UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-60307-Cr-Cohn/Lynch

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SANTIAGO ALVAREZ and
OSVALDO MITAT,
Defendants.
_____/

DEFENDANTS' REPLY IN FURTHER SUPPORT OF JOINT MOTION IN LIMINE TO EXCLUDE RULE 404(b) EVIDENCE, WITH INCORPORATED MEMORANDUM OF LAW

In what is an outrageously offensive and unacceptable display of government stealth and surprise tactics inconsistent with the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, and the Local Rules governing discovery obligations, the government responded to the defense Rule 404(b) motion by disclosing, for the very first time thirty-nine days before trial,[1] its intention to present at trial three items of asserted "intrinsic evidence"

[1] The government's now-withdrawn Response In Opposition to Defendants' Motion to Exclude 404(B) Evidence was served by mail on March 27, 2006, and its now-pending response was served by mail on March 30, 2006. Conveniently, when the parties were recently before this court, defense counsel informed the court the defendants were looking forward to the May 8 commencement of the trial, and expected to be fully prepared at that time. Despite having an opportunity to do so, at no time did the government inform the court it possessed undisclosed evidence about uncharged activity in the Bahamas and it intended to withhold this information from the defense until

so far removed from the charges contained in the indictment as to define a completely new and different case. Specifically, in a case involving allegations the defendants conspired to and did possess a described number of weapons in Broward and Miami-Dade Counties between November 2004 and November 2005, the government only now disclosed[2] its intention to present evidence of a supposed discovery by Bahamian and federal authorities of a weapons arsenal in August 2005 in Guinchos Cay, Bahamas.[3] The second area of uncharged evidence is a 2001 purported weapons list the government cannot connect to the identified weapons in this case, found during the November 18, 2005 search of Mr. Alvarez's Hialeah office. The third item of uncharged conduct is Mr. Alvarez's supposed false Guatemalan passport (that was never in his possession and never used) and the facts surrounding the November 18 search of the Hialeah office. These evidentiary items do not

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one month before trial.

[2] The government's Response to Standing Discovery Order and its subsequent supplements do not even mention this evidence, and the voluminous discovery documents produced by the government that have been painstakingly examined by the defense contain not a single reference to an August 2005 weapons cache in a foreign country.

[3] Guinchos Cay, Bahamas is located twelve miles away from Cuba, but is within Bahamian territorial waters.

form any part of the seven-count indictment, are not identified in that indictment, and do not constitute crimes charged against either defendant. Nor does this evidence form an inseparable part of the conspiracy or offenses alleged in the indictment. Finally, the inclusion of such extraneous conduct is so unfairly prejudicial that it must be excluded in order to preserve the defendants' rights to a constitutionally fair trial.[4]

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[4] As detailed in this submission, the Guinchos Cay disclosure is so dramatic a change from the allegations contained in the indictment that it seriously jeopardizes the defendants' readiness for trial on May 8, 2006, and would require a significant continuance in order to investigate those allegations. Not only must the defense lawyers now obtain access to the supposed weapons, arrange for defense experts to examine the weapons, identify the source of the weapons cache, confer with responsible Bahamian authorities, and research the law applicable to weapons stored in a foreign country, but counsel must also confer with the defendants to evaluate that totally separate uncharged matter. Given the defendants' current incarceration in Palm Beach County and St. Lucie County arising from the Ft. Pierce hearings, communication with the defendants has become irregular and difficult. Simply stated, the government's intentional decision to wait until a month before trial to disclose what it now contends is a part of its case-in-chief has caused insurmountable and unfair prejudice to the defendants in the process of preparing for trial. The defense requires a significant amount of time to investigate and defend against heretofore undisclosed offense conduct, yet the defendants want to proceed to trial on May 8. A continuance of the trial occasioned by the government's purposeful decision to withhold this information until the last possible moment serves to further imprison – and prejudice – the pretrial detained defendants for reasons that only benefit the government.

1. The defense Rule 404(b) disclosure motion described for the court the government's vague and cryptic reference to uncharged conduct in which the government did not identify any uncharged acts, but simply informed the defense it would at some future time "timely advise the defendant of its intent, if any, to introduce during its case in chief proof of any evidence pursuant to F.R.E. 404(b)."[5] That disclosure was never made, and only became known in response to the defense request to exclude any uncharged conduct from the trial of this case. Now, only on the eve of trial as defense counsel are analyzing discovery, preparing for suppression hearings, and replying to government responsive pleadings, does the government identify uncharged conduct it contends is admissible as "inextricably intertwined with the evidence of the charged offenses ..." (Govt Response at 3).

2. Apart from the unfairly dilatory announcement of this uncharged

[5] The Government's Response to the Standing Discovery Order declared it had no uncharged evidence to disclose. Paragraph H states: "The government will timely advise the defendant of its intent, if any, to introduce during its case in chief proof of evidence pursuant to F.R.E. 404(b). You are hereby on notice that all evidence made available to you for inspection, as well as all statements disclosed herein or in any future discovery letter, may be offered in the trial of this cause, under F.R.E. 404(b) or otherwise (including the inextricably-intertwined doctrine)."

act evidence, none of the three areas of purported other acts come within the requirements of Rule 404(b) and do not constitute "Intrinsic evidence that is inextricably intertwined with the offense conduct charged in this case." The Eleventh Circuit explained in *United States v. Utter*, 97 F.3d 509, 513 (11th Cir. 1996), that the *inextricably intertwined doctrine* applies only when the conduct is "(1) an uncharged offense which arose out of the same transaction or series of transactions as the uncharged offense, (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the evidence regarding the charged offense."

3. The seizure of the false passport and the search of the Hialeah office are not inextricably intertwined to the charged weapons possession conspiracy. Nothing about the passport allegations gives rise to any completion of the charged crime, and the passport assertions are not in any way associated with the possession of weapons. Indeed, from the government's investigation of the passport conduct, there is not a single connection to weapons, the storage of weapons, Mitat, or the Inverrary

property where the government contends the weapons were stored.[6] Just as in *Utter,* where the evidence of the defendant's residence burning down was not a part of the crime charged and therefore inadmissible as Rule 404(b) or inextricably intertwined evidence, so too in this case the evidence of other purported misconduct involving a passport violation is insufficiently aligned with the charges to prove anything other than the defendants' supposed criminal propensities.

4. Nor does the reasons for the search of the Hialeah property assist in explaining the charged weapons conspiracy. The validity of the Hialeah search is not an issue for the jury at trial. Nor does the motivation for the government search have any evidentiary value at trial. The government's assertion that the Hialeah search supports the reason why law enforcement agents apprehended the defendants does not justify the presentation of evidence of the passport investigation. Indeed, the weapons case is complete without regard to any passport investigation. Government proof of the weapons conspiracy and possession requires that the informant (CS-1) offer

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[6] Mitat is additionally prejudiced by the passport allegations, as they do not involve him, are inadmissible as to him, and unfairly prejudice his ability to present a defense to the charges.

testimony about his knowledge of the weapons, his conduct on November 18, 2005, the asserted turnover of the cooler by Alvarez at the Inverrary property, and the seizure of the weapons at the Creek Club Apartments in Miami-Dade. Nothing about the passport investigation is necessary to complete the story of the weapons conspiracy. To the contrary, that investigation is merely an uncharged bad act designed to case Alvarez in an unfair and prejudicial light.

5. The list of firearms found in the Hialeah office is similarly irrelevant to the charged weapons conspiracy. Not only are the lists dated in 2001, fully three years before the charged conspiracy, but the weapons listed are not and cannot be connected to the weapons involved in this case. Nor is a list of weapons any evidence of a crime, and does not further the government's proof of the charges in this case. Instead, the evidence is just another attempt to accuse Alvarez of engaging in separate criminal activity. Furthermore, the evidence is unfairly prejudicial to the compact firearms conspiracy described in the indictment.

6. The Guinchos Cay evidence is far from "intrinsic" because it not only has nothing to do with the allegations in the indictment, but it does not even form any part of the overt acts or the underlying object of the charged

conspiracy. The Guinchos Cay episode, whatever that entails,[7] does not in any way describe or complete the charged weapons conspiracy involving the asserted storage of weapons in the Inverrary Apartments.

7. The government's citation to *United States v. Wells*, 995 F.2d 189 ((11th Cir. 1993), is actually supportive of the exclusion of the Guinchos Cay evidence. In *Wells*, the defendant was indicted for a methamphetamine conspiracy that occurred between November 1989 and May 25, 1990. The government sought to introduce evidence of a May 13, 1990 possession of methamphetamine. According to the Eleventh Circuit, the May 13, 1990 event was admissible, *id*. at 192:

> Here, the possession of the alleged illegal drug, said to be methamphetamine, relates directly to the charged offense of conspiracy to manufacture and distribute methamphetamine and, consequently, it is admissible because it does not constitute "other crimes" evidence under Federal Rule of Evidence 404(b).

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[7] The defendants are not even prepared to discuss the facts of the Guinchos Cay incident because no facts have been disclosed by the government to the defense, the defendants are not aware of any seizure of weapons in Guinchos Cay, the weapons recovered from Guinchos Cay have not been disclosed by the government, and there is no known connection between Guinchos Cay and the defendants. The Guinchos Cay surprise allegations constitute a separate criminal charged that, if charged by indictment, would likely require many months for pretrial preparation.

8. In the present case, the indictment charges a conspiracy to possess certain firearms and weapons stored in Broward County and transferred to Mitat, and then seized in November 2005 in Miami-Dade County. The indictment does not encompass weapons allegedly stored in a foreign country. Nor does the indictment encompass weapons generally, as the charges relate only to the weapons seized on November 18, 2005. Whether the informant or the defendants were responsible for weapons seized in a foreign country in August 2005 is not part of this case, and should not form any evidentiary foundation for the government's proof of the crimes charged.

9. Since the uncharged conduct forms no part of the charges in the indictment and does not assist in explaining the crimes for which the defendants are on trial, the evidence is inadmissible. In addition, the evidence is unfairly prejudicial. *See Huddleston v. United States*, 485 U.S. 681, 108 S. Ct. 1496, 1499 (1998) (evidence designed and intended to adversely comment on defendant's alleged criminal propensity is not admissible). Furthermore, without any meaningful advance notice of the Guinchos Cay allegations, the defense has not even begun the investigation necessary to

determine the actual facts, the defendants' purported role with the Bahamas weapons, the veracity of the informant's information, and the legality of that possession under Bahamas law. Absent this ability to investigate this separate factual conduct that effectively constitutes an entirely separate indictment, the defendants are unable to even meet the allegations, and are unquestionably prejudiced in their ability to demonstrate the inaccuracy of the government's allegations. *See United States v. Miller*, 959 F.2d 1535, 1538 (11th Cir.) (en banc), *cert. denied,* 506 U.S. 942, 113 S. Ct. 382 (1992) (three-part test evaluating admissibility of Rule 404(b) evidence requires showing of relevance, sufficient proof of the extrinsic act, and probative value that substantially outweighs prejudice).

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