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

In its Opposition to Government's Motion to Admit Evidence Pursuant to Federal Rule of Evidence 404(b) (hereinafter "Opposition"), the defense claims that the evidence that the government seeks to introduce is neither relevant nor admissible, and that the evidence should be excluded under Federal Rule of Evidence 403.

The defendant's arguments are unsupported and should be rejected. The evidence that the government seeks to admit pursuant to Rule 404(b) ("404(b) evidence") is directly relevant to its proof that the defendant willfully retained documents in violation of 18 U.S.C. § 793(e) while working in Bahrain, and that he "willfully and unlawfully" removed records in violation of 18 U.S.C. § 2071(a). Evidence of the defendant's prior handling of classified materials, prior discussions and recognition of classified markings, and prior statements regarding the importance of protecting classified material in one's workspace, directly demonstrates that his actions were willful and purposeful, and not the result of accident or mistake.

Counsel also argues that the evidence the 404(b) evidence "should be excluded as more prejudicial than probative under Federal Rule of Evidence 403," and because it would cause a "trial within a trial." First, this misstates the applicable legal standard which is that a court may

exclude relevant evidence if its probative value is substantially outweighed by a danger of, inter alia, unfair prejudice. Second, a fair balancing of the evidence indicates that its probative value is not substantially outweighed by any unfair prejudice to the defendant. Third, the government is willing to redact certain documents related to the 404(b) evidence and agree to the use of limiting instructions to the jury in order to minimize any such concerns.

ARGUMENT

A. Whether the Rule 404(b) Documents Contain National Defense Information Is Irrelevant to a Resolution of The Government's 404(b) Motion

The defense writes at length in its Opposition regarding what proof is required to prove a violation of § 793(e), and its understanding of the intersection between the proof of a document's classification and the proof of whether a document contains national defense information. The Court need not consider these arguments because they are irrelevant at this juncture. The government is not seeking to introduce evidence of the defendant's prior statements and actions with respect to classified materials in order to prove that the Rule 404(b) documents contain national defense information (although they probably do), or in order to prove that the documents charged in the Superseding Indictment contain national defense information. Thus, the defense's arguments in this regard, that classification does not equate to national defense information, are not relevant to the Court's consideration of the 404(b) evidence at issue and the Court need not address them.[1]

[1] The government nonetheless notes that courts have repeatedly held that a document's classification may bear on whether the document contained national defense information or on the defendant's intent. See United States v. Abu-Jihaad, 630 F.3d 102 (2d Cir. 2010) (finding evidence sufficient to support 793(d) conviction where information was classified and defendant had reason to believe information could be used to injure the United States); United States v. Morison, 844 F.2d 1057, 1073 (4th Cir. 1988) (finding that a defendant knew he was dealing with national defense information in part because he was an experienced intelligence officer, had been

B. The 404(b) Evidence is Relevant to Proving Intent (i.e. Willfulness), Knowledge, and Lack of Accident or Mistake

In its Opposition, the defense posits that "the government has no burden to prove that Mr. Hitselberger . . . knew that he was mishandling classified information." This statement greatly understates the government's burden. In order to prove each charge of the Superseding Indictment, the government will bear the burden at trial to prove that the defendant acted willfully, that is, with the knowledge that his actions were unlawful. "'[I]n order to establish a willful violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'" United States v. Kim, 808 F. Supp.2d 44, 53-54 (D.D.C. 2011) (quoting Bryan v. United States, 524 U.S. 184, 191–92, (1998) (internal quotation marks omitted)). Thus, the relevance of the proposed 404(b) evidence cannot be understated, as it is relevant to the proof of an element that the government must prove for every charged offense.

The government seeks to introduce the 404(b) evidence outlined in its original Motion to Admit Evidence Pursuant to Rule 404(b) (docket number 34) ("404(b) Motion") in order to prove that the defendant acted knowingly and purposefully and not accidentally when he unlawfully retained, and unlawfully removed, the documents charged in the Superseding Indictment. Specifically, the government seeks to introduce evidence of the defendant's prior handling of classified material (in the form of the documents that he sent to the Hoover Institution), prior statements acknowledging his recognition and comprehension of classification markings (in the July 8, 2005 letter to Brad Bauer), and prior statement regarding the proper handling of classified material (in his 2005 statement in connection with a U.S. Army

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instructed on the regulations concerning the security of secret national defense materials, and the relevant materials were plainly marked Secret).

investigation), in order to prove willfulness – to include lack of accident or mistake – and knowledge of the unlawfulness of his actions. See New York Times Co. v. United States, 403 U.S. 713, 738 (White, J. concurring ("in prosecuting for communicating or withholding a 'document' . . . the Government need not prove an intent to injure the United States or to benefit a foreign nation, but **only willful and knowing conduct**") (emphasis added). "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)).

Furthermore, the defendant has already reported to law enforcement during various discussions and interviews in Bahrain and the United States, that 1) he did not realize that the documents he removed from the Restricted Access Area (RAA) were classified; 2) his removal of the documents was the result of the fact that his eyeglasses were deficient; 3) he did not know that he was not allowed to remove classified materials from the RAA; and 4) that he did not receive training in the proper handling of classified materials. In other words, not only does the government bear the burden of proof as to willfulness at trial, but it also expects – based on the defendant's statements to law enforcement – that it will need to rebut some combination of these arguments at trial. 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").

The government bears a heavy burden at trial and is entitled to use all relevant and admissible evidence to prove the elements of the charges. Undoubtedly, evidence that the defendant previously handled classified materials, was familiar with classified markings, had discussions with other about classified materials and the "national security concerns" they implicated (see Exhibit 1 to 404(b) Motion), and had discussions with others about the importance of securing classified materials within a workspace (see Exhibit 6 to 404(b) Motion), is highly probative of whether the defendant intentionally and knowingly committed the charged offenses, and whether his multiple excuses for removing the documents from the Restricted Access Area (RAA) where he worked are credible.

C. The Defendant's Prior Possession of Public Records Bearing Classification Markings Is Relevant to Prove his Constructive Possession of the Charged Documents

Additionally, as discussed in the government's 404(b) Motion at 15-16, the defendant's prior possession of materials bearing classification markings is relevant to the government's proof of his constructive possession of the March 8, 2012, SOCCENT SITREP charged in Counts 2 and 5 of the Superseding Indictment, which was located in his living quarters; and the February 13, 2012, Bahrain Situation Update charged in Counts 3 and 6 of the Superseding Indictment, which was located at the Hoover Institution. See United States v. Cassell, 292 F.3d 788, 793 (D.C. Cir. 2002) (where a defendant is charged with unlawful possession of something, proof that he possessed similar things at other times is "often quite relevant to his knowledge and intent with regard to the crime charged") (internal quotation marks and citation omitted). In its Opposition, the defense – in a continued misunderstanding of the arguments set forth in the

government's 404(b) Motion – continues to assert that the government may only introduce proof of the defendant's prior possession of documents if they contained national defense information. The government's use of the 404(b) evidence related to the defendant's prior possession of classified materials and habits of sending materials marked as classified to the Hoover Institution, is relevant to show 1) that he previously handled and possessed documents bearing classification markings outside of a secured space, and 2) that he previously removed and possessed public records of a similar character to those charged in Counts Four through Six of the Superseding Indictment. The government also seeks to establish the defendant's relationship with the Hoover Institution and prior mailing of materials to the Hoover Institution to prove that he did send the February 13, 2012 Bahrain Situation Update to the Hoover Institution, as charged in Counts Three and Six. As the Court is well aware, Rule 404(b) not only contemplates the introduction of prior crimes but also "Other Acts." Fed. R. Evid. 404(b).

The central question before the Court is whether the proposed 404(b) evidence is being introduced for a permitted use and satisfies the Rule 403 balancing test. To repeat, the government is not seeking to introduce the 404(b) evidence related to the Hoover Institution documents and mailings in order to prove that the charged documents contained national defense information or that he violated 18 USC § 793(e) by previously sending those documents to the Hoover Institution; and the government is not required to prove that the defendant's prior possession of these documents was unlawful, in order for their introduction to be relevant.

D. There is No Basis for Excluding the 404(b) Evidence Under Rule 403

In its Opposition, the defense argues that the letters and emails that the government seeks to introduce include "potentially prejudicial references" of "anti-American sentiment" that could cause the jury to believe that the defendant "sympathized with [Muqtada al-]Sadr, and that the

government is only seeking to introduce these materials because it "wants to disparage" and "attack Mr. Hitselberger's character." Opposition at 9, 11.

These allegations are baseless and unwarranted. The government has laid out careful and legally supported arguments regarding its intentions for introducing the documents appended to its 404(b) Motion. Furthermore, the government is willing to work with the defense to redact those portions of the 404(b) documents that the defense believes are of particular concern and does not anticipate any issue in reaching a consensus on those points. Moreover, "it 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); see also United States v. Gooch, 665 F.3d 1318, 1336-1337 (citing Zafiro v. United States, 506 U.S. 534, 539 (1993) ("When the risk of prejudice is high, ... less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." (citation omitted))).

That said, the government strongly disagrees with the defense's arguments that portions of these materials are not relevant. For example, in his 2005 statement, the defendant wrote:

> During the first week of March, Captain Bowman took me outside the office and instructed me to remove all materials from my desk in the office and work from my living space. I said to him that it would be difficult to do that task immediately and I got a reprieve. In the meantime, I went to the Titan representative at Lima, Maury Silverman. I explained to him my unease about possessing security-related documents in the living quarters. It had been my own policy never to remove documents from the office.

As discussed above, the defendant's series of explanations for removing materials from the RAA included that he intended to read the materials in his living quarters and that he had not received training on the proper handling of classified materials, i.e., that he lacked the requisite knowledge to understand that his actions were unlawful. The defendant's prior statements in this

regard are obviously relevant to the government's proof that the defendant acted willfully, that is, with the knowledge that his actions were unlawful, when he repeatedly and unlawfully retained classified materials in Bahrain. Cf. United States v. Brown, 597 F.3d 399, 404 (D.C. Cir. 2009) ("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'") (internal citation omitted).

The defense argues incorrectly – and without citation – that the procedures for handling classified information vary depending on whether they were possessed in Iraq or Bahrain and depending on what year they were possessed. To the extent that the defense chooses to raise such points, it may properly do so on cross-examination or in its own case at trial. These arguments provide no basis for the exclusion of what is clearly probative evidence. Cf. United States v. Long, 328 F.3d 655, 660-61 (D.C. Cir. 2003) ("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.") (citations and internal quotation marks omitted).

The defense also objects to the introduction of the defendant's prior statements and documents that he previously sent to the Hoover Institution on the basis that it would "require a trial within a trial" (Opposition at 10). First, the defendant is entitled to testify on his own behalf to provide context to his actions and to explain his state of mind at the time that he sent materials marked as classified to the Hoover Institution. Nothing about the proposed 404(b) evidence prevents him from exercising this right at trial. Second, as discussed in this Motion, the government does not seek to introduce these statements and materials to prove that the documents were properly classified at the time the defendant sent them or the Hoover Institute

received them. Therefore, the defense need not "locat[e] witnesses to demonstrate where the document was found, why it was no longer classified, and who left the document for public disclosure," because the government does not intend to make any such arguments at trial. Thus, this is also not a valid basis for exclusion of the proposed 404(b) evidence.

E. Conclusion

For the foregoing reasons, the Court should grant the government's 404(b) motion and deny the defendant's Opposition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 9th day of May 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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