

**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 TO EXCLUDE
GOVERNMENT'S BELATED DISCOVERY**

Defendant, Luis Posada Carriles, through undersigned counsel, moves this Court to exclude as evidence in this cause certain evidence the Government disclosed to the Defendant on November 10, 2010, which this Court's Discovery Orders and Rule 16 of the Federal Rules of Criminal Procedure required to be disclosed to the Defendant pursuant to no later than December 1, 2009. In support thereof, Posada states:

1. On April 8, 2009 the Government filed a Superseding Indictment adding charges of perjury and obstruction of proceedings before departments and agencies regarding statements he made concerning his alleged involvement in bombings of tourist sites in Cuba in 1997. ECF No. 132.

2. On April 17, 2009 this Court entered a Standing Discovery Order. ECF No. 141. The Order required the Government to provide the Defendant

within 14 days all “[b]ooks, papers, documents, photographs, tangible objects, buildings or places which the Government intends to use as evidence at trial to provide its case-in-chief, or which were obtained from the defendant” which are within the possession, custody or control of the Government, the existence of which is known, or by the exercise of diligence may become known the Government.¹ ECF No. 141-2.

3. In addition, the Court’s initial Scheduling Order set the discovery deadline for June 15, 2009. ECF No. 138. And, pursuant to motions of the parties for continuance of the trial or extension of the discovery deadline, all discovery required pursuant to the Standing Discovery Order was due on December 1, 2009.

4. Nevertheless, on November 10, 2010, the Government provided defense counsel six (6) DVDs containing 6,258 documents in 47 PDF files and six (6) video files. Of the documents provided, 7 files containing 965 pages are corrupt and cannot be opened or downloaded using any Windows or Macintosh

¹ Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure likewise requires the Government to disclose to a defendant “books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government’s possession, custody, or control and: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.”

operating system at undersigned counsels' offices.² Moreover, as discussed below, the documents contain evidence required to be disclosed pursuant to this Court's Standing Discovery Order no later than December 1, 2009, and as indicated in the Government's cover letter, a large portion of the discovery has been in the Government's possession, custody or control since 2005:

A. Evidence from Cuba: After the Superseding Indictment was filed, undersigned counsel met with and requested the Government to provide the Defendant with copies³ of the evidence from Cuba.⁴ Although defense counsel inquired when the documents would be produced after the December 1, 2009 discovery deadline and during the hearings in February 2010, PDF copies of documents from Cuba were not provided to defense counsel until November 10, 2010. A cursory review of the 17 uncorrupted files of documents from Cuba shows that all of the copies were obtained from Cuba in December 2005, and with the exception of one translation

² The following Bate Numbers cannot be accessed or downloaded: 10-2076 to 10-3041, which comprise the first, second, fourth, fifth and sixth items listed in the Government's November 8th letter regarding documents from the Government of Cuba. See copy attached at *Composite Exhibit "A."*

³ Defense counsel also requested to view the original documents, and the Government advised that no original documents were available.

⁴ During a meeting in 2007 shortly after the filing of the first indictment, lead counsel and local counsel were allowed to view eight binders containing evidence reportedly from Cuba for approximately 30 minutes.

PDF'd on February 12, 2010, the Government did not scan the remainder of the evidence from Cuba until mid-October 2010.

These documents and videos from Cuba directly falls into the category of evidence that Rule 16 required the Government to produce by the December 1st discovery deadline – books, papers, documents, and photographs regarding the 1997 bombings in Cuba which are material to preparing the defense, or that the Government intends to use in its case-in-chief at trial.

B. Documents from Guatemala: The DVD's the Government provided also include 396 pages of documents from the Government of Guatemala dated February 26, 2010 which was apparently scanned on March 15, 2010. In addition, the translation of the documents indicates it was completed, scanned and faxed to the Government on April 8, 2010 – seven (7) months before production to the defense. Like the documents from the Government of Cuba, this evidence directly falls into the category of evidence that Rule 16 required to be produced by the December 1st discovery deadline – books, papers, documents, and photographs that the Government intends to use in its case-in-chief at trial regarding the passport of Manuel Enrique Castillo Lopez, and/or which are material to preparing the defense of the Defendant.

ARGUMENT

Federal Rule of Criminal Procedure 16(a)(1)(E) provides that the defendant, upon request, is entitled to certain documents if: “(i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.” Fed.R.Crim.P. 16(a)(1)(E). Rule 16(d)(2) further states “[i]f a party fails to comply with [Rule 16(a)(1)(E)], the court may: (A) order that party to permit the discovery or inspection ...; (B) grant a continuance; (C) prohibit that party from introducing the undisclosed evidence; or (D) enter any other order that is just under the circumstances.” Fed.R.Crim.P. 16(d)(2). See also Standing Discovery Order at ECF No. 141-2.

The decision whether to impose a sanction for a violation of Rule 16(a)(1)(E) rests with the district court's discretion. *United States v. Hall*, 7 Fed. Appx. 301, 302-03 (4th Cir.2001)(citing *United States v. Hastings*, 126 F.3d 310, 317 (4th Cir.1997)). See also *United States v. Runyan*, 290 F.3d 223, 245 (5th Cir. 2002). “In determining a suitable and effective sanction, a court must weigh the reasons for the government's delay and whether it acted intentionally or in bad faith; the degree of prejudice, if any, suffered by the defendant; and whether any less severe sanction will remedy the prejudice and the wrongdoing of the government.” *Hastings*, 126 F.3d at 317. See *United States v. Golansky*, 291

F.3d 1245, 1249 (10th 2002)(where there is no showing that the government acted in bad faith, continuance is the preferred sanction). However, where the Government's failure to timely disclose is a result of a bad faith delay in order to prejudice the ability of the defendant to prepare for trial, more severe sanctions are warranted. *C.f.*, *Golansky* at 1249.

In the case at bar, the Government has had possession, custody and control of copies of the documents from Cuba for the past five (5) years, and the discovery deadline – December 1, 2009 – will soon reach its one-year anniversary. As noted above, defense counsel has requested copies of these documents since the filing of the Superseding Indictment in April 2009. The Government's purposeful delay in providing the Defendant with over 6,000 documents – some inaccessible – and six (6) video files⁵ that were in its possession and control for the past five years, is clearly purposeful and in bad faith. Accordingly, the Defendant respectfully requests that this Court exclude the documents from the Government of Cuba during the trial of this cause.

Similarly, the documents obtained from the Government of Guatemala have been in the Government's possession, custody and control for the past eight (8) months, and were fully translated seven (7) months ago. The issue of whether the Government had obtained documents from Guatemala has been an issue in this

⁵ Counsel has not had sufficient time to inspect the contents of the six video files prior to the filing of this motion.

case since the initial Indictment was filed in 2007. Withholding of such documents which are evidence that the Government intends to introduce at trial, and not *Jencks*, *Giglio* or *Napue* materials which the Government may often delay disclosure, is clearly purposeful and in bad faith as there is no plausible reason to delay disclosure over the course of the past seven to eight months. Accordingly, the Defendant requests that this Court exclude the documents from the Government of Guatemala during the trial of this cause.

WHEREFORE, Posada prays that this Court exclude the Government's belated discovery documents from the Governments of Cuba and Guatemala.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system:

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