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	)	

UNITED STATES' SUBMISSION TO THE COURT CONCERNING ISSUES RELATING TO MATERIALITY

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 submit the following response to the Court's order of November 8, 2010, ECF No. 516, directing the parties to address the question of whether materiality is an element of either 18 U.S.C. § 1425(a) or 18 U.S.C. § 1015(a); and if so whether materiality is a question of fact for the jury to resolve; and finally, whether materiality is properly measured by either an objective or a subjective standard.

I. Summary of Argument

While the United States concurs with the majority of the response submitted by the defendant regarding when materiality is an element of the relevant statutes, we strongly disagree with his suggestion that the questioner's subjective motive in posing a particular question is relevant to the issue of materiality. We do agree that Section 1015(a) contains no element of materiality. The Circuit law governing Section 1425 (a), however, construes that statute to require proof of materiality. While some conflicting authority on the question of materiality concerning Section 1425(a) does exist – and the Fifth Circuit has not addressed the matter – we believe that the most prudent course of action is for the Court to adhere to the decisions of the

two circuits which have construed Section 1425(a), and require that the United States prove materiality for those charges under Section 1425(a). Further, we agree that under *United States v. Gaudin*, 515 U.S. 506 (1995), the issue of whether a statement is material in a prosecution for violation of Section 1425(a) is a fact question for the jury to resolve and that, therefore, the defendant may present evidence to demonstrate that statements at issue were not material to the naturalization process. We part company, however, with the defendant's suggestion that the questioner's subjective motive in posing a particular question is relevant to the issue of materiality. We respectfully submit that under pertinent legal authority, the materiality standard governing Section 1425(a) is plainly an objective one that considers the operative effect of the statement on a reasonable immigration officer. Consequently, an immigration officer's subjective purpose in posing any particular question is irrelevant.

II. Legal Analysis

A. Materiality and 18 U.S.C. § 1015(a)

Section 1015(a) provides:

> [W]hoever knowingly makes any false statement under oath, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization, citizenship, or registry of aliens . . . shall be fined under this title of imprisoned by not more than five years or both.

In *United States v. Wells*, 519 U.S. 482 (1997), the Supreme Court considered whether 18 U.S.C. § 1014, which criminalizes "knowingly mak[ing] any false statement or report . . . for the purpose of influencing in any way the action of a Federal Deposit Insurance Corporation insured bank," requires that the false statement or report be material as an element of the offense. The *Wells* Court held that there was no materiality requirement in Section 1014 as the plain language did not include the word "material." To the contrary, Section 1014 covered "any false statement or report" and nowhere in the statute did it say "a material fact must be the subject of the false

statement or so much mention materiality." *Id.* at 490. As the Ninth Circuit pointed out in *United States v. Youssef*, 547 F.3d 1090, 1093-1094 (2008), the text of Section 1015(a) is practically identical to Section 1014. As in *Wells*, *supra*, Section 1015(a) does not include an express materiality requirement. Thus, "under the plain text of the statute, materiality of the false statement is not an element of Section 1015(a)." *Youssef*, 547 F.3d at 1094. The *Youssef C*ourt likewise determined that none of the terms in Section 1015(a) have a settled meaning at common law requiring proof of materiality and that, consequently, it would "not read a materiality requirement into the statute." *See United States v. Abuagla*, 336 F.3d 277, 278 (4th Cir. 2008) (noting that "[n]owhere does [the statute] further say that a material fact must be the subject of the false statement or so much as mention materiality"), *aff'g*. 215 F. Supp. 684, 686 (E.D. Va. 2002) (relying upon *Wells* and noting that the current Section 1015(a) likewise contains no materiality requirement); *United States v. Terrazas*, 570 F.Supp.2d 550, 553-554 (S.D.N.Y. 2008) (distinguishing Section 1015(a) from statutes that contain a materiality element or an implied materiality requirement based upon the well settled meaning of "fraud"). Although the Fifth Circuit has not construed Section 1015(a), these authorities lend highly persuasive support for the proposition that Section 1015(a) contains no materiality requirement.

B. Materiality and 18 U.S.C. § 1425(a)

Section 1425(a) makes subject to punishment:

> Whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or citizenship[.]

In *United States v. Alferahin*, 433 F.3d 1148 (9th Cir. 2006), the Court held that, in order to obtain a conviction under this Section, the government must prove that the false information provided by the defendant must, *inter alia*, have "a tendency to suggest that [the defendant] was qualified for naturalization." *Id*. at 1154-55 *citing* *United States v. Puerta*, 982 F.2d 1297, 1300-

01 (9th Cir. 1992). In this instance, that Court distinguished *Wells*, *supra*, observing that whereas the statute at issue in *Wells* merely prohibited false statements, Section 1425(a), prohibited the making of statements regarding citizenship "contrary to law" – a requirement that it construed to connote a requirement of materiality. *Accord United States v. Latchin*, 554 F.3d 709, 712-713 (7th Cir. 2009) (noting that "[b]oth sides agree that [under Section 1425(a)] a false statement has to be 'material' to sustain a conviction"). *But see United States v. Biheiri*, 293 F. Supp. 2d 656, 658-59 (E.D.Va. 2003) (refusing, in reliance upon *United States v. Abuaglia*, 336 F. 3d at 279, to ascribe a materiality requirement to the phrase "contrary to law" as employed in Section 1425(a)); *United States v. Rogers*, 898 F.Supp. 219 (S.D.N.Y. 1995) (noting that "Section 1425(a), unlike the perjury statute, 18 U.S.C. § 1623, does not contain an express requirement of materiality" and rejecting contrary Ninth Circuit jurisprudence).

Here again, the Fifth Circuit has not addressed the question whether Section 1425(a) contains a materiality requirement. Although persuasive authority exists for declining to read such a requirement into that Section, *see Biheiri*, 293 F.Supp.2d at 659, we believe that the prudent course in this particular case is to adhere to the views of the Ninth and Seventh Circuits and construe the requirement that the procurement of naturalization be "contrary to law" as informing it with a requirement of materiality.

C. Section 1425(a)'s Materiality Requirement Involves Application of an Objective Standard.

If, as we assume for the purpose of this case, "materiality" is an element of a violation of Section 1425(a), "the Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of [that] element . . . ." *United States v. Gaudin*, 515 U.S. 505, 522-523 (1995). And, just as the United States must establish factual elements beyond a

reasonable doubt, the defense is at liberty to present evidence that challenges the United States' proof.

We understand, however, that, in seeking to rebut the United States' proof of materiality, the defendant anticipates attempting to demonstrate that the naturalization inquiry was "pre-textual;" that the examiner had ulterior motives for making inquiries that resulted in false statements; and that those statements were not material to the question of his eligibility because the examiner already possessed information tending to demonstrate that he was ineligible for naturalization. *See* Order at 1; Def. Mot. at 5-6. This argument, however, fundamentally misperceives the concept of materiality in the context of proof required in cases where "false statements" have been alleged.

In *United States v. Watkins*, 278 F.3d 961, 965 (9th Cir. 2002), the Court held that 21 U.S.C. § 333(a)(2), which imposes felony liability for misbranding drugs "with the intent to defraud or mislead," the phrase "intent to defraud" connotes a requirement of materiality. Addressing that element, it explained that "[t]he requirement of materiality functions to cabin potentially unlimited liability by imposing a[n] *objective standard*." *Id.* at 967 (*emphasis added*). And, the Court observed that, in the context of a false statement statute, "a matter is material if 'a reasonable man would attach importance to its existence or nonexistence in his choice of action' or 'the maker of the representation knows or has reason to know' that the recipient is likely to consider 'the matter as important.'" *Id.* at 967-968 (*quoting* Restatement (Second) of Torts § 538(a).

The materiality standard that appellate courts have read into Section 1425(a) is plainly of the same character. It likewise focuses upon the significance that a reasonable person would attach to false statements made by a defendant during immigration proceedings – an objective standard. Thus, as the *Alferahin* court observed, the materiality inquiry under Section 1425(a) is

whether *the statement at issue* would, at least, have had "a natural tendency to produce the conclusion that the applicant was qualified for citizenship." 433 F.3d at 1155 (internal quotation marks omitted; *emphasis added*). *See Latchin*, 554 F.3d at 713 ("a statement in an application for citizenship is material if it has a 'natural tendency to influence' the naturalization decision") (*quoting Kungys v. United States*, 485 U.S. 759, 771 (1988). *See also* Def. Resp. at 6 (conceding that materiality is based upon whether false statements had "a natural tendency to influence the naturalization decision"). In the case, *sub judice*, the defendant's challenges to materiality must be confined to the bearing a particular question and answer would have upon a naturalization decision. It is, thus, utterly inconsequential to that decision whether the immigration officer subjectively possessed an ulterior motive in making a particular inquiry or whether, as in this particular case, the question was itself essential to resolving the matter of eligibility.

Respectfully submitted,

MICHAEL J. MULLANEY
ACTING UNITED STATES ATTORNEY

By: /s/ T. J. Reardon III
/s/ Jerome J. Teresinski
/s/ Paul E. Ahern
/s/ Bridget Behling
Trial Attorneys
Counterterrorism Section, Nat'l Security Division
United States Department of Justice
10th Street & Constitution Avenue, NW
Washington, D.C. 20530
Tel.: (202) 514-0849
Email: t.j.reardoniii@usdoj.gov
jerome.teresinski@usdoj.gov
paul.ahern@usdoj.gov
bridget.behling@usdoj.gov

Certificate of Service

I hereby certify that on the 24th day of November, 2010, I caused the foregoing to be filed with the Clerk of Court, and have sent a copy of the following via e-mail to:

ARTURO V. HERNANDEZ, ESQ.
Attorney for Defendant
ARTURO V. HERNANDEZ, P.A.
2937 S.W. 27th Avenue, Suite 101
Miami, Florida 33133
Telephone: (305) 443-7527
Facsimile: (305) 446-6150
E-Mail: avhlaw@bellsouth.net

FELIPE D.J. MILLAN, ESQ.
Attorney for Defendant
1147 Montana Avenue
El Paso, Texas 79902
Telephone: (915) 566-9977
Facsimile: (915) 562-6837
E-Mail: fdjmillan@yahoo.com

RHONDA A. ANDERSON, ESQ.
Attorney for Defendant
2655 Le Jeune Road, Suite 540
Coral Gables, FL 33134
Telephone: (305) 567-3004
Facsimile: (3035) 476-9837
E-Mail: randersonlaw@gmail.com

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

/s/ T. J. Reardon III
/s/ Jerome J. Teresinski
/s/ Bridget Behling
T. J. Reardon III
Jerome J. Teresinski
Bridget Behling
Trial Attorneys