

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION**

UNITED STATES OF AMERICA	§	
	§	
v.	§	EP-07-CR-87-KC
	§	
LUIS POSADA CARRILES,	§	
	§	
Defendant.	§	

ORDER

On this day, the Court considered Defendant Luis Posada Carriles's ("Posada") "Motion to Exclude Government's Belated Discovery," ECF No. 520 ("Motion"). For the reasons set forth herein, the Motion is **DENIED**.

On November 10, 2010, approximately two months prior to trial, the government provided Posada's counsel with six DVDs containing 6,258 documents in forty-seven Adobe Portable Document Format files as well as six video files. Mot. 2. Seven files containing 965 pages of documents were corrupted and Posada's counsel could not access these materials. *Id.* These 6,000 documents contain evidence from Cuba in the form of eight reports created by Cuban authorities investigating a series of bombings in 1997-1998 in the tourist district of Havana ("Cuban Documents"), the bombings Posada is accused of lying about during an immigration proceeding. Gov't Resp. 3. Further, these materials also contain evidence from the government of Guatemala regarding the issuance of a Guatemalan passport in the name of Manuel Enrique Castillo Lopez. *Id.* at 5.

Posada's counsel briefly had access to the Cuban Documents in March 2007. Def.'s Reply 5. After the filing of the Superseding Indictment in this case in April 2009, Posada's counsel renewed their requests for copies of the Cuban Documents. *Id.* at 6. Specifically, on

May 20, 2009, August 25, 2009, in October and November 2009, and at the February 5, 2010, Status Conference before this Court,¹ Posada's counsel repeatedly sought access to these materials. *Id.* at 6-8. The government only provided these materials in November 2010.

Federal Rule of Criminal Procedure 16 provides:

Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph 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.

Fed. R. Crim. P. 16(a)(1)(E).

When exercising its discretion to consider the imposition of sanctions for discovery violations, a district court should consider the following factors: "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." *United States v. Garrett*, 238 F.3d 292, 298 (5th Cir. 2000) (citing *United States v. Katz*, 178 F.3d 368, 371 (5th Cir. 1999)). In fashioning a sanction, the district court "should impose only that sanction which is the least severe way to effect compliance with the court's discovery orders." *Id.*

The Cuban Documents are clearly material to preparation of Posada's defense; as such, pursuant to Federal Rule of Criminal Procedure 16, the government should have permitted Posada's counsel to inspect the materials upon their request. In its Response, the government has failed to adequately explain why it had not earlier provided Posada's counsel with the materials.

¹ The case was previously set for trial on February 26, 2010. At the time of the February Status Conference in anticipation of the February trial date, the government had not yet provided these materials to Posada's counsel.

Although the Court is disappointed by the government and its questionable tactics surrounding access to the Cuban Documents, the Court will not exclude these materials from the evidence in this case, nor will the Court issue a continuance. Posada's counsel was aware of the existence of the Cuban Documents since 2007 and actively sought access to the materials since May 2009. Nevertheless, Posada's counsel never sought the formal assistance of the Court in obtaining the materials from the government. While Federal Rule of Criminal Procedure 16 requires the government to provide access to requested materials such as these, still, the Court will not exclude materials that defense counsel was aware of, indeed had already seen, when counsel could have requested the Court's assistance in gaining access at an earlier date. Furthermore, Posada's counsel has now received the materials, and received them two months in advance of trial. In light of the factors set forth by the Fifth Circuit in *Garrett*, the Court finds that no sanction is warranted for the government's discovery violations related to the Cuban Documents.

Accordingly, the Motion, ECF No. 520, is **DENIED**.

SO ORDERED.

SIGNED on this 16th day of December, 2010.


KATHLEEN CARDONE
UNITED STATES DISTRICT JUDGE