

**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 REPLY TO GOVERNMENT’S RESPONSE TO
MOTION TO STRIKE BELATED DISCOVERY**

Defendant, Luis Posada Carriles, through undersigned counsel, hereby files this reply in response to the Government’s Response (ECF No. 536) as follows:

I. INTRODUCTION:

The Government’s Response fails to provide any good faith basis for its purposefully¹ delayed disclosure of discovery and failure to abide by the Court’s Orders setting the discovery deadline for December 1, 2009. Rather, throughout

¹ Defense counsel have not chosen this term lightly. There is simply no other logical basis for such delayed disclosure, especially after the Government obtained a last minute, fortuitous continuance of the February trial setting, after which it failed to provide the documents until nine months later (11/10/2010 for the partially corrupted DVDs and 11/22/2010 for the uncorrupted DVDs), or request an extension of the December 1, 2009 discovery deadline for providing same. Surely, the Government would complain that a similar discovery violation by the Defendant of documents in his possession for five years was “purposeful” and require nothing less than exclusion.

the Response, the Government blames the belated disclosure of discovery on defense counsel's purported failure to seek review of the documents or defense counsel's inability to obtain approval from the Government of Cuba to travel to Cuba. However, as outlined below, those allegations are misleading and false.

Further, the "fraction" of documents that the Government identifies that it intends to introduce in its case in chief, namely the Medical Examiner's Report, fingerprints and related reports, involve issues that require the Defendant to locate and retain at least two available and qualified expert witnesses on the eve of trial – which is exactly the reason Rule 16 and this Court's discovery Order require timely disclosure to avoid unnecessary trial delays and prejudice to the Defendant's ability to prepare for trial.² Rule 16(a)(1)(E) further requires production of items material to the preparing the defense, such as the Cuba Documents the defense had repeatedly requested. This voluminous, untimely discovery, when coupled with the Government's recent belated filing requesting this Court to authorize the Government to take Rule 15 depositions in Cuba on witnesses that they have known about for years, demonstrates that the tardy

² Although defense counsel have made a good faith effort to locate a qualified forensic pathologist, explosives expert, hand-writing expert and fingerprint expert, thus far, the forensic pathologist has advised that given the short period of time available before trial, it is impossible to conduct an expert examination of the cause of death, and that any such examination would require examination of the original evidence. As indicated in the Government's prior submission and representations, the original evidence is in Cuba.

discovery disclosures were orchestrated to prejudice the Defendant's ability to prepare for trial and effectively examine, challenge and use the documents to prepare for trial.

II. ARGUMENT:

The Defendant agrees with the Government's position that this Court "holds great latitude in the management of the discovery process, including fashioning the appropriate remedy for alleged discovery errors." Govt Resp., ECF No. 536 at 7, citing *United States v. Ellender*, 947 F.2d 748, 756 (5th Cir. 1991). See also Defendant's Motion to Exclude Belated Discovery ("Defendant's Motion") ECF No. 530 at 5. The Defendant further agrees that Fifth Circuit law provides that in deciding what sanction to impose for a discovery violation, that "implicit in the discretion granted the district court under Rule 16(d)(2)," the district court must consider "the reasons why disclosure was not made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances." *United States v. Sarcinelli*, 667 F.2d 5, 6-7 (5th Cir. 1982). The court must then enter such order as "it deems just under the circumstances." Rule 16(d)(2). *Sarcinelli*, explained that this means that the court should impose the least severe sanction that will accomplish the

desired result: prompt and full compliance with the court's discovery orders. *Id.* at 7.

However, the Defendant parts company with the Government's suggestion that it did not purposefully act in bad faith, that the belated discovery does not substantially prejudice Posada's ability to prepare for trial, and that the cases they cite do not require exclusion of the belated discovery based upon the facts of this case. Rather, the facts show that the Government's belated discovery was designed to purposefully cause an additional continuance of this matter in order to provide the Government with additional time to: (1) obtain testimony of witnesses incarcerated in Cuba whose presence has been known for years, and for which the Government only recently (after November 24, 2010)³ requested permission to take depositions of, and (2) obtain its forensic expert report on the more legible fingerprints it obtained in March 2010⁴ from the Government of Guatemala. Alternatively, even if this Court declines to impose the less severe "sanction" of a continuance upon the Government, the belated discovery will prevent the Defendant from effectively using it to confront the Government's case and prepare for trial.

³ See footnote 6 on pages 10-11 of the Government's Response.

⁴ See page 16 of the Government's Response.

A. Background Related to the Cuban Documents:

On December 19, 2005 and December 21, 2005 the United States received⁵ certified copies of the documents from the Government of Cuba regarding the 1997 bombing incidents in Cuba (hereinafter “Cuban Documents”), and on April 8, 2009 the United States filed the Superseding Indictment herein related to those documents.

Three years before the filing of the Superseding Indictment, during a discovery conference on March 23, 2007 in Washington, D.C. regarding the first Indictment (ECF No. 1) scheduled for trial on May 11, 2007, (ECF No. 17) the United States permitted defense counsel⁶ view approximately eight large binders containing untranslated copies of the Cuban Documents as a preview of the quantity of evidence the United States possessed to pursue additional charges following the May 2007 trial. Although the first Indictment did not include any charges related to the Cuban Documents and the March 2007 discovery conference was not scheduled for, or was anticipated to include the time necessary to review

⁵ The Cuban Documents each include a certification from an official from the Government of Cuba reflecting the copies were made either on December 19, 2005 or December 21, 2005.

⁶ Felipe D.J. Millan and Arturo V. Hernandez were the defense counsel that attended the discovery conference.

the volume and complexity of the materials contained in the Cuban Documents,⁷ defense counsel requested copies of the documents and an opportunity to review the originals. However, the United States refused to provide copies due to the then pending New Jersey Grand Jury proceedings concerning the 1997 bombings, and advised that they do not have the originals.

Immediately after the filing of the Superseding Indictment in April 2009, defense counsel renewed their requests for copies of the Cuban Documents during an early status conference, and thereafter as follows:

- May 20, 2009: During a discovery conference regarding the Superseding Indictment at the Department of Justice in Washington, D.C., counsel requested copies and requested to view the originals. The Government agreed to provide copies and advised that it does not have the originals.
- August 25, 2009: In a letter to John W. Van Lonkhuyzen, Esq. of the United States Department of Justice, defense counsel again requested the documents, stating “we have not received copies of any documentary evidence related to the 1997 tourist. Please advise when we may expect to receive these materials.” See *Exhibit A* at p. 2. In response to that letter,

⁷ Because the meeting was only for the purpose of a discovery conference for the immigration charges under the first indictment, defense counsel scheduled flights to leave the same day, and as a result, had to leave the Department of Justice after glancing at the untranslated Cuba Documents for approximately 30 minutes.

the Government provided 120 pages documents and two (2) videos,⁸ which do not include the documents and reports that the Government intends to introduce from the Cuba Documents (see Govt. Resp. at pp. 11-12) or that are necessary and material for the defense to obtain expert opinion testimony regarding cause of death, to challenge the witness' testimony concerning the manner in which the bombings occurred, and to refute the Government's assertions in their opening statement regarding what the evidence and witnesses from Cuba will show. Additionally, the footnotes herein generally describing the contents of the Cuban Documents demonstrate that the Cuban Documents contain extensive material evidence that defense counsel must have an opportunity to thoroughly review in order to provide effective assistance and confront the Government's proposed witnesses from Cuba that will testify at trial or for which the Government is now seeking Rule 15 depositions before trial. See notes 10 through 20, *infra*. In addition, the

⁸ On September 9, 2009, the Government provided a copy of the Italian birth and death certificates of Fabio DiCelmo (Bate Nos. 09-0405 to 0406a), and photographs of the bombing scenes (Bate Nos. 09-0407 to 0512). On October 1, 2009, the Government provided a photograph of Fabio DiCelmo (Bate No. 09-1678) and on October 5, 2009, they provided videos showing the exterior and interior areas of the hotels bombed and an interview of Otto Rene Rodriguez-Llerena in which he identifies Posada's voice. (Bate Nos. 09-01 to 02). Lastly, during a meeting in El Paso, the Government hand-delivered copies of various State Department cables apparently sent in or about the time of the bombings, declassified on January 27, 2010, regarding the bombings (Bate Nos. 10-0015 to 0025). See Govt. Resp. at p. 12.

Government's minimization of the voluminous nature of the disclosure by suggesting that counsel does not need to review the translations for accuracy is equally misplaced, and would likewise result in ineffective assistance of counsel. See Govt. Resp., ECF No. 536 at p. 2, n. 2.

- October 2009 through November 2009: Prior to the December 1, 2009 discovery deadline, during telephone conversations with the Government, defense counsel Arturo Hernandez inquired when the copies of the documents he was permitted to view on March 22, 1997 which were not provided to date, would be provided.
- February 5, 2010 Status Conference: During the in chambers portion of the Status Conference on February 5, 2010 as well as the in Court portion of the Status Conference, defense counsel again complained that the majority of the Cuban Documents had not been provided, and that any disclosure after December 1, 2009 would be a violation of the Court's discovery order and Rule 16, and prejudice the ability of the Defendant to a fair trial. (See Govt. Resp. at pp. 12-13 and Transcript of Sealed Arguments on Motions in Limine held on Feb. 5, 2010 pp. 151-154).

In addition, although the Government asserts that it “produced” the Cuban Documents on November 8th, the DVDs were not received⁹ at lead counsel’s office until November 10th – two days before out-of-town defense counsel travelled to El Paso for the pretrial hearings. Moreover, the following documents were corrupted and uncorrupted copies were not provided until November 22, 2010 – even though the undersigned placed the Government of the fact that the files were corrupted on November 14th:

- Bate Nos. 10-1245 to 10-1314 and 10-2834 to 10-2902:¹⁰ Spanish version and English translation of “Informes entregado a la delegacion norteamericana del FBI” (Reports handed over to the FBI Delegation) consisting of 139 pages. No certificate of translation appears on the document reflecting when the FBI translator, Yvonne Daughtery, translated the document. The metadata on the Spanish version certified by the GOC on December 21, 2005 shows that it the PDF version of the filed was not

⁹ Although the Government’s cover letter dated November 8th indicates that the letter without the enclosures were sent to defense counsel Felipe D.J. Millan and Rhonda A. Anderson, the letter and enclosures were only received at the office of Arturo V. Hernandez.

¹⁰ This file contains the “Reports Handed Over to the FBI American Delegation” on “December 22, 2005” (Bate 10-1246), which include Summary Reports regarding results of investigations and forensic criminal-technical conclusions regarding the explosive devices, damage reports, and identification of officials who executed reports.

created until October 19, 2010 – two months before the uncorrupted versions of the files were provided. However, the metadata on the English translation file reflects that it was “created” in PDF format on February 12, 2010 -- one week after the February 5, 2010 Status Conference. Moreover, the translation of the Chess Case listed *infra* shows that Ms. Daugherty prepared that translation on February 24, 2006 – four and one-half (4 ½) years ago.

- Bate Nos. 10-2076 to 10-2265 and 10-3086 to 10-3261:¹¹ Spanish version and English translation of “Caso ‘Guatemala’” (Guatemala case) consisting of 366 pages. It is unclear when the Spanish document was translated. However, the first page¹² of the English version indicates that the “Date of Document” is August 1998, the last page shows the GOC certified the copy on December 19, 2005, and the metadata on the file reflect that it was “created” in PDF format on October 19, 2010 – two months before the Government sent the uncorrupted files.

¹¹ The Guatemalan Case file contains Statements by Explosive, Trace and Chemical Experts, Technical Reports on Explosives, and Witness Statements of Ivan Molina Cueto, Orlando Priede Perez, Miguel Abraham Herrera Morales (a/k/a Nadar Musalam Barakat) and others, Transcripts of recorded calls between Barakat and others, Statements of detainees Barakat, Maria Elena Gonzalez Meza de Fernandez and Jazid Ivan Fernandez Mendoza, and reports and photographs of items seized from accused individuals and travel documents.

¹² The first page shows the FBI translator/ typist was Lourdes Gil.

- Bate Nos. 10-2266 to 10-2455 and 10-2903 to 10-3041:¹³ Spanish version and English translation of ‘Panel-Kiosco’ Hotel ‘Sol Palmeras’” (Panel Kiosko Case) consisting of 329 pages. It is unclear when the translation was prepared. However, the cover page prepared by the FBI translator/typist Yvonne Daugherty contains a redaction where a document date may exist, and the metadata on both the Spanish and English files reflect that they were “created” in PDF format on October 19, 2010 – two months before the Government sent the uncorrupted files. Further, the translation of the Chess Case listed *infra* shows that Ms. Daugherty prepared that translation on February 24, 2006 – four and one-half (4 ½) years ago.
- Bate Nos. 10-2456 to 10-2616 and 10-2617 to 10-2778:¹⁴ Spanish version and English translation of “Caso ‘Salvador’” Volume I (Salvador Case

¹³ The Panel Kiosko case file contains forensic crime scene and lab technical and fingerprint reports from various hotels and the airport, numerous witness statements; investigative reports on Guatemalan terrorists Marlon Antonio Gonzalez Estrada and Jorge Venancio Ruiz; telephone, immigration and reservation records; and photo displays of explosives and handwritten documents provided by Guatemalan nationals Jose Luis Castillo and Nery Galicia Hernandez.

¹⁴ The Salvador Case Vol. 1 file contains forensic expert reports on explosives and fingerprints at various hotels; statements of witnesses, explosive technicians and customs officials; statement of accused Otto Rene Rodriguez Llerena and reports of evidence seized from Llerena; diagram allegedly delivered by Posada for assembling an explosive device, and letter and pictures of secret writings remitted by Rolando Borges Paz to Juan Francisco Fernandez Gomez, Feliz and Oscar Madruga Lopez.

Volume I) consisting of 323 pages. It is unclear when the translation was prepared or who prepared it, because there is no translation cover sheet for the English translation. However, the metadata for the Spanish document shows that it was “created” in PDF format on October 15, 2010 – five years after the document was acquired from the GOC, and two months before the Government sent the uncorrupted version of the file. Similarly, the metadata for the English version of the document shows that it was “created” in PDF format on October 18, 2010 – two months before the Government sent the uncorrupted version of the file.

- Bate Nos. 10-2779 to 10-2833 and 10-3042 to 10-3085:¹⁵ Spanish version and English translation of “Caso ‘Ajedrez’” (“Chess Case”) consisting of 99 pages. The English version of this document contains a translation cover sheet clearly showing that on February 24, 2006 (over four and one-half (4 ½) years ago) FBI Translators Lourdes Antonieta Ruiz and Yvonne Daugherty completed the translation – which was just two months after the GOC certified the Spanish version of the document (December 19, 2005).

Nonetheless, the metadata on both documents indicates that the PDF files

¹⁵ The Chess Case file contains forensic expert and investigative reports on explosive devices used in various bombings and parts minors found; and statements of witnesses; and depositions of witnesses.

were created on the same date as the majority of the files of the Cuban Documents, to-wit: October 19, 2010.

In addition, the translations of the Cuban Documents provided on November 10, 2010 show that the translation of the Volcan Case Volume 2 was completed on April 18, 2006 by Translator Gil Grasslfy (Bates 10-1662 to 10-1846). This file translated in 2006 includes the translation of the Medical Examiner's Report and supporting documents on Fabio DiCelmo.¹⁶ However, the remainder of the English translations of the uncorrupted files received on November 10th either redact the date of translation (See Volcan Case Vols. 3 and 4 - Bate Nos. 10-1847 to 10-1992 and 10-1993 to 10-2075)¹⁷ or contain no translation cover sheet indicating the name of the translator or date of translation. (See Volcan Case Vols. 1 at Bates 10-1513 to 10-1661,¹⁸ The "Palm" Case at Bates 10-4316 to 10-4461¹⁹

¹⁶ The PDFs of all of these documents were created on October 19, 2010.

¹⁷ Volcan Case Vols 3 and 4 contain expert reports and inspection of crime scenes, investigative reports, passport information on suspects, witness statements, and call records between Cruz Leon and Chavez Abarca.

¹⁸ Volcan Case Vol. 1 contains Forensic Expert Reports, Record of Inspection, Technical Expert Reports, and statements of witnesses for the Melia Cohiba Ache Discotheque and Amobs Mundos Hotel bombings, plus the Statements of Raul Cruz Leon and travel agency witnesses.

¹⁹ The Palm Case file contains forensic reports on the explosives, witness statements, statements of accused individuals (Santos Armando Martinez Rueda, Jose Enrique Rameriz Oro and Norges Rodriguez Verges, Angel Nicot Su, Leonardo Cecilio Perez Escalona, Jose Ramon Tamayo Rojas, Emilio Enrique

and the Salvador Case Vol. 2 at Bate Nos. 10-4462 to 10-4681²⁰). This pattern also exists with the (previously corrupted) files produced on November 22nd: The “Chess Case,” translated/reviewed by Lourdes Antonieta Ruiz and Yvonne Duagherty, contains a translation cover sheet showing a 2006 date transcription date. The “Salvador Case Volume I” has no translation cover sheet indicating the name of the translator or date of translation, and the translation cover sheet on the “Guatemala Case” either redacts or simply does not show a date of transcription. However, the undated or redacted translation cover sheets on the “Panel Kiosko Case” and “Reports handed over to the FBI Delegation” do show that the same translator (Daugherty) that translated/reviewed “The Chess Case” in 2006, performed the translation of those files.

Guerro Verges, Freddy Fernandez Labrada and Ruben Rodriguez Guerro); and reports of items seized from Martines Rueda and Rameriz Oro.

²⁰ The Salvador Case Vol. 2 contains numerous forensic expert reports concerning handwriting, decoded text and fax numbers for diagrams for making explosive devices; forensic reports on the digital clocks used in various bombings; an illustrative photo display of Miami “terrorists” that Oscar Jose Madruga Lopez, Juan Francisco Fernandez Gomez, and Olga Alfonso identified; photographs provided by Madruga Lopez and Fernandez Gomez of vessels and weapons in the United States; and transcripts of telephone calls between terrorists Rolando Borges Paz, Fernandez Gomez and Alfonso Prado before and after Llerana’s detention, and maps and instructions for coding and decoding.

B. Background Related to the Defense Requests for Approval to Travel to Cuba:

The Government illogically blames their belated discovery disclosures in part on the purported failure of defense counsel to travel to Cuba, while ignoring the failure of the State Department to obtain approval from the Government of Cuba for defense counsel's travel, *and* even assuming that defense counsel's travel had been approved, the significant prejudice the Defendant would have suffered by not having received English as well as Spanish versions of the Cuba Documents sufficiently before a January 2010 trip that the Government asserts that defense counsel "chose" not to participate in. (Govt. Resp. at pp. 1, 10 (n. 6), 13). Nonetheless, for the purposes of clarifying the record, the Defendant sets forth below the steps defense counsel took seeking approval of travel to Cuba for the purposes of viewing evidence and interviewing witnesses:

- May 20-22, 2009: Defense counsel requested orally and in writing assistance from Government's counsel in obtaining travel to Cuba.
- June 29, 2009: The Government's counsel provided defense counsel instructions to contact the Cuban Affairs Desk at the State Department for approval by the United States Government, and that defense counsel had to directly request approval from the Government of Cuba. In its response, the

Government specifically declined to solicit the Government of Cuba (GOC) for defense counsel. See letter of June 29, 2009 attached as *Exhibit B-1*.

- August 11, 2009 to October 27, 2009: Pursuant to Government's counsel's instructions, all defense counsel submitted written requests to the State Department for a license to travel to Cuba, which was issued on October 16, 2009. On October 27, 2009 defense counsel informed the Government of defense counsels' receipt of the license approvals.
- November 4, 2009: Pursuant to the Government's instructions, defense counsel then wrote a letter to the Cuban Interests Section, to the attention of General Consul Tomas Lorenzo [Gomez], informing of the license approvals and requesting Cuban visas to travel to Cuba, and as required, set forth the purpose of the trip. Defense counsel further specified that permission was specifically requested to conduct interviews and inspect evidence. See copy of letter attached at *Exhibit B-2*.
- December 7, 2009: Tomas Lorenzo Gomez, Consul General of the Cuban Interests Section, sent a letter acknowledging receipt of the November 4, 2009 letter, and redirecting defense counsel to "submit your travel request to the US Department of State" because "there is no judicial cooperation agreement between Cuba and the United States...." See *Exhibit B-3*.

- December 14, 2009: In follow-up to conversations with the Government regarding travel to Cuba, on December 14, 2009, in a letter regarding various matters, defense counsel reminded the Government that “in light of your direct contact with Cuban officials, . . . before any plans are finalized regarding our trip to Cuba, that the Cuban authorities must confirm in writing that we will be permitted to inspect crime scenes, original records and interview witnesses, including those charged in Cuba.” See *Exhibit B-4*.
- December 23, 2009: The Government sent defense counsel a letter explaining that a trip to Cuba was dependent upon the discretion of the GOC, and that each team had to make its own travel arrangements. At the time, the letter indicate the period from January 19 to 25th were considered tentative dates for travel. See *Exhibit B-5*.
- January 4, 2010: Defense counsel wrote the Government regarding the defense counsel’s efforts to obtain Visas from the GOC per the Government’s (DOJ’s) instructions, and enclosed a copy of the letter from Cuban Interests Section General Consul Tomas Lorenzo Gomez, and informing Government’s counsel that per the Consul’s instructions, defense counsel contacted the United States State Department. See *Exhibit B-6*.
- January 25, 2010: Pursuant the instructions of Ms. Aynes-Neville of the United States State Department, defense counsel emailed her a copy of the

letter to Cuban Interests Section General Consul Tomas Lorenzo Gomez. The State Department has not responded or otherwise provided approval for Visas for defense counsel to travel to Cuba. See *Exhibit B-7*. And, there is no evidence that the Government contacted the State Department or the GOC to facilitate defense counsel's requests to travel to Cuba. In the interim, the Government and its team obtained approval from the GOC for travel and traveled to view evidence and interview witnesses in this matter.

C. Background Related to the Guatemalan Documents:

The Defendant does not dispute that the Government produced documents from the Government of Guatemala (GOG) early in this case which contained illegible copies of the fingerprints and other documents. However, the Defendant disputes the Government's assertion that the differences in the illegible and legible copies of the documents are immaterial. More pointedly, it is implausible that documents that the Government sought better copies of because they were so materially illegible²¹ that the Government's expert could not conduct a fingerprint

²¹ On this point, the Government's Response acknowledges at pages 15-16:

[T]he United States placed a supplemental MLAT request with the GOG in late 2009 for additional documents relating to the passport. **This was done in order to obtain a more accurate photocopy of the fingerprint** associated with the subject passport application. **The MLAT documents provided by the GOG in its initial response to the**

comparison are immaterial and not prejudicial to the preparation of Mr. Posada's defense.

Further, the Defendant disagrees that the failure of the Government to forward the legible copies of the fingerprints to defense counsel shortly after their receipt in March 2010 was mere oversight. Had this been the only lapse in the Government's production in this case, such a scenario might be plausible. However, given the history of the belated disclosure of the Cuban Documents despite defense counsel's reminders and requests, and the Government's receipt of the more legible copies of the fingerprints for the specific purpose of being able to conduct a forensic analysis thereon, the Government's representation of good faith negligence is not credible.

Moreover, the prejudice to the Defendant's ability to prepare his defense is significant. While the Government has had the past eight (8) months to submit the legible fingerprints for forensic analysis – for which an expert report has not been produced thus far -- in reality, given the intervening hearings and holidays, the

United States – which had already been turned over to the defendant – **did not provide a clear enough copy of the fingerprints** on the passport. **Thus, the United States filed a supplemental MLAT request with the GOG in order to obtain higher quality copies of the fingerprints, so that these fingerprints could be properly analyzed.**

ECF No. 536, pp. 15-16 (emphasis added).

Defendant has only had 40 days to obtain an expert to examine the legible fingerprints – not 60 as the Government claims. More specifically, at the time the legible fingerprints were received²² on November 10, 2010, defense counsel had a day and a half to attempt to download all the Cuban Documents and documents from the GOG prior to leaving for the pretrial hearings in El Paso. As noted in the Defendant's prior submission, that process took undersigned defense counsel's technician/secretary over four hours, and was not completed until November 11th. The undersigned, thereafter, attempted to review the files and learned that significant portions of the Cuban Documents were corrupted.

In addition, although the Government faults defense counsel for not divining that the only material differences between the old and new discovery was the legibility of the fingerprints and photographs, the Government's cover letter was of no assistance in this process. See *Composite Exhibit A* at page 3 attached to Defendant's Motion (ECF No. 520). Thus, in order to discern whether the documents the Government received in March 2010 were materially different from the documents previously produced, defense counsel had to painstakingly compare

²² As noted earlier, the Government only sent copies of the DVDs to lead defense counsel. And, although the cover letter indicates the letter, without enclosures, was copied to co-counsel Millan and Anderson, in reality it was never received. Furthermore, lead defense counsel had to forward the DVD's to Anderson's secretary who had the technical expertise and equipment to accomplish the downloading process – which was not completed until sometime on November 11th.

the old and new discovery – a process that time did not permit while the parties were engaged in the pretrial hearings during the week of November 15th and while counsel was further attempting to review over 6,000 pages of Spanish and English versions of the Cuban Documents on top of the *Giglio* and *Napue* materials the Government timely sent out on November 8th – which were also received by defense counsel on November 10th.

A review of the Fifth Circuit cases cited in the Government Response demonstrates that they do not preclude this Court from excluding the belated discovery herein -- which the Government purposefully chose not to disclose to the Defendant even though the requested Cuba Documents were in the Government's possession for years, and the legible fingerprint from the Guatemalan documents was in the Government's possession for the past eight months. In the only case cited where the trial court found that the government did not have any "lawful reasons" for the belated discovery, the Fifth Circuit reversed the trial court's exclusion of evidence where, unlike the case at bar, exclusion gutted the government's entire case and there was no showing that the belated disclosure prejudiced the defendant or that any prejudice could not be cured with a short

continuance. *United States v. Sarcinelli*, 667 F.2d 5, 6-7 (5th Cir. 1982).²³ Similarly, in *United States v. Garrett*, 138 F.3d 293 (5th Cir. 2000), the Fifth Circuit reversed the exclusion of the testimony of 25 government's witnesses, which the district court recognized was "tantamount to a dismissal of charges," where there was no showing that the government acted in bad faith in failing to provide identical copies of the target letters sent to those witnesses,²⁴ and there was no showing that the minimal prejudice suffered could not be cured by a brief continuance. *Id.* at 295-99. In *United States v. Gordon*, 182 F.2d 965 (5th Cir. 1987), the government inadvertently failed to provide the defendant with the last page of a ballistics report. The court affirmed the trial court's denial of the defendant's motion for mistrial because the defendant failed to show that the missing page would have had any effect upon his expert's opinion or the preparation of his defense, or that the government's error was in bad faith. *Id.* at 970-71. See also, *United States v. Valdes*, 545 F.3d 957, 961-62 (5th Cir.

²³ Nonetheless, the Fifth Circuit commented that "[o]n this record, the district judge could have cited the prosecutor for civil contempt and put her in jail, if that would have been necessary to coerce her into obeying the magistrate's discovery orders. The court could have called the United States Attorney to task as well; for, after all, he bears the ultimate responsibility for ensuring that his lawyers conduct themselves in conformance with the law." *Id.* at 6.

²⁴ In *Garrett*, the government overlooked 25 letters located in a separate binder during the initial disclosures. In contrast, in the case at bar the Government claims it overlooked thousands of pages of documents contained in eight binders that defense counsel persistently reminded the Government were not provided.

1977)(belated disclosure of chemical tests on cocaine did not result in prejudice where defendant's expert agreed substance was cocaine).

In the case at bar, the prejudice to the defense counsel and the Defendant's ability to effectively prepare for trial has been substantial. Counsel has not and will not have the opportunity to confront the Government's belated discovery with expert witness testimony, or effectively use the thousands of pages of materials in the Cuba Documents to refute the Government's theory of prosecution. No expert contacted by defense counsel to date has stated that given the short time frame before this case goes to trial, that he or she could be prepared for trial under the current trial setting. As a further consequence of the tardy disclosures, in opening statement defense counsel will be unable to confront the Government's expected expert testimony, because counsel will not be able to provide the jury with information regarding a defense expert in the fields of fingerprinting, handwriting and forensic pathology. A brief continuance will not cure the material and substantial prejudice Posada will suffer. On the other hand, exclusion of the Cuba Documents and the legible fingerprints in the Guatemalan documents will not gut the Government's case. Accordingly, given the facts and history of this case, the Government's purposeful and bad faith conduct designed to achieve a continuance and/or substantially prejudice the Defendant, demands that the severe sanction of

exclusion be imposed to accomplish the desired result: “prompt and full compliance with the court's discovery orders.” *Sarcinelli* at 7.

III. CONCLUSION:

WHEREFORE, Posada prays that this Court exclude the Government's belated discovery documents from the Governments of Cuba and Guatemala. Alternatively, in the event this Court declines to exclude the belated discovery, Posada requests that this Court impose sanctions upon the Department of Justice, including 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, calling the Department of Justice to task for its actions, and taxing the costs the Defendant would incur for another continuance upon the Government.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of December 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system:

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