UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
El Paso Division

UNITED STATES OF AMERICA	)	
	)	Case N. EP-07-CR-87
v.	)	
	)	The Honorable Kathleen Cardone
LUIS POSADA CARRILES	)	

UNITED STATES MOTION FOR RECONSIDERATION OF ADMISSIBILITY OF STATEMENTS MADE BY COCONSPIRATORS IN FURTHERANCE OF A CONSPIRACY

The United States of America, by and through Michael J. Mullaney, Acting U.S. Attorney, T. J. Reardon III, Jerome J. Teresinski, and Bridget Behling, Trial Attorneys, respectfully moves the Court to reconsider its January 24, 2011 ruling to exclude testimony by a United States witness regarding statements made by coconspirators in furtherance of the March 2005 conspiracy to smuggle the defendant into the United States.

The defendant is charged in this case with counts of Perjury, Obstruction of Proceedings Before Departments and Agencies, Naturalization Fraud, and False Statements in a Naturalization Proceeding. Certain allegations in the Superseding Indictment[1] require the United States to prove beyond a reasonable doubt that in 2005, a group of individuals sailed aboard the "Santrina" vessel in order to rendezvous with the defendant in Isla Mujeres, Mexico and transport him back to Miami, Florida. The testimony of Mr. Gilberto Abascal clearly establishes that the individuals who sailed on the Santrina in March 2005 did conspire to sail to Mexico and smuggle the defendant back into the United States. As such, any statement exchanged between

[1] Specifically, Counts 4-8 pertain to the defendant's alleged travel aboard the Santrina and his journey from Isla Mujeres to Miami.

the individuals aboard the boat in furtherance of that plan is admissible as nonhearsay evidence in this case.

Rule 801(d)(2)(E) of the Federal Rules of Evidence provides that a statement is not hearsay if it is made "by a coconspirator of a party during the course and in furtherance of the conspiracy." If the "preliminary facts" as to the existence of a conspiracy are in dispute, the offering party must prove by a preponderance of the evidence that a conspiracy did, in fact, exist. *United States v. Triplett*, 922 F.2d 1174, 1181 (5th Cir. 1991) (citing *Bourjaily v. United States*, 483 U.S. 171, 176 (1987)) (finding that a prima facie case of conspiracy to commit arson was established where a coconspirator admitted to having spent all evening with another coconspirator on the night the crime occurred, admitted that the other coconspirator had bought chemicals to start the fire, and admitted to taking jewelry and attempting, along with the other coconspirator, to trade it for drugs after the fire had occurred).

Although the party offering the coconspirator's statement must show a conspiracy existed, "[t]here is no requirement that the defendant against whom the coconspirator's statements are being offered be charged in a conspiracy count." *United States v. Holder*, 652 F.2d 449, 450 (5th Cir. 1981) (allowing recording of a phone call between undercover agent with the Drug Enforcement Agency and a witness in the case to be admitted because the recording contained statements about selecting a time and location for an illegal hashish sale to occur). Thus, "statements by a non-testifying coconspirator are admissible against the defendant if 'there is independent evidence of a concert of action,' in which the defendant was a participant. *See United States v. Dawson*, 576 F.2d 656, 658 (5th Cir. 1978) (citing *Park v. Huff*, 506 F.2d 849, 859 (5th Cir.), *cert. denied*, 423 U.S. 824 (1975)) (in trial where the defendant was charged only

with aiding and abetting a bank robbery, statements by coconspirators that the they agreed to compensate the defendant for his help with the robbery were properly admitted).

Moreover, the Fifth Circuit has held that a statement by one coconspirator to another that he would "get to her" if she testified truthfully about the crime they had committed together was admissible as a coconspirator statement. *Triplett*, 922 F.2d at 1181 (noting there was sufficient evidence to show the statement was made "in furtherance" of the conspiracy because it was made "to avoid apprehension and, thereby, avoid punishment").

In the case at bar, the United States has already admitted evidence establishing that a conspiracy existed among the five individuals who had sailed from Miami, Florida to Isla Mujeres, Mexico, to rendezvous with the defendant and bring him back to Miami. The evidence already admitted in this matter consists of the testimony of Mr. Gilberto Abascal (and related exhibits), who was aboard the vessel with the other individuals. As the case in chief continues, the United States will call witnesses who will provide additional proof that this conspiracy existed, including: (1) an individual who did not sail to Isla Mujeres aboard the Santrina in March 2005 but whose passport was taken on the voyage so that the defendant could use it during the trip if necessary; and (2) multiple agents from the Department of Homeland Security who will testify about documents obtained during a search warrant, as well as a Grand Jury investigation, which indicate that Santiago Alvarez planned the trip to Isla Mujeres in order to rendezvous with the defendant and bring him back to Miami.

Several statements made in furtherance of the conspiracy and witnessed by Mr. Abascal while he was aboard the Santrina in March 2005 are admissible under both Rule 801(d)(2)(E) and Fifth Circuit precedent. These statements include: (1) the announcement by Santiago Alvarez to his Santrina crew members that the real purpose of the trip to Isla Mujeres was to

rendevous with the defendant in Mexico and bring him back to Miami; (2) the admonition by Santiago Alvarez during the Santrina's voyage back to Miami that Mr. Abascal and his other shipmates, including the defendant, should remain quiet about the smuggling of the defendant; and (3) the statement by Santiago Alvarez to his shipmates that the Santrina would stop in the Bahamas on the way back to Miami in order to leave a smaller boat there. Under Rule 801(d)(2)(E) of the Federal Rules of Evidence and Fifth Circuit authority, these and other statements made during the course of the voyage are admissible as evidence. They provide probative evidence relating to all those Counts which involve the voyage of the Santrina (see note 1, *supra*). This evidence demonstrates that the group of individuals aboard the vessel were working jointly both to execute and cover up the illegal plan which they engaged to bring the defendant into the United States.

WHEREFORE, the United States respectfully requests that the Court reconsider its ruling and enter an order admitting testimony by a United States witness regarding statements made by coconspirators in furtherance of the March 2005 conspiracy to smuggle the defendant into the United States.

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 24th day of January, 2011, I caused the foregoing to be filed with the Clerk of Court, and have sent a copy of the following via U.S. Mail and e-mail to:

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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.

/s/ Bridget Behling
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Trial Attorney

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ORDER

On this day, the Court considered the United States Motion for Reconsideration of Admissibility of Coconspirator Statements Made in Furtherance of a Conspiracy, filed January 24, 2011. Upon due consideration, it is the opinion of this Court that the Motion should be **GRANTED**.

SO ORDERED.

Signed this ___ day of _____, 2011.

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KATHLEEN CARDONE
U.S. District Judge