UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
El Paso Division

UNITED STATES OF AMERICA	)	
	)	Case No. EP-07-CR-87
v.	)	
	)	The Honorable Kathleen Cardone
LUIS POSADA CARRILES	)	

Government's Motion in Limine
Regarding Defendant's Relationship with Central Intelligence Agency

The United States of America, by and through Michael J. Mullaney, Acting U.S. Attorney, and John W. Van Lonkhuyzen and Paul Ahern, Trial Attorneys, respectfully moves this Court pursuant to Rule 16, Federal Rules of Criminal Procedure and Rules 103(c) 402, 403 of the Federal Rules of Evidence, to exclude all testimony, evidence, questioning and argument concerning defendant's relationship with the Central Intelligence Agency (the "CIA"), except as set forth on the attached Unclassified Summary of the CIA's Relationship with Luis Clemente Posada Carriles (bates # 1886). Defendant's relationship with the CIA ended over thirty years ago in 1976 (other than one contact in 1993 to issue a warning to Posada), and evidence, testimony, questioning and argument about that relationship, or the details thereof, is completely irrelevant to the charges here, which concern defendant's false statements in 2005-06 about his activities in 2004-05, and to any possible defenses to those charges. Moreover, defendant has failed to comply with the requirements of Section 5 of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. III, § 5, and so is precluded from disclosing any such classified information.

STATEMENT

1. In his pleadings and argument to this Court, defense counsel has argued to the effect that defendant had worked for the CIA for 30 years, and received from the CIA or used numerous false names and false passports in the course of that work: "the CIA previously provided Mr. Posada Carriles with 'false' passports," D.E. # 37, p. 14, "for 25 years after that incident [in 1976] the CIA and the Government of the United States used Mr. Posada Carriles," Transcript of detention hearing, April 3, 2007, p. 41.)[1] Regardless of whether those statements are factually accurate, and the government does not concede that they are, they raise the issue whether certain information defendant may have relating to such employment is classified, relevant to this case, and admissible for any purpose.

2. Defendant Luis Posada worked for the CIA as a paid asset for a period of time. An unclassified summary of the relationship between the Agency and defendant is attached to this motion (bates # 1886). That relationship ceased in 1976, over thirty years before these charges were brought. At that time, the defendant signed a Termination Secrecy Oath. A declassified copy of that document is attached as well (bates # 1887-88). Under the terms of that agreement, he agreed "never [to] divulge, publish, or reveal, by writing, word or conduct, or otherwise, any

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[1] In addition, defense counsel made several similar statements in their Response and Opposition to Government's Motion for an Emergency Stay of the District Court Order Granting Pretrial Release, 5th Cir. No. 07-50456, filed April 16, 2007. For example, defense counsel wrote that "Posada [w]as a covert CIA operative for 25 years, Posada use[d] ... passports under the auspices of the CIA with names of Franco Rodriguez and Ramon Medina," page 12. See also pp. 2, 3 & fn. 16. There is no dispute that, as Posada disclosed in his naturalization interviews, he used the names of Franco Rodriguez and Ramon Medina in the past. What is apparently in dispute – and is in no way relevant to this case – is how long defendant had some sort of relationship with the CIA, what that relationship was, and when it ended. Even if it had lasted for 25 years, as defense counsel asserts, it would have ended in the mid 1980s, two decades before the events underlying this case.

information relating to the national defense and security and particularly information of this nature relating to intelligence sources, methods, personnel, fiscal data, or security measures to anyone" (¶ 1).[2] This proceeding provides no occasion to disclose facts relating to that relationship in violation of the secrecy oath. Accordingly, we request that this Court enter an order prohibiting such disclosures, adverting to that relationship during argument or making inquiries during direct or cross-examination that are designed to or of a nature that would likely result in such disclosure.

ARGUMENT

a. Introduction

Federal Rule of Evidence 103(c) provides that, "[i]n jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the presence of the jury." As the Advisory Committee Note to that subsection explains, under this Rule, "[t]he judge can foreclose a particular line of testimony and counsel can protect his record without a series of questions before the jury, designed, at best, to waste time, and at worst 'to waft into the jury box' the very matter sought to be excluded."

In this case, the necessity of obtaining rulings in advance of trial excluding material relating to the defendant's prior relationship with the CIA is of an even more substantial dimension. First, such evidence may embrace classified information whose disclosure could adversely affect national security. Moreover, as several courts have recognized, the sensational nature of information relating to the CIA's covert activities possesses a particular capacity "to

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[2] Defendant further recognized that doing so could constitute violations of the espionage laws of the United States. Introduction & ¶ 6.

impermissibly divert the jury's attention away from the basic charges in the indictment" thereby making it subject to exclusion under Fed. R. 403 even if otherwise arguably relevant. United States v. Anderson, 872 F.2d 1508, 1519 (11th Cir. 1989); see United States v. Rewald, 889 F.2d 836, 853 (9th Cir. 1989) (approving exclusion under Fed. R. Evid. 403 of evidence that CIA instructed defendant to pilfer investor funds as "[t]hese developments would have turned the jury's attention away from the issues of [defendant's] misrepresentations" and would have "permitted the trial to degenerate into an unfocused presentation of facts and testimony that would confuse the issues and mislead the jury"); United States v. Wilson, 586 F. Supp. 1011, 1016 (S.D.N.Y. 1983) (noting that evidence relating to CIA covert activities "would divert th[e] attention [of the jury] from the basic issues in this case"), aff'd, United States v. Wilson, 750 F. 2d 7, 9 (2d Cir. 1984). Accordingly, for the reasons set out below we request that the court exclude references to such information before the opportunity to inject them into the trial, with similar likely consequences, arises.

b. The Classified Information Procedures Act Precludes Posada From Disclosing Classified Information Relating To His Activities as a CIA Informant.

In the first place, to the extent that information relating to the defendant's service as a paid CIA asset continues to be classified, it is not subject to disclosure except with prior notice under Section 5 of the Classified Information Procedures Act (hereafter "CIPA"), 18 U.S.C. App. 3, § 5. CIPA Section 5 requires that:

> when a defendant reasonably expects to disclose or cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant, the defendant shall, within the time specified by the court or, where no time is specified, within thirty days prior to trial, notify the attorney for the United States and the court in

writing. Such notice shall include a brief description of the classified information. As the court explained in United States v. Collins, 720 F.2d 1195, 1199 (11th Cir. 1983), "[t]he Section 5 notice is the central document in CIPA." Id.. This is because the notice requirement is the mechanism by which the government determines, in terms of the potential disclosure of classified information, the likely price of the prosecution, and the basis upon which it seeks to ameliorate that cost by challenging, under Section 6 of CIPA, the relevance and admissibility of such information. Id. at 1199-1200. Such notice is also necessary "to permit the government to choose an alternative course that minimizes the threat to national security." United States v. Badia, 827 F.2d 1458, 1465 (11th Cir. 1987) (citation omitted).[3]

Accordingly, "if [as in this case] the defendant fails to comply with the requirements, "the court may preclude disclosure of any classified information not made the subject of notification and may prohibit the examination by the defendant of any witness with respect to any such information." CIPA Section 5(b). Consequently, defendant's failure to notice his intention to disclose classified information relating to his previous employment relationship with the CIA in accordance with CIPA Section 5 forecloses him from doing so at trial.[4]

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[3] Further, should the defendant, without prior notice to the government, introduce classified information concerning his prior employment relationship with the CIA and such information proves to be inaccurate, the government would be hard pressed to rebut it at trial as it would likely require the further disclosure of classified information.

[4] To the extent any details of defendant's relationship with or activities for the CIA are not included in the attached unclassified summary of information relating to such employment or have not been otherwise previously declassified, those details remain classified. Classified information may not be disclosed by the defendant, and doing so could be a violation of the espionage laws of the United States or of the statutes, rules and regulations for handling classified information and his secrecy agreement. Defense counsel has been advised that should he or defendant intend or reasonably expect to disclose or to cause the disclosure of any information concerning defendant's relationship with the CIA, that doing so could be a violation

c. In Any Event, Information Relating To Posada's Prior Relationship With the CIA Is Irrelevant

Moreover, such information, whether it is classified, is not classified or has been declassified, it is excludable on relevancy grounds. Under Fed. R. Evid. 402, "[a]ll relevant evidence is admissible except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." The phrase, "relevant evidence" is defined by Fed. R. Evid. 401 to mean "evidence having any tendency to make the existence of a fact *that is of consequence to the determination of the action* more or less probable than it would be without the evidence." (emphasis added). And, even where relevant under this definition, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." Fed. R. Evid. 403. We can perceive of no reason why the defendant's prior relationship as a paid asset – which terminated over 30 years ago – may be "of consequence to the determination of" (Fed. R. Evid. 401) any matter that is germane to this litigation. And, even, if it possessed any theoretical relevance to such a matter, its potential for distracting the jury and confusing the issue would nonetheless warrant its exclusion under Fed. R. Evid. 403.

In the first place, the defendant is charged with naturalization fraud and false statements

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of the espionage laws or of the statutes, rules and regulations for handling classified information, and that if he does intend or reasonably expect to disclose or to cause the disclosure of such information, he is required to proceed under Section 5 of the Classified Information Procedures Act, 18 U.S.C. App. 3, § 5.

in immigration proceedings, in violation of 18 U.S.C. §§ 1425 and 1015, based on statements he made in 2005-2006. Those statements concerned his activities in 2004-05, activities not related to the CIA. They have no bearing whatsoever upon his relationship with or the activities of the CIA that were terminated more than 30 years ago. We therefore submit that defendant's relationship with the CIA in 1976 is irrelevant to them.

Nor do we perceive any defense to which such information may be germane. Some defendants have argued that a prior relationship with the CIA (such as the defendant apparently possessed) provides the predicate for an apparent authority defense, *i.e.*, that the defendant believed in good faith that, because that agency permitted him to engage in conduct that otherwise violated the law on one occasion, it was permissible for him to behave in the same manner on other occasions. See, e.g., United States v. Wilson, 732 F.2d 404, 407 (5th Cir. 1984); United States v. Wilson, 721 F.2d 967, 974 (4th Cir. 1983). Here, however, the defendant has failed to notice an intent to assert such a defense, based upon public authority, as required by Fed. R. Evid. 12.3(a)(1). The court may therefore exclude evidence relating to such a defense for that reason alone. See Fed. R. Evid. 12.3(c). In any event, however, as the defendant's relationship with the CIA terminated more than 30 years prior to his unlawful entry into the United States, he has no rational basis whatsoever to assert that he believed that the terminated relationship afforded him a *carte blanche* to violate the law during his naturalization proceedings.

Aside from this, the courts are now virtually in accord that a governmental authority defense must be predicated upon evidence that the governmental agency (or representative thereof) that sanctioned otherwise unlawful conduct possessed actual authority to do so. See, e.g., United States v. Fulcher, 250 F.3d 244, 254 (4th Cir. 2001); United States v. Archer, 52 F.3d 753,

755 (8th Cir. 1995); United States v. Burrows, 36 F.3d 875, 882 (9th Cir. 1994); United States v. Baptista-Rodriguez, 17 F.3d 1354, 1368 n. 18 (11th Cir. 1994); United States v. Anderson, 872 F.2d at 1515; United States v. Duggan, 743 F.2d 59, 83-84 (2d Cir. 1984); see also 7th Circuit Model Jury Instructions 6.07 (reliance on public authority). The defendant has never proffered evidence that, following his termination as a CIA asset, he was ever afforded authority to enter the United States illegally or to make false statements in his naturalization proceedings, and we are aware of none. Absent the proffer of evidence legally necessary to support the components of an affirmative defense a district court may preclude the presentation of that defense entirely. See United States v. Bailey, 444 U.S. 394, 416 (1980) ("[i]f as we here hold, an affirmative defense consists of several elements and testimony supporting one element is insufficient to sustain it even if believed, the trial court and jury need not be burdened with testimony supporting other elements of the defense").

Finally, the defendant may claim that the latitude he may once have possessed, via his relationship with the CIA, to employ false immigration documents for the purpose of entering or leaving the United States or other nations confused him into believing that, on the occasions alleged in the indictment, it was likewise permissible to do so. The scienter requirement for a violation of 18 U.S.C. § 1425(b) is that the defendant *knowingly* procured a document evidencing naturalization to which he is not entitled and, likewise, 18 U.S.C. § 1015(a) prohibits *knowingly* making any false statement under oath "in any . . . proceeding or matter . . . relating to naturalization, citizenship or registration of aliens[.]" Thus, all that the violations alleged in the indictment require, by way of *mens rea*, is knowledge that a representation made to procure an immigration document is false (18 U.S.C. § 1425(b)) or that a statement made in connection with

seeking naturalization is false (18 U.S.C. § 1015(a)). As the Supreme Court explained in Bryan v. United States, 524 U.S. 182, 192 (1998), "the term 'knowingly' does not necessarily have any reference to a culpable state of mind or to knowledge of the law. As Justice Jackson correctly observed, 'the knowledge requisite to a knowing violation of a statute is factual knowledge as distinguished from knowledge of the law." It is only when a statute requires that an offense have been committed "wilfully" that the question of appreciation of wrongfulness or bad purpose becomes germane. See id. at 191-92. It is therefore inconsequential whether the defendant may have believed that, due to his relationship with the CIA, which had terminated over 30 years prior to the commission of the offenses alleged in the indictment, it was permissible for him to have made the misrepresentations which are at their core.

CONCLUSION

WHEREFORE, the United States requests that the Court rule that the defense may not introduce any evidence concerning defendant's relationship with the CIA, or his activities on its behalf, nor pose any question, nor make any argument or reference concerning such at the trial of this matter.

Respectfully submitted,

MICHAEL J. MULLANEY
ACTING UNITED STATES ATTORNEY

/s/ *John W. Van Lonkhuyzen*
/s/ *Paul Ahern*

By: _____

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Certificate of Service

I hereby certify that, on April 27, 2007, I caused a copy of the foregoing pleading to be served upon Arturo V. Hernandez, counsel for Luis Posada Carriles, by electronic mail.

/s/ *John W. Van Lonkhuyzen*

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John W. VanLonkhuyzen

UNCLASSIFIED SUMMARY OF THE CIA'S RELATIONSHIP WITH LUIS CLEMENTE POSADA CARRILES

The Central Intelligence Agency's first contact with Luis Clemente Posada Carriles was in 1961, in connection with planning for the Bay of Pigs invasion. Posada was a paid asset of the CIA from 1965 to 1967 and again from 1968 to 1974. From 1974 to 1976, CIA had intermittent contact with Posada, primarily to resolve outstanding financial matters. During that same period, Posada occasionally provided unsolicited threat reporting, including information regarding a bombing threat against a June 1976 flight from Panama to Havana. That information was promptly disseminated by CIA to intelligence, law enforcement, and foreign policy agencies.

CIA had an additional contact with Posada in 1993 when CIA anonymously contacted him in Honduras by telephone to warn him about a threat to his life.

SECRET

TERMINATION SECRECY OATH

I, Luis Clemente Posada C., am about to terminate my association with the Organization. I realize that, by virtue of my duties with the Organization, I have been the recipient of information and intelligence which concerns the present and future security of our country. I am aware that the unauthorized disclosure of such information is prohibited by the espionage laws of our government which specifically requires the protection of intelligence sources and methods from unauthorized disclosure. Accordingly, I SOLEMNLY SWEAR, WITHOUT MENTAL RESERVATION OR PURPOSE OF EVASION, AND IN THE ABSENCE OF DURESS, AS FOLLOWS:

1. I will never divulge, publish, or reveal by writing, word, conduct, or otherwise, any information relating to the national defense and security and particularly information of this nature relating to intelligence sources, methods, personnel, fiscal data, or security measures to anyone, including, but not limited to, any future governmental or private employer, private citizen, or government employee or official without the express written consent of the Chief of the Organization or his authorized representative.

2. I have been invited to submit in writing any monetary claims I may have against the Organization or our government which may in any way necessitate the disclosure of information described herein. I have been advised that any such claims will receive full legal consideration. In the event, however, that I am not satisfied with the decisions of the Organization concerning any present or future claims I may submit, I will not take any other action to obtain satisfaction without prior written notice to the Organization, and then only in accordance with such legal and security advice as the Organization will promptly furnish me.

3. I do not have any documents or materials in my possession, classified or unclassified, which are the property of, or in custodial responsibility of the Organization, having come into my possession as a result of my duties with the Organization or otherwise.

4. During my exit processing and during my period of employment with the Organization I have been given an opportunity to report all information about the Organization, its personnel, and its operations which I consider should receive official cognizance. Hence, I am not aware of any information which it is my duty, in the national interest, to disclose to the Organization, nor am I aware of any violations or breaches of security which I have not officially reported, except as set forth on the reverse side of this sheet or on other attachments.

5. I have been advised that, in the event I am called upon by the properly constituted authorities to testify or provide information which I am pledged hereby not to disclose, I will notify the Organization immediately; I will also advise said authorities of my secrecy commitments to our government and will request that my right or need to testify be established before I am required to do so.

6. I am aware of the provisions and penalities of the espionage laws of our government and am fully aware that any violation on my part of certain matters sworn to by me under this oath may subject me to prosecution under the terms of these laws, and that violation of other portions of this oath are subject to appropriate action, including such dissemination of the violation as the circumstances warrant.

I have read and understand the contents of this oath and voluntarily affix my signature hereto with the full knowledge that this oath was executed for the mutual benefit of myself and our government, and that

SECRET

[redacted] RECORD COPY [redacted]

SECRET

it will be retained in the files of the Organization for its future use or for reference by me at any time in the future that I may be requested or ordered to testify or disclose any of the matters included within the scope of this oath.

IN WITNESS WHEREOF, I have set my hand and seal this 13th day of February 19 76.

(SEAL)

Signature

at [redacted]

Signature

Witnessed by me this 13th day of February, 1976

at [redacted]

SECRET

[redacted]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
El Paso Division

UNITED STATES OF AMERICA	)	
	)	Case No. EP-07-CR-87
v.	)	
	)	
LUIS POSADA CARRILES	)	

ORDER

The Court having considered the Government's Motion in Limine Concerning Defendant's Relationship with the Central Intelligence Agency, and having found good cause therefore, it is it hereby

ORDERED, that the Government's Motion in Limine Concerning Defendant's Relationship with the Central Intelligence Agency is GRANTED, and further

ORDERED, that all evidence of defendant's relationship with the Central Intelligence Agency, and his activities on behalf thereof, is excluded, except for the facts stated in the Unclassified Summary of the CIA's Relationship with Luis Clemente Posada Carriles (bates # 1886), and all disclosures, argument, questioning and other statements that are designed to or of a nature that would likely result in the disclosure of such evidence or information, are prohibited.

Dated this ____ day of April, 2007.

_____
The Honorable Kathleen Cardone
United States District Judge