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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	Case No. 07-3064
	)	Appeal from the
v.	)	United States District Court
	)	for the District of ~~Columbia~~
I. LEWIS LIBBY,	)	
also known as Scooter Libby,	)	D. Ct. No. CR -5-394 (RBW)
	)	
Defendant-Appellant.	)	

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ORIGINAL
(M-38)

GOVERNMENT'S RESPONSE TO APPELLANT'S APPLICATION FOR RELEASE PENDING APPEAL

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On March 6, 2007, defendant was convicted by a jury of obstruction of justice, making false statements, and perjury, based on evidence the district court described as "overwhelming" (6/5/07 Tr. 80; 6/14/07 Tr. 58). On June 14, 2007, the district court imposed a sentence of thirty months' imprisonment and denied defendant's motion for release pending appeal on the ground that the issues defendant planned to raise on appeal were not "substantial" and would not likely result in reversal or a new trial. *See* 18 U.S.C. § 3143(b).[1]

Defendant seeks an order under Fed. R. App. P. 9(b) and Circuit Rule 9(b). Because he has failed to show that any issues he will raise on appeal present a substantial question the resolution of which in his favor would likely lead to reversal or a new trial, the application should be denied. *See United States v. Perholtz*, 836 F.2d 554, 555-56 (D.C. Cir. 1987)(per curiam)(requiring two-part inquiry).

I. Defendant's Appointments Clause Claim

The district court correctly found that defendant's Appointments Clause argument presents no substantial issue on appeal. In this case, the Acting Attorney General ("AAG"), when confronted with allegations of possible criminal conduct by

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[1]Under § 3143(b), confinement pending appeal is the exception rather than the rule, and release may be granted only upon an "affirmative finding that the chance for reversal is substantial." S. Rep. No 225, 98th Cong., 1st Sess. 27, reprinted in 1984 USCCAN 3182, 3210.

high-ranking Executive Branch officials, made the judgment to delegate authority over the day-to-day conduct of the investigation to foster public confidence that the case was being handled fairly. *United States v. Libby*, 429 F. Supp 2d at 33, 45-46 (Ex. A). In a letter dated December 30, 2003, the AAG delegated "all the authority of the Attorney General with respect to the Department's investigation into the alleged unauthorized disclosure of a CIA employee's identity." Ex. B. In a letter dated February 6, 2004, the AAG clarified several aspects of the delegation. Ex. C.[2]

Remarkably, defendant's application, while suggesting that the AAG might have addressed the urgent conflict-of-interest issue by opting to seek new legislation from Congress (Def. App. at 3), contains no mention of the statutory provisions under which the AAG acted. In fact, the delegation was made pursuant to the AAG's statutory authority under 28 U.S.C. § 510 to delegate *any* of the functions of the Attorney General to any other officer of DOJ.[3]

Defendant argues that despite this clear statutory authority, the nature of the

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[2]The record in the district court concerning the delegation also included Exhibits D, E, and F.

[3]Although the district court decided to reach the Appointments Clause claim, the government submits that the Appointments Clause is not implicated because this case involves a lawful delegation of authority to an officer of the Department of Justice previously appointed by the President and confirmed by the Senate. *Weiss v. United States*, 510 U.S. 163, 170-73 (1994).

delegation in this case was such that the Special Counsel was no longer an "inferior officer" under the Appointments Clause. Defendant's argument so lacks merit that it does not present a substantial issue. The primary defect in defendant's argument, as the district court concluded, is that this case "falls squarely into the mold" of *Morrison v. Olson*, 487 U.S. 654 (1988), which is binding precedent for lower federal courts. 429 F. Supp. 2d at 44. Defendant's principal argument is that *Morrison* is not the controlling case because *Morrison* was eclipsed by *Edmond v. United States*, 520 U.S. 651 (1997), and that the Special Counsel was not an inferior officer under *Edmond*'s alleged new test that requires inferior officers to be "directed and supervised *at some level*." 520 U.S. at 663 (emphasis added). This argument presents no substantial question for this Court.

In *Morrison*, the Supreme Court rejected an Appointments Clause challenge to the Ethics in Government Act, concluding that the Independent Counsel was an inferior officer. The Court did not draw a precise line of demarcation between principal and inferior officers because it found that the Independent Counsel "clearly [fell] on the 'inferior officer' side of that line." *Id.* at 671. The Court relied on several factors: the Independent Counsel (1) could be removed by the Attorney General for good cause subject to judicial review; (2) was "empowered under the Act to exercise only certain, limited duties" and was required to comply with Department

of Justice policies to the extent possible; (3) was given limited jurisdiction; and (4) was limited in tenure. *Id.* at 671-72. Based on these factors, the Court held the Independent Counsel to be an inferior officer. *Id.*

In this litigation, defendant has suggested that this case is not controlled by *Morrison*, but by *Edmond*. Defendant argued in the district court that *Edmond* may have "wholly supplanted" the approach in *Morrison*. Def. App. at 19, n.8, 23. In this Court, defendant is a bit more mysterious about his reading of *Edmond*. Whatever defendant's precise argument, a close look at *Edmond* clearly reveals that the Supreme Court did not dilute or disavow, much less overrule, *Morrison*.[4] The district court's careful opinion clearly establishes this point. 429 F. Supp.2d at 37. Significantly, *Edmond* expressed no doubt about the outcome in *Morrison* and no reservations about the application of the *Morrison* factors to the determination of whether a special prosecutor is an inferior officer. Defendant's argument concerning *Edmond* is asking this Court to conclude that *Morrison* is no longer good law. As the Supreme Court has stated, this Court cannot do that. *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989). This Court must apply

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[4]Defendant suggests that *Morrison* may not apply to this case because *Morrison* involved an act of Congress that had been signed by the President. Of course, this overlooks that the AAG had clear statutory authority to make the delegation in this case. *See* 429 F.Supp 2d at 30-34, attached as Ex. F.

Morrison as the controlling precedent, and look to whether the Special Counsel is an inferior officer based on the Special Counsel's being subject to removal at will, and his limited duties, jurisdiction, and tenure.[5]

The district court made factual findings regarding application of the *Morrison* factors to the delegation of authority to the Special Counsel, and concluded that this case presents a stronger case for inferior officer status than that considered in *Morrison*. 429 F. Supp. 2d at 38-45. The district court concluded that "the Special Counsel's authority is limited." 429 F. Supp. 2d at 40-41. Accordingly, the Special Counsel cannot make any decisions that extend beyond his express jurisdiction." *Id.* at 41. The district court further concluded that the Special Counsel had no authority to disregard DOJ policies promulgated by the Attorney General. *Id.* at 42. Finally, the district court concluded that "the Special Counsel's tenure is both limited and temporary." *Id.* The conclusion about the Special Counsel's tenure also was supported by the fact that the Special Counsel's delegation could be revoked at will.

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[5]Defendant contends that the Special Counsel cannot meet the "test" allegedly adopted in *Edmond*. Def. App. at 5. However, as the district court concluded, the Special Counsel's "appointment would also likely survive under *Edmond*" because the court "would have no basis for adopting the view that an inferior officer must be under active day-to-day supervision. Rather, an inferior officer's work must be simply be 'directed and supervised at some level.'" 429 F. Supp 2d at 45, n.17. The district court concluded that for purposes of the Appointments Clause, "the Special Counsel is subject to the direction and control of the Deputy Attorney General." *Id.* Thus, even if *Edmond* applied, there is no substantial issue on appeal.

Id. at 43. In *Morrison*, the Independent Counsel was only removable for good cause.[6] Based on all these factors, this is a much easier case than *Morrison* to find that a special prosecutor is an inferior officer.

Defendant's application advances several specious arguments. First, defendant contends that letter of February 6, 2004 "expressly exempted" the Special Counsel from following all DOJ policies. Def. App. at 7. Defendant interprets the sentence stating that the Special Counsel's position was not "defined and limited" by 28 C.F.R. Part 600, the regulations providing for appointment of a Special Counsel from *outside* the Department, as freeing the Special Counsel from obeying any and all Department regulations. Defendant's logic runs like this: under § 600.7(a), an outsider appointed as a Special Counsel must comply with all Department rules and regulations, so if a Department insider is appointed with the proviso that he is not "defined and limited" by Part 600, then the Department insider does not have to follow Department rules and regulations. That bit of sophistry was roundly rejected by the district court, and rightly so. The district court found that "the only logical way" to interpret the delegation in this case was to find that the Special Counsel was not free to ignore

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[6]It is telling that Justice Scalia, the lone dissenter in *Morrison*, stated if the Independent Counsel at issue in that case been removable at will, "then she would be subordinate to [the Attorney General] and thus properly designated as inferior." 487 U.S. at 716 (Scalia, J., dissenting).

rules and regulations. 429 F. Supp. 2d at 41-42. That clearly was the intent of the AAG and the understanding of the Special Counsel, who, in fact, complied with Department policies, including the guidelines regarding media subpoenas. The AAG's decision not to appoint an outsider under Part 600 was made for sound reasons, including avoiding unnecessary delay of the investigation.

Second, the defendant suggests that the Special Counsel was relieved of any requirement to make reports of significant events in the case and that the lack of any reporting requirement rendered the AAG's removal authority "an empty formality." Def. App. 7-8. This argument lacks merit. As an initial matter, the AAG may well have preferred to restrict the required flow of information to promote the public's confidence in the independence of the investigation. Not requiring regular reporting did not, however, convert the Special Counsel into a principal officer because the power to remove the Special Counsel and ultimate political accountability remained with the AAG. Furthermore, as a practical matter, much information about the Special Counsel's significant investigative steps was in the public record and therefore available to the AAG in exercising the power to remove the Special Counsel. In any event, the power to remove at will carries with it the power to demand information if the AAG deemed it necessary.

Finally, defendant grasps at the execution of a CIPA affidavit in November

2006 as evidence of an Appointments Clause error in late 2003 and early 2004. That argument is as unpersuasive as it is untimely. Defendant first raised this issue in his *reply* brief for bond pending appeal in the district court. Defendant's claim not to have known before trial that the Special Counsel signed relevant CIPA affidavits (Def. App. 9 n.2) is simply not true in light of public court filings.[7]

Had defendant timely raised the issue, the government could have mooted the issue either by seeking a co-signature of another Department official or by obtaining permission to seal the hearing or submit an *ex parte* affidavit on another basis. Defendant's failure to renew his Rule 12(b)(3)(A) motion when he was on notice of the § 6(c)(2) affidavit results in waiver.[8] Defendant bears the burden of making the

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[7]On September 5, 2006, the government publicly filed and served a § 6(a) certification, plainly signed by the Special Counsel, that the hearing "may result in the disclosure of classified information," R. 134 (Ex. G). On November 7, 2006, the government publicly filed and served a "Motion to Seal Affidavit *of the Special Counsel* Pursuant to Classified Information Procedures Act Section 6(c)(2)." R. 172 (emphasis added) (Ex. H). The district court then granted that motion, and the publicly-docketed order repeated that the court had considered the motion to seal the "Affidavit of the Special Counsel Pursuant to Classified Information Procedures Act Section 6(c)(2)." R. 174. (Ex. I). Thus, defendant's citation to "a copy of a cover letter at the time. . . [which] did not state that *he* [Special Counsel] . . . had signed that affidavit," Def. App. 9 n.2, paints an inaccurate picture of what defendant knew.

[8]Fed. R. Crim. P. 12(e); *see also United States v. Mitchell*, 951 F.2d 1291, 1296 (D.C. Cir. 1991) (Rule 12(b) motions "must contain facts and arguments that make clear the basis of defendant's objections") (internal quotation and citation omitted); *United States v. Colon-Munoz*, 192 F.3d 210, 217-18 (1st Cir. 1999) (applying rule 12(b) to Appointments Clause claim); *United States v. Solomon*, 216 F. Supp. 835,

factual record on his Appointments Clause claim, and reliance on the affidavit as evidence comes too late.

Even if defendant did not waive reliance on the CIPA affidavit, there are three independent reasons why the affidavit does not manufacture a close question. First, the only conceivable way that the signing of the affidavit can support an Appointments Clause claim is if AAG Comey intended to, and in fact did, delegate that signatory authority. Defendant relies solely on the fact of the Special Counsel's signature in 2006 as evidence that AAG Comey did so in 2003 and 2004. However, that bare fact is insufficient to show that, if CIPA's signatory authority is indeed not delegable, AAG Comey intended to delegate such authority. Rather, the AAG's delegation to the Special Counsel, explicitly premised on 28 U.S.C. § 510, which generally permits the delegation of "any function of the Attorney General," could not reasonably be construed to express an intent by the AAG that the Special Counsel assume a function that could not, as a matter of law, be delegated where a later-enacted, more-specific statute – such as CIPA § 14 – prohibited the delegation. There is simply no evidence that the AAG intended, by his reliance on a general statute, to override a specific statute that limited what functions could be delegated. Thus, the Special Counsel's signature on the CIPA affidavits was, at most, inconsistent with a

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837 (S.D.N.Y. 1963).

statutory provision but not violative of the Appointments Clause. Defendant has not, and cannot, identify any prejudice flowing from the Special Counsel's request for an *in camera* § 6(a) hearing or certification concerning the harm of disclosure under § 6(c), and thus any technical breach should clearly be harmless and not result in a new trial.[9]

Second, even if defendant could somehow show that the AAG granted the Special Counsel the authority to sign the § 6(c)(2) affidavit, that delegation would not elevate the Special Counsel to a principal officer because the affidavit was ministerial. Section 6(c)(2) simply provides that the "United States may" – but is not even required to – submit "an affidavit of the Attorney General certifying that disclosure of classified information would cause identifiable damage to the national security . . . and explaining the basis for the classification of such information." Accordingly, the § 6(c)(2) affidavit simply certifies that damage would result from disclosure and the basis for the classification – an unsurprising certification given that

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[9]Such a statutory error would clearly be subject to harmless error review, *see United States v. Gordon*, 829 F.2d 119, 127 & n.9 (D.C. Cir. 1987), and even more onerous for defendant, waiver or plain error review in this instance because he did not timely raise the issue. Indeed, virtually all *constitutional* errors are subject to harmless error review, and only a "very limited class" of fundamental constitutional errors are so intrinsically harmful that they require reversal without a harmless error inquiry. *Johnson v. United States*, 520 U.S. 461, 468 (1997) (listing only six examples).

classified information is, by definition, information whose disclosure could, at the very least, reasonably be expected to cause damage to the national security. Exec. Order 12,958, §§ 1.1(c), 1.3(a)(3).

Furthermore, those affidavits made the same request to the district court as every Assistant United States Attorney – who are indisputably inferior officers – would make were there no such thing as the Classified Information Procedures Act. Section 17.17 of the Department of Justice's regulations direct that, even in those cases where CIPA is not invoked, federal prosecutors must request that the district court apply "appropriate" safeguards for classified information. 28 C.F.R.§ 17.17(c).[10] Thus, the non-principal officer nature of the § 6(c)(2) affidavit[11] is supported by the fact that any federal prosecutor should have sought the same relief

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[10]On the listing of examples of potential safeguards are closing the courtroom, and seeking relevancy and materiality findings by the district court. §§ 17.17(c)(3), 17.17(c)(1). And § 17.17(c) provides a *non*-exclusive set of examples of "appropriate security safeguards," which would naturally include asking the district court to provide defendant with substitutions for the classified information. *Cf. Old Chief v. United States*, 519 U.S. 172, 180 (1997) (invoking Federal Rule of Evidence 403 to require acceptance of defendant's proposed stipulation).

[11]The ministerial nature of the § 6(c)(2) affidavit contemplated by CIPA is borne out by the actual filing in this case, which was 1.5 pages and relied on an attached affidavit of a CIA representative.

regardless of whether CIPA existed or not.[12]

Lastly, even if defendant could prove that the AAG intended to delegate authority to sign the § 6(c)(2) affidavit – and defendant has not and cannot – attempting to delegate such ministerial authority would not transform the Special Counsel to principal officer status as § 14 permits delegation to officials who are apparently inferior officers: namely Assistant Attorney Generals.[13]

II. The Court's Memory Defense Evidentiary Rulings

Throughout the CIPA hearings, defendant represented that his testimony would

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[12]Furthermore, the ministerial certifications under § 6(a) and § 6(c)(2) are radically different from an objection filed pursuant to § 6(e), which has the extraordinary effect of mandating that a district court, despite having found that disclosure of classified information is necessary for defendant to have a fair trial, preclude the defendant from disclosing the information. § 6(e)(1). Thus, *United States v. Fernandez* is inapposite because it addressed the Attorney General's authority to file a § 6(e) affidavit. 887 F.2d 465, 471 (4th Cir. 1989) ("The constitutional concerns that would be raised if the power to protect national security information were vested in a prosecutor not fully accountable to the President therefore need not engage us, for as long as the Attorney General can file a section 6(e) affidavit prohibiting absolutely the disclosure of classified information by a criminal defendant, national security cannot be compromised.").

[13]Section 14 permits delegation of the Attorney General's CIPA functions to any Assistant Attorney General of the Attorney General's choosing. There are 12 Assistant Attorney Generals assigned to defined subject matters (ranging from the Criminal Division to Administration), five of whom report to the Associate Attorney General, the third-ranking official in the Department. Given that United States Attorneys, who are the chief law enforcement officers for their districts and who report to the Deputy Attorney General, are inferior officers, it would be remarkable if each of the 12 Assistant Attorney Generals were held not to be inferior officers.

lay the foundation for the relevance of certain classified information he sought to introduce, and, the district court based its CIPA § 6(a) relevancy determinations on those representations.[14]

Among the substitutions prepared by the government during the proceedings under CIPA § 6(c) was a one-page document entitled "Statement Admitting Relevant Facts," which described the nature of defendant's job, and his duties and responsibilities with respect to a number of national security issues.[15] The admission

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[14]*See* Ex. J, *United States v. Libby*, 475 F. Supp.2d 73, 85, 86 n.14 (D.D.C. 2006)("During the course of the CIPA hearings, this Court concluded that certain pieces of evidence were relevant to assist in establishing the defendant's 'memory defense' based upon the expectation that the defendant's own testimony would establish that his attention was consumed by various matters other than the key events outlined in the indictment").

For a sampling of relevant cites from the CIPA hearings, *see* R. 280 at pages 2 - 5, which is attached as Ex. K. In addition, the defendant filed a brief, "Memorandum of I. Lewis Libby Concerning Admissibility of Documents to Corroborate His Potential Trial Testimony," which made clear that the classified information he was seeking to offer would provide "tangible and contemporaneous support for Mr. Libby's testimony." R. 150 at 2.

[15]Defendant's characterization of this document as an unqualified admission is baseless. *See Libby*, 475 F. Supp.2d at 86 (stating,"[i]n no way can the Statement reasonably be construed as an unqualified admission of fact that was intended to bind the government (or this Court, which approved the substitution) even if the defendant chose not to testify.)" The title came from CIPA § 6(c)(1)(A), ". . . the United States may move that, *in lieu of* the disclosure of such *specific classified information*, the Court order . . . the substitution for such classified information of a *statement admitting relevant facts* that the specific classified information would tend to prove . . . ." (emphasis added).

at trial of this substitution was conditioned on the relevancy determinations the district court had made during the CIPA § 6(a) proceedings, e.g., without the foundational predicate for the relevance of the information that was being substituted, the substitution itself certainly could not be relevant and admissible.[16]

At trial, after the defendant chose not to testify, the district court ruled that without the defendant's testimony, the Statement and portions of the intelligence briefing information were inadmissible under Federal Rules of Evidence 401 and 403; however, the court permitted the defendant to offer some evidence relating to his intelligence briefings, including extremely detailed information from briefings on one key date. *See Libby*, 475 F. Supp.2d at 85-97; Tr. 2/14/07 a.m. at 68.

Defendant claims that exclusion of the Statement and extra intelligence briefing information (along with preclusion of his memory expert and ordering allegedly

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[16]Defendant's perfunctory challenge to the adequacy of the government's substitutions lacks any merit. Def. App. at 16. Because defendant failed to use the majority of the substitutions at trial, he cannot claim that a different ruling on their adequacy would result in reversal. Moreover, the government's final substitutions were, as the district court found when looking at them as a whole, more than sufficient to give the defendant "substantially the same ability to make his defense," as is required under CIPA. *See* Ex. L, 467 F. Supp.2d 20 (D.D.C. 2006).The court's determination is entitled to substantial deference. *See United States v. Rezaq*, 134 F.3d 1121, 1142-1143 (D.C. Cir. 1998) ("The district court's substitution decisions turned on the relevance of the facts contained in the discoverable documents, and are therefore reviewed, like other relevance decisions under CIPA, for abuse of discretion.").

inadequate substitutions) "eviscerated" his memory defense and "unconstitutionally burdened his exercise of a Fifth Amendment right." Def. App. at 11.

There is no "close question" as to whether the defendant's Fifth Amendment right was burdened. Nothing that occurred during CIPA or at trial "bound" the defendant to take the stand in his own defense. Rather, he was on notice through the representations he made to the district court during CIPA, and through the court's explicit rulings based on those representations, that the relevance of classified information he was seeking to introduce to show that he was "consumed" or "obsessed" with matters other than Ms. Wilson was predicated on his own testimony. Without defendant's testimony, this information would not be sufficiently relevant to be admissible. As the district court held, by excluding evidence which was not independently relevant and would be unduly prejudicial, "the Court did not preclude the defendant from exercising his choice of whether and when to testify. Indeed, the defendant was entitled to adopt a different course until the very close of his case, consistent with the dictate of *Brooks*." *Libby*, 475 F. Supp.2d at 95 (citing *Brooks v. Tennessee*, 406 U.S. 605, 609 (1972)). The district court's decision did not burden defendant's Fifth Amendment rights; rather, it was a routine evidentiary ruling fully supported by the record of the CIPA hearings, entitled to substantial deference. *See United States v. Garner*, 396 F.3d 438, 440 (D.C. Cir. 2005) (district court's

evidentiary rulings reviewed for abuse of discretion).

Second, defendant's claimed "evisceration" of his memory defense simply did not occur. Defendant introduced a substantial portion of the information contained within the Statement (some of it verbatim from the Statement), as well as a substantial amount of intelligence briefing information, through, for example, the testimony of John Hannah and a stipulation for his CIA briefings. *See* 2/13/07 Tr. A.M. 57-89; 2/14/07 Tr. A.M. 69-74 (Ex. M and N).[17] Thus, even assuming the doubtful proposition that the Statement and material's exclusion presents a substantial question, a favorable appellate ruling would not result in a reversal or a new trial.[18]

Nor does the district court's denial of defendant's motion to admit expert testimony provide a basis for granting defendant release pending resolution of his appeal. The district court properly performed the "gatekeeping" function mandated by *Daubert v. Merrell Dow*, 509 U.S. 579, 592-93 (1993), in determining that the defendant had failed to establish that the testimony would "assist the jury in understanding or determining" the facts at issue, as required by Fed. R. Evid. 702, and

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[17]In fact, as the district court found, admitting the first two paragraphs of the Statement would have been cumulative in light of Mr. Hannah's testimony. *See Libby* 475 F. Supp. 2d at 88.

[18]Defendant now seeks to convert his trial decision not to call additional witnesses into a claim that the district court precluded him from offering that information. *See Libby*, 475 F. Supp. 2d at 91 n.21.

exercised its discretion in excluding the testimony under Fed. R. Evid. 403 because its minimal probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.[19] The district court's evidentiary determinations under Rules 702 and 403 are entitled to substantial deference.

III. Exclusion of the Testimony of Andrea Mitchell

At trial, defendant sought to impeach Tim Russert's testimony that he did not tell defendant that Mr. Wilson's wife worked at the CIA (2/7/07 PM Tr. 11, 26) purportedly by showing that Ms. Mitchell knew of Ms. Wilson's CIA-employment prior to the publication of Robert Novak's column and may have conveyed that information to Mr. Russert. Ms. Mitchell had made an out-of-court statement which defendant argued indicated that she knew that Ms. Wilson worked at the CIA prior to the publication of Mr. Novak's column, and prior to defendant's conversation with Mr. Russert. As the district court found, however, the prior statement was at best ambiguous, and the interpretation defendant was pressing had been publicly refuted by Ms. Mitchell on numerous occasions.[20] Thus, it was clear defendant's sole

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[19]*See* Ex. O, *United States v. Libby*, 461 F. Supp.2d 3 (D.D.C. 2006).

[20]Ms. Mitchell's attorney represented to the court that, if called, Ms. Mitchell would testify that she had no knowledge of Ms. Wilson prior to the publication of Mr. Novak's column. *See Libby*, 475 F. Supp. 2d 73, 79-80. Ms. Mitchell and her

purpose in calling Ms. Mitchell was to put the October 3, 2003 statement before the jury.[21]

As the district court correctly held, the October 3, 2003 statement was not admissible as substantive evidence, and calling Ms. Mitchell as subterfuge to place her otherwise-inadmissible statement before the jury violated not only well-settled authority in the D.C. Circuit, but also authority from other jurisdictions. *See United States v. Johnson*, 802 F.2d 1459, 1466 (D.C. Cir. 1986) (holding that it was "entirely inappropriate" for the prosecution to call a witness for the sole purpose of bringing about the admission of a statement that was not independently admissible).[22] The question of whether *Johnson* and other authorities bind the government but exempt defendants is not a "close" question – it is well settled that the Sixth Amendment does not give a defendant *carte blanche* to introduce inadmissible evidence. *E.g., Taylor*,

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employer repeatedly denied that she had been a recipient of a leak regarding Ms. Wilson, and explained that her ambiguous statement should not be taken to mean that she knew about Ms. Wilson's CIA employment before Novak's column. *See id.*

[21]The defense requested and was granted an opportunity to question Ms. Mitchell; however, defense counsel declined the court's offer to allow questioning under oath and outside the presence of the jury. 2/13/07 AM Tr. 18-23. *See also* 475 F. Supp. 2d at 82, n.8. Defendant thus waived the claim that Ms. Mitchell's account would differ from her attorney's representation had she been placed under oath.

[22] *See also United States v. Peterman*, 841 F.2d 1474, 1479 n.3 (10th Cir. 1988)(citing authorities from every circuit).

484 U.S. at 410 (1988).

The district court's evidentiary determination that the probative value of Ms. Mitchell's testimony was minimal at best (as the jury would be asked to draw a string of speculative inferences), and was substantially outweighed by the risk of confusion and unfair prejudice, is entitled to substantial deference.[23] Moreover, any error in excluding Ms. Mitchell's testimony is harmless, especially in light of the overwhelming evidence of defendant's guilt.

CONCLUSION

The government respectfully asks that defendant's application be denied.

Respectfully submitted,

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PATRICK J. FITZGERALD
Special Counsel

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[23]These inferences would have been powerfully rebutted by, among other things, evidence indicating a search of *NBC News*' files revealed no document reflecting any information regarding Ms. Wilson prior to publication of Novak's column. *See* Motion to Quash Subpoenas, at 1, *United States v. Libby*, 06-MS-126 (Apr. 18, 2006). Ex. P.