, and use of the bathroom; and provided with comfortable chairs to sit in and a bed with a mattress, pillow, and a blanket, to sleep in. The restraints to which defendants were subjected were employed solely for the purpose of ensuring their safety and that of the federal agents who participated in their transport to the United States to face federal criminal charges authorized by a magistrate judge in this District. Defendants were never subjected to restraints intended to increase the likelihood of eliciting a confession.

I District Court May Not Divest Itself of Jurisdiction Premised on the Manner by Which the Defendants Were Brought to Trial

At issue here is whether the district court may assert personal jurisdiction over these defendants, who were lawfully expelled from Afghanistan, arrested, and transported to the United States by the FBI on a warrant issued by this Court. It is well established that a court's power to try a defendant is not affected by the manner in which the defendant is brought to trial.[1]

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[1] In support of her argument that the circumstances of her arrest and transport warrant dismissal of the Indictment, defendant Cobos cites a litany of inapposite cases. Those cases, including *United States v. Russell*, 411 U.S. 423 (1973); *United States v. Osborne*, 935 F.2d 32 (4th Cir. 1991); and *United States v. Goodwin*, 854 F.2d 33 (4th Cir. 1988), address (and ultimately reject) due process claims based on the government's involvement during the commission of the actual crime. As the First Circuit noted, even this "doctrine is moribund; in

Frisbie v. Collins, 342 U.S. 519 (1952) (upholding conviction of defendant bludgeoned, kidnapped and brought from one jurisdiction to another); *Ker v. Illinois*, 119 U.S. 436, 444 (1886) (holding court's power to try defendant not impaired by forcible and violent abduction). The general rule, referred to as the *Ker-Frisbie* doctrine, rests on the sound basis that due process is satisfied when one present in court is convicted after having been fairly apprised of the charges against him and after a fair trial. *Frisbie*, 342 U.S. at 522.

In every opportunity subsequently presented, the Supreme Court has consistently reaffirmed the vitality of *Ker-Frisbie*. *See, e.g.*, *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039-40 (1984) (holding non-citizen illegally arrested and brought to deportation proceeding was nevertheless subject to the jurisdiction of the court); *United States v. Crews*, 445 U.S. 463, 474 (1980) (holding defendant "himself is not a suppressible 'fruit' and the illegality of his detention cannot deprive the government of the opportunity to prove his guilt"); *Gerstein v. Pugh*, 420 U.S. 103 (1975) (refusing to "retreat from the established rule that illegal arrest or detention does not void a subsequent conviction"). Most recently, in *United States v. Alvarez-Machain*, the Supreme Court held that the *Ker-Frisbie* doctrine fully applied to a Mexican national who had been forcibly abducted in violation of general international law principles, even though the abduction may have been "shocking." 504 U.S. 655, 669 (1992).

Particularly in the wake of *Alvarez-Machain*, which expressly countenances and accepts the possibility of "shocking" government conduct in gaining jurisdiction over an accused, the

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practice, courts have rejected its application with almost monotonous regularity." *United States v. Santana*, 6 F.3d 1, 4 (1st Cir. 1993). In any event, those cases do not apply to the *Ker-Frisbie* doctrine, which addresses how the defendant arrived before the court, not what crime the defendant (with encouragement from the government) may have committed.

case defendants primarily rely upon,[2] *United States v. Toscanino*, 500 F.2d 267, 273-75 (2d Cir. 1974),[3] no longer remains good law. *See, e.g., United States v. Best*, 304 F.3d 308, 312-13 (3d Cir. 2002) ("In light of these cases [*Alvarez-Machain* and *Pugh*], it appears . . . that the exception described in *Toscanino* rests on shaky ground."); *United States v. Matta-Ballesteros*, 71 F.3d 754, 762-63 (9th Cir. 1995) ("In the shadow cast by *Alvarez-Machain*, attempts to expand due process rights into the realm of foreign abductions as the Second Circuit did in [*Toscanino*] have been cut short."); *Matta-Ballesteros v. Henman*, 896 F.2d 255, 263 (7th Cir. 1990) (citing *Lopez-Mendoza*, *Crews*, and *Pugh* in concluding that "in the face of repeated affirmation by the Supreme Court . . . *Toscanino* . . . no longer retains vitality"); *United States v. Darby*, 744 F.2d 1508, 1531 (11th Cir. 1984) ("[T]he continuing validity of the *Toscanin*o approach is

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[2] Defendants also cite to *United States v. Rochin*, 342 U.S. 165 (1952), as support for their argument that government misconduct may warrant their demanded relief. In that case, officers induced a doctor to insert an emetic solution intravenously into a defendant's stomach, thereby causing vomiting. Prosecutors used the recovered drugs in the subsequent prosecution of the defendant. 342 U.S. at 166. *Rochin*, however, presents a different issue – whether a conviction can survive once it is determined that the *only* evidence supporting that conviction was obtained illegally. There is no such allegation in this case.

[3] When presented the opportunity, no other court adopted *Toscanino*'s rationale. *United States v. Cotten*, 471 F.2d 744, 748-49 (9th Cir. 1973) (holding nothing in the Supreme Court's due process jurisprudence would preclude trial by a court of competent jurisdiction); *Hobson v. Crouse*, 332 F.2d 561, 561-62 (10th Cir. 1964) (finding no due process jurisprudence to "impel or even encourage" carving out an exception to *Ker-Frisbie*). After *Toscanino*, many decisions questioned its constitutional foundation, which rely on due process grounds, but use as support Fourth Amendment exclusionary rule jurisprudence. *See, e.g.*, *Matta-Ballesteros*, 896 F.2d at 261 (remarking *Toscanino* "is of ambiguous constitutional origins"); *United States v. Mitchell*, 957 F.2d 465, 470 (7th Cir. 1992) (questioning *Toscanino*'s "constitutional vitality"). Especially after *Lopez-Mendoza* and *Crews*, which held that the defendant was not a suppressible "fruit" and his illegal detention could not abrogate jurisdiction over him, the Fourth Amendment foundation of *Toscanino*'s reasoning appears unsalvageable.

questionable after [*Pugh*].").[4] The Fourth Circuit has not expressly evaluated the vitality of *Toscanino* since *Alvarez-Machain*, but in *Kasi v. Angelone*, the court, discussing *Ker* and *Alvarez-Machain* with considerable approval, found jurisdiction over the defendant even though he had been abducted from Pakistan in violation of an extradition treaty. 300 F.3d 487, 493-97 (4th Cir. 2002). Tellingly, the court made no mention of *Toscanino*.

After *Alvarez-Machain*, it is clear that, as a matter of law, there is no exception to the *Ker-Frisbie* doctrine. Given constant recitation by the Supreme Court that due process is limited to the guarantee of a fair trial, regardless of the method by which jurisdiction was obtained over the defendant, this Court should summarily deny defendants' Motions To Dismiss.

II Defendants Allege No Conduct That Shocks The Conscience and Thus Their Motions To Dismiss Fail as a Matter of Law

As described in the accompanying Response of the United States to Defendant Raymond Azar's Motion To Suppress, the United States rejects defendants' characterization of their expulsion from Afghanistan to the United States. Assuming as true, however, all the allegations in defendants' briefs, the alleged government misconduct would not warrant dismissal of the

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[4] Before *Alvarez-Machain*, the Fourth Circuit expressly refused to adopt the *Toscanino* doctrine, but twice assumed *arguendo* that such a doctrine existed, and that the facts alleged did not shock the conscience. *United States v. Porter*, 909 F.2d 789, 792 (4th Cir. 1990) (refusing to extend *Toscanino* to the Fourth Circuit because claim failed on the facts); *United States v. Wilson*, 721 F.2d 967, 972 (4th Cir. 1983) (same); *see also United States v. Yunis*, 924 F.2d 1086, 1093 (D.C. Cir. 1991) (questioning the existence of a *Toscanino* exception, but finding that even if one existed, the alleged facts did not rise to outrageous government conduct); *United States v. Lovato*, 520 F.2d 1270, 1271 (9th Cir. 1975) (declining to adopt a *Toscanin*o exception because alleged conduct was nothing more than a routine expulsion).

Indictment, even if such a remedy were available.[5]

Defendants were charged in this District and warrants issued for their arrest. With the permission of the Government of Afghanistan, defendants were expelled from that country. Defendants were detained near Camp Eggers by armed federal agents and transported by convoy to Bagram Airfield ("Bagram"). At Bagram, they were held in a working office until night, when they were taken to a jail cell. The next morning, defendants were taken back to the office, where a physical examination confirmed their health for airplane travel. According to accepted procedure for the transport of prisoners by airplane, defendants were then fitted with earphones and a blindfold, which allowed them only to see downward. Once the airplane arrived at its destination, the earphones and blindfold were removed. Despite defendants' hyperbolic references to torture and enhanced interrogation techniques, at no time were defendants subjected to anything reminiscent of this sort of harsh treatment.

No court has ever found the facts of any case so "shocking" as to dismiss an Indictment, and the facts alleged here, even if true, would not clear that high hurdle. Even in the Second Circuit, the facts alleged in *Toscanino* set the due process bar.[6] *United States v. Noorzai*, 545 F. Supp. 2d 346, 352 (S.D.N.Y. 2008); *United States v. Caro-Quintero*, 745 F. Supp. 599, 605 n.10 (C.D. Cal. 1990) ("[T]he *Toscanino* showing is the minimum required showing to invoke the

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[5] While the United States believes no findings of fact are required to deny defendants' Motions To Dismiss, it will be prepared, if necessary, to establish, as set forth in the accompanying affidavits, the actual circumstances of defendants' detention, arrest, and transport.

[6] Defendant Cobos argues that the *Toscanino* exception contains within it a proportionality doctrine, whereby the conduct of the government must vary directly to the violence or seriousness of the crimes alleged to have been committed by the defendant. This is an incorrect statement even of the wobbly *Toscanino* doctrine. Whether conduct "shocks the conscience" is an objective standard applied regardless of the crime or the criminal.

doctrine."). In *Toscanino*, the defendant alleged that he was forcibly abducted from Uruguay by police officers acting as paid agents of the United States. Defendant claimed he was pistol-whipped unconscious in front of his pregnant wife and kidnapped to Brazil. While en route, the defendant alleged that he was removed from his vehicle and made to lie face down in the mud with a pistol pressed to his temple. He alleged that he was told that if he moved, he would be executed. Once in Brazil, defendant claimed that he was forced to go without food for days at a time and fed only intravenously in order to keep him alive. He was forced to pace a hallway for hours at a time and was beaten when he fell. Defendant averred that his fingernails were pinched with pliers and that electric shock was administered to his earlobes, toes, and genitals. Alcohol was washed over his eyes and other fluids forced into his anus. After enduring this treatment for seventeen days, defendant claimed he was drugged and put on an airplane for the United States. In contrast, black-jacking in *Frisbie* and "forcible abduction" in *Ker* did not suffice to divest the district court of jurisdiction, nor did the conduct in *Matta-Ballesteros*, which included repeatedly using a stun gun on the defendant's feet and genitals. 71 F.3d at 761; 896 F.2d at 256.

Defendants in this case allege nothing remotely similar to the conduct in *Toscanino* or even anything on par with the facts in *Ker*, *Frisbie*, or *Matta-Ballesteros*. Defendants were not kidnapped or abducted, an action which the Supreme Court has nevertheless determined did not divest the courts of jurisdiction in the cases of *Ker* and *Alvarez-Machain*; rather, defendants were expelled from Afghanistan, with the permission of the Government of Afghanistan, based upon outstanding arrest warrants issued by this Court. Moreover, unlike the barbarous allegations in *Toscanino*, defendants make no allegations of bodily invasion, intentionally painful treatment, or being physically harmed in any way. While being arrested in Afghanistan and its hostile

environs and transported to the United States[7] may not have been comfortable, defendants were not subject to extreme physical or emotional anguish. Defendants were provided food, water, and bathroom breaks, a bed to sleep in, with a mattress, pillow, and blanket, and a padded office chair and an over-sized leather airplane seat to sit in. Moreover, agents used rapport-building interview techniques, not confrontation, loud voices, or angry threats. Throughout their detention and transport, the FBI undertook the least restrictive security measures deemed necessary under the circumstances. Modifications were made as necessary, and when the need for a particular security measure abated, it was removed.

Defendants' characterizations aside, these facts amount to nothing more than the routine transfer of multiple prisoners by aircraft from an active war theater to the United States to face pending criminal charges. *Lovato*, 520 F.2d at 1272 ("[S]tripped of its opinions, suspicions, and conclusions, [Lovato's] affidavit amount[s] to little more than . . . a routine expulsion."). Nothing in defendants' allegations amounts to the kind of barbarism considered in *Toscanino*, nor to the oppressive conditions described in *Matta-Ballesteros*, and thus, as matter of law, these allegations simply do not approach conduct that shocks the conscience.

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[7] Defendants claim that use of a blindfold amounted to torture. Yet the use of a blindfold is an accepted safety protocol, observed to limit (not extinguish) vision and prevent communication among conspirators, and thus ensure agent and prisoner safety during international airplane transport. *See, e.g.*, Zambeck Aff.; *Matta-Ballesteros,* 71 F.3d at 761-63 (observing federal agents bound defendants hands and blindfolded him during forcable extradition to the United States and declining to dismiss prosecution based on agents' conduct); *Matta-Ballesteros*, 896 F.2d at 256, 260 (noting agents' conduct in blindfolding defendant and observing that "for the past 100 years, the Supreme Court has consistently held that the manner in which a defendant is brought to trial does not affect the ability of the government to try him"); *United States v. Abu Ali*, 396 F. Supp. 2d 338, 358, 367 (E.D. Va. 2005) (describing hooding of accused during take-off and landing of airplane transport during single prisoner transport).

CONCLUSION

For the foregoing reasons, defendants' Motions To Dismiss should be denied.

DATED this 21st day of July, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 2009, I will electronically file the foregoing Response of the United States To Defendants' Motions To Dismiss with the Clerk of the Court using the CM/EDF system, which will then send a notification of such filing (NEF) to:

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