

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA \*  
Plaintiff \* CRIMINAL NO. 00-000  
vs. \*  
DEFENDANT \*  
Defendant \*  
\* \* \* \* \*

**MOTION TO DISMISS INDICTMENT FOR LACK OF JURISDICTION**

TO THE HONORABLE SALVADOR E. CASELLAS  
UNITED STATES DISTRICT JUDGE  
FOR THE DISTRICT OF PUERTO RICO

COMES NOW defendant, represented by the Federal Public Defender, and respectfully  
STATES and PRAYS:

**I. INTRODUCTION AND STIPULATED FACTS**

On May 26, 1999 an Indictment was returned, charging defendant with being an alien  
previously deported from the United States and attempting to re-enter the United States without  
obtaining the permission from the Attorney General, in violation of 8 U.S.C. 1326 (a)(2) and (b)(2).

From the evidence provided by the Government during discovery, the following facts can be  
stipulated<sup>1</sup> :

- a. On May 16, 1999, U.S. Coast Guard Cutter intercepted a small wooden yawl off  
the coast of Puerto Rico. The yawl was interdicted fourteen to fifteen miles off the

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<sup>1</sup> See Situation Report generated by the U.S. Coast Guard on May 17, 1999, consisting of  
one page. The pertinent part of the Report is highlighted. The same is attached to this motion,  
identified as Exhibit I.

nearest United States territory, specifically at the following coordinates, 18-45N  
067-16W<sup>2</sup>.

c. The Yawl was intercepted by the U.S. Coast Guard at the request of the U.S.  
Border Patrol.<sup>3</sup>

The question being presented before this Honorable Court is whether the United States had  
jurisdiction to detain and arrest defendant.

## II. ARGUMENT

The defendant is charged with attempt to re-enter after deportation, after being detained by  
immigration officials approximately fifteen miles off the coast of Puerto Rico, three miles beyond  
the territorial waters of the United States and the jurisdiction of law enforcement officials. The  
United States Coast Guard was not authorized, under the facts stipulated, to make a warrantless  
arrest of the defendants for attempting to enter the United States under 8 U.S.C. § 1326. United  
States law enforcement personnel generally have powers of enforcement only within the territory of  
the United States, unless Congress clearly intended to extend their authority under a statute  
extraterritorially within the confines of international law. U.S. v. Bowman, 260 U.S. 94, 98 (1932).  
Unlike a civil deportation case, for a criminal offense the statute must be strictly construed, U.S. v.

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<sup>2</sup> These coordinates are identified in the Situation Report attached as exhibit I. The  
appropriate part is highlighted. Attached to this motion, and identified as exhibit II is a  
photocopy of the appropriate nautical chart, identifying the place where the yawl was interdicted.

<sup>3</sup> See Situation Report document generated by the U.S.C.G. on May 17, 1999, consisting  
of two pages. The pertinent part of the Report is highlighted. The same is attached to this motion  
as exhibit number III.

Wong Kim Bo, 472 F.2d 720, 721 (5th Cir. 1972), and extraterritorial jurisdiction should not simply be inferred.

Under United States and international law, there is no extraterritorial jurisdiction under 8 U.S.C. § 1326 for an attempt to enter the United States. The Convention on the Territorial Sea and the Contiguous Zones, opened for signature April 29, 1958, art. 24, 15 U.S.T. 1606, T.I.A.S. No. 5639 (entered into force Sept. 10, 1964), allows states to assert immigration interests only in a contiguous zone 12 miles offshore. A treaty ratified under the Constitution is the supreme law of the land to which all judges are bound, U.S.C.A. Const. Art. 6, cl. 2, and “the comprehensiveness of the Convention provides answers to many of the lesser problems related to coastlines which, absent the Convention, would be most troublesome.” U.S. v. California, 381 U.S. 139 (1965); See also U.S. v. Alaska, 422 U.S. 184 (1975); Texas v. Louisiana, 426 U.S. 465 (1976).

Furthermore, there is no evidence that Congress intended jurisdiction under § 1326 to be extended beyond United States’ territory for an “attempt to enter.” This is best illustrated when examining judicial requirements that satisfy an “entry” according to the statute. In order to effect an “entry” under §1326, an alien must reach land. Zhang v. Slattery, 55 F.3d 732, 754 (2nd Cir. 1995). An alien can not be prosecuted for entry simply by crossing into the territorial waters of the United States. Chen Zhou Chai v. Carroll, 48 F.3d 1331 (4th Cir. 1995). And as there is no express language in the statute or other evidence of congressional intent to extend jurisdiction extraterritorially in violation of treaty, it follows that to be prosecuted for an “attempt to enter” an alien must at least be within United States territorial waters.

The territorial waters of the United States are limited to twelve miles from the U.S. coast, Proclamation No. 5928, 54 Fed. Reg. 777 (1989), and the yawl on which defendants were riding was intercepted by the Coast Guard approximately fifteen miles from United States shores, clearly out of the jurisdiction of the United States. As the First Circuit has recently stated, “[w]aters twelve miles beyond... the main island of Puerto Rico are ‘international’ in the sense that vessels of other nations have a right of free navigation through them.” U.S. v. Ramirez-Ferrer, 82 F.3d 1131, 1136 n.4 (1st Cir. 1996).

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#### A. Extraterritorial Jurisdiction

According to the “protective principle,” a nation has jurisdiction “to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems.” U.S. v. Pizzarusso, 388 F.2d 8, 9-10 (2nd Cir. 1968) (quoting Restatement (2nd), Foreign Relations, § 33 (1965)). In other words, a nation can assert jurisdiction “over a person whose conduct outside the nation's territory threatens the nation's security.” U.S. v. Cardales, 168 F.3d 548 (1st Cir. 1999). A state can also exercise jurisdiction under the “effects doctrine,” where “[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.” Strassheim v. Daily, 221 U.S. 280, 285 (1911).

However, with few exceptions, federal criminal law does not apply to extraterritorial acts. Hemphill v. Moseley, 443 F.2d 322, 323 (10th Cir. 1971). Courts will give extraterritorial effect to

penal statutes only where congressional intent is clear, U.S. v. Bowman, 260 U.S. 94, 98 (1932), and whether or not Congress has intended extraterritorial application is a matter of statutory interpretation. U.S. v. MacAllister, 160 F.3d 1304, (11th Cir. 1998). If the criminal law “is to be extended to include those [crimes] committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard.” Bowman, 260 U.S. at 98. The Court should ask whether the “language in [the statute]... gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control.” Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949). “The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States, is a valid approach whereby unexpressed congressional intent may be ascertained.” Id. (citation omitted). “The necessary *locus*, when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations.” Bowman, 260 U.S. at 97.

B. Under the Constitution of the United States, the Government Is Bound by Treaty as the Supreme Law of the Land, and under § 1326 Can Not Exercise Jurisdiction Beyond its Territorial Waters.

The Convention on the Territorial Sea and the Contiguous Zones, opened for signature April 29, 1958, art. 24, 15 U.S.T. 1606, T.I.A.S. No. 5639 (entered into force Sept. 10, 1964), allows states to assert immigration interests in a contiguous zone 12 miles offshore. Article 24 reads:

“1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:

- (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea
  - (b) Punish infringement of the above regulations committed within its territory or territorial sea
2. The contiguous zone *may not extend beyond twelve miles* from the baseline from which the breadth of the territorial sea is measured.” (italics added).

Just as an act of Congress may supersede a prior conflicting treaty, a subsequent treaty may supersede a prior conflicting act of Congress. Alvarez y Sanchez v. U.S., 216 U.S. 167 (1910). The Immigration and Naturalization Act was passed by Congress in 1952, while the Convention on the Territorial Sea and Contiguous Zones was entered into force in the United States in 1964. As the supreme law of the land, judges are bound to abide by the laws of Convention, U.S.C. Const. Art. 6, cl. 2, which was ratified subsequent to the Immigration Act. Moreover, there is no conflict between § 1326 and laws of the Convention. Section 1326 does not define “attempt to enter,” nor is there express language defining the territorial limits for which the United States may exercise jurisdiction. The Convention, meanwhile, explicitly delineates the authority of all parties to the treaty when exercising their authority over immigration regulations to a maximum of twelve miles from the nations’s coastal baselines. Congress was well aware of these limitations when the treaty was ratified, yet they chose not to amend § 1326 to extend jurisdiction for attempting to re-enter the United States.

C. According to Principles of Statutory Construction, § 1326 Requires That  
an Alien must Be Within Territorial Waters to Be Charged with an “Attempt to Re-enter”  
the United States

In U.S. v. Bowman, the Supreme Court stated that when the “necessary *locus* [of an offense], when not specially defined, depends upon the purpose of Congress as evinced by the description and

nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations.” 260 U.S. at 97.

“The starting point in statutory interpretation is the language [of the statute] itself. “ U.S. v. James 478 U.S. 597, 604 (1986). 8 U.S.C. § 1326(a) states that “any alien who--

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under Title 18, or imprisoned not more than 2 years, or both.”

According to the statute there are three distinct offenses that a previously deported alien may violate:

(1) entering, (2) attempting to enter, or (3) being found in the United States. U.S. v. Rodriguez, 26 F.3d 4, 8 (1st Cir. 1994). To be arrested for offenses (1) and (3), the necessary *locus* appears to be clear and unambiguous: the defendant must be arrested within United States territory. It would therefore seem at first blush that one “enters” the United States upon crossing into United States territorial waters, and one who “attempts to enter” has not done so, thereby conferring powers under § 1326 upon United States officers to arrest aliens in international waters they believe are “attempting to enter” the United States.

However, in order to “enter” the United States an alien must satisfy the three-pronged test articulated in Matter of Pierre, 14 I & N Dec. 467 (BIA 1973), which states that an entry involves: (1) the physical presence, (2)(a) an inspection and admission by an immigration officer or (b) actual

and intentional evasion of inspection at the nearest inspection point, and (3) freedom from official restraint. Id., at 1171. The first prong, physical presence, is satisfied when the alien had a physical presence on land within the United States. Zhang v. Slattery, 55 F.3d 732, 754 (2nd Cir. 1995). An alien's mere presence in territorial waters of the United States does not constitute an entry. Chen Zhou Chai v. Carroll, 48 F.3d 1331 (4th Cir. 1995).

In Zhang, the Second Circuit reversed the district courts holding that the defendant satisfied the "physically presence" requirement for entry by coming within the twelve mile territorial limit of the United States coast. The defendant alien was aboard a vessel just offshore Rockaway, Queens, when the ship struck a sandbar. The defendant then jumped ship and swam toward the beach where he was immediately detained by government officers. The district court had mistakenly relied on 8 C.F.R. § 287.1(a)(1), which defines "external boundary" of the United States as the "land boundaries and the territorial sea of the United States extending twelve nautical miles from the baseline of the United States..." The court stated that "United States immigration law is designed to regulate the travel of human beings, whose habitat is land, not the comings and goings of fish or birds," and therefore the defendant could only make an "entry" by establishing a physical presence on the land of the United States. Zhang, 55 F.3d at 754.

The question remains, if in order to "enter" the United States one must reach land, at what point does an alien attempt to reach the land of the United States to satisfy an "attempt to enter" under § 1326? When the alien leaves the vessel in an attempt to set foot ashore, or when the vessel attempts to tie on to docks? When the vessel crosses into territorial waters of the United States, or when the vessel simply comes near territorial waters? When the vessel disembarks from its place

of origin; or when passengers board such a vessel? While there are no published opinions regarding an alien apprehended on the high seas and charged with attempted re-entry, prior decisions concerning an attempt to re-enter require that the defendant do more than merely approach United States territorial waters.

To obtain a conviction for an attempt to re-enter the United States under § 1326, the government must prove that the defendant:

- 1) was an alien at time of alleged offense;
- 2) had previously been arrested and deported;
- 3) attempted to enter the United States; and
- 4) had not received the express consent of the Attorney General of the United States to apply for readmission to the United States since the time of his previous arrest and deportation. U.S. v. Cardenas-Alvarez, 987 F.2d 1129, 1131-1132 (5th Cir. 1993).

In the instant case there are no disputes as to elements one, two, and four; but the third element, “attempt to enter,” can not be established when the defendant is found and arrested outside of the territorial waters of the United States. To prove the charge of attempt, the government must show beyond reasonable doubt defendant’s intent to commit offense charged and that defendant performed substantial step toward the commission of the offense. U.S. v. Levy-Cordero, 67 F.3d 1002, 1019 (1st Cir. 1995). The step must be more than mere preparation of the substantive offense, but less than the last act necessary before the actual commission of the crime. Id. The prosecution is required to show that the defendants acted with the specific intent to complete the offense of attempt to re-enter under § 1326. U.S. v. Morales-Tovar, 37 F.Supp.2d 846, 849 (W.D. Tex. 1999). The defendants, having never crossed into the territorial waters of the United States, did not take

substantial steps toward the commission of the crime to constitute an “attempt to enter” as a matter of law.

In U.S. v. Morales-Tovar, 37 F.Supp.2d 846 (W.D. Tex. 1999), the district court found that there was no credible evidence that the defendant attempted to re-enter the United States upon entering a port-of-entry and requesting to replace his resident alien card. The defendant in that case had previously been deported from the United States after committing an aggravated felony drug offense. He was served with notice that in order to apply for readmission to the United States within twenty years of committing the felony offense, he was required to obtain permission from the Attorney General. Within approximately four years after his conviction, he went to the port of entry at Del Rio, Texas, with his Mexican birth certificate and labor union card. He then proceeded to a “secondary inspection” point, and asked an immigration inspector to replace his resident alien card. After the inspector asked the defendant for identification, a computer check revealed that he had been previously deported, whereupon the defendant was arrested and charged with attempt to re-enter under § 1326. In a sworn statement the defendant admitted his desire to re-enter the country to be united with his family.

The court held that there was insufficient evidence to convict the defendant despite the fact that he had entered the port-of-entry inspection post. While it was undisputed that the defendant never received the express consent of the Attorney General to apply for readmission to the United States, the port of entry has the authority to grant such a waiver pursuant to 8 C.F.R. § 2.1. Likewise, 8 C.F.R. § 212.2 grants a person previously deported or removed from the United States the right to apply for permission to reapply for admission at a port of entry. The court found that these rights

granted to the defendant under the Code of Federal Regulations were plausible explanations for the defendant's conduct other than an attempt to illegally re-enter the United States.

In the instant case the defendants were traveling in international waters where they enjoy the right of free navigation. Ramirez-Ferrer, 82 F.3d 1131, 1136 n.4 (1st Cir. 1996). At no time did the yawl or its passengers "attempt to reach land" as a matter of law. The defendants were apprehended by the United States Coast Guard on orders from the United States Border Patrol. They did not request permission to enter the United States, they did not present false documents or visas, nor did they in any way attempt to fraudulently enter United States land. They never stated their intent to surreptitiously enter the United States, nor did they voluntarily enter territorial waters. The defendants were intercepted outside territorial waters near a port of entry in Aguadilla, Puerto Rico, where they are explicitly permitted by 8 C.F.R. § 212.2 to ask for permission to reapply for admission.

### III. CONCLUSION

The government does not have jurisdiction over the defendants under § 1326 for an attempt to re-enter the United States. There is no extraterritorial jurisdiction because the United States is limited by the Convention on the Territorial Seas and Contiguous Zones, a treaty ratified pursuant to the Constitution of the United States with full force and effect as the supreme law of the land. Furthermore, the offense of "attempting to re-enter" the United States can not be satisfied when the defendants were apprehended outside of territorial waters, as they did not take a substantial step toward the commission of the crime as a matter of law. All charges should be dismissed with prejudice and the defendants should be subject only to civil deportation proceedings.

WHEREFORE, defendant respectfully requests this Honorable Court to take notice of the above and dismiss the Indictment..

I HEREBY CERTIFY: That a copy of the foregoing Motion was served to counsel for the Government, U.S. Attorney Guillermo Gil (**Att. Assistant U.S. Attorney Aixa Maldonado**), Federico Degetau Federal Building, Room 452, Hato Rey, Puerto Rico 00918.

In San Juan, Puerto Rico, this July 28, 1999.

Joseph C. Laws, Jr.  
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