IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO: 1:09-cr-21010-JEM

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

CARLOS RODRIGUEZ,

Defendant.

REPLY TO GOVERNMENT'S CONSOLIDATED RESPONSE TO DEFENDANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL AND NEW TRIAL

The Defendant, CARLOS RODRIGUEZ, through undersigned counsel, files this reply to the Government's Consolidated Response in Opposition to Defendants' Motions for Judgment of Acquittal or New Trial (ECF No. 561), and states:

I. JUDGMENT OF ACQUITTAL:

A. The Evidence was Insufficient to Sustain Conviction:

Relying upon the anecdotal evidence from cooperating witnesses and Haitian lawyer Gary Lissade, regarding the transformation of Teleco from a privately owned and created to an entity whose stock, although unseen, was believed to have been largely acquired by the Haitian central bank, and whose officers were illegally appointed by the corrupt deposed former Haitian president,

Aristide, the Government asserts that the evidence was sufficient to prove that Rodriguez knowingly violated the Foreign Corrupt Practices Act (FCPA) and was therefore guilty of the substantive and inchoate offenses based thereon charged in the indictment. However, testimony indicating that "everybody knew" or "believed" that Teleco was part of the administration, and evidence of the unauthorized appointment of officers to Teleco by a deposed corrupt former president and laws passed four (4) years later regulating the telcom industry and announcing that Teleco is part of the administration,[1] is insufficient to sustain Rodriguez' conviction.

The FCPA clearly requires that the Government prove that Rodriguez knew that the individuals operating Teleco were foreign officials acting in their official capacities. See Government's Supplemental Brief Regarding Jury Instructions; Memorandum and Points and Authorities, filed on Sept. 26, 2011, in *United States v. Carson,* S. Distr. Calif. Case No. SA-CR-09-00077-JVS at ECF No. 443 attached hereto as Exhibit "H." However, the evidence, when viewed in the light most favorable to the Government, is insufficient to support the jury's verdict. Rather, the evidence only showed that Rodriguez was present during a telephone

[1] Lissade's reliance upon Aristide's appointment of officers and board members is of no moment because it ignores the fact that the essential requirement that Teleco's By-Laws convert Teleco to a public entity never occurred. As a result, Aristide appointments were a nullity because he had no authority to assume control over Teleco or appoint anyone to Teleco. *Cf., Manhattan General Equipment Co. v. Commissioner,* 297 U.S. at 134, 56 S. Ct. at 400.

conference in which the company's lawyer negotiated for the purchase of insurance applicable only to governments on the Teleco contract wherein the attorney noted that Haiti owned stock in Teleco, that Rodriguez congratulated Tony Perez' successful negotiations after meeting with Robert Antoine in order to reduce the rate Teleco charged, and that Rodriguez signed all of the checks issued by the accounting department. Tr. 7/21/2011 PM pp. 3-17; Tr 7/20/2011 PM pp. 41-60, 70-82; Tr 7/25/2011 AM pp. 70-71. In addition, the evidence only showed that Rodriguez reviewed spreadsheets to track Terra's expenses on a macro basis, did not pay invoices in full when cash flow was tight, issued check requests for some of the fees paid to consulting companies not owned or operated by the Teleco officers allegedly bribed, and spent half of his time on Terra's finances and half on the carrier's infrastructure. Such evidence is insufficient to show that Rodriguez knew that Haitian government officials were bribed to reduce the Teleco rates charged, and, therefore, is insufficient to sustain the jury's verdict. *Id.,* and Tr 7/19/2011 AM pp. 77-81.

FCPA and Money Laundering Counts

The Government alternatively argues that the convictions based upon the money laundering counts (9-21) must be sustained because one of the specified unlawful activities "are not based upon the FCPA violations." Response at 22. However, the language of Indictment and the Government's arguments and proof

at trial provided otherwise, and, therefore, the Government is factually collaterally estopped[2] from asserting that different facts underlie Counts 9 through 21. Specifically, Count 9 states that the purposes of the money laundering conspiracy were for defendants Esquenazi, Rodriguez, Antoine, Duperval and Grandison and their co-conspirators "to conceal bribe payments paid to Antoine and Duperval." ECF-3 at 23. Count 9 further defines the "Manner and Means of the Conspiracy" as including "Paragraphs 4 through 13 of the Manner and Means section of Count 1" – a 371 conspiracy based upon the alleged payment of bribes to alleged foreign government officials. Indeed both the allegations of the Indictment and the proof

[2] Where a judgment of acquittal is entered based upon the jury's finding of insufficient evidence of a scheme to defraud, the Government is collaterally estopped from retrying the case based upon the same fact. Cf., *Yeager v. United States,* -- U.S. --, 129 S. Ct. 2360, 174 L. Ed. 2d 78 (2009)(Double Jeopardy precludes the government from relegating any issue necessarily decided). To decipher what a jury has necessarily decided, a court should "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe v. Swenson*, 397 U.S. 397 U.S. 436, 444, 90 S.Ct. 1189 (internal quotation marks omitted). "First, courts must examine the verdict and the record to see what facts, if any, were necessarily determined in the acquittal at the first trial. Second, the court must determine whether the previously determined facts constituted an essential element of the second offense." *United States v. Ohayon,* 483 F.3d 1281 (11th Cir. 2007). Therefore, if this Court determines that the facts supporting the jury's finding that Teleco was part of the public administration of the Republic of Haiti are insufficient to support the verdict or warrant a new trial, the Court must determine if the same facts necessarily supported the jury's finding regarding the defendant's guilt of a scheme to defraud in Counts 9 through 21, and if so, an acquittal or new trial must also be similarly entered.

at trial sought to establish one underlying scheme to defraud, involving multiple participants: the defrauding of a foreign government through the payment of alleged bribes to foreign government officials, working in their official capacity, for an alleged state-owned entity: Teleco. Count 9 focuses on "bribe payments" Terra made to Antoine and Duperval – individuals alleged to be foreign government officials in the Indictment.

Similarly, Counts 10 through 21 contain substantive counts of money laundering, which like Count 9, are specifically tied to the payments to an alleged foreign government official – Duperval. Like Count 9, the Government's arguments and proof at trial asserted that the payments were bribes to a foreign government official. Nothing in the indictment nor the proof at trial indicated that proceeds of the underlying specified unlawful activity involved a different offense. Accordingly, the Government's assertion that a failure of proof of the FCPA counts, either as the Record presently stands or due to newly discovered evidence, does not affect the wire fraud allegations in Counts 9-21, is woefully misplaced.

B. Jury Instructions, Pretrial Rulings and Evidentiary Objections:

In addition to the arguments previously raised at trial and in Rodriguez's post trial motions, Rodriguez submits:

Deliberate Ignorance Jury Instruction: A deliberate ignorance instruction is not proper merely because the FCPA contains language allowing for it. Before a deliberate ignorance instruction may be given in any case, the proof must show that there was evidence that the defendant was aware of "high probability" that there were illegal payments being made and defendant was deliberately, or "studiously sought to avoid knowing what was plain." *United States v. Kozeny,* 664 F Supp 2d 369, 388 (SD NY 2009)(FCPA case). Indeed, the Eleventh Circuit has similarly held that a deliberate ignorance instruction is only appropriate where the facts "support the inference that the defendant was aware of a *high probability* of the existence of the fact in question and *purposely contrived* to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution." *United States v. Schlei,* 122, F.3d 944, 973, (11th Cir. 1997)(SEC violations)(emphasis added). Here, nothing was plain about Teleco was part of the administration of Haiti or that the payments were illegal in nature. As a result, the deliberate ignorance instruction in this case was improperly given to the jury.

By making the foregoing argument, however, the Defendant does not waive the constitutional objection he preserved to the instruction on the grounds that it diminished the government's burden to prove specific intent, and reasserts it hereby by reference.

FCPA Jury Instructions: In addition to the arguments previously raised, Rodriguez asserts that the Courts jury instructions improperly did not require the jury to find that Rodriguez knew that the individuals at Haiti Teleco were government officials. The Government recently acknowledged in *United States v. Carson* that proof that the defendant had knowledge that the individual bribed is in fact a government official, and proposed the following instruction be given to the jury regarding the elements of an FCPA offense:

> A defendant may be found guilty of violating the FCPA only if the government proves beyond a reasonable doubt all of the following elements:
>
> (1) The defendant is a domestic concern, or an officer, director, employee, or agent of a domestic concern, or a stockholder of a domestic concern who is acting on behalf of such domestic concern;
>
> (2) The defendant acted corruptly and willfully;
>
> (3) The defendant made use of the mails, wires, or any means or instrumentality of interstate commerce in furtherance of conduct that violates the FCPA;
>
> (4) The defendant offered, paid, promised to pay, or authorized the payment of money, or offered, gave, promised to give, or authorized the giving of anything of value;
>
> (5) The payment or gift at issue in element 4 was to

(a) a person the defendant knew or believed was a foreign official or (b) any person and the defendant knew that all or a portion of such money or thing of value would be offered, given, or promised (directly or indirectly) to a person the defendant knew or believed to be a foreign official.

The government need not prove that the defendant knewthe legal definition of "foreign official" under the FCPA or knew that the intended recipient of the payment or gift fell within the legal definition. The defendant need not know in what specific official capacity the intended recipient was acting, but the defendant must have known or believed that the intended recipient had authority to act in a certain manner as specified in element 6.

(6) The payment or gift at issue was intended for at least one of four purposes:

a. To influence any act or decision of a foreign official in his or her official capacity;

b. To induce a foreign official to do or omit to do any act in violation of that official's lawful duty;

c. To secure any improper advantage; or

d. To induce a foreign official to use his or her influence with a foreign government or department, agency, or instrumentality thereof to affect or influence any act or decision of such government, department, agency, or instrumentality; and

(7) The payment or gift was intended to assist the defendant in obtaining or retaining business for or with, or directing business to, any person.

See Exhibit H at pp. 4-5 (emphasis added).

In contrast, the Court's instructions here used a strict liability standard that only required that the payments be made to a foreign government official; not that the defendant had knowledge that the individual was performing his job for a state owned entity in his or her official capacity as a government official. See Court's Instructions at ECF No. 520 at page 20. As a result, the FCPA jury instructions provided improperly removed the issue of the defendant's knowledge regarding whether the individual allegedly bribed was in fact a government official.

II. NEWLY DISCOVERED EVIDENCE, DISCOVERY & BRADY:

In *United States v. Espinosa-Hernandez*, 918 F.2d 911 (11th Cir. 1990), the court reversed and remanded the trial court's denial of the defendant's motion for

new trial based upon newly discovered evidence of serious misconduct by a key government witness where the trial court had found that the evidence was merely impeachment evidence. In remanding the case with directions to permit discovery and conduct an evidentiary hearing, the Eleventh Circuit noted that the discovery and evidentiary hearing may enlighten the trial court as to the impact of the new evidence and explore when the United States Attorney's Office learned of it. *Id.* at 913-914.

In the case at hand, the discovery and evidentiary hearing requested should enlighten this Court regarding critical discrepancies in the manner in which the United States procured the Second Declaration and failed to produce exculpatory evidence before trial regarding Haiti Teleco's legal status in Haiti. As a result, the Defendant has simultaneously filed with this Reply a motion for discovery and evidentiary hearing. In that motion, Rodriguez notes that the Government's Response and the Second Declaration from Haiti has heightened the need for an evidentiary hearing for the following reasons:

(1) After Rodriguez filed his motions for new trial and judgment of acquittal, the Government obtained a second "clarifying" declaration from Mr. Bellerive (Second Declaration) in order to refute the First Declaration attached to Rodriguez' motion.

(2) The Government's Response acknowledges that it assisted Mr. Bellerive in drafting the Second Declaration, and the evidence shows that the assistance was substantial, because:

A. Rather than "clarify," Mr. Bellerive dramatically changed his conclusion regarding Haiti Teleco's status.

B. The manner in which the Second Declaration symmetrically follows Mr. Lissade's trial testimony indicates that the United States assistance was substantial, and an overt effort to save the convictions. See Exhibit "C" to Joint Request for Status Conference and Briefing Schedule filed on September 12, 2011.

C. The excuse Bellerive offered for the need to "clarify" the First and Second Declarations, is a false statement. Specifically, the statement in the Second Declaration claiming that the First Declaration was "signed strictly for internal purposes and to be used in support of the on-going modernization process of Teleco" is false. See, Exhibit "B" - Second Declaration at ¶ 2. While at first blush that claim may seem logical because Haiti has periodically sold stock it held in companies in order to modernize infrastructure and obtain funds it sorely needed, the documentary evidence reveals that the First Declaration

pursuant to a request from counsel for Patrick Joseph, Richard Klugh, Esq.,[3] requesting an official statement from the Republic of Haiti regarding the Haitian law and status of Haiti Teleco, and not a request for a letter from anyone involved in the modernization process. See Klugh Letter attached hereto as Exhibit "D."[4] Moreover, the "modernization" of Haiti Teleco consisted of the purchase of a majority of Teleco's shares of stock by a Vietnamese company named Viettel in early 2010 – over a year prior to trial. And, assuming that the First Declaration somehow had some purpose in the Viettel's stock purchase in Teleco, one would expect the declaration to at least mention Viettel, and for the cover letter to Mr. Klugh not to match the date of the declaration only prepared for internal purposes. See cover letter at Exhibit "E." However, both the First Declaration and the cover letter from Jean Max Bellerive to Richard Klugh bear the date of July 26, 2011. See Exhibits "D" and "E." Notably, the Second Declaration failed to

[3] Counsel for Rodriguez was not aware of Richard Klugh's letter at the time of filing his motions for Judgment of Acquittal and/or new trial.

[4] The Klugh letter is also attached as Exhibit "D" to the Joint Request for Status Conference filed by all defense counsel of record.

> mention how or for what specific purpose the First Declaration was needed in order to somehow facilitate its already completed sale to Viettel. Compare Paragraph 2 of Second Declaration (Exhibit "B") to articles regarding the 2010 Viettel stock purchase attached at Composite Exhibit "G."[5]

The United States has unique access to Haitian government officials and the records of Teleco. As noted in the First Declaration, and unbeknownst to the Defendants during trial, the records in Haiti do not reflect that Teleco ever changed its By-Laws to convert Teleco to a public entity.[6] Nevertheless, the United States Government permitted their expert, Gary Lissade, to testify that he did not and could not review the Teleco By-Laws. In addition, after receiving the First Declaration, the United States Government immediately sought a Second Declaration from the same Haitian government official to repudiate the First

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[5] Book-marked by date. The newspaper articles are also available on the internet at http://www.cfihaiti.net/j10/index.php?option=com_content&task=view&id=1058&Itemid=106, http://en.baomoi.com/Home/sciencetechnology/cpv.org.vn/Viettel-expands-operations-in-Haiti/101793.epi; http://www.mpi.gov.vn/portal/page/portal/mpi_en/32343?pers_id=417332&item_id=9527562&p_details=1, and http://ayitinou.com/article-posts/29-haitian-articles/2932-great-news-for-the-haitian-people-in-haiti-viettel-officially-enters-haitian-telecom-market.html.

[6] In *United States v. McNab,* 324 F.3d 1266 (11th Cir. 2003), the Eleventh Circuit held that this Court is entitled to "rely upon the representations of foreign officials as to the validity of their government's laws." *Id.* 30. See also Fed. R. Crim. Pro. 26.1.

Declaration he issued days earlier. Haiti, due to its political unrest, series of natural disasters, rampant poverty and history of occupation and financial dependence upon United States, is particularly vulnerable to the influence of the United States. See Philippe Girard, *Haiti: The Tumultuous History – From Pearl of the Caribbean to Broken Nation* (MacMillan 2010), and excerpt of same at Exhibit "F." [7]

Thus, as in *Espinosa-Hernandez*, discovery may also reveal when the United States Government obtained a copy of the By-Laws, what the Government knew about the By-Laws during trial, and whether the Haitian government or others informed or the Government otherwise knew that the change in the By-Laws was "essential" for Teleco to be a public entity. Discovery will also enlightened the Court as to what measures the United States Government engaged in in order to cause the Haitian government to execute the Second Declaration changing its conclusion that Teleco was never part of the public administration.

Accordingly, the Second Declaration's claims (and the Government's argument) that the First Declaration was only for the modernization process and that it was unknown that it would be used in United States courts, are highly

[7] In addition to the United States long history of military occupation and political influence, (*ibid*), Girard documents U.S. involvement and influence in Haiti through access to U.S. markets and financial assistance, and the more recent lifting of US State Department travel warnings in 2009, which impeded Haiti's tourist industry. (See pp. 223-24 at Exhibit "F").

suspect,[8] and must be explored through discovery and an evidentiary hearing. The deprivation of an individual's liberty should never be based upon testimony or interpretations of law that are incorrect, or worse, influenced due to political or financial pressures. Due process requires that discovery and an evidentiary hearing be held address the knowledge of the United States concerning the existence of *Brady* evidence regarding Teleco's status as a private rather than public entity, and the diplomatic or other pressures the United States applied before and after trial to suppress same. It is only through this process that this Court can ensure that an individual's liberty is not improperly deprived due to errors, mistakes or diplomatic pressures to change a sworn statement.

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[8] It is axiomatic that evidence that refutes an element of an offense is material to the defense and is not mere impeachment. Nevertheless, under *Brady v. Maryland*, the prosecution is required to disclose to the defense evidence favorable to the accused if the evidence is material to guilt or punishment. 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *Routley v. Singletary*, 33 F.3d 1279, 1285 (11th Cir. 1994). Indeed, the United States Supreme Court has held that "impeachment evidence, ... as well as exculpatory evidence, falls within the *Brady* rule." *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481 (1985). A successful *Brady* claim requires three elements: (1) the prosecution suppressed evidence, (2) the evidence suppressed was favorable to the defense or exculpatory, and (3) the evidence suppressed was material. *Brady,* 373 U.S. at 87, 83 S. Ct. at 1196-97; *Jacobs v. Singletary*, 952 F.2d 1282, 1288 (11th Cir.1992); *Delap v. Dugger,* 890 F.2d 285, 298 (11th Cir. 1989), *cert. denied*, 496 U.S. 929, 110 S. Ct. 2628, 110 L. Ed. 2d 648 (1990). "Favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 432, 115 S. Ct. 1555, 1565, 131 L. Ed. 2d 490 (1995) (citation and quotation marks omitted).

Therefore, any ruling by this Court without first conducing discovery and an evidentiary hearing would be premature. *Espinosa-Hernandez*, at 913-914. (remanded for evidentiary hearing and discovery to determine when the prosecution learned of evidence despite testimonies of other witnesses supporting conviction).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of September 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all parties, including the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: None.

/s/ Rhonda A. Anderson_____
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