

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS**

CASE NO: EP-07-CR-87-KC

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

LUIS POSADA CARRILES,

Defendant.

**DEFENDANT’S MOTION FOR CONTINUANCE DUE TO
GOVERNMENT’S BELATED DISCOVERY**

Defendant, Luis Posada Carriles, through undersigned counsel, moves this Court to continue the trial of this cause due to the Government’s belated discovery, and in support thereof, states:

I. INTRODUCTION:

As noted in this Court’s Order entered on December 16, 2010 (ECF No. 549), the Cuban Documents are clearly material to the preparation of Posada’s defense and pursuant to Federal Rule of Criminal Procedure 16, the Government should have permitted Posada’s counsel to inspect the materials upon their request. *Id.* at 2. The effect of the Department of Justice’s discovery tactics upon an individual’s right to a fair trial has been the topic of national concern, yet the Department and its lawyers are rarely effected while the accused’s ability to

defendant himself or herself suffers. See *USA Today's* investigative series at <http://projects.usatoday.com/news/2010/justice/>. Inasmuch as the prejudice to the Mr. Posada's trial preparation was not ameliorated by a 30-minute review of thousands of pages of highly technical, untranslated Spanish documents two years before the filing of the Superseding Indictment pertaining to these documents, the Defendant requests this Court to reconsider its decision to not impose sanctions or continue the trial of this cause in order to provide the Defendant effective assistance of counsel and a fair trial.

II. ARGUMENT:

The Defendant should not be penalized, or the Government rewarded, for the Government's untimely production of voluminous, technical material evidence. As noted in the Defendant's submissions seeking exclusion, defense counsel actively sought access to the Cuban Documents upon the filing of the Superseding Indictment in 2009. The Government's tactical decision to withhold this evidence has wrought extreme prejudice on the Defendant's ability to present his defense. In contrast to the cumulative, common target letters and plea agreements untimely produced in *United States v. Garrett*, 238 F.3d 293 (5th Cir. 2000) -- which most defense counsel in *Garrett* acknowledged only required a two to three day continuance -- the documents withheld here are technical and scientific in nature. Specifically, unlike the letters and agreements in *Garrett*, the nature and

complexity of the Cuban Documents require defense counsel to consult with and retain forensic expert witnesses. And, due to the timing of the Government's discovery production immediately before the pretrial evidentiary hearings and holiday periods, defense counsel have not been able to obtain available defense experts on the eve of trial willing to dedicate themselves to reading thousands of pages of discovery and be ready to testify for the January 10th trial setting. See *Exhibit A* - attached letter from forensic pathologist R. K. Wright.

Although the Court notes that defense counsel did not "formally" request the Court's intervention in seeking production, nothing in Rule 16(d) (2) demands that this Court compel¹ or defense counsel formally compel the Government to disclose potentially incriminatory evidence against the accused or to otherwise comply with the discovery rules or this Court's discovery orders, before imposing sanctions.² In addition, defense counsel is entitled to rely upon this Court's discovery orders and the rules of discovery, which required the Government to produce all scientific

¹ In contrast to the Government's anecdote during the pretrial hearings of Justice Holmes' conversation with his then law clerk, Justice Brandeis, regarding "following the rules" as opposed to "doing justice," the Government's routine response to such defense motions to compel discovery has been its assurance of its awareness of its obligations

² As noted in this Court's Order, *Garrett* instructs that when imposing sanctions, a trial court should consider (1) the reasons why disclosure was not made; 2) the amount of prejudice to the opposing party; 3) the feasibility of curing such prejudice with a continuance of the trial; and 4) any other relevant circumstances. *Garrett*, 238 F.3d at 298.

evidence and reports within fourteen days after the arraignment. See ECF No. 141. Thus, it was reasonable for defense counsel after the close of discovery to have concluded that Government elected not to introduce the Cuban evidence.

Here, in addition to the medical examiner's report which clearly falls within Rule 16(a)(1)(E) through (F), a closer examination of the investigative reports that the Government claims are *Jencks* materials,³ demonstrates that they contain thousands of pages of Rule 16(a)(1)(E) through (F) materials and are not merely cumulative evidence to the 120 pages of materials timely produced. See description of contents of materials in footnotes 10 through 20 of Defendant's Reply, ECF No. 543 at pp. 9 to 14 which shows that the Cuban Documents contain papers, documents, photographs, tangible objects, reports and scientific tests of items related to the medical examiner's report and the bombing incidents that are material to the preparation of the defense.

Further, as the Government's response acknowledges that "[t]he remaining Cuba documents provide general background information about the bombings that is related to the testimony that these witnesses are expected to provide at trial," the Government may seek to use these documents at trial to support the basis of expert

³ See Govt Response, ECF 536 at 9.

testimony of the Cuban medical examiner as well as the testimony of the two Cuban police officers. Govt. Resp., ECF No. 536 at page 11.⁴

Moreover, the inability of defense counsel to effectively use these materials at trial is a critical factor in assessing whether a continuance must be granted. See *Garrett* at 299 and *United States v. Archibold-Manner*, 581 F.Supp.2d 22, *25-26 (D.C. Cir. 2008)(denied request for exclusion and admonished government, but granted additional time to produce and review materials even though the Court and parties had cleared two months off their calendars after multiple continuances). In *Ungar v. Sarafite*, 376 U.S. 575, 84 S.Ct. 841, 849 (1964), the Supreme Court addressed the criteria for a continuance in the context of a contempt case. The Court observed that no mechanical test exists for determining when the denial of a continuance results in the denial of due process. However, the Court opined that a trial court must examine the reason for the continuance, and noted that an “insistence upon expeditiousness in the face of a justifiable request for delay can

⁴ See *United States v. Sterling*, 555 F.3d 452, 456 (5th Cir. 2009)(“where there is no tangible proof of injury to person or property, the corroborative evidence must tend to connect the accused with the crime.”); *Warszower v. United States*, 312 U.S. 342, 61 S.Ct. 603, 85 L.Ed. 876 (1941); *United States v. Duggan*, 936 F.2d 181, 184 (5th Cir. 1991) and *United States v. Micieli*, 594 F.2d 102, 108-109 (5th Cir. 1979). Even where the offense involved does not involve a homicide, corroboration is required. See *Smith v. United States*, 348 U.S. 147, 154-55, 74 S.Ct. 194, 99 L.Ed. 192 (1954) (the rule that an accused may not be convicted on his own uncorroborated confession is applicable to the crime of tax evasion case even though there is no tangible *corpus delicti*).

render the right to defend with counsel an empty formality.” See also, *Hicks v. Wainwright*, 633 F.2d 1146 (5th Cir. 1981)(denial of continuance deprived petitioner due process where defendant was prevented from presenting only expert witness on insanity defense and defense exercised due diligence in attempting to obtain witness).

The technical and scientific issues concerning the cause of death and explosives contained in the Cuban Documents are inherently complex and material to the preparation of Posada’s defense. A continuance is necessary in order to afford the defendant an opportunity to challenge this evidence with expert testimony, without which the undersigned cannot effectively represent the Defendant. Although a continuance of this cause will undoubtedly inconvenience the Court and the Government has advised defense counsel it opposes a continuance, the Defendant is not incarcerated and the Government will not be prejudiced by a delay indeed resulting from their lack of diligence.

III. CONCLUSION:

WHEREFORE, Posada prays that this Court a continuance of this cause, because his counsel cannot provide effective assistance of counsel given the limited time available before trial and inability to obtain expert witnesses to confront same.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of December 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system:

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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.

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