

**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 MEMORANDUM AND REPLY TO GOVERNMENT’S
RESPONSE TO DEFENDANT NOTICE OF
POTENTIAL RULE 404(b) EVIDENCE**

The Defendant, Luis Posada Carriles, through undersigned counsel, replies to the Government’s Response to the Defendant’s Notice of Potential Rule 404(b) evidence, as follows:

As noted in the Defendant’s Notice, the type of evidence that the Defendant seeks to introduce is classic impeachment evidence. More specifically, the evidence is admissible under Rule 406 as well as potential 404(b), on the following six grounds: (1) The evidence demonstrates the habit or routine of the Government of Cuba to fabricate evidence; (2) The evidence demonstrates the habit and routine of the Government of Cuba to influence the testimony of witnesses through unfair trials and violent acts; (3) The evidence demonstrates that the documentary evidence from the Government of Cuba is unreliable and inauthentic under Rule

902; (4) The evidence demonstrates the “motive, opportunity, intent, preparation and plan” of individual witnesses from various departments under the control of the Government of Cuba to fabricate evidence and create false documents as dictated by the Cuban communist regime; (5) The evidence demonstrates that the United States recognized that evidence from the Government of Cuba is unreliable and fabricated, that the Cuban judicial system unfairly convicts individuals with false and fabricated evidence and coerced testimony; and (6) The Government of Cuba, through propaganda and official statements, as a habit and routine, disseminates false information and assertions both inside and outside Cuba. Each of these grounds are briefly discussed in turn below.

Habit or Routine of an Individual or Organization

Rule 406 of the Federal Rules of Evidence provides:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

The Fifth Circuit has addressed the application of Rule 406 to the routine practice of an organization in *Mobil Exploration and Producing U.S., Inc., v. Cajun Construction Services, Inc.*, 45 F.3d 96 (5th Cir. 1995), where it held that the trial court improperly excluded evidence of an organization’s routine practice

where direct evidence of that practice in the that case was unavailable. The evidence improperly excluded consisted of a supplier's practice of short-loading the orders of others in order to show that the deliveries to Mobil were short-loaded. Citing a long line of authority, the Fifth Circuit stated that "evidence of routine practice is highly probative, and persuasive." *Id.* at 99.¹ The Court further noted that in order to show a Rule 406 inference of the routine practice of an organization, the proponent must show a sufficient number of specific instances of conduct to support that inference. *Mobil* at 99, citing *Reyes*, 589 F.2d at 795 ("Although a precise formula cannot be proposed for determining when the behavior may become so consistent as to rise to the level of habit, "adequacy of sampling and uniformity of response" are controlling considerations." (quoting Fed.R.Evid 406 adv. Comm. notes)).

Here the defense has proffered that it will produce evidence of over fifty years of the routine practice of the Cuban Regime to fabricate evidence, coerce testimony and disseminate false information within the Cuban State, in this

¹ *Reyes v. Missouri Pac. R. Co.*, 589 F.2d 791, 794 (5th Cir.1979) and *Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519, 1524 (11th Cir.1985). See also *Jones v. Southern Pac. R.*, 962 F.2d 447, 449 (5th Cir.1992) ("Habit evidence is superior to character evidence because the uniformity of one's response to habit is far greater than the consistency with which one's conduct conforms to character.").

Country in the media and Courts, as well as internationally.² The fact that the underlying records may be authentic and accurate copies of the original documents from the Cuban State under a Rule 902 analysis³ does not preclude a challenge to the relevancy or reliability of the records. See *United States v. Southard*, 700 F.2d 1, 23 (1st Cir. 1983)(“Self-authentication merely eliminates the requirement of testimony by a public official that a document is authentic. It does not eliminate the requirement of relevancy”).

Evidence of Motive, Opportunity, Intent, Preparation or Plan

Similarly, Rule 404(b) permits the introduction of evidence to show that an individual had the motive, opportunity, intent, preparation or plan to do a particular act. The fact that the proffered evidence is directed more than one individual in the

² See also, Amnesty International’s 2008 *Submission to the UN Universal Periodic Review on Cuba; Restrictions on Freedom of Expression in Cuba*, (Amnesty International Publications 2010); and December 3, 2010 Press Statement by Philip J. Crowley, United States Bureau of Public Affairs, *One Year Continued Incarceration of Alan Gross*.

³ Rule 902(3) permits this Court to admit foreign public documents in evidence “if reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the official documents.” The defense submits that due to the lack of diplomatic relations between the United States and Cuba, and the refusal of the Cuban State to grant defense counsel an opportunity to examine original evidence in Cuba, that the documents from the Cuban State are not self-authenticating.

Government of Cuba does not render Rule 404(b) evidence inadmissible.⁴ Moreover, in cases where the defendant challenges the reliability of evidence admitted to prove charges against him, Rule 404(b) permits the admission of evidence to show that the underlying testimony or evidence is false or fabricated. Here, the Defendant seeks to admit evidence showing that the underlying motive, opportunity and plan of the witnesses from the Cuban State to falsely provide testimony and evidence identifying Luis Posada Carriles as having some involvement in the Havana bombings. The exclusion of evidence to show that the witnesses and officials producing the evidence have fabricated or falsified the evidence in other matters will deprive the defendant his right to confrontation and a fair trial. See *Holt v. United States*, 342 F.2d 163, 164-166 (5th Cir. 1965)(conviction reversed where trial court excluded “reverse 404(b)” evidence admissible to show misidentification), *United States v. McClure*, 546 F.2d. 670, 672-73 (5th Cir. 1990)(held it was reversible error for trial court to exclude evidence of systematic campaign of law enforcement officer to threaten and coerce individuals) and *United States v. Stevens*, 935 F.2d 1380, 1401-2 (3rd Cir. 1981)(reverse 404(b) evidence admissible to show that victim of similar crime did

⁴ No reported case has held that the fact that more than one individual participated in a systematic campaign to fabricate or falsify testimony or evidence, or did it as the result of threats or coercion of another, renders the evidence inadmissible.

not identify defendant). Like with all other types of evidence, the reliability and weight to be accorded physical evidence or testimony of an individual is an issue for the jury, and the exclusion of evidence show the unreliability thereof, or the motive, opportunity, intent, preparation or plan of the individuals, under the direction and systematic coercion and threats of the Cuban State, to fabricate and falsify evidence, would result in reversible error. *See Holt* at 166 (evidence admissible sufficient to permit the jury to draw an inference that defendant did not commit the offense charged).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of January 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system:

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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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