UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
El Paso Division

UNITED STATES OF AMERICA	)	
	)	Case N. EP-07-CR-87
v.	)	
	)	The Honorable Kathleen Cardone
LUIS POSADA CARRILES	)	

SUBMISSION BY THE UNITED STATES REGARDING THE COURT'S ORDER DENYING DEFENDANT'S MOTION FOR CONTINUANCE

The United States of America, by and through Michael J. Mullaney, Acting U.S. Attorney, T. J. Reardon III, Jerome J. Teresinski, and Bridget Behling, Trial Attorneys, submits this filing in response to the Court's Order of December 22, 2010 (Doc. 555) which denied the defendant's "Motion for Continuance Due to Government's Belated Discovery" (Doc. 554) and held in abeyance certain requests made by the defendant in his "Motion to Exclude Government's Belated Discovery" (Doc. 520). The United States respectfully makes the following submission in order to amplify the record and provide information material to the Court's consideration of Cuba-related evidence which the United States intends to offer at trial:

I. Procedural Background

On December 16, 2010, the Court entered an Order denying the defendant's motion to exclude documents that the United States received from the Government of Cuba (GOC) detailing the investigation of the 1997 bombing campaign in Havana ("Cuba Documents") and documents that the United States received from the Government of Guatemala (GOG), regarding a passport application filed by the defendant ("Guatemala Documents").[1] On December 21,

[1] On November 14, 2010 the defendant filed with the Court his "Motion to Exclude Government's Belated Discovery" (Doc. 520), in which he sought to exclude as evidence at trial certain documents produced by the United

2010, the defendant filed a motion to continue the trial, arguing that the burden of reviewing the respective documents prior to trial would prejudice his ability to prepare effectively for trial. (Doc. 554). On December 22, 2010, the Court entered an Order denying the defendant's motion for a continuance. (Doc. 555). In its Order, however, the Court, *sua sponte*, reconsidered its prior ruling on the defendant's motion to exclude evidence, and held in abeyance the defendant's motion to exclude certain documents from trial "until such time as the Court has the opportunity to determine the actual hardship to Posada's defense at trial, if any."

In its December 22, 2010 Order, on the record as then developed, the Court noted that it was concerned that the admission of certain Cuba Documents as evidence at trial could cause "undue hardship" to the defendant. The United States fully recognizes the Court's concerns.

II. Proffer of the United States Regarding Testimonial and Documentary Evidence by Cuban Nationals.

To address the Court's concerns and, in the process, appropriately amplify the record, the United States submits that it intends to elicit the testimony of no more than three Cuban nationals during the defendant's trial. Towards this end, we have requested that the GOC permit these three witnesses to travel to the United States so that they may testify at the trial of the defendant. We remain cautiously optimistic that the GOC will soon grant this particular request.[2] The defendant, it should be noted, has refused to stipulate that the relevant 1997 Havana bombings ever occurred or that an Italian national, Fabio Di Celmo was killed by one of the bombings.

States to the defendant on November 8, 2010. The evidence which the defendant sought to exclude in that motion included the "Cuba Documents," and materials received by the United States from the GOG.

[2] As the Court is aware, the GOC has recently declined the United States' request to permit the travel to the United States of two incarcerated former confederates of the defendant: Otto Rene Rodriquez and Francisco Chavez-Abarca. Both of these individuals have been convicted in Cuba for participating in the 1997-1998 hotel/tourist bombing campaign in Havana, Cuba, and both have directly implicated defendant as being involved in this bombing campaign as well.

Two of the three requested Cuban witnesses are police officers each of whom we expect would succinctly chronicle, by his personal knowledge and duty assignments, the relevant 1997 series of bombings in Havana's tourist district.[3] The third Cuban witness is a medical examiner, who we expect would relate facts about the autopsy which she performed upon the body of Mr. Di Celmo. We expect that the direct examination of all three Cuban witnesses would be completed well within three hours.

With regard to exhibits likely to be introduced into evidence through the testimony of the Cuban police officers, there are a substantial number of documents and photographs which were produced to the defendant in 2009. Specifically, on September 9, 2009, the United States produced to the defendant 106 pages of photographs of the relevant 1997 Havana bombing scenes. The United States will likely offer a select number of these items into evidence.

With regard to the testimony of the Cuban Medical Examiner, we anticipate that the only document which will likely be offered as evidence by the United States in connection with her testimony is the report of the autopsy which she performed on the body of Mr. Di Celmo.[4]

III. Placing the Cuba Documents in Context with the Conduct of the Defendant

The United States has never sought to prevent, or delay the defendant from accessing the information contained within the Cuba Documents. To the contrary, the context of pertinent events in this case evidences the constant good faith of the United States in this matter.[5] The very

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[3] Many of the Cuba Documents regarding these two witnesses were produced as possible *Jencks* material in the United States' November 8, 2010 disclosure to the defendant.

[4] The United States produced to the defendant the birth and death certificates of Mr. Di Celmo on September 9, 2009, and photographs of him on October 1, 2009.

[5] Intemperate and incorrect assertions by the defendant that the United States "purposefully delayed" production of the Cuba Documents to the defendant and attempted to "purposefully cause an additional continuance of this matter" (*See* defendant's "Reply to Government's Response to Motion to Strike Belated Discovery" (Doc. 543) (pp. 1, 4)) were completely unfounded. The United States never sought to delay the January 11, 2011 trial date in this matter, and made no mention that a continuance should even been considered by the Court.

documents at issue had been made available for inspection by the defendant nearly four years ago in March 2007. The documents, themselves, contain no exculpatory evidence and were provided to the defendant as a "courtesy copy" on November 8, 2010—more than 60 days in advance of trial. This date was also well in advance of when certain of the documents might be producible under the *Jencks* Act. The defendant's focus on the length of time that the United States has been in possession of these documents was both misplaced and misleading. While the defendant repeatedly claimed that all the documents should have been excluded because they were mailed to the defendant on November 8, 2010, he omitted the context, including his own conduct, within which the matter could be fairly considered.

In January 2010, members of the prosecution team traveled to Cuba to interview witnesses and review evidence specifically related to the information contained within the Cuba Documents. Although the defendant had abundant opportunity to ensure that he could participate in that process, he simply did not complete the steps required to gain GOC permission to travel to Cuba, interview witnesses, and visit the 1997 bombing venues. Since the defendant's now denied motion to continue the trial relied in part on the argument that defense counsel required additional time to provide effective assistance of counsel to their client, the United States herein amplifies the record with regard to the opportunities to travel to Cuba which were available to him.

The defendant's "Reply to Government's Response to Motion to Strike Belated Discovery" (Doc. 543) mischaracterized the nature of the communications exchanged in anticipation of travel to Cuba by both parties in the case. Most notably, the defendant's Reply omitted the fact that the defendant, himself, failed to contact the necessary parties in a timely manner in order to obtain the permission required for travel. Indeed, the United States has

always favored a trip to Cuba by the defendant's representatives in order to witness the 1997 Havana crime scenes and interview witnesses either by themselves or in tandem with its own representatives. However, it appears clear that the defendant made the strategic choice not to participate in such travel.

The defendant's comment that the United States "specifically declined to solicit the Government of Cuba (GOC) for defense counsel" misleadingly insinuated that the United States possessed the authority to obtain permission for the defendant to travel to Cuba, and that it refused to do so. The United States possesses neither the authority nor the responsibility to make such a request. Indeed, in two separate letters, the United States made it explicitly clear to the defendant that it was simply not in a position to make travel requests on his behalf to the GOC—a sovereign nation with which the United States has no diplomatic relations. In a June 29, 2009 letter[6] to the defendant, the United States noted that it "did not—and cannot—agree to 'assist [him] in obtaining permission to travel to Cuba'" as the defendant had requested during a prior meeting with prosecutors. In a December 23, 2009 letter[7] to the defendant, the United States reiterated its earlier representations that it would (and, in fact, did) advise the defendant whom he should contact within the United States Department of State for permission to travel to Cuba, and that such advise was the "limit of our abilities" to assist him. The same letter noted that any "demands" by the defendant regarding availability of witnesses during the trip must be directed through proper channels to the GOC because "Only the GOC can grant your requests; we are unable to do anything with them." The United States has always assured the defendant that if he or his representatives were permitted by the GOC to travel to Cuba, we would request that the defendant's representatives be permitted to visit any place in Cuba which the United

[6] *See* Attachment A

[7] *See* Attachment B

States would be granted access, and interview any person whom the United States would be granted access.

Although the defendant was repeatedly made aware of the fact that he, alone, would be responsible for securing permission for his travel to Cuba, he chose not to follow the directions happily provided to him. Specifically, in a June 29, 2009 letter, the United States notified the defendant that he should contact the Office of Cuban Affairs in the Department of State to initiate the process for obtaining permission to travel to Cuba, and also provided the phone number for that Office. The letter also advised the defendant that in order to travel to Cuba, he would first be required to obtain a license from the Department of the Treasury's Office of Foreign Assets Control (OFAC).[8]

On December 23, 2009, the United States sent another letter to the defendant, which notified him, once again, of the need to contact the Office of Cuban Affairs in the Department of State for permission to travel to Cuba, and which also noted that "it appears that you have not yet made such a request." The United States then provided the defendant with the name and phone number of a specific point of contact in the Office of Cuban Affairs. However, in a January 4, 2010 letter, the defendant informed the United States that he had instead written directly "to the Government of Cuba (GOC) through the Cuban Interest Section." The United States never advised the defendant to contact the GOC directly through the Cuban Interest Section—an entity which is not even affiliated with the Department of State—in order to obtain permission to travel to Cuba.

[8] The defendant's Reply stated that he submitted a written request to the State Department for a license to travel to Cuba and that he received the license on October 16, 2009. (*See* Doc. 543 at p. 16.) While the State Department must also approve travel to Cuba, it is the Department of the Treasury which must first issue a license to a potential traveler to Cuba. Defendant was fully informed concerning this requirement.

In yet a third letter to the defendant dated January 21, 2010,[9] the United States noted its "surprise and disappointment" that the defendant had not yet contacted Office of Cuban Affairs within in the Department of State for permission to travel to Cuba. According to his recently filed Reply in the instant matter, the defendant did not make contact with that Office until January 25, 2010—the date that attorneys and agents for the United States departed for Cuba.[10] Plainly, the defendant chose not to avail himself of the opportunity to reach out to those in the United States government who were able and willing to assist him in obtaining the necessary approval to travel to Cuba.[11] While the inaction of this most sophisticated defendant may have been the result of mistake, it was far more likely his own litigation strategy. Regardless of his reasons, it was ultimately his choice not to complete the administrative requirements which would have permitted him to visit the 1997 Havana bombing locations and to interview Cuban witnesses.

Respectfully submitted,

MICHAEL J. MULLANEY
ACTING UNITED STATES ATTORNEY

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/s/ Jerome J. Teresinski
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[9] *See* Attachment C

[10] *See* Doc. 542 at p. 17.

[11] The January 21, 2010 letter noted that the United States had long intended for a trip to Cuba to include counsel for both the defense and the prosecution. However, the letter also noted that, if the defendant were not able to secure permission to travel to Cuba in the four days before the trip was scheduled to begin, the United States would still travel to Cuba without the defendant, because "our responsibilities dictate that we must do so."

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Certificate of Service

I hereby certify that on the 1st day of January, 2011, I caused the foregoing to be filed with the Clerk of Court, and have sent a copy of the following via U.S. Mail and e-mail to:

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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.

/s/ Bridget Behling__________
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