IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

CASE NO: EP-07-CR-87-KC

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

LUIS POSADA CARRILES,

Defendant.

DEFENDANT'S RESPONSE TO GOVERNMENT'S MOTION IN LIMINE REGARDING DEFENDANT'S RELATIONSHIP WITH THE CENTRAL INTELLIGENCE AGENCY

Defendant, Luis Posada Carriles, through undersigned counsel, responds to the Government's Motion in Limine Regarding Defendant's Relationship with the Central Intelligence Agency (Doc. 292) as follows:

Relevance of CIA Relationship to Defense

The Defendant's prior relationship with the CIA is relevant and admissible to establish the Defendant's state of mind at the time of the offenses charged in Counts 3, 4, 10 and 11, because during the Defendant's relationship with the CIA, the Defendant used several passports and identifications with different names from different countries. Such evidence is relevant and admissible to show the Defendant's lack of *mens rea* for the offenses charged due to confusion, mistake

and faulty memory regarding his failure to mention one of the many names he did provide to the immigration authorities.

The unclassified evidence provided in discovery reflects that the Defendant did disclose his various names and identifications he used with the CIA. For the jury to hear the Government's accusation that the Defendant failed to disclose the one name and passport charged in Counts 4, 10 and 11, without knowing that the Defendant provided two other names he had routinely used, the reason why he used them, and that his use of those names were with the blessing and at the behest of the CIA, would improperly infer that the Defendant fraudulently and illegally used those names without the U.S. Government's knowledge or consent. Alternatively, if the jury is not apprised that the Defendant disclosed other names and identifications, the Defendant will not be able to provide the jury evidence that his failure to mention one was the result of confusion, a faulty memory or mistake. In addition, the Defendant's relationship with the CIA and activities in Cuba, Venezuela and Central American (Iran-Contra affair) establish why the Defendant was not removable to Cuba or Venezuela and is relevant to his answers in almost all the taped interviews that the Government seeks to introduce.

The Government's assertion such evidence is prohibited because he has not filed a CIPA notice or a notice of a "public authority" defense is misplaced. A defendant is not required to file a CIPA notice where information is not classified

or a notice of a public authority defense any time evidence,[1] such as other names legally used while in an undercover capacity, is necessary for the jury to determine the *mens rea* at the time of the offenses, or as here, whether the Defendant was confused or suffering from faulty memory – as long as the Defendant does not argue before the jury that the Government authorized the charged activities. The Government has not provided the Defendant any notice that any of the evidence he has requested is classified, and has consistently asserted that the evidence requested is not classified. See note 1.

Memorandum of Law

In *United States v. Libby*, 429 F.Supp. 1 (D.D.C. 2006), former White House staff member, I. Lewis Libby, presented a similar lack of *mens rea* defense, which was coined as the "preoccupation defense," to perjury, false statement and

[1] Before the filing of the pretrial discovery motions commenced, defense counsel provided the Government with a list of items that the Defendant was requesting as Brady evidence, including information and evidence regarding his CIA Relationship. See, Specific Brady Request at Doc. 185, p. 3, and pp. 13-14 at Item G(1) to G(14). The Government has consistently denied the Defendant's access to the documents requested, even though the requests clearly reflect that the nature of the information sought included the government:

- Providing or assisting the Defendant in obtaining identification, including passports or visas, bearing aliases or false names for the Defendant to use for "official" and "unofficial" reasons and/or knowledge, acquiescence, or complicity of Government in those activities, (Item G(8));
- Involvement, knowledge, acquiescence and complicity in sabotage or bombings in Cuba; (Item G(3)); and
- Training, instructions, memos, or other documents reflecting orders to the Defendant to maintain secrecy and not disclose his relationship or information regarding his activities on behalf of the U.S. Government or any of its Agencies. (Item G(7)).

obstruction charges based upon his failure to recall his disclosure of Valerie Plame Wilson's affiliation with the CIA to a reporter when federal agents questioned him. In considering Libby's request for discovery of CIA materials to support his defense, the trial court rejected the government's argument that the evidence he sought in discovery was not relevant or material to his defense. The court explained that because the charges required the government to prove that the defendant acted with the specific intent, the defendant could defeat the charges by demonstrating that the "alleged misstatements were not made intentionally, but were merely the result of confusion, mistake, faulty memory, or another innocent reason." *Libby*, 429 F.Supp.2d at 12, *citing United States v. Dunnigan*, 507 U.S. 87, 95, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993) (noting that to defeat a perjury charge a defendant can establish that he gave "inaccurate testimony due to confusion, mistake, or faulty memory"); *United States v. Montague*, 202 F.3d 261, 2000 WL 14169 (4th Cir.2000) (observing that if a false statement was the product of mistake, evidence of intent would be lacking); *United States v. Baker,* 626 F.2d 512, 516 (5th Cir.1980).

None of the offenses charged in this indictment are strict liability offenses.[2] At a minimum, each requires the Government to prove that the Defendant acted

[2] In *United States v. Pasillas-Gaytan,* 192 F.3d 864 (9th Cir. 1999), the Ninth Circuit rejected the argument that merely intentionally applying for naturalization is sufficient

knowingly, and not as a result of confusion, mistake or faulty memory. See Counts 1 through 3 wherein the Defendant is charged acting willfully and Counts 4 through 11 where the Defendant is charged knowingly making various false statements. Thus, evidence that shows that misstatements were not made "intentionally, but were merely the result of confusion, mistake, faulty memory, or another innocent reason," are relevant.

Further, the Government's concern that the Defendant's prior CIA relationship would "impermissibly divert the jury's attention away from the basic charges in the indictment" is misplaced. As noted above, the evidence of the Defendant's legal use of other names and forms of identification is essential to show the jury that the Defendant did disclose other names and that his failure to disclose an additional name was the result of confusion, mistake or faulty memory. Without such evidence, the Defendant would not be able to present a complete defense because he could not demonstrate the reasons why he was confused, mistaken or simply could not remember certain facts in the context of the events of his life.

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to satisfy the knowing requirement under Title 18 U.S.C. § 1425. The Court explained that such an approach would essentially impose strict liability upon defendants who did not understand the documents they were signing, and those who apply for citizenship when not eligible because of failure to meet some requirement. *Id.* at 867. Instead, the Ninth Circuit held that "liability under [section] 1425 requires proof that [the defendant] either knew he was not eligible for naturalization ... or knowingly [made misrepresentations] on his application or interview." *Id.* at 868.

Additionally, the unclassified activities the Defendant conducted in Cuba under the direction, supervision or acquiescence of the CIA are essential for the jury to evaluate the Cuba's bias against the Defendant and motives to fabricate evidence and witnesses against him. The weight and credibility of the evidence and witnesses is the exclusive province of the jury, and exclusion of evidence that assists the trier of fact in determining same would deny the Defendant this constitutional right to a fair trial. Further, in the context of the allegations charged in Counts 1 through 3 in which bombings and international terrorism are alleged, the Defendant's prior relationship with the CIA will not divert the jury's attention, but rather will apprise the jury of the motives and biases of those providing evidence against the Defendant.

The cases the Government cites in support of its position that evidence of the existence of a CIA relationship are inapposite. For instance, in *United States v. Anderson,* 872 F.2d 1508 (11th Cir. 1989), the defendants were charged and convicted of conspiracies and eight substantive charges arising from an unauthorized removal and unlicensed transfer of a variety of military armaments and explosive devices from Fort Bragg, North Carolina. On appeal, the defendants argued that the trial court improperly excluded classified information showing that their actions were taken in reasonable good faith reliance on the apparent authority of a purported agent of the CIA. The defendants, members of the Special Forces

of the U.S. Army, conspired with other unknown military personnel to steal high explosives and other military supplies from Fort Bragg and to sell this material to undercover government agents and an informant posing as narcotics distributors and dealers in stolen property. The defendants also provided and offered to provide assistance to undercover agents in their purported activity as drug distributors. *Id.* at 1511.

Before trial, the defendants filed CIPA notices regarding their intent to argue that they were acting under the apparent authority of the informant, who claimed to be a CIA agent. However, the testimony failed to establish that the defendants had any reasonable belief that the informant had actual or apparent authority as a CIA Agent. Notably, no evidence demonstrated that the defendants ever requested or obtained any identification from the purported CIA Agent to support such a belief, or ever attempted to report or obtain the required authorization for a covert operation through the chain of command. *Id.* at 1512-14. As a result, the appellate court found that the district court properly excluded classified material of a prior authorized covert operation because the evidence did not support a showing that a valid apparent authority defense existed, and it was "irrelevant, confusing and misleading evidence." *Id.* 1514-18. Therefore, unlike the case at bar, the defendants' relationship with the CIA was irrelevant to establish a valid defense.

The remaining two cases that the Government cites to support its argument that the Defendant's CIA relationship would be excludable under Rule 403 of the Federal Rules of Evidence are similarly unavailing.

In *United States v. Rewald*, 889 F.2d 836, 853 (9th Cir. 1989), Rewald was convicted of mail fraud, interstate transportation of stolen securities or money, false statement to a federal officer, perjury, falsely representing accounts as being insured by the FDIC, securities fraud, failure to maintain books and records as required by the SEC, fraud by an investment advisor, income tax evasion, and subscribing to a false document. Rewald committed these crimes by swindling hundreds of investors in his investment firm, Bishop Baldwin, out of millions of dollars. His principal defense at trial was that the CIA purportedly told him to spend the investors' money extravagantly so as to cultivate relationships with foreign potentates and wealthy businessmen who would be useful intelligence sources. *Id.* at 838-39.

Prior to trial, Rewald filed an affidavit outlining his relationship with the CIA, claiming to be a covert CIA agent. He stated that the Chief of the CIA Domestic Collection Division's (DCD) Honolulu Office, instructed him and another individual to set up the investment firm for the CIA's benefit, and provided him with fake university degrees in business administration and law. His mission was to cultivate social and business contacts with wealthy and well-placed

businessmen and government officials. Rewald also accused the CIA of using the investment firm to transfer funds to covert foreign intelligence operations, and to facilitate arms sales to several foreign countries. *Id.* at 840.

The evidence at trial showed that Rewald had offered his assistance to the CIA and was eventually requested to open company providing light cover, known as "backstopping" in the intelligence community. The trial court permitted Rewald to admit extensive evidence of his relationship with the CIA, from his activities in the mid-1960s "as an infiltrator of student organizations at the University" and with his initial contact agents in 1978. *Id*. at 849. The court also permitted Rewald to admit significant evidence regarding the approved formation of fictitious companies at the CIA behest, all evidence relating to Rewald's CIA reimbursed expenses incurred in maintaining a backstop, the relationship of various CIA agents to those companies, accounts opened at the CIA's request, and other detailed evidence regarding the CIA's involvement with Rewald's investment companies. *Id.* 850-51. However, the trial court refused to admit the details of specific intelligence covert daily activities. Rewald argued that these reports were essential to defeat the CIA's claim that Rewald only provided incidental cover for unrelated CIA covert activities. But the district court concluded that because so many of the entries on the activity reports made reference to specific covert activities, their introduction would confuse the issues and mislead the jury, and that

because the government agent would be available to testify at trial, if a dispute arose over the frequency of Rewald's contacts with the agent, he would permitted to use the detailed activity reports while examining the agent.

On appeal, Rewald argued that the specific details in the documents excluded would have shown that he was a bona fide CIA agent. However, the Ninth Circuit found that "the ultimate anchor of Rewald's defense is not that he was a CIA agent, but that the CIA ordered him to spend investor money. Thus, evidence of Rewald's specific intelligence activities is twice removed from his defense that he lacked specific intent to defraud the investors." *Id.* at 853. The Court noted that the district court permitted Rewald to introduce all evidence having any tendency to prove that the CIA was aware of the expenditure of investor funds for CIA purposes. *Id.* at 854. Accordingly, the court upheld the trial court's exclusion of the evidence of Rewald's specific intelligence activities, because it "did not prove that the CIA had instructed Rewald to spend … investor money to cultivate foreign intelligence contacts," "considerably delayed an already lengthy trial," and " turned the jury's attention away from the issues of Rewald's misrepresentations and the CIA's alleged instruction to him to pilfer investor funds, to events transpiring many hundreds of miles away with little or no connection to this case." *Id.* at 853.

In contrast, in this case the Government seeks to exclude *all* references of the Defendant's CIA relationship from the jury – including from his work against the Castro regime commencing in the 1960s through his anti-communist activities in Venezuela and Central America. Such evidence is the essential for the Defendant to present his defense by demonstrating that he did not knowingly commit the offenses charged in Counts 4 through 11, and challenging the reliability, credibility and weight that should be given to the Government's witnesses and evidence through a showing of the long-standing biases, motives and lack of authenticity of the evidence and witnesses produced. Exclusion of this evidence would indeed deny the Defendant a fair trial, and permit the Government to admit evidence without providing the jury the facts necessary to perform its task.

United States v. Wilson, 586 F. Supp. 1011 (S.D.N.Y. 1983), similarly does not require exclusion of the Defendant's unclassified information of his CIA relationship. In *Wilson,* the defendant was convicted of attempted murder of federal prosecutors, criminal solicitation, obstruction of justice, and tampering with and retaliating against witnesses. Before his trial, the defendant, a former CIA agent, sought to introduce many details of activities during his service with the CIA under CIPA. Wilson argued that the details of his work for American intelligence "would tend to negate that he had the required intent to commit the

crimes charged or a motive to do so." *Id.* at 1014. The trial court found such information regarding details of the defendant's service in the CIA irrelevant and inadmissible with respect to the issues of intent and motivation arising under the charges in the indictment.

In contrast, the Defendant's CIA relationship, stemming from his work against the Castro regime through his anti-communist activities in Venezuela and Central America, are relevant and admissible to his defense, and will not distract the jury. Rather, it will assist the jury in performing its critical fact finding task.

WHEREFORE, the Defendant prays that this Court denies the Government's Motion in Limine Regarding Defendant's Relationship with the Central Intelligence Agency.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 28st day of January 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send the following individuals electronic notification thereof, and have sent a copy to the following via e-mail:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: None.

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