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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JORGE SOSA, Aka "Jorge Vinicio Sosa Orantes," Defendant.	No. ED CR 10-49-VAP GOVERNMENT'S TRIAL BRIEF Trial date: 9/24/13 Time: 8:30 a.m. Place: Courtroom 2

Plaintiff United States of America, by and through the United States Attorney of the Central District of California and the Acting Assistant Attorney General of the Criminal Division, hereby submits the government's trial brief.

Dated: September 17, 2013

Respectfully submitted,

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I. CASE SCHEDULING MATTERS

A. Trial is set for September 24, 2013 at 8:30 a.m. before the Honorable Virginia A. Phillips, United States District Judge.

B. The estimated time for trial is eight days.

C. Defendant JORGE SOSA, also known as ("aka") "Jorge Vinicio Sosa Orantes" ("defendant") is detained pending trial.

D. Trial by jury has not been waived.

E. The government anticipates calling approximately 15 witnesses in its case-in-chief.

F. Defendant should have the assistance of a Spanish language interpreter.

II. THE INDICTMENT

Defendant is charged in a two-count indictment with:

Count One: Making a false statement in a naturalization matter, in violation of 18 U.S.C. § 1015(a); and

Count Two: Procuring naturalization contrary to law, in violation of 18 U.S.C. § 1425(a).

A copy of the indictment is attached to this memorandum as Exhibit A.

III. STATEMENT OF FACTS

The government intends to prove at trial the following facts, among others:

In or around 1982, the Guatemalan military maintained a special forces unit known as the "Kaibiles," who trained at a facility in La Polvora, El Peten, Guatemala, known as "the Kaibil School."

From in or around August 1982, the Kaibil School was closed as an instruction facility. During this time the Kaibiles at the school engaged in activities designed to locate, interrogate, and remove suspected guerrillas and suspected guerrilla sympathizers from the local population. Defendant was in charge of the Kaibil School during this time and oversaw the kidnapping and torturing of civilians.

In or around November 1982, the Guatemalan guerrilla group known as "Fuerzas Armadas Revolucionarias" (Revolutionary Armed Forces or FAR) ambushed a Guatemalan military convoy near Las Cruces, Guatemala, killing soldiers and taking their rifles. In response, the Guatemalan military ordered a special patrol of approximately twenty Kaibiles from the Kaibil School to find the suspected guerrillas and recover the stolen weapons. The special patrol deployed to a small village near Las Cruces named Does Erres. Defendant was one of the commanders of the special patrol.

On or about December 7, 1982, the special patrol entered Dos Erres with the support of approximately forty additional Kaibiles, who created a security perimeter around the village so

that no one could enter or escape. The members of the special patrol searched all the houses for the missing weapons, forced the villagers from their homes, and separated the women and children from the men. No weapons were found and the villagers put up no resistance.

During the night, the Kaibiles began raping the girls and women of the village. As a result, a decision was made to "vaccinate" or kill everyone in the village. The killing began with the throwing of live children into the village's well. Next, the special patrol systematically led the men, women, and children at Dos Erres to the well, where they were questioned about the rifles and then killed by, among other methods, hitting them in the head with a sledgehammer and having their bodies fall into the well. During this time, the special patrol continued to forcibly rape the women and girls of Dos Erres before killing them. Defendant oversaw the killing at the well, and participated in the killing by hitting men, women, and children in the head with a sledgehammer. In addition, defendant fired a rifle and threw a grenade into the well to kill villagers who were still alive.

On or about May 10, 1985, defendant applied for asylum in the United States. His application was denied and defendant departed for Canada, where he obtained asylum.

On or about October 22, 1997, defendant submitted a Form I-485 Application to Register Permanent Residence or Adjust Status (Form I-485 Application) for lawful permanent resident status in the United States based upon his marriage to a United States citizen. On or about November 30, 1998, defendant appeared before a United States Citizenship & Immigration Services (USCIS) adjudication officer for an interview based on his I-485 Application. In the application and orally at his interview, defendant responded "none" to the question in Part 3(c), which asked defendant about his prior military service:

> List your present and past membership in or affiliation with every political organization, association, fund, foundation, party, club, society, or similar group in the United States or in any other place since your 16th birthday. Include any foreign military service in this part. If none, write "none." Include the name of the organization, location, dates of membership from and to, and the nature of the organization. If additional space is needed, use separate paper.

On or about November 30, 1998, defendant's petition for lawful permanent residence was granted.

On or about April 18, 2007, defendant applied to naturalize as a United States citizen. Specifically, defendant submitted a Form N-400 Application for Naturalization (Form N-400 Application), which was processed by the San Bernardino Field Office of the USCIS, located in San Bernardino, California. Defendant was then residing in Riverside County, California.

On or about March 18, 2008, defendant appeared before a naturalization examiner at the San Bernardino Field Office of USCIS in San Bernardino, California, for an interview based on his Form N-400 Application. At that time, defendant swore under oath to the answers he had made in the Form N-400 Application and knowingly made the following false statements under oath:

(1) Part 10, Question (D)(15), that he had never committed any crime or offense for which he had not been arrested, when in truth and in fact, as he then well knew, he had committed crimes, including but not limited to murder, at the village of Dos Erres;

(2) Part 10, question (B)(8)(a), that he was not a member of or associated with any organization, association, fund, foundation, party, club, society, or similar group in the United States or in any other place, and failed to list his membership in a foreign military, when in truth and in fact, as he then well knew, he had been a member of the Guatemalan Army; and

(3) Part 10, Question (D)(23), that he had never given false or misleading information to any U.S. government official while applying for any immigration benefit, when in truth and in fact, as he then well knew, that he had falsely denied any foreign military service in his Form I-485 Application to Register Permanent Residence or Adjust Status in part 3(c).

On or about August 27, 2008, defendant's petition for naturalization was granted. On or about September 26, 2008, defendant became a naturalized citizen of the United States.

IV. OFFENSE ELEMENTS

A. FALSE STATEMENT IN A NATURALIZATION MATTER

The elements of making a false statement in a naturalization matter, in violation of 18 U.S.C. § 1015, are:

First: Defendant knowingly made a false statement;

Second: The statement was made under oath; and

Third: The statement was made in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization, citizenship, or registry of aliens.

18 U.S.C. § 1015(a); Pattern Criminal Jury Instructions of the Seventh Circuit: Making False Statement in an Immigration Document - Elements, p. 285 (In order for you to find [a; the] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt: 1. The defendant knowingly made a false statement under oath; and 2. The statement was made in a [case] [proceeding] [matter]] [[related to] [under] [by virtue of] any law of the United States related to [naturalization] [citizenship] [registry] of aliens); United States v. Sadig, 352 F. Supp. 2d 634, 637 (W.D.N.C. 2005) ("The elements of this offense are (1) the knowingly making; (2) of a false statement; (3) under oath; (4) related to naturalization."); United States v. Li, 2013 WL 147803, 2013 Dist. LEXIS 5571 *11 (D. Ariz. Jan. 14, 2013) (accepting as

proper defendant's conviction where defendant confirmed in plea agreement "that the elements of the offense [we]re as follows: (1) I knowingly made a false statement under oath; (2) in a matter relating to naturalization or citizenship under the laws of the United States"). See also United States v. Ali, 557 F.3d 715, 725 (6th Cir. 2009) ("we acknowledge that while the making of a "false statement under oath" is an element required to convict under 18 U.S.C. § 1015(a), the government must also prove beyond a reasonable doubt that Ali "knowingly" made such a false statement"); United States v. Youssef, 547 F.3d 1090, 1091 (9th Cir. 2008) (holding materiality is not an element of 8 U.S.C. § 1015(a)).

Here, the indictment charges defendant with making three false statements, and the jury must agree on at least one particular false statement that defendant made. Ninth Circuit Model Jury Instruction No. 7.9 (2010) [Specific Issue Unanimity] ("When a specific unanimity instruction is necessary, the Committee recommends including in the substantive instruction the phrase ". . . with all of you agreeing [as to the particular matter requiring unanimity]," citing United States v. Garcia-Rivera, 353 F.3d 788, 792 (9th Cir. 2003)).

B. UNLAWFUL PROCUREMENT OF NATURALIZATION

The elements of obtaining naturalization contrary to law, in violation of 18 U.S.C. § 1425, are:

First: Defendant knowingly made a misrepresentation on, or omitted information from, his Application for Naturalization, Form N-400.

Second: Defendant knowingly procured United States citizenship; and

Third: The procurement of United States citizenship was contrary to law in that the misrepresentation or omission was material.

18 U.S.C. § 1425(a); United States v. Puerta, 982 F.2d 1297 (9th Cir. 1992) ("We therefore look to the standards governing materiality in the denaturalization context as a guide to determining what is "contrary to law" under 18 U.S.C. § 1425.... Presumably the 'law' referred to is the law governing naturalization").

A misrepresentation or omission is material for an offense under 18 U.S.C. § 1425 if the misrepresentation or omission has a tendency to suggest that defendant was qualified for naturalization, and the production of truthful information would have led to the discovery of facts relevant to the defendant's naturalization petition. To establish materiality, the government must provide evidence sufficient to give rise to a fair inference that defendant was not eligible for naturalization, but the government does not have to prove that it was more likely than not that knowledge of the true facts

would have precluded naturalization. Kungys v. United States, 485 U.S. 759, 776 (1988); United States v. Alferahin, 433 F.3d 1148, 1154-55 (9th Cir. 2006); Puerta, 982 F.2d at 1303-05.

To be entitled to naturalization, defendant needed to establish that he was a person of good moral character for the five years immediately preceding his naturalization application; however, USCIS could have considered defendant's conduct and acts during any time period in determining whether defendant had established such good moral character. 8 U.S.C. § 1427(a)(7), (e); 8 C.F.R. §§ 316.2(a)(7), 316.10(a)(1); United States v. Dang, 488 F.3d 1135, 1140 (9th Cir. 2007) (finding agency's definition of "good moral character" to include "underlying convictions that were entered outside the [statutory] five-year good moral character period" permissible under Chevron)(referencing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984)).

No person shall be regarded as or found to be a person of good moral character who, during the time period for which good moral character is required to be established, gave false testimony for the purpose of obtaining any immigration benefit. 8 U.S.C. § 1101(f)(6); 8 C.F.R. § 316.10(b)(2)(vi). Further, no person shall be regarded as or found to be a person of good moral character if they, at any time, ordered, incited, assisted, or otherwise participated in any extrajudicial killing

outside the United States under color of law of any foreign nation. 8 U.S.C. § 1101(f)(9). "Extrajudicial killing" is the deliberated killing of another not authorized by a judgment of a regularly constituted court. 28 U.S.C. § 1350 note.

C. INTENT

Both Count One and Count Two require that defendant acted "knowingly." An act is done knowingly if the defendant is aware of the act and does not act or fail to act through ignorance, mistake, or accident. The government is not required to prove that the defendant knew that his acts or omissions were unlawful; knowledge that the representation was false is sufficient. The jury may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly. Ninth Circuit Model Jury Instruction No. 5.6 (2010) [Knowingly - Defined]; Forbes v. INS, 48 F.3d 439, 442 (9th Cir. 1995) ("knowledge of falsity is enough").

V. EVIDENTIARY ISSUES

A. DEFENDANT'S STATEMENTS

The government anticipates that it will introduce prior statements made by defendant. Under the Federal Rules of Evidence, a defendant's statement is admissible only if offered against him by the government; a defendant may not elicit his own prior statements. Fed. R. Evid. 801(d)(2)(A); United States

v. Fernandez, 839 F.2d 639, 640 (9th Cir. 1988). When the government introduces some of a defendant's prior statements, the door is not thereby opened for the defendant to introduce all of his out-of-court statements, because when offered by the defendant, the statements are hearsay. Id.

Defendant made certain written and/or oral statements to USCIS and others that are relevant and material to this case, including in emails. All these statements are admissible against defendant as statements of a party opponent pursuant to Fed. R. Evid. 801(d)(2). A statement need not be incriminating to be an admission. Territory of Guam v. Ojeda, 758 F.2d 403, 408 (9th Cir. 1985).

B. DOCUMENTARY EVIDENCE

The government intends to introduce documentary evidence, including defendant's immigration file maintained by the Department of Homeland Security ("DHS"), domestic and foreign public records, business records, and items found at defendant's residence on or about May 4, 2010 pursuant to a search warrant.

1. Duplicates

Some of the documents that the government intends to introduce are duplicates of the originals. A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original, or (2) under the circumstances, it would be unfair to

admit the duplicate instead of the original. Fed. R. Evid. 103; United States v. Smith, 893 F.2d 1573, 1579 (9th Cir. 1990).

2. Domestic and Foreign Records of a Public Office

The government intends to introduce certain public records at trial, including immigration documents contained in defendant's Alien File or "A-File," border crossing records, passport records, Department of Motor Vehicle (DMV) records, and foreign public documents, such as Guatemalan military service records obtained through a Mutual Legal Assistance Treaty (MLAT) with Guatemala and travel records obtained through a MLAT with Canada. These records fall within the public records exception to hearsay as provided in Federal Rule of Evidence 803(8).

The Supreme Court held in Crawford v. Washington, 541 U.S. 36 (2004) that where the government offers at trial hearsay evidence that is "testimonial" in nature, the Confrontation Clause of the Sixth Amendment requires actual confrontation, i.e., cross-examination, regardless of how reliable the statement may be. Id. at 68. Although the Court did not define what evidence is "testimonial," it did hold (or strongly suggested) that certain types of statements would not constitute "testimonial" hearsay, and thus would not be subject to the requirement of actual confrontation. Examples of such statements included business records (id. at 56), co-conspirator statements (id.), and statements made unwittingly to a

government informant (citing Bourjaily v. United States, 483 U.S. 171, 182-84 (1987)). According to Chief Justice Rehnquist, concurring in the judgment, "official records" also do not fit within the Crawford majority's definition of "testimonial." Id. at 76.

Specifically as to defendant's A-file, the contents of an A-file may be admitted under the public records exception to the hearsay rule, pursuant to Federal Rule of Evidence 803(8). United States v. Hernandez-Herrera, 273 F.3d 1213, 1217-18 (9th Cir. 2001) (holding defendant's immigration file admissible under public records hearsay exception); United States v. Loyola-Dominguez, 125 F.3d 1317-18 (9th Cir. 1997). Further, the defendant's A-file is not "testimonial" in nature. United States v. Rueda-Rivera, 396 F.3d 687 (5th Cir. 2005) (holding contents of an immigration file are akin to business records and, thus, not testimonial in nature).

Similarly, border crossing records, passport records, DMV records, foreign military service records, and travel records are akin to business records, are not testimonial in nature, and are admissible under Federal Rule of Evidence 803(8).

3. Business Records

The government intends to introduce certain business records at trial, such as defendant's cellphone records and travel records. These are records of regularly conducted

activity and, therefore, admissible under the business records exception to the hearsay. Fed. R. of Evid. 803(6); United States v. Ray, 930 F.2d 1368, 1370 (9th Cir. 1990) ("There is no requirement that the government establish when and by whom the documents were prepared.").

4. Adoptive Admissions

Adoptive admissions are not hearsay. Fed. R. Evid. 801(d)(2). Documents found in a defendant's possession are adoptive admissions, and therefore the documents found at defendant's residence when a search warrant was executed are admissible as nonhearsay. "[C]ourts have held that possession of a written statement becomes an adoption of its contents." United States v. Ospina, 739 F.2d 448, 451 (9th Cir. 1984) (business cards with handwritten notations found in defendant's motel room admissible as adoptive admission); United States v. Carillo, 16 F.3d 1046, 1049 (9th Cir. 1994) ("tally sheet" in defendant's possession was adoptive admission where defendant manifested his adoption of its contents or belief in its truth by possessing the slip of paper); United States v. Marino, 658 F.2d 1120, 1124-25 (6th Cir. 1981) (airline tickets found in defendant's possession admissible as adoptive admission); United States v. Canieso, 470 F.2d 1224, 1232 (2d Cir. 1972) (letters found in defendant's possession admissible as adoptive admission).

C. AUTHENTICATION

Federal Rule of Evidence 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Under Rule 901(a), evidence should be admitted, despite any challenge, once the government makes a prima facie showing of authenticity or identification so "that a reasonable juror could find in favor of authenticity or identification . . . [because] the probative force of the evidence offered is, ultimately, an issue for the jury." United States v. Chu Kong Yin, 935 F.2d 990, 996 (9th Cir. 1991) (citations and internal quotation marks omitted); United States v. Black, 767 F.2d 1334, 1342 (9th Cir. 1985).

The majority of the government's documentary exhibits at trial will be self-authenticating, pursuant to Federal Rule of Evidence 902. This includes: foreign public documents, pursuant to Federal Rule of Evidence 902(3); certified copies of public records, pursuant to Federal Rule of Evidence 902(4); and business records accompanied by a custodian of records declaration, pursuant to Federal Rule of Evidence 902(11).

Specifically as to foreign public documents, Federal Rule of Evidence 902(3) provides that a foreign public document is self-authenticating if it 1) "purports to be signed or attested

by a person who is authorized by a foreign country's law to do so"; and 2) is accompanied by a final certification of the genuineness of the signature and official position of the signer or attestor that is made by a consul general, vice consul, or consular agent of the United States. In this case, each of the foreign public records (obtained pursuant to MLAT) that the government expects to introduce as exhibits are 1) attested by the Chief of Authentications of the Guatemalan Ministry of Foreign Affairs, and 2) are accompanied by a final certification by the Consul of the United States, who certifies the genuineness of the signature and official position of the attestor. Thus, these foreign public records are self-authenticating. United States v. Regner, 677 F.2d 754, 758-59 (9th Cir. 1982) (admission of certified foreign public documents does not violate Confrontation Clause, as record was devoid of evidence that foreign officials harbored ill will against defendant, were biased or prejudiced, or were motivated to prepare false documents).

Moreover, Federal Rule of Evidence 902(3) provides that foreign public records can be treated as presumptively authentic without a final certification if "all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy." Here, defense counsel was provided these documents with their accompanying attestations and

certifications well in advance of trial, and provided written notice of the government's intent to introduce these documents pursuant to Federal Rule of Evidence 902(3).

Specifically as domestic public records, certified copies are self-authenticating. Fed. R. Evid. 902(4); United States v. Estrada-Eliverio, 583 F.3d 669, 672-73 (9th Cir. 2009); see also United States v. Orellana-Blanco, 294 F.3d 1143, 1150 (9th Cir. 2002) (documents in A-file admissible under the public records exception to hearsay rule if they are records of routine, non-adversarial matters made in a non-adversarial setting, reflecting ministerial, objective observations).

Specifically as to business records, copies are self-authenticating if accompanied by a custodian of records declaration that establishes the requirements set forth in Federal Rule of Evidence 803(6)(A). In addition, the proponent of the records must give the adverse party "reasonable written notice of the intent to offer the record" and "must make the record and certification available for inspection - so that the party has a fair opportunity to challenge them." Here, the custodian of records declarations accompanying the government's business record exhibits meet the requirements of Federal Rule Evidence 803(6)(A). Further, the government gave defendant written notice of its intent to introduce these business records

into evidence at trial through custodian of records declarations in a letter dated August 2, 2013.

D. ENGLISH TRANSLATION OF SPANISH LANGUAGE

Some of the government's documentary evidence is written in the Spanish language and, thus, is accompanied by an English-language translation of the document or excerpts of the document. This includes public records obtained from Guatemala via MLAT, defendant's emails, documents seized from defendant's residence, and excerpts from the Guatemalan penal and military codes. Further, some of the government's witnesses are Spanish speakers requiring an interpreter.

When another language is used at trial, the jury is only to consider the English language translation. Ninth Circuit Model Jury Instruction No. 3.19 (2010) [Jury to be Guided by Official English Language Translation]. That is because it is the English translation that is the evidence. United States v. Taghipour, 964 F.2d 908, 910 (9th Cir. 1992) (affirming Judge Tevrizian's instruction to the jury that tape was the evidence for the portion of the conversation in English, while the translated transcript was the evidence for the portion of the conversation in Farsi). Accordingly, the English translation of a foreign language is properly admitted into evidence. Taghipour, 964 F.2d at 910 n.1; United States v. Fuentes-Montijo, 68 F.3d 352 (9th Cir. 1995), opinion supplemented, 74

F.3d 1247 (9th Cir. 1996) (in the case of recorded foreign language conversations, transcripts containing an English translation is the best evidence of the conversations, not the tape). Thus, a trial court may admit English translations of a foreign language as long as the proper foundation is laid and the proper instructions are provided to the jury. United States v. Armijo, 5 F.3d 1229, 1234 (9th Cir. 1993).

Because the English translation of a foreign language constitutes "the evidence," there usually will be no need to provide the jury with a Spanish language document at trial; [1] and it may be potentially harmful if the jury has bilingual speakers. United States v. Franco, 136 F.3d 622 (9th Cir. 1998) (when the tape is in a foreign language, an instruction that the tape is controlling -- if the transcript and the tape vary -- is "not only nonsensical, it has the potential for harm where the jury includes bilingual jurors," citing Fuentes-Montijo, 68 F.3d at 355-56).

To preclude the admission of a foreign language translation, the defendant has the burden of showing that the translation is inaccurate and that the defendant is prejudiced by the use of the translation. See, e.g., Armijo, 5 F.3d at 1234-35; Taghipour, 964 F.2d at 910; United States v. Pena-

[1] There may be reasons to admit some Spanish language documents into evidence in this case. For instance, sometimes the text of the document is accompanied by a photograph in the original.

Espinoza, 47 F.3d 356, 360 (9th Cir. 1995); United States v. Font-Ramirez, 944 F.2d 42, 48 (1st Cir. 1991), cert. denied, 502 U.S. 1065 (1992) (no abuse of discretion to admit transcript where defendant failed to meet burden of showing inaccuracies or offering alternative transcript).

Here, the government produced draft translations of Spanish language documents that the government intends to offer into evidence at trial, and defendant has not asserted any objections to those draft translations. As such, admission of the foreign language translation of such documentary evidence is proper. Pena-Espinoza, 47 F.3d at 358.

E. EXPERT WITNESSES

The government intends to offer the testimony of the following expert witnesses at trial:

(1) Anita Garcia, Section Manager of the San Bernardino Field office of USCIS, who has specialized knowledge in the qualifications and procedures for obtaining lawful permanent resident status and naturalization in the United States, including what is material to USCIS in granting or denying status, and will testify on those topics;

(2) Alexander Aizenstatd, who has specialized knowledge in Guatemalan law and is expected to testify regarding whether certain actions constituted crimes under Guatemalan law;

(3) Kate Doyle, who has specialized knowledge in and familiarity with Guatemalan military documents and Guatemalan history, and is expected to testify on those topics; and

(4) Silvana Turner, who has specialized knowledge in anthropological science, was part of the Argentine Forensic Anthropology Team ("EAAF") that investigated Dos Erres, and will testify about the findings of the EAAF relating to Dos Erres.

The government gave notice to defendant of these experts and the topics on which they would testify at trial. Further, the government has produced reports by Aizenstatd and the EAAF.

F. CROSS-EXAMINATION

The scope of a cross-examination is within the discretion of the trial court. Fed. R. Evid. 611(b). Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. Id. A trial court may, in the exercise of its discretion, permit inquiry into additional matters as if on direct examination. Id.

A defendant who testifies at trial waives his Fifth Amendment privilege and may be cross-examined on matters made relevant by his direct testimony. Black, 767 F.2d at 1341. The scope of the defendant's waiver is co-extensive with the scope of relevant cross-examination. The defendant may be cross-examined as to all matters reasonably related to the issues he

puts in dispute during cross-examination. A defendant has no right to avoid cross-examination on matters that call into question his claim of innocence. United States v. Mehrmanesh, 682 F.2d 1303, 1310 (9th Cir. 1982); United States v. Miranda-Uriarte, 649 F.2d 1345, 1353-54 (9th Cir. 1981).

G. CHARACTER EVIDENCE

Generally, evidence of a person's character is not admissible to prove that a person acted in conformity therewith. However, under Federal Rule of Evidence 404(a)(1), a defendant may elect to offer evidence of "a pertinent trait of character." If a defendant offers such evidence, the prosecution may offer evidence "to rebut the same." Fed. R. Evid. 404(a).

Defendant's character witnesses' testimony should be limited to relevant character evidence. In limiting a defendant's introduction of character evidence, the first issue to consider is whether the testimony is "pertinent" to the crimes charged in the indictment. In Rule 404(a)(1), "pertinent" is read as synonymous with "'relevant.'" United States v. Angelini, 678 F.2d 380, 381 (1st Cir. 1982).

The relevance of a particular character trait depends upon the crime charged. If relevant to the charge, a defendant's character witnesses may offer their opinion as to defendant's character trait for law-abidingness. United States v. Diaz, 961 F.2d 1417, 1419 (9th Cir. 1992). However, testimony as to a

defendant's propensity to violate immigration law would not be an admissible character trait. Id. Therefore, it follows that testimony about a defendant's lack of prior bad acts is also not admissible.

If the defendant should call a character witness to testify, there may be a question concerning the scope of the direct and cross-examinations. As a general rule, character witnesses called by the defendant may not testify about specific acts demonstrating a particular trait or other information acquired only by personal observation and interaction with the defendant; the witness must summarize the reputation or opinion of the defendant as known in the community. Fed. R. Evid. 405(a); Michelson v. United States, 335 U.S. 469, 477 (1948); United States v. Hedgcorth, 873 F.2d 1307, 1313 (9th Cir. 1989).

Defendant's character witnesses cannot testify to specific instances of conduct, including specific instances of truthfulness. A defendant may introduce specific instances of character only where character or trait of character "is an essential element of a charge, claim, or defense." Fed. R. Evid. 405. The Advisory Committee Notes to Federal Rule of Evidence 405 explain that:

> [T]he rule confines the use of evidence of [specific instances of conduct] to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used

circumstantially and hence occupies a lesser status in the case, proof may only be by reputation and opinion.

For example, instances of good conduct may be allowed in a case where the defendant raises a claim of entrapment because predisposition to commit the crime, and therefore character, becomes an essential element of the crime. United States v. Thomas, 134 F.3d 975, 980 (9th Cir. 1998).

However, in most cases, Rule 405 precludes a defendant from eliciting evidence of specific acts to demonstrate good character. Thus, any testimony regarding specific instances of a defendant's good character, for example, that a defendant is a loyal American, or is a legitimate businessman, or is devoted to his family, or has not had any problems with the law, is specifically prohibited by the rules of evidence. Moreover, specific good deeds cannot be introduced to negate intent elements of a crime. United States v. Doyle, 130 F.3d 523, 542 (2d Cir. 1997) (quoting J. Weinstein, M. Berger & J. McLaughlin, 2 Weinstein's Federal Evidence § 405.05[4] (1997).

On cross-examination of a defendant's character witness, however, the government may inquire into specific instances of defendant's past conduct relevant to the character trait at issue. Fed. R. Evid. 405(a). In particular, a defendant's character witnesses may be cross-examined about their knowledge of the defendant's past crimes, wrongful acts, and arrests. Michelson, 335 U.S. at 479, 481 n.18. The only prerequisites

are (1) that there be a good faith basis that the incidents inquired about occurred and (2) that the incidents are relevant to the character trait at issue. United States v. McCollom, 664 F.2d 56, 58 (5th Cir. 1981).

H. RECIPROCAL DISCOVERY

The government has made requests to defendant for all reciprocal discovery to which the government is entitled under Rules 16(b) and 26.2 of the Federal Rules of Criminal Procedure. To date, defendant has not produced any reciprocal discovery. To the extent the defendant may attempt to introduce or use any documents at trial that he has not produced, the government reserves the right to object and to seek to have such documents precluded. Further, the government reserves the right to object and to seek to preclude any expert opinion testimony offered by defendant at trial because defendant has failed to provide notice under Rule 16(b)(1)(C).