

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA)	
)	
v.)	09 CR 383-3
)	
JESUS VICENTE ZAMBADA-NIEBLA,)	
)	Judge Ruben Castillo
a/k/a “Vicente Zambada-Niebla,”)	
a/k/a “Vicente Zambada,”)	
a/k/a “Mayito,”)	
a/k/a “30”)	

**GOVERNMENT’S RESPONSE TO DEFENDANT’S MOTION FOR
EXTENSION OF TIME TO FILE REPLY BRIEFS UNTIL AFTER
THE CIPA PROCESS HAS BEEN COMPLETED**

The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, provides the following response to defendant’s motion for extension of time to file reply briefs until after the CIPA process has been completed.

INTRODUCTION

Defendant has filed a motion seeking to delay filing his replies to the government’s responses to defendant’s pretrial motions until after the Classified Information Procedure Act (“CIPA”) process has been completed. Defendant continues to allege that he was granted immunity and public authority for his actions in exchange for providing information regarding rival drug cartels. R. 117 at 2-3. Defendant argues that he cannot adequately reply to the government’s filings, which denied defendant’s allegations, without first understanding the nature, scope, and substance of the classified information in the possession of the government. Defendant’s arguments are without merit. Defendant’s proffered defenses of immunity and public authority both require that defendant personally receive immunity or public authority directly from an authorized agent of the

United States. While the discovery produced to defendant established that no such agreement existed, even if one did, defendant would be in the best position to demonstrate that he had contact with an agent who granted him immunity or public authority. Defendant does not require access to classified information, or unclassified information for that matter, to reply to the government's filings. Accordingly, this Court's order requiring defendant to reply to the government's filings on or before October 17, 2011 should stand and defendant's motion for delay should be denied.

ARGUMENT

A. Defendant Is Currently In a Position to Reply to the Government's Filings.

With its discovery production of September 6, 2011, the government has more than satisfied its discovery obligations with respect to defendant's proffered defenses of immunity, public authority, and entrapment by estoppel. As the materials produced to defendant make clear, at no time did an authorized agent of the U.S. government bestow upon defendant public authority to conduct any illegal activity. Moreover, in an abundance of caution, the undersigned Assistant U.S. Attorneys collectively interviewed all U.S. law enforcement personnel known to have had contact with defendant, as well as their immediate supervisors. Without exception, each of these agents and supervisors stated that no promises of immunity were issued to defendant at any time, defendant was never informed that he had public authority to engage in criminal conduct of any kind, and defendant was never informed that it was legal for him to traffic massive quantities of drugs or otherwise participate in a transnational narcotics conspiracy. The materials produced by the government further establish that, despite defendant's allegations to the contrary, no immunity agreement existed between the United States, through any law enforcement agency, and Humberto Loya-Castro that could have been extended to defendant, much less the entirety of the Sinaloa Cartel.

As he did in his motions seeking pretrial discovery, defendant now argues that he is caught in a chicken-or-egg dilemma in which he cannot adequately reply to the government's filings without further information. However, the Seventh Circuit has directly rejected this argument. In *United States v. Tokash*, the Seventh Circuit affirmed the district court's decision to quash defendants' Rule 17(c) subpoenas, and dismissed the defendants' argument that they could not establish the threshold showing of the required elements of their proposed necessity defense unless they were allowed their fishing expedition through the records of the federal agency involved. *United States v. Tokash*, 282 F.3d 962, 971 (7th Cir. 2002). The court explained that discovery does not exist "to allow criminal defendants to blindly comb through government records in a futile effort to find a defense to a criminal charge. Instead, it allows only for the gathering of specifically identified documents which a defendant knows to contain relevant evidence to an admissible issue at trial." *Id.*, citing *United States v. Nixon*, 418 U.S. 683, 700 (1974).

Like the defendants in *Tokash*, defendant cannot claim that he requires further information before he can proceed. An immunity or public authority defense necessarily requires that defendant himself possess knowledge of the central facts relevant to make a prima facie showing that such a defense is warranted. *See United States v. Baker*, 438 F.3d 749, 753 (7th Cir. 2006) (explaining that the defenses of public authority and entrapment by estoppel require that a government official authorize defendant to perform an act that would otherwise be a crime, or assure defendant that certain conduct is legal). Because immunity and public authority each require representations to be made directly from an authorized government agent to a defendant, in this case, defendant would be in the best position to detail the promises or authorizations made to him. As in *Tokash*, defendant cannot claim that he needs to be provided with discovery, whether classified or unclassified, to

establish what he himself was told before he can adequately establish his defense. Likewise, such circular reasoning cannot be used as a means to artificially delay defendant's filings.

In support of his request for delay, defendant now alleges that he requires access to classified materials to confirm that the intelligence community has "relevant and material information to establish that they had knowledge that the leaders of the Sinaloa Cartel were allowed to engage in drug trafficking activity but did nothing to prevent the trafficking or to arrest those leaders." R. 117 at 3-4. Defendant's argument is legally untenable. First, defendant has not alleged that he communicated with any member of the U.S. intelligence community, much less that such a person granted defendant immunity or public authority. But even if an intelligence official had done so, "[o]fficials of the C.I.A. or any other intelligence agency of the United States do not have the authority to authorize conduct which would violate 'the constitution or statutes of the United States,' including federal narcotics laws." *United States v. Anderson*, 872 F.2d 1508, 1516 (11th Cir. 1989), citing Exec. Order No. 12333, 3 C.F.R. 200 (1982). *See also United States v. Rosenthal*, 793 F.2d 1214, 1236 (11th Cir. 1986) (Because C.I.A. officials have no real authority to authorize conduct that would violate the Constitution or statutes of the United States, the defendants' theory that they were acting on the apparent authority of a C.I.A. agent is not a viable defense) (modified on other grounds); *United States v. Matta-Ballesteros*, 71 F.3d 754, 770 n.12 (9th Cir. 1995) (where a CIA agent could not lawfully authorize the violation of the federal drug laws, the public authority defense fails as a matter of law). Because all U.S. intelligence agencies lacked the authority to grant defendant immunity or public authority to traffic enormous volumes of cocaine and heroin into the United States, defendant cannot support his allegations with discovery from such agencies. Accordingly, defendant cannot claim that he requires such discovery before replying to the

government's filings.

Moreover, delay is unwise in light of the trial date in this case. Should this Court ultimately grant the government's motions to bar defendant's proffered defenses, defendant will presumably be left to alter his defense at trial. If defendant waits to file his replies, which will necessarily delay the Court's rulings, defendant will be left with either a small window to change his defense strategy or will be forced to ask this Court to delay his trial. Such delay in both unwarranted and unnecessary. Defendant should be required to file his reply briefs on or before October 17, 2011 to avoid needlessly jeopardizing the trial date previously set by this Court.

B. The Classified Materials Do Not Support Defendant's Allegations.

Defendant argues that he will be "disadvantaged if required to file replies before the CIPA process has been initiated, much less completed, because it will not have the benefit of the very information that supports its motions." R. 117 at 4. Defendant is correct that the government has yet to make any classified filings with the Court pursuant to CIPA. However, the undersigned Assistant U.S. Attorneys have reviewed all of the classified materials in this matter related to defendant and will be prepared to expeditiously follow the procedures outlined in its public CIPA filing, R. 110, in accordance with a schedule established by the Court. While the government cannot address classified materials that do exist in a public filing, the undersigned submit, based on their review of the classified materials, that there are no classified materials that support defendant's claim that he was promised immunity or public authority for his actions.¹ Accordingly, the CIPA

¹Defendant intimates that, because the government filed its CIPA memorandum on the same day as its responses to defendant's immunity and public authority motions, the two subjects must be related. R. 117 at 1. They are not. The government filed its CIPA motion on that date for judicial convenience and to provide the Court with sufficient time to set a CIPA schedule that will not negatively impact the trial date previously established.

process will not impact defendant's motions related to immunity and public authority and therefore should not be used to delay defendant's replies.

For the reasons detailed in the government's filings, this Court should bar defendant's related defenses of immunity and public authority as a matter of law and should preclude further discovery related to defendant's baseless allegations. The government submits that this Court can, and should, deny defendant's motions and grant the government's motion in limine to bar defendant's defenses based on the factual record and legal arguments made, which will be complete at the time defendant files his reply briefs. However, in the alternative, this Court should merely rule on these motions without prejudice to allow either party to revisit any issue decided by the Court in the unlikely event that such action becomes necessary following the CIPA process.

CONCLUSION

WHEREFORE, for the reasons stated herein the Court should deny defendant's motion for extension of time to file reply briefs until after the CIPA process has been completed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that the following document:

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was served October 4, 2011, in accordance with Fed. R. Crim. P. 49, Fed. R. Civ. P. 5, LR5.5, and the General Order on Electronic Case filing pursuant to the District Court's Electronic Case Filing (ECF) system as to ECF filers.

Respectfully submitted,

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