UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

July 2, 1996

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324c Proceeding
	)	OCAHO Case No. 96C00027
PEDRO DOMINGUEZ, Respondent.	)	

ERRATUM

On July 1, 1996, I issued an Order Granting Complainant's Motion to Strike Respondent's Double Jeopardy Defense. On page seven, the correct cite for denial of certiorari in the case of *Fransaw v. Lynaugh,* 810 F.2d 518 (5th Cir. 1987), is 483 U.S. 1008 (1987), *not* 483 U.S. 896 (1960). Attached to this Erratum is the corrected page.

ROBERT L. BARTON, JR.
Administrative Law Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
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July 1, 1996

UNITED STATES OF AMERICA, Complainant, v. PEDRO DOMINGUEZ, Respondent.	8 U.S.C. §1324c Proceeding OCAHO Case No. 96C00027

ORDER GRANTING COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S DOUBLE JEOPARDY DEFENSE

I. *Procedural History*

A complaint charging civil document fraud under 8 U.S.C. §1324c, and seeking civil penalties in the amount of $412,000, was filed on March 4, 1995. In its answer to the complaint Respondent asserted that Complainant's claims were barred by the double jeopardy clause of the Fifth Amendment to the United States Constitution because Respondent already had been arrested, indicted and prosecuted for criminal violations in connection with possession, forging and counterfeiting immigration documents. *United States v. Pedro Dominguez*, (W.D. Tex., Laredo Division No. L–93–181–S). Based on a plea agreement, Respondent had pled guilty to one count of the indictment. Subsequently, he was sentenced to prison and ordered to pay a fine of $15,000, pursuant to the Judgment of the Court entered on August 5, 1994.

On April 22, 1996 Complainant moved to strike the double jeopardy defense, asserting that the offense to which Respondent pled guilty is different from the civil document fraud charged in the complaint. On May 30, 1996 Respondent filed a response to com-

plainant's motion to strike. At the same time Respondent also filed a motion for summary decision based on the defense of double jeopardy, among other reasons.[1]

Pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §556(c), and the Rules of Practice and Procedure, 28 C.F.R. §68.13, a prehearing conference was conducted with both parties by telephone on June 25, 1996 to hear oral argument on the outstanding motions.[2]

II. *Background*

A. *Criminal Indictment*

In the United States District Court for the Southern District of Texas, in October 1993, a grand jury initially indicted Respondent on three counts of violating 18 U.S.C. 1546(a). The indictment charged that Respondent did "knowingly utter, offer to sell, sell and otherwise dispose of . . . I–94 Arrival and Departure record[s]." However, in November 1993, the grand jury returned a superseding indictment charging eleven counts related to document fraud. In December 1993, pursuant to a plea agreement, the Government agreed to dismiss Counts 2–11, and in return Respondent agreed to plead guilty to Count 1 of the superseding indictment, which charged Respondent with conspiracy to violate 18 U.S.C. §1546(a) in violation of 18 U.S.C. §371.[3] The District Court accepted the guilty plea and convicted Respondent on Count 1, sentencing him to fifteen months in prison and ordering him to pay a $15,000 fine.

B. *Civil Fraud Action*

Following the criminal prosecution, on June 7, 1995, the Immigration and Naturalization Service (INS) served on Respondent a Notice of Intent to Fine for civil document fraud pursuant to 8 U.S.C. §1324c and 8 C.F.R. §270. INS charged Respondent with two counts of document fraud: Count 1 alleged that Respondent

[1] Respondent also based his motion for summary decision on the Excessive Fines Clause of the Eighth Amendment to the United States Constitution, citing *Austin v. United States*, 509 U.S. 602 (1993). Complainant also has moved to strike that defense. I will issue a separate order with respect to the issue raised as to the Excessive Fines Clause.

[2] A court reporter was scheduled to be present to record the conference but did not appear on time and thus the conference was not transcribed.

[3] *See infra* p. 5 for the pertinent text of these statutory provisions.

forged, counterfeited, altered, or falsely made 103 I–94 Departure Records; and Count 2 alleged Respondent used, possessed, or provided 103 I–94 Departure Records knowing them to be forged, counterfeit, altered, or falsely made. The Government seeks, under 8 U.S.C. 1324c(d)(3)(A), the maximum $2000 statutory penalty for each of the 206 alleged violations, totaling $412,000 in civil money penalties.

In July 1995, Respondent requested a hearing before an Administrative Law Judge, and in March 1996, a complaint was filed and served on Respondent. In his answer to the complaint, Respondent denied Counts 1 and 2 and set forth as affirmative defenses that the civil proceeding is blocked by the Fifth Amendment's prohibition on double jeopardy, and by the Eighth Amendment's prohibition on excessive fines. On April 22, 1996, Complainant moved to strike these affirmative defenses. Finally, on May 29, 1996, Respondent moved for summary decision, asserting again that the civil money penalties would violate both the Double Jeopardy Clause and the Excessive Fines Clause.

III. *Burden of Proof*

The Fifth Circuit, in *United States v. Stricklin*, 591 F.2d 1112 (5th Cir. 1979), *cert. denied*, 444 U.S. 963 (1979), has held that "[i]t is undisputed that the burden of going forward by putting the double jeopardy claim in issue is and should be on the defendant. It is similarly reasonable to require the defendant to tender a prima facie nonfrivolous double jeopardy claim before the possibility of a shift of the burden of persuasion to the government comes into play." *Id.* at 1117. The Fifth Circuit reaffirmed this rule in *United States v. Deshaw*, 974 F.2d 667 (5th Cir. 1992), noting that "the defendant bears the initial burden of establishing a prima facie claim of double jeopardy." *Id.* at 670.

Therefore, in the present case, Respondent has the burden of making a prima facie showing that the double jeopardy defense is applicable to this action.

IV. *Standard for Striking Affirmative Defenses*

Under the OCAHO Rules of Practice, respondents may include affirmative defenses in their answers to complaints, and complainants may file response to these defenses. 28 C.F.R. §68.9 (1995). In the

present case, in its answer to the complaint, Respondent included the affirmative defense based on the Double Jeopardy Clause. Complainant has moved to strike the defense, asserting that the double jeopardy defense is legally insufficient.

Because OCAHO procedural rules do not provide for motions to strike, it is appropriate to apply Rule 12 (f) of the Federal Rules of Civil Procedure (FRCP) as a guideline in considering motions to strike affirmative defenses.[4] *See United States v. Chavez-Ramirez*, 5 OCAHO 774, at 2 (1995); *United States v. Chi Ling, Inc.,* 5 OCAHO 723, at 3 (1995); *United States v. Makilan*, 4 OCAHO 610, at 3 (1994). Rule 12(f) of the FRCP provides that the court may order stricken from any pleading any insufficient defense.

It is well settled that motions to strike affirmative defenses generally are not favored in the law and are only granted when the affirmative defense lacks any legal or factual grounds. *See Chavez-Ramirez*, 5 OCAHO 774, at 3; *United States v. Task Force Security, Inc.*, 3 OCAHO 533, at 4 (1993). However, an affirmative defense will be stricken if the legal theory upon which the affirmative defense is premised lacks prima facie viability. *Makilan,* 4 OCAHO 610, at 4; *Task Force Security, Inc.,* 3 OCAHO 533, at 4. Thus, the instant motion to strike should be denied unless it lacks prima facie viability.

V. *Double Jeopardy Defense*

At the prehearing conference, three main issues were discussed. The first issue involved whether this civil proceeding charges Respondent with the "same offense" as that for which he was already criminally charged. This issue was further broken down into the question of whether a conspiracy to commit a crime is the "same offense" as the crime itself; and second, even if it is not, whether Respondent in fact pled guilty only to conspiracy. The second issue discussed was whether a further double jeopardy problem might arise as to the *dismissed* criminal counts, that is, whether jeopardy "attached" to those counts. The final issue discussed was whether Respondent, even if he does have a valid double jeopardy argument, in fact *waived* his double jeopardy defense.

[4] Under the OCAHO Rules of Practice and Procedure, "[t]he Rules of Civil Procedure for the District Courts to the United States may be used as a general guideline in any situation not provided for or controlled by these rules ." 28 C.F.R. §68.1 (1994).

A. *Same Offense*

The Double Jeopardy Clause provides that no person shall be put in jeopardy twice for the "same offense." U.S. Const. amend. V. Respondent alleges that the Government charged him with the "same offense" as that to which he pled guilty in the criminal prosecution.

1. *Conspiracy to commit a crime is not the "same offense" as the crime itself.*

In deciding whether or not the double jeopardy defense is viable in this case, I will first consider whether a substantive crime and a conspiracy to commit that crime are the "same offense" for the purpose of applying the double jeopardy clause. In *United States v. Felix*, 503 U.S. 378 (1992), the Supreme Court considered whether the conspiracy offense charged in one case was the same offense as the substantive offense prosecuted in a prior case. The Court held it was not, stating that "the agreement to do the act is distinct from the act itself," and that "a conspiracy to commit a crime is a separate offense from the crime itself." *Id*. at 390–91. Moreover, the Fifth Circuit Court of Appeals held, in *United States v. Deshaw*, 974 F.2d 667 (5th Cir. 1992), that the fact that the defendant had been previously tried and acquitted on conspiracy charges did not bar a subsequent prosecution for substantive offenses involving the importation and possession of cocaine. *Id.* at 676. The Court held that these substantive counts were not barred by double jeopardy because overt acts charged in a conspiracy count may also be charged as substantive offenses. *Id. See also United States v. Brunk,* 615 F.2d 210, 211–12 (5th Cir. 1980) (conspiracy to commit a crime and the crime itself are separate offenses); *United States v. Gambino,* 968 F.2d 227, 231–32 (2d Cir. 1992) (a conspiratorial agreement is distinct from the overt acts underlying the conspiracy). Consequently, I rule that the substantive offense charged in this civil proceeding is not the "same offense" as the conspiracy offense charged in the criminal proceeding.

2. *Respondent did not plead guilty only to conspiracy.*

In Paragraph 11 of the plea, Respondent stated, "I agree to plead guilty . . . to Count 1 of the Indictment . . . which charges me with conspiracy to violate Title 18, United States Code, Section 1546(a), that is to knowingly utter, use, possess, obtain, accept, or receive I–94 arrival and departure records . . . *in violation of Title 18, United States Code, Section 1546(a),* and Section 371." (Emphasis added.)

Therefore, Respondent did not plead guilty only to the conspiracy offense contained in Section 371.[5] In count one of the indictment Respondent in fact pled guilty to Section 1546(a), which involves a substantive offense. Indeed Paragraph 11 of the plea agreement referenced certain pertinent parts of Section 1546(a) which provides that "[w]hoever knowingly . . . utters, uses . . . possesses, obtains, accepts, or receives any . . . document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made . . . shall be fined under this title or imprisoned." 18 U.S.C. §1546(a) (1994).

During the prehearing conference, Complainant argued that even if Respondent pled guilty to substantive offenses, the civil penalty counts would still not violate double jeopardy. This is because count one of the superseding indictment was based on two overt acts of fraudulent I–94s, which, according to Complainant, were not included in the civil penalty counts. These I–94s were fraudulently issued to Jorge Lopez Hernandez and Jose Guadalupe Barraza-Torres. Contrary to Complainant's assertion, while it is true that Jose Guadalupe Barraza-Torres is not included in the civil complaint, Jorge Lopez Hernandez does appear in the civil complaint. *See* Complainant's First Amended Complaint at 2– 6, para. A(1)(55) and (56) of Counts 1 and 2.

However, of the two counts alleged in this civil proceeding, only Count 2 would implicate double jeopardy; Count 1 would not. As indicated above, Respondent pled guilty in the criminal indictment to knowing *use* of forged I–94 documents, in violation of 18 U.S.C. §1546(a), which is the same offense as that charged in Count 2 of the civil complaint.[6] However, this is not the same offense as that charged in Count 1 of the civil complaint, which alleges that Respondent actually *forged* I–94 documents.[7]

[5] Section 371 provides, in pertinent part, "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined and imprisoned." 18 U.S.C. §371 (1994).

[6] Count 2 of the civil complaint alleges that Respondent knowingly "used, attempted to use, possessed, and provided . . . forged, counterfeited, altered, and falsely made" I–94 documents.

[7] Count 1 of the civil complaint alleges Respondent knowingly "forged, counterfeited, altered, and falsely made" I–94 documents.

Therefore, the INS seeks to fine Respondent for the same offense as that to which he pled guilty only with respect to the allegation involving Jorge Lopez Hernandez contained in Count 2 of the civil complaint. However, even as to this allegation, there will be no double jeopardy violation if I find that Respondent waived his double jeopardy defense.

B. *Dismissed Counts*

Another double jeopardy issue arises with respect to the criminal counts against Respondent that were dismissed pursuant to the pretrial agreement. The question is whether jeopardy attached to those counts. If jeopardy attached, then this civil proceeding could potentially violate double jeopardy as to those counts.

Only Counts 2, 9, and 10 of the criminal indictment are at issue because they involve offenses similar to those charged in this proceeding, whereas the remaining dismissed counts charged offenses that are clearly distinct from those charged in this proceeding.[8]

Count 2 of the criminal indictment charged that Respondent knowingly possessed I–94 documents that had not been lawfully issued to him, and Counts 9 and 10 each charged that he knowingly sold "and otherwise disposed of" an I–94 document issued in the name of Jaime Villeda–Gonzalez and Julio Villeda–Gonzalez, respectively. These offenses are similar to Count 2 of this civil proceeding, which alleges that Respondent knowingly "used, possessed, or provided" 103 forged I–94 documents, two of which were issued to Jaime and Julio Villeda-Gonzalez.[9] Therefore, if jeopardy attached to the dismissed Counts 2, 9, and 10, and if in fact they charge the same offense, then this civil proceeding is subject to the limitations of the Double Jeopardy Clause as to those counts. Respondent, in

[8] Count 3 alleged possession of I–151 documents; Count 4 alleged possession of a counterfeit seal of the U.S. Immigration and Naturalization Service (INS); Count 5 charged possession of a counterfeit seal of the U.S. Department of Justice; Count 6 charged that Respondent converted to his own use an INS typewriter; Count 7 alleged that Respondent converted to his own use a counterfeit INS perforator; Count 8 alleged possession of counterfeit social security cards. Lastly, Count 11, although it charged the same offense as Counts 9 and 10, involved an I–94 that was issued to a person who is not listed in the civil complaint.

[9] Once again, Count 1 of this civil proceeding is not at issue because it alleges that Respondent actually forged documents, which was not alleged in any of the criminal counts.

support of his motion for summary decision, contends that jeopardy did attach to the dismissed counts. R. Brief at 28–29. I will therefore consider whether jeopardy can attach to counts dismissed in consideration of a pre-trial plea agreement.

The Supreme Court and the Fifth Circuit have strongly implied that jeopardy does *not* attach to counts dismissed pursuant to a pretrial plea agreement, and other Circuits have clearly held that jeopardy does *not* attach. In *United States v. Jorn,* 400 U.S. 470, 479 (1971), the Supreme Court held that jeopardy does not attach until a defendant is "put to trial before the trier of facts, whether the trier be a jury or a judge." In the context of jury trials, the Court in *Crist v. Bretz,* 437 U.S. 28 (1978), held that jeopardy attaches when the jury is impaneled and sworn. In the context of nonjury trials, the Court in *Serfass v. United States,* 420 U.S. 377 (1975), held that jeopardy attaches when the court begins to hear evidence.

Complainant has cited the Fifth Circuit's decision in *Fransaw v. Lynaugh,* 810 F.2d 518 (5th Cir. 1987), *cert. denied*, 483 U.S. 896 (1960), to support its assertion that jeopardy attaches only to counts to which a defendant pleads guilty. C. Brief at 8 n.3. However, *Fransaw* did not involve the same factual pattern that exists here; that is, whether jeopardy attaches to counts dismissed *prior* to trial. *Fransaw* involved a defendant who entered a plea agreement *during* trial and then repudiated the agreement. *Fransaw* held that once the defendant breached the agreement, reinstating the counts did not violate double jeopardy. 810 F.2d at 524–25.

However, while the facts in *Fransaw* were different, the Court of Appeals implied that jeopardy does not attach to pretrial dismissed counts. First, the Court said that in a plea bargain context, the rule in the Fifth Circuit is that jeopardy attaches when a guilty plea is accepted. *Id.* at 523. The Court went on to say that it does *not* follow from this rule that jeopardy attaches to counts dismissed prior to trial as part of the plea bargain. *Id.* at 524 n.9.

Furthermore, *Fransaw* cited *United States v. Vaughan*, 715 F.2d 1373 (9th Cir. 1983), where the Ninth Circuit Court of Appeals specifically held that jeopardy does not attach to counts dismissed pursuant to a pretrial plea agreement. *See also United States v. Garner,* 32 F.3d 1305, 1311 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1366 (1995) (jeopardy does not attach to charges dismissed as part of a plea agreement); *United States v. Hawes,* 774 F. Supp. 965, 970

(E.D.N.C. 1991) (pretrial dismissal of an indictment does not invoke double jeopardy because jeopardy cannot attach until jury is sworn).

In the present case, the issue of Respondent's guilt or innocence as to the dismissed counts never came before a trier of fact. Therefore, applying the Supreme Court's decisions in *Jorn, Crist* and *Serfass* discussed above, as well as the applicable Circuit law, I rule that jeopardy did not attach to the dismissed criminal counts. Therefore, for purposes of double jeopardy, there is no need to decide whether this civil proceeding charges the "same offense" as criminal Counts 2, 9, and 10 of the indictment that were dismissed pursuant to the plea agreement.

C. *Waiver of Double Jeopardy Defense*

Lastly, I will consider whether Respondent waived his double jeopardy defense when, in paragraph 17 of the plea agreement, he stated, "I understand and agree that the plea agreement does not bar or compromise any civil or administrative claim that may be pending or that may be made against me."

1. *The double jeopardy defense can be waived.*

Several United States Supreme Court decisions hold that it is possible to waive the double jeopardy defense. In *Ricketts v. Adamson*, 483 U.S. 1, 10 (1987), the Court held that a defendant can agree to waive a double jeopardy defense by specifying that charges, which are dropped pursuant to a plea agreement, may be reinstated if the defendant breaches the terms of the agreement. The defendant in *Ricketts,* during his trial for first-degree murder, pled guilty to second-degree murder and agreed to testify against other parties in return for a specified prison term. However, the agreement provided that "[s]hould the defendant refuse to testify . . . this entire agreement is null and void and the original charge will be automatically reinstated." *Id.* at 4. The defendant breached the agreement by refusing to testify, and consequently the second-degree murder charge was vacated and the first-degree charge reinstated. The defendant was convicted of first-degree murder and sentenced to death. Despite this harsh outcome, the Supreme Court found no violation of the Double Jeopardy Clause. The Court found that the defendant's plea agreement, under the circumstances, was "precisely equivalent to an agreement waiving a double jeopardy defense." *Id.* at 10. The Court also stated that "we do not find it significant . . . that 'double

jeopardy' was not specifically waived by name in the plea agreement." *Id.* at 9. The Court further noted that to find that the defendant had not effectively waived his double jeopardy defense "would render the agreement meaningless." *Id.* at 10.

In *United States v. Broce*, 488 U.S. 563 (1989), the Court held that a defendant can waive the double jeopardy defense by a plea of guilty entered into voluntarily and intelligently. The Defendants in *Broce* had pled guilty to two separate conspiracy charges and were subsequently convicted and sentenced. Later, they claimed that there was in fact only one conspiracy and that therefore double jeopardy principles required their convictions to be set aside. The Supreme Court disagreed, finding that the Defendants had entered into a "voluntary and intelligent" plea of guilty to two separate agreements, and the Court held that a double jeopardy challenge was thereby foreclosed. *Id.* at 571, 574. Although the Defendants could have challenged the theory of two separate agreements prior to pleading guilty, they chose not to. In so choosing, they waived a right to raise a double jeopardy claim. *Id.* at 571.

Elsewhere, the Court has strongly implied that the double jeopardy defense can be waived. In *United States v. Scott*, 437 U.S. 82 (1978), the Court stated that the Double Jeopardy Clause "does not relieve a defendant from the consequences of his voluntary choice." *Id.* at 99. In *United States v. Mezzanatto*, 115 S. Ct. 797 (1995), the Court noted that "[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." *Id.* at 801. In *Peretz v. United States,* 501 U.S. 923 (1991), the Court stated that "[t]he most basic rights of criminal defendants are . . . subject to waiver." *Id.* at 936. In *Menna v. New York,* 423 U.S. 61 (1975), where the Court had found that double jeopardy had not been waived under the particular facts of the case, the Court nevertheless said that "[w]e do not hold that a double jeopardy claim may never be waived." *Id.* at 63 n.2.

The Fifth Circuit's decisions also are instructive on the issue of waiver of the double jeopardy defense. In *Taylor v. Whitley*, 933 F.2d 325 (5th Cir. 1991), *cert. denied,* 503 U.S. 988 (1992), a defendant pled guilty to first-degree murder and armed robbery. The Fifth Circuit, without reaching the question of whether the two offenses were the "same offense" for purposes of double jeopardy, held that Taylor had waived his opportunity to raise the double jeopardy defense because his guilty plea had been "voluntary and intelligent."

Id. at 329. The Court stated that "[i]n determining if a plea is voluntary and intelligent . . . the critical issue is whether the defendant understood the nature and substance of the charges against him, and not necessarily whether he understood their technical legal effect." *Id.* The question also arose in *Taylor* whether the defendant had "deliberately relinquished" his right to a double jeopardy defense.[10] The Court concluded that "the 'deliberate relinquishment' requirement does not apply to double jeopardy violations that are not apparent on the face of the indictments or trial court record at the time the defendant enters his plea." *Id.* Since the Fifth Circuit found that a double jeopardy violation was not apparent in Taylor's case, "deliberate relinquishment" was not required. *Id.* at 330. The Court also stated that "the failure to inform the defendant that his convictions raise double jeopardy concerns that are not apparent on the face of the indictments . . . does not render a guilty plea involuntary and unintelligent." *Id.*

2. *Respondent waived his double jeopardy defense.*

I now address the question of whether Respondent, in Paragraph 17 of the plea agreement, by agreeing that the plea agreement did not bar or compromise any civil or administrative claim that may be pending or that may be made against him, waived his double jeopardy defense. The Tenth Circuit case of *United States v. Cordoba*, 71 F.3d 1543 (10th Cir. 1995), closely approximates the waiver issue in the present case. The defendant in *Cordoba* was indicted on eight counts of violating federal drug laws. Prior to the indictment, the FBI had seized certain property and proceeds belonging to Cordoba related to drug trafficking. Before trial, Cordoba entered a plea agreement in which he pled guilty to two counts in return for dismissal of the remaining six. In addition, he agreed to the "forfeiture of any property or proceeds from . . . drug trafficking." However, before being sentenced, Cordoba moved to dismiss the indictment asserting that the forfeitures constituted a second punishment for the same offense in violation of the Double Jeopardy Clause. The Tenth Circuit held that when Cordoba expressly consented to the imposition of both the criminal conviction and the civil administrative forfeitures he effectively waived any double jeopardy objection.[11] *Id.* at 1546–47. The Court fur-

[10] The Court in *Taylor* recognized that "the Supreme Court has repeatedly emphasized that a defendant can waive constitutional rights only if the defendant *deliberately* relinquishes those rights." *Id.* at 330 (emphasis in original; citing *Barker v. Wingo*, 407 U.S. 514, 528–29 (1972) and *Johnson v. Zerbst*, 304 U.S. 458, 464–65 (1938)).

[11] The Court reached this conclusion relying on the Supreme Court's rulings in *Ricketts, Scott,* and *Mezzanatto, Id.* at 1546, all discussed *supra* pp. 7–8.

ther held that "the fact that Cordoba was not specifically advised by counsel of his double jeopardy rights at the time he entered the plea agreement does not *per se* defeat his waiver in this case." *Id.* at 1546 (citing *United States v. Broce*, 488 U.S. 563, 572–73 (1989)).

Cordoba is similar to Respondent's case in several respects. Like the Respondent, Cordoba pled guilty in a plea agreement in exchange for the dismissal of other counts. Cordoba expressly agreed in the plea agreement that his guilty plea to a criminal count did not bar any civil administrative forfeitures, and Respondent expressly agreed that his guilty plea to a criminal count did not bar or compromise any civil or administrative claim. Finally, there is no indication that either Cordoba, or Dominguez in this case, was aware that he might be waiving the double jeopardy objection by entering the plea agreement.

In light of the preceding cases, and the clear wording of Paragraph 17 of the Plea Agreement, I hold that Respondent waived the defense of double jeopardy.

VI. *Conclusion*

For the reasons expressed above, I grant Complainant's motion to strike the defense raised in Respondent's answer to the complaint based on the Double Jeopardy Clause, and consequently I deny Respondent's motion for summary decision on that defense.

ROBERT L. BARTON, JR.
Administrative Law Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

July 2, 1996

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324c Proceeding
	)	OCAHO Case No. 96C00027
PEDRO DOMINGUEZ, Respondent.	)	

ORDER CERTIFYING INTERLOCUTORY ORDER GRANTING COMPLAINANT'S MOTION TO STRIKE

On July 1, 1996 I issued an order granting Complainant's motion to strike Respondent's defense of double jeopardy and denying Respondent's motion for summary decision based on that same defense. Both in his written papers and during the oral argument held on June 25, 1996 Respondent requested that I certify any adverse ruling to the Chief Administrative Hearing Officer pursuant to 28 C.F.R. §68.53(d)(1)(i). During the conference Complainant indicated that it did not oppose such certification.

Section 68.53(d)(1)(i) provides in pertinent part that, within 5 days of the date of the interlocutory order, an Administrative Law Judge may certify the interlocutory order for review to the Chief Administrative Hearing Officer (CAHO) when the Judge determines that the order contains an important question of law or policy on which there is substantial ground for difference of opinion and where an immediate appeal will advance the ultimate termination of the proceeding or where subsequent review will be an inadequate remedy.

Respondent has urged me to certify to the CAHO any order granting Complainant's motion to strike the double jeopardy defense because it is a threshold issue that must be decided at the earliest

stage of the litigation so as not to unnecessarily subject Respondent to considerable expenditure of time and financial resources in order to defend himself in this civil penalty proceeding. Respondent has cited several U.S. Supreme Court decisions in support of his position that interlocutory appeal should be permitted when a double jeopardy claim is involved.

Normally I would be reluctant to certify an interlocutory order. However, after careful consideration, I believe that there are special circumstances which make interlocutory review particularly appropriate in this case. As the United States Supreme Court stated in *Abbate v. United States,* 359 U.S. 187, 198–99 (1959), the basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials, and that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same acts. *Accord, Green v. United States*, 355 US 184, 187 (1957). The Fifth Circuit court of appeals also has allowed interlocutory appeals when a double jeopardy defense has been involved. *See Tilley v. United States,* 18 F.3d 295 (5th Cir. 1994).

Applying the standards of Section 68.53(d)(1)(i), I find that the order granting the motion to strike involves an important question of law; i.e., the double jeopardy issue involves a fundamental constitutional right. Moreover, subsequent review will not provide an adequate remedy for Respondent if the defense is applicable because the protection against double jeopardy is supposed to preclude multiple prosecutions, not just multiple punishment. *United States v. Ursery*, Decision of the United States Supreme Court, 1996 WL 340815, at 4 (June 24, 1996) (double jeopardy clause serves the function of preventing both successive punishments and successive prosecutions).

While I believe that Respondent did waive any double jeopardy defense and that my ruling striking the defense is correct, obviously if that ruling is erroneous, and a double jeopardy defense is viable, subsequent appellate review will not be adequate because the subsequent review which occurs after a final decision is rendered would not protect Respondent from the burden of defending himself in a second prosecution. Thus, while it appears that Respondent did waive the defense, and while there is some doubt in my mind as to whether the requirement in Section 68.53(d)(1)(i) that there be a substantial ground for difference of opinion has been shown, after

due consideration I believe that there are compelling reasons for interlocutory review in this instance.

Therefore, pursuant to 28 C.F.R. §68.53(d)(1)(i), I am certifying my July 1, 1996 Order granting Complainant's motion to strike the defense of double jeopardy.

ROBERT L. BARTON, JR.
Administrative Law Judge

U.S. Department of Justice
Executive Office for Immigration Review
Office of the Chief Administrative Hearing Officer

Chief Administrative Hearing Officer

5107 Leesburg Pike, Suite 2519
Falls Church, Virginia 22041

July 19, 1996

NOTIFICATION TO: Distribution List

SUBJECT: Notice by the Chief Administrative Hearing Officer that Administrative Law Judge's Order Granting Complainant's Motion to strike Respondent's Double Jeopardy Defense of July 1, 1996, Will be Deemed Adopted

On April 22, 1996, the Immigration and Naturalization Service, hereinafter the Complainant, filed a motion with the Administrative Law Judge entitled Motion to Strike Respondent's Affirmative Defenses. On July 1, 1996, the Administrative Law Judge entered an order entitled Order Granting Complainant's Motion to Strike Respondent's Double Jeopardy Defense. On July 2, 1996, the Administrative Law Judge, in response to a request by Respondent, submitted an order entitled Order Certifying Interlocutory Order Granting Complainant's Motion to Strike of July 1, 1996, to the Chief Administrative Hearing Officer, pursuant to 28 C.F.R. §68.53(d)(1)(i).

The Complainant and Respondent have each filed briefs with this office regarding the Administrative Law Judge's interlocutory order. This Notice is to advise that I have chosen not to modify or vacate the said interlocutory order. Therefore, pursuant to 28 C.F.R. §68.53(d), the Administrative Law Judge's July 1, 1996 Order will be deemed adopted 30 days from the date of entry by the Administrative Law Judge.

JACK E. PERKINS
Chief Administrative Hearing Officer