UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	CRIMINAL NO. 09-335 (RJL)
	:	
v.	:	
	:	
AMARO GONCALVES, *et al.*,	:	
	:	
Defendants.	:	
	:	

GOVERNMENT'S SUPPLEMENTAL PROPOSED JURY INSTRUCTIONS

Pursuant to Rule 30 of the Federal Rules of Criminal Procedure, the United States of America, by and through its undersigned attorneys, submits the following supplemental proposed jury instructions, which were referenced or provided to the Court and the defendants at the jury charge conference ("Charge Conference") on January 6, 2012. In addition to those jury instructions, which include additional authority in support of particular instructions, the government proposes an additional jury instruction concerning the statements and acts of co-defendants in a common venture. The government proposes this additional instruction to address the concerns raised by the Court as to how to instruct the jury on the use of statements made by the defendants in the three common ventures consisting of (1) John and Jeana Mushriqui, (2) Patrick Caldwell and Stephen Giordanella, and (3) Greg Godsey and Mark Morales.

As an initial matter, with the exception of statements made by Mr. Giordanella, the defendants' statements were properly admitted as statements of a defendant, not merely as statements of members of a common venture under Federal Rule of Evidence 801(d)(2)(E). Therefore, the only issue with regard to those statements is the extent to which the jury may permissibly consider the statements as evidence against another defendant. That decision is

properly left to the jury and is addressed in the additional instruction the government proposes herein (Government's Proposed Instruction #6).

With regard to statements by Giordanella, the trial court must determine the admissibility of the statements prior to submitting them to the jury. *See, e.g., Bourjaily v. United States*, 483 U.S. 171, 174 (1987). The government submits that Giordanella's statements are admissible as statements of a member of a common venture under Federal Rule of Evidence 801(d)(2)(E). The Court has indicated that it believes there is sufficient evidence in the record to find a common venture between Giordanella and Caldwell by a preponderance of the evidence. (*See, e.g.*, Transcript of January 3, 2012 at 29-30; Transcript of January 6, 2012 PM at 89.) The Court has also indicated that in determining the existence of each defendants' involvement in their respective common venture, the common venture would begin when both of the defendants became aware of the opportunity for the Gabon deal. (*See* Transcript of January 6, 2012 AM at 72-75, 81-82; Transcript of January 6, 2012 PM at 87-88.) In determining when both Giordanella and Caldwell became aware of the opportunity for the Gabon deal, the evidence in the record shows that Caldwell and Giordanella both became aware of the Gabon deal by April 21, 2009, when Caldwell was forwarded an email from Mr. Bistrong to Giordanella advising him of the Gabon opportunity (GX 243).

In determining when the common venture ended, the evidence in the record shows that it did not end until Giordanella and Caldwell were arrested on January 18, 2010. Caldwell cannot demonstrate that Giordanella affirmatively withdrew from the common venture because Giordanella did not communicate his abandonment of, or otherwise act inconsistently with, the goal of the venture at any time prior to his arrest. Giordanella's resignation from PPI and relative lack of involvement in the deal thereafter, does not constitute withdrawal. *See, e.g.,*

United States v. Garrett, 720 F.2d 705, 714 (D.C. Cir. 1983) (finding that it is "clear that to establish an effective withdrawal, the defendant must show that he took affirmative action to defeat or disavow the purpose of the conspiracy."); *United States v. United States Gypsum Co.*, 438 U.S. 422, 464-65 (1978) (withdrawal from a conspiracy may be established by "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators."). Despite his resignation, Giordanella did not disavow the Gabon deal, as demonstrated by various documents and conversations, including an email Giordanella sent Caldwell about the Gabon deal as late as January 4, 2010 (GX 258), Caldwell's reference to Giordanella in connection with the Gabon deal in an email on January 11, 2010, and Caldwell's reference to Giordanella in a conversation with Bistrong on January 17, 2010 (GX 306, 316).

As a result, any acts or statements of Giordanella after April 21, 2009 until Giordanella's arrest on January 18, 2010, are admissible under Federal Rule of Evidence 801(d)(2)(E) and may be considered by the jury as evidence against Caldwell.[1] The manner in which they may be properly considered is addressed by Government's Proposed Instruction #6.

[1] Giordanella's statements prior to the May 14, 2009 meeting with Pascal Latour and Bistrong are also independently and properly admissible because they relate to the integrity of the investigation in various ways, including the fact that they show that Mr. Bistrong discouraged Giordanella from bringing Caldwell and O'Dea to the Miami pitch meeting, thus countering the notion that Mr. Bistrong and the FBI were trying to "round up" as many people as possible for either cooperation credit or stats.

Respectfully submitted,

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GOVERNMENT'S PROPOSED INSTRUCTION #1

Liability On The Grounds Of An Uncharged Conspiracy

Each defendant is charged with the crime of violating the Foreign Corrupt Practices Act. A defendant may be found guilty of this crime, that was committed by a co-conspirator, even though the defendant did not participate directly in the acts constituting the offense. That is because a conspiracy is a kind of partnership in crime and its members may be responsible for each others' actions. A defendant is responsible for an offense committed by another member of the conspiracy if the defendant was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of, and as a natural consequence of, the conspiracy. Before you may find a defendant guilty of violating the Foreign Corrupt Practices Act under this theory, you must find beyond a reasonable doubt that:

1. There was a conspiracy to commit the crime of violating the Foreign Corrupt Practices Act by offering, promising, or authorizing the payment of money to a foreign official in order to obtain or retain contracts to sell goods to the government of Gabon;

2. The offense of violating the Foreign Corrupt Practices Act was committed by a co-conspirator of the defendant, not including anyone who at that time was a government informant or agent;

3. That defendant was a member of the conspiracy to commit the crime of violating the Foreign Corrupt Practices Act by offering, promising, or authorizing the payment of money to a foreign official in order to obtain or retain contracts to sell goods to the government of Gabon at the time the offense of violating the Foreign Corrupt Practices Act was committed;

4. The offense of violating the Foreign Corrupt Practices Act was committed during the existence of the conspiracy;

5. The offense of violating the Foreign Corrupt Practices Act was committed in furtherance of the conspiracy; and

6. The offense of violating the Foreign Corrupt Practices Act was a reasonably foreseeable consequence of the conspiracy. It is not necessary to find that the crime was intended as part of the original plan, only that it was a foreseeable consequence of the original plan.

In order to determine whether a conspiracy existed at the time of this crime and whether the defendant was a member, you must find beyond a reasonable doubt the following two elements, that:

1. Between in or about May 2009 through in or about January 2010, an agreement existed between two or more people, not including anyone who at that time was a government informant or agent, to commit the crime of violating the Foreign Corrupt Practices Act. This does not have to be a formal agreement or plan in which everyone involved sat down together and worked out the details. On the other hand, merely because people get together and talk about common interests or do similar things does not necessarily show that an agreement exists to violate the Foreign Corrupt Practices Act. It is enough that the government prove beyond a reasonable doubt that there was a common understanding among those who were involved to commit the crime of violating the Foreign Corrupt Practices Act.

2. The defendant intentionally joined in that agreement. It is not necessary to find that the defendant agreed to all the details of the crime or that he or she even knew the identity of all the other people the government has claimed were participating in the agreement. A person may become a member of a conspiracy even if that person agrees to play only a minor part, as

long as that person understands the unlawful nature of the plan and voluntarily and intentionally joins in it with the intent to advance or further the unlawful object of the conspiracy. But mere presence at the scene of the agreement or of the crime or merely being with the other participants does not show that the defendant knowingly joined in that. Similarly, unknowingly acting in a way that helps the participants, without more, does not make a person part of the conspiracy. In addition, merely knowing about the agreement itself, without more, does not make the defendant a part of the conspiracy.

A conspiracy can be proved indirectly by facts and circumstances that lead to a conclusion that a conspiracy existed. The government's burden is to prove such facts and circumstances existed and lead to that conclusion in this particular case.

In deciding whether an agreement existed, you may consider the acts and statements of all the alleged participants. In deciding whether the defendant became a member of that conspiracy, you may consider only his or her own acts and statements.[1]

[1] *The Red Book* Instr. 7.102-B (modified). *See also United States v. Budd*, 496 F.3d 517 (6th Cir. 2007) ("district courts may give a *Pinkerton* co-conspirator liability instruction for a substantive charge, even for a defendant who has not been charged with conspiracy."); *United States v. Gallo-Chamorro* 48 F.3d 502, 505, n. 6 (11th Cir. 1995) (upholding conviction on substantive counts following acquittal on conspiracy charge despite defendants' claim that verdict required reliance on *Pinkerton* instruction because "the jury could have found from the evidence that [the defendant] was involved in more than one conspiracy."); *United States v. Jackson*, 627 F.2d 1198, 1216 (D.C. Cir. 1980) (noting the "firmly established" rule that "joint participation in the commission of the substantive offenses may be denominated as conspirators. The conspiracy may be shown as an evidentiary fact to prove the participation in the substantive crime").

GOVERNMENT'S PROPOSED INSTRUCTION #2

Willfully Causing an Act to Be Done

You may find a defendant guilty of the crime of violating the Foreign Corrupt Practices Act without finding that he or she personally committed each of the acts constituting the offense of violating the Foreign Corrupt Practices Act or was personally present at the commission of the offense. A defendant is responsible for an act which he or she willfully causes to be done if the act would be criminal if performed by him/her directly or by another. To "cause" an act to be done means to bring it about. You may convict a defendant of the offense of violating the Foreign Corrupt Practices Act if you find that the government has proved beyond a reasonable doubt each element of the offense and that the defendant willfully caused such an act to be done, with the intent to commit the crime.[2]

[2] *The Red Book* Instr. 3.102. *See also United States v. Concepcion*, 983 F.2d 369, 383 (2d Cir. 1992) (explaining that 18 U.S.C. § 2(a) is a separate theory of liability from 18 U.S.C. § 2(b) and stating that "whereas § 2(a) speaks in terms of procuring or aiding and abetting the commission of an 'offense,' and hence requires proof that the primary actor had criminal intent, § 2(b) speaks in terms of causing the actor perform only an 'act'.").

GOVERNMENT'S PROPOSED INSTRUCTION #3

Entrapment Instruction

You have heard and seen audio and video recordings from a government undercover operation in this case, as well as testimony from undercover agents and a paid cooperating witness who were involved in the government's investigation. I previously instructed you that law enforcement officials are not precluded from engaging in stealth and deception, such as the use of informants and hidden recording devices, in order to investigate criminal activities. Indeed, certain types of evidence would be extremely difficult to detect without the use of undercover agents and informants. Whether or not you approve of the use of an informant or undercover agent to detect unlawful activity is not to enter into your deliberations in any way. I also instruct you that, as a matter of law, entrapment is not a valid defense in this case.

If you are satisfied beyond a reasonable doubt that a defendant committed the offenses charged in the indictment, the circumstance that the government made use of an undercover agent or audio and video recordings obtained from an undercover operation is irrelevant to your determination.[3]

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[3] *See* Sand *et al.*, *Modern Federal Jury Instructions* § 5.08 (2010) (modified); Model Crim. Jury Instr. 9th Cir. 4.10 (2010) (modified); *see United States v. Allibhai*, 939 F.2d 244, 251 (5th Cir. 1991) (quoting *United States v. Fera*, 616 F.2d 590, 596 (5th Cir. 1980) (approving district court's instruction that it is "sometimes necessary and permissible for the Government to use stratagems, artifices, ruses and undercover agents or investigators who may use assume names and conceal their true identity," where court declined to give entrapment instruction)); *United States v. Winslow*, 962 F.2d 845, 848 (9th Cir. 1992) (rejecting defendants' challenge to undercover agent jury instruction given in the absence of an entrapment instruction); *see also United States v. Russell*, 411 U.S. 436 (1973) (noting that "there are circumstances when the use of deceit is the only practicable law enforcement technique available"); *United States v. Kelly*, 707 F.2d 1460, 1473-74 (D.C. Cir. 1983) ("[W]e recognize the need for law enforcement efforts to detect official corruption. Furthermore, such corruption is 'that type of elusive, difficult to detect, covert crime which may justify Government infiltration and undercover activities.'") (internal citation omitted).

GOVERNMENT'S PROPOSED INSTRUCTION #4

Motive

Motive is not an element of the offenses charged, and the government is not required to prove motive in this case. You may, however, consider evidence of motive or lack of evidence of motive in deciding whether or not the government has proved the charges beyond a reasonable doubt.[4]

[4] *The Red Book* Instr. 2.307.

GOVERNMENT'S PROPOSED INSTRUCTION #5

False Or Inconsistent Statement By Defendant

You have heard evidence that John Mushriqui made statements in explanation of his actions that may have been false or inconsistent. It is up to you to decide whether he made the statements, and whether they were, in fact, false or inconsistent. If you find he did make such statements and that they were false or inconsistent, you may consider such evidence as tending to show his feelings of guilt, which you may, in turn, consider as tending to show actual guilt. On the other hand, you may also consider that he may have given such statements for reasons John Mushriqui consistent with his innocence.

If you find that John Mushriqui made a false or inconsistent statement in explanation of his actions, you should give the testimony as much weight as in your judgment it deserves.[5]

[5] *The Red Book* Instr. 2.210.

GOVERNMENT'S PROPOSED INSTRUCTION #6

Statements and Acts of Co-Defendants in a Common Venture

In determining whether the government has proven the charges in Count One through Seven in the indictment, you may consider the acts and statements of other members of a common venture as evidence against a defendant. A common venture is not necessarily the same as a conspiracy. I will instruct you on conspiracy and statements and acts attributable to co-conspirators later.

When persons enter into a common venture, they become agents for each other so that the act of one member of the common venture is considered the act of the other members of the common venture. However, statements of a member of the common venture which are made before the existence of the common venture or after its termination may be considered as evidence only against the person making such statements. In other words, you may consider as evidence against a defendant the statements or actions of a defendant's fellow member of the common venture whether they were done in or out of the presence of the defendant, as long as they were made during the course of the common venture. This is because when individuals join a common venture, everything which is said or done by one of them in furtherance of that common venture is deemed to be the statement of all who have joined in that common venture.

Acts done or statements made by a member of the common venture before the common venture began or after it ended may only be considered by you regarding the defendant who performed that act or made that statement.[6]

[6] Modified version of Trial 1 Instruction No. 42 (Statements and Acts of Co-Conspirators) (citing *United States v. Treadwell*, 760 F.2d 327, 337-38 (D.C. Cir. 1985) (approving co-conspirator statement instruction)).