IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	**CRIMINAL NO. 12-231 (RC)**
	:	
v.	:	
	:	
JAMES F. HITSELBERGER,	:	
	:	
Defendant.	:	

GOVERNMENT'S MOTION TO ADMIT EVIDENCE PURSUANT
TO FEDERAL RULE OF EVIDENCE 404(b)

The United States of America, through its undersigned attorneys, moves in limine pursuant to Rule 404(b), Fed. R. Evid., for the Court to admit certain evidence against defendant James F. Hitselberger. Such evidence is admissible as proof of, inter alia: the defendant's knowledge of classification markings and protocol, and of the restrictions on the improper removal and retention of classified information; his intent to remove classified information from its proper storage places and retain for his own purposes; his motive for doing so; and the absence of accident or mistake in his removal and retention of classified information.[1]

Specifically, the government seeks to introduce 1) evidence of letters, post-marked envelopes, and materials sent between the defendant and the Hoover Institution between 2005 and 2012, including three documents with overall classifications of Secret that agents located at the Hoover Institution; 2) the defendant's July 8, 2005, letter to an official of the Hoover Institution, under cover of which the defendant enclosed classified materials and discussed their classified status; and 3) statements that the defendant made in 2005 regarding the handling and storage of classified material and security clearances, while working as a contract linguist for

[1] The government also tenders this motion as the notice required under Fed. R. Evid. 404(b)(2)(A) regarding "the general nature of any [404(b)] evidence that the prosecutor intends to introduce at trial."

Titan Corporation, in connection with an Army investigation of the possible mishandling of sensitive work-related materials (of which he was cleared of any wrongdoing).

This evidence is admissible under Rule 404(b) to demonstrate the defendant's knowledge that the materials that he removed from the secure facility at the Naval Support Activity—Bahrain were classified and that their removal from a secure storage facility was improper; to prove absence of mistake and lack of accident regarding the defendant's actions in printing and removing these materials from the secure facility; and to show the defendant's intent and motive in printing and removing these documents from the secure facility.

I. Background

A. Procedural Background

The acts underlying the Indictment took place between February and April 2012. The defendant was charged by complaint in this matter on August 6, 2012, and subsequently indicted by the grand jury on October 26, 2012. He was charged with two counts of unlawful retention of national defense information, in violation of 18 U.S.C. § 793(e), for incidents alleged to have occurred on or about April 11, 2012, and March 8, 2012. On February 28, 2013, a superseding indictment was returned by the grand jury that charged the defendant with an additional count of unlawful retention of national defense information, in violation of 18 U.S.C. § 793(e), for an incident alleged to have occurred on or about February 13, 2012. The superseding indictment also charged three counts of unauthorized removal of a public record, in violation of 18 U.S.C. § 2071(a).

B. Factual Background

From October 2004 to February 2007, Hitselberger worked as a contract linguist for Titan Corporation (Titan). He served in Iraq and worked at several forward operating locations,

including Fallujah, Al Asad Airbase, Camp Ramadi, and Camp Victory. During this period, he was responsible for translating from Arabic at various checkpoints and worked intimately with the force protection assets at these locations. As part of his job, Hitselberger received a Secret level security clearance and had access to classified materials.[2]

In June 2011, Hitselberger accepted a position as a linguist with Global Linguist Solutions (GLS), a government contractor headquartered in Reston, Virginia. Hitselberger was assigned to be an Arabic linguist at the Naval Support Activity – Bahrain.[3] Before leaving for Bahrain, Hitselberger went through two weeks of training at GLS' Reston office, where he received instruction on the proper handling, storage, reproduction, and disposition of classified and sensitive material. He received further guidance and training regarding the proper handling of classified materials in August and September 2011. Hitselberger initially received an interim Secret level clearance which became permanent in January 2012. However, he never became an authorized courier of classified information and thus could not handle classified materials outside of an approved secure facility.

In September 2011, Hitselberger arrived in Bahrain. He was assigned to work for the Joint Special Operations Task Force (JSOTF), Naval Special Warfare Unit Three (NSWU-3). NSWU-3 conducts such missions as unconventional warfare, training, direct action, combating terrorism, and special reconnaissance. NSWU-3 relied on Hitselberger's expertise in the Arabic

[2] Pursuant to Executive Order No. 13526 (December 29, 2009), there are three levels of classified information: Confidential, Secret, and Top Secret. The designation "Confidential" is applied to information, the unauthorized disclosure of which could reasonably be expected to cause damage to national security; the designation "Secret" is applied to information, the unauthorized disclosure of which could reasonably be expected to cause serious damage to the national security; and the designation "Top Secret" is applied to information, the unauthorized disclosure of which could reasonably be expected to cause exceptionally grave damage to the national security. Information is classified by an individual known as an original classification authority (OCA) who has been delegated the power to determine that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security.

[3] Naval Support Activity – Bahrain is located in the Kingdom of Bahrain, just east of Saudi Arabia, and is the home to over 6,000 United States military personnel. Several elements of the United States armed forces are based there, including the Navy's Fifth Fleet and the Joint Special Operations Task Force – Gulf Cooperation Council (JSOTF-GCC).

language and sent raw data to him regularly for translation. Through this work, Hitselberger obtained intimate knowledge of sensitive source operations, including the true names and addresses of sources. While in Bahrain, he received additional training and regular reminders concerning the proper storage and handling of classified information.

C. The Events Charged in the Indictment

On the morning of April 11, 2012, Hitselberger was working with other linguists and two of his JSOTF supervisors in a Restricted Access Area (RAA). This was a structure within Naval Support Activity – Bahrain that was approved for the processing and handling of classified information up to the Secret level. There was a cipher lock on its reinforced door, and the classified hard drives used in the RAA were stored in a locked vault.

Around 11:15 a.m., everyone took a break. Hitselberger signed onto his Secret Internet Protocol Router Network (SIPRnet) account, which is located on a secure, Secret level computer system. Two of his supervisors observed him viewing JSOTF Situation Reports (SITREPs), which were classified Secret. They also saw Hitselberger print multiple pages of Secret documents from a Secret printer. A supervisor then observed Hitselberger take the classified documents from the printer, fold them, and place them into an Arabic-English Dictionary, which he then put into his backpack. Hitselberger proceeded to leave the RAA. As noted above, Hitselberger did not have the requisite authority to remove classified documents from the RAA.

After witnessing the event, one of Hitselberger's supervisors immediately notified their commanding officer. The two of them left the RAA to follow Hitselberger. They stopped him near a picnic table outside of the building where the RAA was located. They told Hitselberger that they needed to see what was in his bag and asked him to produce the documents that he had just printed. Hitselberger first took out only one classified document from inside the dictionary.

When his supervisor asked what else he had, Hitselberger surrendered the second classified document. Hitselberger told his supervisors both that he did not know that the documents that he had printed and removed from the RAA were classified; and that he did not know that one was not allowed to remove classified documents from the RAA.

One of the two documents was that day's JSOTF SITREP (SITREP 104). It had **SECRET//NOFORN** in red, bold type (all capitals) in the header and footer of each page. On the first page of the document, and continuing on to the second page, is a multi-paragraph portion marked **(S//NF)**. It contains an analyst's assessment of the availability of certain improvised explosive devices in Bahrain. Elsewhere in the document, in portions marked **(S)**, are the schedule for the monthly travel of a high-ranking commander at Naval Support Activity-Bahrain and information about the locations of U.S. armed forces in the region and their activities.

The second document was a Navy Central Command (NAVCENT) Regional Analysis dated April 9, 2012. It bears the following header and footer on each page: **SECRET//REL TO USA, FVEY**.[4] On the third page of the document are five bullet points, marked **(S//REL)**, discussing gaps in UNITED STATES intelligence concerning the situation in Bahrain, which, at the time, was volatile. Original classification authorities from the Navy have reviewed both SITREP 104 and the April 9, 2012, NAVCENT Regional Analysis. These Navy officials have determined that both documents were properly classified and contained national defense information. The defendant's removal of these two documents from the RAA is charged in the first and fourth counts of the Indictment.

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[4] REL is an abbreviation for "releasable to." FVEY is an abbreviation for a group of allied nations known as the "Five Eyes," which are the United States, the United Kingdom, Canada, Australia, and New Zealand.

Later in the day on April 11, 2012, agents from the Naval Criminal Investigative Service (NCIS) searched Hitselberger's quarters pursuant to a "Command Authorization for Search and Seizure" issued upon a finding of probable cause by the commanding officer of Naval Support Activity – Bahrain. On the top of Hitselberger's desk, they discovered a document that appeared to be classified. The top and bottom of the document had been cut off, effectively removing the classification markings in the header and footer of the document, which concealed its overall classification. The page of the document in Hitselberger's room still had the individual paragraph classification markings, which revealed the paragraphs of the page were classified at the Confidential level. These paragraphs contained an intelligence analyst's assessment of the situation in Bahrain, which had experienced recent civil unrest. The agents learned that the document in question was JSOTF SITREP 72 (SITREP 72) from March 8, 2012. This SITREP is five pages long and has **SECRET** in red in the headers and footers.[5] Like SITREP 104, it contained highly sensitive information about the location of United States forces and their undisclosed activities in the region. An original classification authority from the Navy has reviewed SITREP 72 and has confirmed that the document is properly classified and that it contains national defense information. Review of the defendant's SIPRnet e-mail indicated that he received this document on his SIPRnet account on or about March 8, 2012. The defendant's unauthorized retention of this document is charged in the second and fourth counts of the Indictment.

On the evening of April 11, 2012, and the afternoon of April 12, 2012, NCIS agents conducted two voluntary, non-custodial interviews of Hitselberger. Although he was not in custody, the agents advised Hitselberger of his Miranda rights on April 11, 2012, and he waived

[5] The government has never found the missing four pages of this copy of the document. However, it has ascertained that it was an attachment to an e-mail that Hitselberger received on his SIPRNet account on or about March 8, 2012.

them. In both interviews, Hitselberger claimed not to know that the documents that he printed were classified, notwithstanding their clear markings. He said he printed the NAVCENT Regional Analysis by mistake, and that his sole purpose was to take the material to his quarters to read. When asked about the document agents found in his quarters with the header and footer removed, he did not admit having taken it or having stored it in the room. However, Hitselberger went on to claim that he cuts around paper because he does not like having extra paper.

During their investigation of Hitselberger, agents learned that he had established a collection at the Hoover Institution of writings that he had acquired during his times in the Middle East. The collection is titled the "James F. Hitselberger Collection, 1977-2012." Agents visited the Hoover Institution and reviewed the collection. In an area accessible to the public, the agents found a classified document titled "Bahrain Situation Update (13 FEB 2012)." It is officially classified as **SECRET//REL ACGU**.[6] Like the NAVCENT Regional Analysis found in Hitselberger's backpack, it included a section that discussed gaps in U.S. intelligence with respect to the political situation in Bahrain. A Navy original classification authority has reviewed these portions of the Bahrain Situation Update and determined that these paragraphs are properly classified at the Secret level and that they contain national defense information.

A review of the defendant's SIPRnet account revealed that this classified document was sent to him on or about February 13, 2012. Additionally, the agents that visited the Hoover Institution located three envelopes that the defendant sent to the Hoover Institution in March 2012, all of which were post-marked from Bahrain. The agents also collected emails between representatives of the Hoover Institution and the defendant, from March and April 2012, in which they confirmed receipt of materials that the defendant had sent from Bahrain. The

[6] "ACGU" means that the document is releasable to Australia, Canada, Great Britain, and the United States.

defendant's unauthorized retention of this document is charged in the third and sixth counts of the Indictment.

II. Rule 404(b) Evidence That the Government Seeks to Admit at Trial

A. Hitselberger's Dissemination of Secret Level Materials from Iraq To The Hoover Institution

Between 2005 and 2012, the defendant sent a number of letters and packages to the Hoover Institution containing materials that he had collected in Iraq and Bahrain. At the Hoover Institution, agents found cover letters to such letters and packages authored by the defendant dated July 8, 2005; November 6, 2006; January 11, 2008; February 2, 2008; and February 26, 2008. See Exhibit 1.[7] Agents also located envelopes posted by the defendant and bearing his name and address as the sender, dated August 19, 2006 (posted from Camp Victory, Baghdad); January 22, 2007 (posted from the Baghdad International Airport); August 13, 2011 (postmarked from Michigan); March 19, 2012 (postmarked from Bahrain); March 20, 2012 (postmarked from Bahrain); and March 27, 2012 (postmarked from Bahrain). See Exhibit 2.

The agents who visited the Hoover Institution found three additional classified documents, in addition to the February 13, 2012, Bahrain Situation Update discussed above. In an area open to the public, they located a document containing a series of bullet points marked **S//REL TO USA, MCFI** and dating from Hitselberger's time in Iraq.[8] See Exhibit 3. And in a secure, non-public area of the Archives, agents discovered two other documents marked **SECRET//REL TO USA and MCFI,** namely a color flyer and an intelligence report. See Exhibit 4.[9] These materials also dated from Hitselberger's time in Iraq with Titan.

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[7] The government has produced all of the exhibits to this motion to the defense in discovery.
[8] "MCFI" is an abbreviation for Multinational Coalition Forces Iraq.
[9] One of the classified documents found in the secure area cannot be redacted in a meaningful way and is not included as part of Exhibit 4.

The agents also located at least four letters from the defendant to a former Associate Archivist for Collection for the Hoover Institution. In a letter dated February 2, 2008, the defendant wrote, "I think that this will be the last batch of materials which I will send you from Iraq." In a letter dated January 11, 2008, the defendant wrote, "I promised long ago to send you more materials and you will find enclosed multiple copies of a handbill. As I mentioned to you in earlier correspondence, the authenticity of this one may be suspect." The letter is signed "James Hitselberger -- Camp Victory – Baghdad." In a letter dated November 6, 2006, the defendant wrote, "I am enclosing the volume I mentioned in an earlier letter, that is the one by Sayyid Muqtada al-Sadr." The letter bears the location and date "Camp Victory Baghdad, Iraq, No. 6. 2006." See Exhibit 1.

Finally, agents also collected email correspondence between the defendant and employees of the Hoover Institution that discussed and acknowledged the materials that the defendant sent to the Hoover Institution. See Exhibit 5.

a. The Defendant's July 8, 2005, Letter to Brad Bauer of the Hoover Institute

In a letter sent by the defendant to the former Associate Archivist dated July 8, 2005, he wrote "I am enclosing three intelligence reports for your archives. These are all from Fallujah. . . . Two of the reports have no classification and the third is classified as 'secret.' It states that it will be declassified on 20150323. Could that mean ten years from the date it might be issued? That is March 23, 2015? Regardless of the case, this material seems to warrant archival preservation. I will leave the matter up to you to determine when researchers can have access to these items, as I am fully confident that your institution balances national security concerns with the need of researchers for original source material." See Exhibit 1.

The proposed evidence indicates that the 'secret' document referenced in this letter is the classified intelligence report that agents located in the secure, non-public area of the Hoover Archives. The final line of this document reads "DECL ON [Declassification on]: (U) 20150323." See Exhibit 4.

B. The Defendant's 2005 Statement in the Army Investigation

The Department of the Army, United States Intelligence and Security Command, 513th Military Intelligence Brigade, Sub-Control Office Southwest Asia, of Fort Gordon, Georgia, conducted an investigation involving the defendant in 2005 and 2006. During this time period, the defendant was working as a Titan Category II Interpreter and had a Secret security clearance. The Army's investigation was triggered by an incident during which the defendant was observed working on an unclassified computer with sensitive materials including detainee profiles and images.

In connection with the Army's investigation, the defendant provided investigators a five-page typed statement dated March 12, 2005. See Exhibit 6. In his statement, the defendant discussed being asked to remove sensitive materials from his workspace and instead work from his living space, and his "unease about possessing security-related documents in the living quarters. It had been my own policy never to remove documents from the office." He further noted "that the presence of [security plan] documents in the living space violated our policy to keep documents secure." He then recounted his shock at learning that a Lieutenant Colonel had given Iraqi intelligence reports to Civil Affairs translators to be translated into English, noting "Now, I thought, our security policy has completely fallen apart. We have no more security for Iraqi documents." In his statement, the defendant also notes several instances in which he raised these issues regarding the mishandling of sensitive information with his superiors.

The Army eventually determined, based on the evidence available to it, that Hitselberger had committed no wrongdoing. At trial, the government would be willing to characterize the defendant's statement as being made during the course of a general investigation into security practices at the forward operating base in Iraq. In this context, Hitselberger's statement is not Rule 404(b) evidence, but rather an admission concerning knowledge of the proper handling and storage of classified information.

III. Evidence of the Defendant's Prior Retention and Dissemination of Classified Material and Prior Statements Regarding Classified Material is Admissible

A. The Applicable Legal Standards

Fed. R. Evid. 404(b) permits the introduction of others crimes, wrongs, or acts that are extrinsic to the crimes charged to prove a material issue other than character, including motive, opportunity, intent, preparation, plan, knowledge, identity and absence of mistake or accident. "Under the law of this circuit, 'Rule 404(b) is a rule of inclusion rather than exclusion,' . . . and it is 'quite permissive,' excluding evidence only if it is offered for the sole purpose of proving that a person's actions conformed to his or her character.'" United States v. Long, 328 F.3d 655, 660-61 (D.C. Cir. 2003) (citations and quotations omitted). The rule lists several categories of appropriate uses of other crimes evidence – e.g., to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; however, this list is not exhaustive. United States v. Miller, 895 F.2d 1431, 1435 (D.C. Cir. 1990). As the D.C. Circuit noted, "in some cases '[e]xtrinsic acts evidence may be critical . . ., especially when the[e] issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct." United States v. Brown, 597 F.3d 399, 404 (D.C. Cir. 2009) (quoting Huddleston v. United States, 485 U.S. 681, 685 (1988)).

This Circuit has accepted a two-pronged test for determining whether evidence of prior crimes is admissible under 404(b). First, the evidence must be "probative of a material issue other than character." See Miller, 895 F.2d at 1435 (quoting Huddleston, 489 U.S. at 1499)). Second, the evidence is subject to the balancing test of Fed. R. Evid. 403, so that it is inadmissible only if the prejudicial effect of admitting the evidence substantially outweighs its probative value. See id. Furthermore, as this Circuit has noted, it is not enough that the evidence is simply prejudicial; the prejudice must be "unfair." See United States v. Cassell, 292 F.3d 788, 796 (D.C. Cir. 2002) (quoting Dollar v. Long Mf'g, N.C., Inc., 561 F.2d 613, 618 (5th Cir. 1977) ("Virtually all evidence is prejudicial or it isn't material. The prejudice must be "unfair.")). For evidence to be unfairly prejudicial within the meaning of the Rule, it must have "'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" Old Chief v. United States, 519 U.S. 172, 180 (1997), quoting Advisory Committee Notes on Fed. Rule Evid. 403.

In assessing the relevance of other acts evidence, the court "neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence." Huddleston, 485 U.S. at 690. As to the probative value of such evidence, the court should consider "the similarity of the bad act with the charged offense, the time separating the two events, and the prosecution's need for the evidence." United States v. Lavelle, 751 F.2d 1266, 1277 (D.C. Cir.), cert. denied, 474 U.S. 817 (1985) (citations and footnote omitted), abrogated on other grounds by Huddleston, 485 U.S. at 687, n. 5.

B. The Evidence is Admissible to Prove Knowledge, Intent, Motive, and Lack of Accident or Mistake

In order to prove that the defendant unlawfully retained classified information, the government has the burden to prove that he had "unauthorized" control over the relevant documents and that he "willfully retain[ed]" them. 18 U.S.C. § 793(e). In order to prove willfulness, the government must show that the defendant's possession of the classified materials at issue was purposeful and intentional, and not the result of mistake or inadvertence.

"Intent and knowledge are . . . well-established non-propensity purposes for admitting evidence of prior crimes or acts." United States v. Douglas, 482 F.3d 591, 597 (2007) (quoting United States v. Bowie, 232 F.3d 923, 930 (D.C. Cir. 2000)). In Douglas, the court sanctioned the admission of evidence of Douglas' prior possession and distribution of crack cocaine because it was relevant to show "that he knew the nature of the substance," "and that he intended to distribute it." Likewise, evidence of the defendant's prior discussions regarding classified information with the former Associate Archivist of the Hoover Institution in 2005 and the statements that he made regarding the proper handling of sensitive material in his 2005 statement to Army investigators demonstrate his knowledge of classified material, including how to read classified markings, and how to properly handle classified material. Moreover, evidence of the defendant's prior retention of classified materials from his time in Iraq, and his dissemination of those materials to the Hoover Institution, show his intent in removing classified documents from the RAA on April 11, 2012, and in removing the third classified document located in his room on April 11, 2012. "It hardly can be denied that in cases where a defendant is charged with unlawful possession of something, evidence that he possessed the same or similar things at other times is often quite relevant to his knowledge and intent with regard to the crime charged." Long, 328 F.3d at 663 (internal quotation marks and citations omitted).

This evidence would also rebut arguments that the defendant did not realize that the materials he printed and removed from the RAA were classified; or that he did not intend to retain the documents for his own possession or further dissemination, but rather intended to later return the documents to their rightful place, deliver them to a person or place authorized to receive the material, or dispose of the material once he was through reviewing it. See Douglas, 482 F.3d at 598. See Bowie, 232 F.3d at 930 ("Evidence that Bowie possessed and passed counterfeit notes on a prior occasion was relevant because it decreased the likelihood that Bowie accidentally or innocently possessed the counterfeit notes.").

Evidence of the defendant's prior possession and prior unlawful retention of classified materials is probative of the fact that he knew what classified information was and would recognize it by its markings – as opposed to any lay citizen to whom classified headers, footers, paragraph markings, and classification abbreviations generally, might mean little or nothing; that his removal of classified material from the RAA was not mistaken, accidental, or the result of inadvertence; and that he printed classified material, secreted it in his dictionary and backpack, and removed it from the RAA with the intent to retain the documents in an unauthorized fashion and for his own purposes. See ; United States v. Brown, 597 F.3d 399, 402, 405 (D.C. Cir. 2009) (evidence of defendant's previous attempts to use fictitious documents to obtain items of value relevant under Rule 404(b) to show defendant's intent, knowledge, motive, and absence of mistake or accident; and to rebut defendant's claim that he acted in good faith in attempting to deposit fraudulent bills of exchange at a credit union); United States v. Aleskerova, 300 F.3d 286, 295 (2d Cir. 2002) (trial court did not plainly err by admitting evidence of defendant's prior possession of stolen artwork, to show defendant's intent and plan to receive, possess and conceal stolen items, in case charging possession of stolen artwork); United States v. Washington, 969

F.2d 1073, 1080-81 (D.C. Cir. 1992) (when defendant was charged with distribution and possession with intent to distribute drugs, 404(b) evidence of his prior drug transactions was admissible to demonstrate intent, knowledge, plan, and absence of mistake). "Where the issue addressed is the defendant's intent to commit the offense charged, the relevancy of the extrinsic offense derives from the defendant's indulging himself in the same state of mind in the perpetration of both the extrinsic and charged offenses. The reasoning is that because the defendant had unlawful intent in the extrinsic offense, it is less likely that he had lawful intent in the present offense." United States v. Beechum, 582 F.2d 898, 911-912 (5th Cir. 1978).

C. The Evidence is Admissible to Prove Constructive Possession of the Document Located in the Defendant's Quarters

Additionally, the government bears the burden at trial to prove that the defendant constructively possessed the document he sent to the Hoover Institution in March 2012 and the document located in his room on April 11, 2012. To prove constructive possession, the government must prove the defendant's knowledge of and intent to control this document. To this end, proof of his prior possession of classified material is highly probative. As the D.C. Circuit noted in Cassell, "[w]e have previously held that 'in cases where a defendant is charged with unlawful possession of something, evidence that he possessed the same or similar things at other times is often quite relevant to his knowledge and intent with regard to the crime charged." Cassell, 292 F.3d at 793. The Court further noted, "A prior history of intentionally possessing guns, or for that matter chattels of any sort, is certainly relevant to the determination of whether a person in proximity to such chattel on the occasion under litigation knew what he was possessing and intended to do so." Id. at 794-95. See also United States v. Garner, 396 F.3d 438, 443-45 (D.C. Cir. 2005) (where jury faced "a paradigmatic constructive possession scenario in which contraband (here, a firearm) is found in proximity to a defendant who may or may not have been

‘*knowingly* in a position to, or [have] had the right to exercise “dominion or control” over the contraband,’” evidence of the defendant’s prior possession of a handgun was admissible under Rule 404(b) to show knowledge, intent, and the absence of mistake). Furthermore, the D.C. Circuit was clear in Cassell that its holding was not limited to firearms cases, but rather extended to any prosecution in which the government must prove that the defendant’s possession of an item is unlawful. See 292 F.3d at 795-96.

D. The Government May Introduce 404(b) Evidence In Its Case-in-chief

Furthermore, the government is entitled to anticipate the defendant’s denial of intent and knowledge and introduce 404(b) evidence in its case-in-chief. See United States v. Inserra, 34 F.3d 83, 90 (2d Cir. 1994) (“[Rule 404(b) other crimes evidence] is admissible during the Government’s case-in-chief if it is apparent that the defendant will dispute that issue”); United States v. Estabrook, 774 F.2d 284, 289 (8th Cir. 1985) (“where it is made clear at the outset of the trial that the defendant’s principal defense is a lack of knowledge or intent, and thus the issue is unarguably in dispute, the government may take the defendant at his word and introduce the evidence in its case-in-chief”); United States v. Lewis, 759 F.2d 1316, 1349 n. 14 (8th Cir. 1985) (“It was not necessary for the government to await defendant’s denial of intent or knowledge before introducing [Rule 404(b) other crimes] evidence; instead the government may anticipate the defense and introduce it in its case-in-chief”).

E. Rule 403 Balancing Strongly Favors Admission of the 404(b) Evidence

“Rule 403 tilts, as do the rules as a whole, toward the admission of evidence in close cases, even when other crimes evidence is involved.” Douglas, 482 F.3d at 600 (citing Cassell, 292 F.3d at 795) (internal quotation marks omitted). Moreover, where, as here, the crimes and bad acts that the government seeks to admit are directly related to the defendant’s unauthorized

retention of classified material on prior occasions, the 404(b) evidence is that much more probative and weighs that much more heavily in the Rule 403 analysis. See Douglas, 482 F.3d at 601 ("the probative value of another crime is significant 'when the evidence indicates a close relationship to the event charged,' Cassell, 292 F.3d at 795, as it does here where [defendant] Douglas's prior arrest involved sale of the same substance in almost the same neighborhood."); Beechum, 582 F.2d at 915 ("the probative value of the extrinsic evidence correlates positively with its likeness to the offense charged"); United States v. Johnson, 802 F.2d 1459, 1463-64 (D.C. Cir. 1986) ("the balance should generally be struck in favor of admission when the evidence indicates a close relationship to the event charged.") (quoting United States v. Day, 591 F.2d 861, 878 (D.C. Cir. 1978)).

Furthermore, this Circuit has consistently minimized the residual risk of prejudice not by exclusion, but by issuing limiting instructions to the jury. See, e.g., Douglas, 482 F.3d at 601 (emphasizing the significance of the district court's instructions to jury on the permissible and impermissible uses of the evidence); United States v. Pettiford, 517 F.3d 584, 590 (D.C. Cir. 2008) (same); Crowder II, 141 F.3d at 1210 (stating that mitigating instructions to jury enter into the Rule 403 balancing analysis). "[I]t is the law, pure and simple, that jury instructions can sufficiently protect a defendant's interest in being free from undue prejudice." United States v.Perholtz, 842 F.2d 343, 361 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988) (citation omitted).

Here, the 404(b) evidence that the government seeks to introduce is not substantially outweighed by potential prejudice to the defendant. Evidence of the defendant's prior unauthorized possession and transmittal of classified materials is prejudicial only in the sense that the high probative value of the proof incriminates him. The evidence does not appeal to the jury's emotions, and it will not lead the jurors to decide the case on improper grounds.

Moreover, the Court can alleviate any prejudice to the defendant by instructing the jury that it is only to consider the proposed evidence for the limited purposes for which the government is offering it.

F. Conclusion

For the foregoing reasons, the Court should grant the government's motion to admit evidence of the defendant's prior retention and dissemination of classified materials and his prior statements regarding classification markings and the proper handling of classified materials under Rule 404(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 1st day of March 2013, a copy of the foregoing was served on counsel of record for the defendant, Ms. Mary Petras, via the Court's Electronic Filing System.

____________/s/____________________
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