

**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 LUIS POSADA CARRILES'
MOTION TO SUPPRESS EVIDENCE AND STATEMENTS AND
INCORPORATED MEMORANDUM OF LAW**

The Defendant, LUIS POSADA CARRILES, through undersigned counsel, moves this Court pursuant to the Fourth, Fifth and Sixth Amendments of the United States Constitution, *Miranda v. Arizona*, 384 U.S. 436 (1966), Rule 41 of the Federal Rules of Criminal Procedure, to suppress evidence in statements in this cause, based upon the failure to warn Mr. Posada of the existence of a criminal investigation. In support thereof, Mr. Posada states:

I. EVIDENCE TO BE SUPPRESSED:

(a) Any and all statements Mr. Posada uttered during the course of his Naturalization interviews from April 25 through and including April 27, 2006.

(b) Any and all audio or video tapes, documents and notes containing the statements of Mr. Posada uttered during the course of his Naturalization interviews from April 25 through and including April 27, 2006.

II. STATEMENT OF FACTS:

As early as April 21, 2005, the Government has been assembling a criminal case against Mr. Posada, and used his naturalization interviews conducted approximately a year later, on April 25 through 27, 2006, to gather further information – even though it was clear that Mr. Posada did not qualify for naturalization due to his prior foreign convictions in Panama.

The Government's reports reflect that the Government, with the assistance of Immigration and Customs Enforcement (ICE), initiated an investigation on or before April 21, 2005. Specifically, ICE commenced the investigation of Posada shortly after his presence in the United States was alerted by the press and through the Castro regimes pronouncements. Unaware of the on-going investigation, on October 11, 2005, Mr. Posada filed an application for naturalization (N-400) under section 329 of the Immigration and Nationality Act (INA) based upon his honorable discharge from U.S. military service during a time of hostilities. See Executive Order 12081 issued by President Carter on September 18, 1978. A review of Mr. Posada's Naturalization interview, for which the stated purpose is to determine whether or not an applicant is entitled to any statutory immigration

benefit, reveals that the Government's primary purpose during the hearing was to augment the Government's year long investigation seeking evidence to support a criminal indictment.

A. The Investigation:

As soon as the investigation into Mr. Posada commenced on April 21, 2005, ICE agents in conjunction with agents in other U.S. Federal agencies, began a sweeping investigation into both Mr. Posada's history and his manner of entry into the United States. Because of the unique circumstances surrounding Mr. Posada's past, specifically his history of anti-Castro militancy and long standing relationship with the Central Intelligence Agency (CIA), the Government moved swiftly to undercut what it saw as a burgeoning geopolitical firestorm that they believed would result if Posada gained legal status or was released on bond in the United States.

On May 17th, 2005, Mr. Posada scheduled an appointment before an immigration officer for the purpose of an asylum interview. For reasons related to both strategy by his lawyers and his health, Mr. Posada cancelled and/or otherwise withdrew his request for appointment. Later on May 17, 2005, Mr. Posada gave a press conference at an undisclosed location. Shortly thereafter, Federal agents arrested Mr. Posada on immigration charges related to having entered the country

without inspection and being present in the country without a valid visa, and placed him under the custody of ICE.

Once Mr. Posada was arrested, the Government pursued its remedies in the immigration sector in furtherance of its desire to detain him indefinitely. Additionally, the Government vigorously pursued two separate grand jury investigations relating to Mr. Posada's entry into the United States and his alleged involvement in the bombings of hotels in Cuba.

On April 26, 2005 came the first of several collateral requests for information about Posada by ICE from its attachés in Guatemala, Panama, Mexico, El Salvador, and the Bahamas. Some of these collateral requests were for information pertaining to visa applications for Posada's alleged alias "Franco Rodriguez Mena" (3/14/06), information from Mexican authorities regarding the voyage of the "Santrina" to Isla Mujeres that allegedly smuggled Posada into the United States (7/22/05), and for documents pertaining to Posada's purported involvement in 2000 in an alleged plot to assassinate Fidel Castro (4/26/05).

In addition to the above, by July of 2005, the disclosed informant began to cooperate with the FBI and revised his original denials regarding the presence of Mr. Posada on the vessel the Santrina -- after offers of monetary rewards and assistance with his citizenship application -- even though he does not qualify for citizenship.

In furtherance of the rapidly expanding investigation, on November 18th, 2005, ICE agents executed a search warrant for the business office of Caribe Foundation in Hialeah, Florida, that resulted in the procurement of a treasure trove of evidence regarding Mr. Posada and his benefactor Santiago Alvarez. ICE supervisory and case agent Chris Cappanelli headed the search team and previously testified that one of the primary purposes for conducting the search was to obtain evidence of a criminal nature against Mr. Posada Carriles. From this search came the Guatemalan passport that is the basis for Count Seven of the indictment. Neither Mr. Posada nor his immigration lawyers knew of these events before his naturalization interview.

Thus, by the time Mr. Posada was set for his naturalization interview, ICE agents had already assembled a significant dossier that included but was not limited to the following elements:

- (1) A comprehensive list of news periodicals published about Mr. Posada in the past thirty years;
- (2) A thorough review by federal agents of Mr. Posada's "Application for Asylum and for Withholding of Removal and Convention Against Torture" (Form I-589);

- (3) Information proffered by confidential informants in both Guatemala¹ and Greenville, South Carolina – which formed the basis of various questions posed during Posada’s naturalization hearing;
- (4) Interviews with former law enforcement officers who had had dealings with Posada in the past;
- (5) An interview of Posada conducted by federal agents and counsel after his arrest on May 17, 2005;
- (6) A seized Guatemalan passport in the name of Manuel Enrique Castillo Lopez bearing Posada’s picture. This passport was recovered from the offices of the Caribe Foundation in Miami, Florida which was served with a search warrant on November 18, 2005 and executed by ICE agents including Chris Cappannelli;
- (7) Debriefings by Customs and Border Patrol Officials stationed at the Port of Miami who were responsible for waiving the Santrina through Customs;
- (8) Subpoenaed flight itinerary for Ernesto Abreu from Miami to Guatemala which the Government will allege formed part of the conspiracy to smuggle Posada aboard the Santrina;

¹ The informant in Guatemala proffered information regarding Posada’s alleged involvement in a string of hotel bombings in Havana and named coconspirators.

- (9) Customs documents from the United States, the Bahamas, and Mexico which constitute the bulk of the evidence that confront Mr. Posada in the subject criminal matter.
- (10) Testimony of the disclosed informant about the trip to Cancun/Isla Mujeres for the purpose of transporting the defendant to Miami, Florida.

B. The Naturalization Interview:

Before the Naturalization (NAT) Interview commenced, the Government did not warn Mr. Posada or his immigration lawyer that he was the subject or target of a criminal investigation. Further, before the NAT interview commenced the Government did not advise Mr. Posada or his immigration lawyer that they had seized documents, passports and other records as part of their criminal investigation, and would use the information obtained to question Mr. Posada during the NAT interview. Additionally, before the NAT interview commenced, the Government did not advise Mr. Posada or his immigration lawyer that the primary purpose for the interview was to obtain information or statements from Mr. Posada to use against him in criminal indictments being sought against him in two separate districts – or that ICE had already informally determined from information obtained during their criminal investigation that Mr. Posada did not qualify for naturalization.

Without these warnings, the Government embarked on a two-day, six hour (6 hour) interrogation of Mr. Posada – which Mr. Posada believed was for the purpose of obtaining naturalization as a United States Citizen. At the time of the interview, Mr. Posada was 79 years old, and in ailing health.²

MEMORANDUM OF LAW

This case presents unique circumstances that no district court has ever addressed: Whether the Government, under the guise of a naturalization interview, may utilize the interview for the sole purpose of gathering statements, under oath, to frame a criminal indictment based upon false statements made during the interview, where the Government had predetermined that the Applicant was not eligible for any immigration benefits due to a prior foreign conviction?

Underlying the Government's desire to indict was their directive to quell a political firestorm that Mr. Posada's presence in the United States ignited, to-wit: criticism on the world stage that this Government, while fighting the war on terror, harbored a fugitive and alleged "terrorist" of the communist regimes of Cuba and Venezuela who assisted the United States during the era of counterinsurgency to impede the advance of communism in this hemisphere.

² As a consequence of his lifelong opposition to Castro, in 1999, Cuban agents tried to assassinate him in Guatemala. They almost succeeded, shooting him seven times in his body and face. One bullet ripped through his lower jaw and tongue and has resulted in significant impairment of his speaking and swallowing ability.

Before the interview commenced, the Government knew that Mr. Posada had prior convictions for aggravated felonies in a foreign country – and that such prior convictions could not be absolved by any foreign pardon. See, *Zgodda v. Holland*, 184 F.Supp. 847 (E.D. Pa. 1960) (a foreign pardon does not relieve an alien from the effect of a conviction of a crime involving moral turpitude under immigration laws) and 8 USC §§ 1182(a), 1251(a).³

Moreover, prior to the interview, the Government failed to submit Mr. Posada's N-426 form to the Department of Defense to certify that Mr. Posada had served in the United States Army – which was the sole basis for his Naturalization

³ See also, *In Re: Parchment, Whenford Decordova*, 2006 WL 901466 (BIA, Feb. 8, 2006)(unpublished), wherein the Immigration Court held in the context of a removal proceeding:

The Immigration Judge properly denied the respondent's motion to terminate because he is an honorably discharged veteran and eligible to apply for naturalization, due to the respondent's aggravated felony convictions. See *Lopez v. Henley*, 416 F.3d 455, 456 (5th Cir. 2005) (The Immigration Judge noted alien's active duty service in the Army and that Section 329 of the Immigration and Nationality Act makes citizenship by naturalization available to aliens who served honorably in the U.S. armed forces during wartime. However, she concluded that alien would not be eligible to file a naturalization application under this provision because he could not show "good moral character" as required by the implementing regulation, 8 C.F.R. § § 329.2(d)); *Nolan v. Holmes*, 334 F.3d 189 (2d Cir. 2003) (in order to petition for naturalization, alien who had been honorably discharged from the United States Army, but had been convicted of aggravated felony, still had to satisfy all naturalization requirements including good moral character).

Id. See copy attached at *Exhibit B*.

Application (I-400) for admission pursuant to Title 8 U.S.C. § 329. *See also*, 8 C.F.R. § 329 and *Exhibit A* - Mr. Posada's Naturalization Application and N-426 Request, at Bate No. 530.⁴ The failure of the Government to submit Mr. Posada's N-426 for certification prior to the interview demonstrates that the purpose of the interview was not to gather information regarding his eligibility for naturalization under Section 329, but to obtain allegedly false statements to indict a 79 year old man who could no longer be indefinitely detained in immigration custody absent the Attorney General's certification pursuant to Title 8 U.S.C. § 1182(a) of Mr. Posada "as a terrorist or danger to the community or national security," or pursuant to Title 8 C.F.R. 241.14(c), and (d), that "special circumstances" exist which would result from the release of Mr. Posada, because he was an alien posing "serious adverse foreign policy consequences" or "security or terrorism concerns." *See*, Order of Magistrate Judge Garney, U.S. Western District of Texas Case No. EP-06-CV-130-PRM, DE-26 at 21-22. (See copy filed herein at DE-25-*Ex. D*).

Nonetheless, before the naturalization interview commenced, the Government did not disclose that his foreign convictions foreclosed his eligibility for naturalization, or that it had not even submitted his I-426 for certification by the Department of Defense – which is a routine prerequisite to any naturalization interview.

⁴ All social security number and dates of birth have been redacted.

Additionally, throughout the interview, the Government encouraged Mr. Posada to respond to questions through deception -- telling him that if he refused to answer certain questions, that his failure to answer may jeopardize his already ill-fated naturalization application. *Cf., United States v. Tweel*, 550 F.2d 297, 299 (5th Cir. 1977) ("a consent search is unreasonable under the Fourth Amendment if consent was induced by the deceit, trickery or misrepresentation of the Internal Revenue agent").

As this Circuit stated in *Tweel*, since the documents, statements and evidence provided were obtained by deception, the civil audit constituted an unreasonable search in violation of the Fourth Amendment. *Id.* at 300, *citing Gouled v. United States*, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647 (1921). In *Tweel* the taxpayer's accountant asked if there was an IRS special agent involved in the investigation, and was truthfully told no, which led the accountant to believe the IRS was conducting only a civil audit. The accountant then produced various records to the IRS. What the IRS agent did not volunteer was the fact that the audit had been specifically requested by the Justice Department's organized crime and racketeering section, which was only involved in criminal cases. *Id.*

The Fifth Circuit in *Tweel* reversed the trial court's denial of the appellant's motion to suppress, finding that the revenue agents "silent misrepresentation was

both intentionally misleading and material” where the civil audit was commenced at the request of the organized crime bureau. The Court further opined:

We cannot condone this shocking conduct by the IRS. Our revenue system is based upon the good faith of the taxpayers and the taxpayers should be able to expect the same from the government in its enforcement and collection activities.

Id. at 300.

The *Tweel* court found that the accountant's consent to produce the documents was therefore obtained by deception, and suppressed the documents. *Tweel* held that the evidence obtained in violation of appellant's Fourth Amendment rights, as well as any evidence derived therefrom, must be suppressed. *Id.*, citing *Alderman v. United States*, 394 U.S. 165, 171, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969). The burden of proving any evidence was untainted is on the government. *Id.*, citing *Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939). After *Tweel*, the IRS addressed this issue and implemented regulations explicitly prohibiting a revenue agent from developing a criminal case against a taxpayer under the guise of a civil investigation.

As in *Tweel*, Mr. Posada was entitled to and was not warned that true purpose of the NAT interview was to further a criminal investigation, or that he would be asked questions during the interview that directly formed the foundation of the instant indictment. Unlike a taxpayer, Mr. Posada could have simply withdrawn his Application once he knew that Immigration determined he was not eligible, and

not submitted to the “interview.” Like the documents obtained from Tweel, the statements of Mr. Posada obtained in his naturalization “interview” were obtained absent warning and through deception. As a result, Mr. Posada’s statements obtained during the interview must be suppressed in their entirety.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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