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 BRIEF ON MATERIALITY AS AN ELEMENT TO THE NATURALIZATION CHARGES IN THE INDICTMENT

Defendant, Luis Posada Carriles, through undersigned counsel, hereby files this brief in response to the Court's Order (ECF No. 516) of November 8, 2010 as follows:

I. Materiality is an Element of 18 USC §1425(a) - Naturalization Fraud:

Several courts of appeal have addressed the issue of whether 18 U.S.C. § 1425(a) requires the Government to prove that an alleged false statement is material to naturalization decision, and have held that materiality is an element. The most recent decision was issued by the Seventh Circuit in *United States v. Latchin*, 554 F.3d 709 (7th Cir. 2009). In *Latchin,* the defendant was charged with one count of procuring citizenship illegally by making false statements in violation of 18 U.S.C. § 1425(a) and acting as an unregistered foreign agent in violation of 18 U.S.C. § 951(a). Like the case at bar, the indictment alleged that Latchin

falsely answered questions on his written application as well as during his naturalization interview. *Id.* at 711-712. The Seventh Circuit noted in its opinion that the Government and the defense agreed "that a false statement has to be "material" to sustain a conviction" and that "a trivial falsehood will not." However, the parties disagreed over the definition of materiality and other elements of the offense. *Id.* at 712. After noting that the Seventh Circuit had not previously defined the elements necessary for Section 1425(a) conviction, the court stated:

> The pivotal decision in all this is *Kungys v. United States*, 485 U.S. 759, 108 S.Ct. 1537, 99 L.Ed.2d 839 (1988). *Kungys* holds that a statement in an application for citizenship is material if it has a "natural tendency to influence" the naturalization decision. *Id.* at 771, 108 S.Ct. 1537. The Court eschewed any strict formula hinging on probabilities, observing that it "has never been the test of materiality that the misrepresentation or concealment would more likely than not have produced an erroneous decision, or even that it would more likely than not have triggered an investigation." *Id.* Instead, a statement is material as long as it is germane to the decisional process, as long as it has a "natural tendency to influence" a reviewing officer's actions.

Id. at 713.

In its application of *Kungys* to Section 1425, the Seventh Circuit acknowledged that *Kungys* dealt with a different statute, the civil statute applied in denaturalization proceedings, 8 U.S.C. § 1451(a). However, the court and the parties agreed that the distinction in the statutes is trivial, because both the civil

and criminal statutes require a material misrepresentation and procurement of citizenship. *Id.* at n. 3.

Before *Latchin,* the Ninth Circuit similarly held that Section 1425 includes a materiality element in *United States v. Puerta*, 982 F.2d 1297 (9 Cir. 1992). In *Puerta,* the indictment charged the defendant for false statements he made on his naturalization application and to an immigration examiner. The government agreed that § 1425(a) implies a materiality requirement similar to the one used in the denaturalization context. *Id.* at 1301. As in *Latchin,* the Ninth Circuit followed the Supreme Court's decision in *Kungys,* holding that materiality is an element of a charge alleging a violation of Section 1425(a). See also *United States v. Alferahin,* 433 F.3d 1148 (9th Cir. 2006).

Based upon the foregoing authorities, materiality is an essential element Count IV.

II. Materiality is Not an Element of 18 U.S.C. § 1015(a) – False Statement in a Naturalization Proceeding:

Aside from two early decisions[1] analogizing a violation of Section 1015(a) with a perjury violation or relying upon earlier versions of the statute, courts have uniformly held that materiality is not an element of 18 U.S.C. § 1015(a). See, *United States v. Youssef*, 547 F.3d 1090 (9th Cir. 2008); *United States v. Terrazas*,

[1] *United States v. Bressi,* 208 F. 369, 370-71 (WD Wash. 1913); *United States v. Laut,* 17 F.R.D. 31, 34 (S.D.N.Y. 1955).

570 F.Supp.2d 550 (S.D.N.Y. 2008); *United States v. Sadig*, 352 F.Supp.2d 634 (W.D.N.C. 2005); and *United States v. Abuagla*, 215 F.Supp.2d 684 (E.D. Va. 2002). Based upon the foregoing, materiality is not an element of Counts 5 through 11.

III. *Gaudin* Requires Materiality to be Decided by the Jury:

In *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), the Supreme Court addressed whether the element of materiality in an offense must be determined by the jury rather than the trial court. Although the Court in *Gaudin* addressed the issue in the context of a perjury statute, 18 U.S.C. § 1001, the Court made a clear that the Fifth and Sixth Amendments require conviction by a jury of all elements of a crime, and rejected cases that embraced the "historical tradition" of the trial court deciding the element of materiality. *Gaudin,* 515 U.S. at 515-520, 115 S.Ct. at 2316-2319.

The Fifth Circuit's opinion does not alter the application of *Gaudin* for three reasons: First, nothing in the Fifth Circuit's opinion addressed or determined that in the context of a Section 1425 charge that the materiality of the allegedly false answers is not an element of the offense. No party raised the elements of a Section 1425 as an issue, nor did the Court discuss or redefine the elements of the offense. *United States v. Posada,* 541 F.3d 344, 355-361 (5th Cir. 2008).

Second, to the extent that the word "material" is found in the opinion, it only relates to the issue of whether "the *government* made "material misrepresentations" about the nature of the investigation or inquiry," not the Defendant. *Id.* at 355. (emphasis added).

Third, the Fifth Circuit made it clear that the issues of Posada's statements during the naturalization interview were jury issues. Albeit, the issues of the materiality under Section 1425 and a defendant's understanding of an ambiguous or uncertain questions are different, it is clear that the Fifth Circuit did not hold that it was the province of the trial court, not the jury, to decide the elements of the offenses charged in this case.

Accordingly, *Gaudin* requires the jury to decide the issue of materiality under Section 1425.

IV. The Fifth Circuit's Decision Does Not Preclude the Defendant from Presenting Evidence to Demonstrate Immateriality of the Statements Charged.

The Fifth Circuit's decision held that the evidence adduced was insufficient to warrant dismissal for a due process violation based upon *United States v. Tweel* 550 F.2d 297 (5th Cir.1977) and its progeny. However, the Court did not hold that evidence of the agency's "preliminary" decision or its position from the inception of Mr. Posada's immigration detention that he was statutorily ineligible for asylum or naturalization, were immaterial for the jury to consider at trial. In addition,

appellate decisions holding that the trial court erred in suppressing evidence or dismissing a case based upon facts that the trial court found indicated that the arrest, or in this case the interview, was pretextual, do not render those facts irrelevant to other issues at trial.

A statement is material during a naturalization interview if it has a "natural tendency to influence" the naturalization decision. *Kungys*, 485 U.S. at 771. As a result, the determination of which facts are material will vary from case to case based upon the information that the agency has in its possession at the time of the interview regarding an applicant's eligibility or lack thereof for citizenship. For instance, in *United States v. Puerta*, the defendant was charged with unlawful procurement of citizenship under 18 U.S.C. § 1425(a) and use of a false non-immigrant visa under 18 U.S.C. § 1546(a). During the naturalization interview and on his application, Puerta failed to provide other names he had used or information on other addresses he resided at. The Ninth Circuit found that those statements were not material because they did not have a natural tendency to influence the naturalization decision, because the answers to those questions would not have rendered him statutorily ineligible. Conversely, in the case at bar, the examiner had information before the interview that precluded Posada from obtaining citizenship, to-wit: his Panamanian conviction. Although the Fifth Circuit held that based upon the limited record before it, the agency had not yet

decided that foreign pardons had no effect upon that conviction, the broader record available at trial will show otherwise. Further, the Fifth Circuit's findings regarding the aspects of the interview that were unusual solely addressed whether the interview was pretextual; not whether the questions asked were material, or had a "natural tendency to influence" the naturalization decision. As a result, the Court's decision did not address or determine the admissibility of the facts that can demonstrate the materiality of the charged statements in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of November 2010, 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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