UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
El Paso Division

UNITED STATES OF AMERICA	)	
	)	Case No. EP-07-CR-87
v.	)	
	)	The Honorable Kathleen Cardone
LUIS POSADA CARRILES	)	

UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO STRIKE EXPLOSIVES EXPERT WITNESS REPORT AND EXCLUSION OF TESTIMONY, ALTERNATIVELY FOR PRODUCTION OF EVIDENCE FOR TESTING

The United States of America hereby submits this response to the Defendant's Motion to Strike Government's Explosives Expert Witness Report, and Exclusion of Testimony, Alternatively Motion for Production of Evidence for Testing by Defense Expert, filed on May 18, 2010 [dkt. 452] ("Deft. Mot."), and respectfully requests that the defendant's motion be denied.

The defendant first asks this Court to strike the reports of two FBI explosives experts. The documents report the analysis of blasting caps and explosive samples conducted, respectively, in a foreign country and at the FBI's laboratory in the United States. The Bureau analyzed these items in 1998, close in time to the Havana bombing campaign that forms the factual basis for some charges in this case. Noting this date, and claiming that the United States disclosed these reports "[o]n the eve of trial, and before the Government requested an emergency continuance," the defendant's spare submission simply asks this Court to exclude the reports as "untimely." Deft. Mot. at 2.

The defendant's motion is grounded in the premise that this Court should strike the challenged reports, or derivative testimony, because their disclosure was "untimely" for the originally-scheduled March 1, 2010 trial. Leaving aside, for the moment, that *the trial date has*

not yet been rescheduled, the defendant's argument rings hollow. In fact, the expert reports were not disclosed "[o]n the eve of trial" as the defendant contends, but rather weeks before trial was originally scheduled to begin. Notably, the defendant failed to object during that pre-trial period. Moreover, the defendant's focus on the analysis dates ignores the operative facts. After a late-January 2010 visit to a foreign nation, the United States verified the knowledge and availability of witnesses relevant to establishing the foundation for potential testimony about the explosives and blasting caps described in the reports. The reports and potential expert testimony thus only became available for use in the United States' case-in-chief, and subject to discovery, after these foundational predicates were established. The United States disclosed the information shortly after it became discoverable. The defendant's observation that the reports "have been in the Government's possession for over 12 years," Deft. Mot. at 2, is ultimately irrelevant because they were disclosed as soon as they were subject to discovery.

However, even assuming for the sake of argument that the disclosure of the challenged reports weeks before the original trial date was somehow "untimely," the defendant offers no basis for the draconian remedy of exclusion that he seeks. In exercising its broad discretion to remedy a failure to comply with discovery requirements, "the district court should consider factors such as the reasons why disclosure was not made, the prejudice to the opposing party, the feasibility of rectifying that prejudice by granting a continuance, and other relevant circumstances." *United States v. Bentley*, 875 F.2d 1114, 1118 (5th Cir. 1989); *see also United States v. Martinez*, 455 F.3d 1127, 1130 (10th Cir. 2006) (noting that courts "have identified several considerations a district court should make in determining which sanction is appropriate," including "(1) the reasons the government delayed producing the requested materials, including whether or not the government acted in bad faith when it failed to comply

with the discovery order; (2) the extent of prejudice to the defendant as a result of the government's delay; and (3) the feasibility of curing the prejudice with a continuance"). "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 order." *United States v. Sarcinelli*, 667 F.2d 5, 7 (5th Cir. 1982), *quoted in Bentley*, 875 F.2d at 1118; *see also United States v. Kubiak*, 704 F.2d 1545, 1552 (11th Cir. 1983) (finding no error in refusing to strike untimely report when "[t]he appellant simply asserts that the government's untimely disclosure of the lab report denied him his right to effectively challenge the report or pursue further discovery concerning the evidence or the government witness. . . . the only step taken by the defense to relieve itself from the predicament it now complains of, was its request that the chemist's testimony be stricken from the record") (internal citation omitted). The remedy of exclusion, sought by the defendant here, is the "most extreme sanction possible," and may only be justified upon the strongest of showings. *Bentley*, 875 F.2d at 1118.

The defendant fails to make any such showing. There has been no bad faith on the part of the United States here. To the contrary, the reports were disclosed in an abundance of caution as soon as they became potentially discoverable. The defendant made no objection to their disclosure in the original pre-trial period, nor did he demonstrate why a continuance would fail to remedy any arguably late discovery. And his submission makes no mention of any prejudice flowing from the disclosure of this information in February of this year.

Indeed, the defendant cannot justify the remedy he seeks, because the premise of his motion is fatally flawed. There simply is no basis to exclude as "untimely" information that has been known to the defendant for months. In fact (and, as the Court is aware, through no fault on the part of the United States), the trial did not occur on March 1, but has been continued for

several months, perhaps to be rescheduled at the June 2, 2010 status conference. The "most extreme sanction" of exclusion is only appropriate where a continuance or other lesser remedy would fail to redress late discovery. Here, the defendant effectively received a continuance, during which he had adequate opportunity to address the information disclosed in the reports. That the defendant waited until May to ask this Court to strike as "untimely" information disclosed in February emphasizes the vacuous nature of his request. The defendant simply cannot show any prejudice flowing from the timing of disclosure here, which placed the challenged information into his hands more than three months before trial is even scheduled. At this juncture, the prejudice, if any, is entirely of the defendant's own making. This Court should therefore deny the defendant's motion to strike as "untimely" information that he received months ago.

The defendant also argues that the information in the challenged reports should be excluded for a variety of reasons, including supposed foundational defects related to the chain of custody and lack of authentication, as well as the defendant's boilerplate—and otherwise unsupported—claim that the evidence is irrelevant or has a prejudicial effect exceeding its probative value. However, its relevance is manifest. Among other things, the defendant is accused of making false statements regarding his involvement in a bombing campaign in Cuba. Explosives recovered in the course of that campaign are, of course, relevant to establishing that fact. The prejudicial effect of such evidence lies only in that it helps establish the defendant's guilt, as with any other evidence in a criminal prosecution. As for the foundational issues that the defendant raises, the United States notes that they go to the weight a fact-finder accords the evidence, not its admissibility, and thus these challenges are inappropriate as a basis for exclusion. *See, e.g.*, *United States v. Barlow*, 568 F.3d 215, 220 (5th Cir. 2009) ("Evidence must

be authenticated to support a finding that the matter in question is what its proponent claims. This is not a burdensome standard. . . . The ultimate responsibility for determining whether evidence is what its proponent says it is rests with the jury.") (footnotes and internal quotation marks omitted); *United States v. Smith*, 481 F.3d 259, 265 (5th Cir. 2007) (noting that questions about the chain of custody goes to the weight of the evidence, not its admissibility). In any event, we anticipate that, if the material is used, a sufficient foundation to admit this information into evidence will be laid at trial. *See, e.g.*, *Barlow*, 568 F.3d at 220 ("Testimony by a witness with knowledge that the matter is what it is claimed to be can be enough to prove the thing's authenticity.").

In the alternative, the defendant asks the Court to compel the United States to produce the blasting caps and explosive samples described in the reports. The Federal Rules of Criminal Procedure, however, require the United States to allow a defendant to inspect only physical objects that are "within the government's possession, custody, or control." Fed. R. Crim. P. 16(a)(1)(E); *see also id.* 16(a)(1)(F) (requiring same for reports of examinations or tests). The blasting caps described in the report have never been in the United States. The explosives provided to and subsequently tested by the United States were only small samples, and we understand that any portions that remained after testing were disposed of as a matter of routine and are no longer in the FBI's possession. The remainder of the explosives from which the samples were taken would, like the blasting caps, be in the possession of a foreign government.

On multiple occasions in connection with the January 2010 visit described above, the United States has as a matter of comity informed the defendant of the process by which, if he chooses to do so, he may arrange travel to the foreign country or direct investigative requests to

its government.[1] The defendant nevertheless chose to refuse to take the steps necessary to travel along with the United States in the January 2010 trip and, as far as the United States is aware, has not otherwise availed himself of the process for requesting investigative assistance. Having so chosen, the defendant's inability to inspect items not in the possession, custody or control of the United States is again a problem of his own making.

As the Court is well aware, the United States cannot be compelled to produce something not in its possession. Although unstated in the defendant's motion, he likely will request that the evidence be excluded if it cannot be produced. However, when evidence is unavailable for a defense expert's inspection, a court need not impose a *per se* exclusion of testimony related to the evidence. Rather, the court must consider "the materiality of the evidence, the likelihood of mistaken interpretation of it by government witnesses or the jury, and the reasons for its nonavailability to the defense." *United States v. Herndon*, 536 F.2d 1027, 1029 (5th Cir. 1976); *see United States v. Gordon*, 580 F.2d 827, 837 (5th Cir. 1978). Should the FBI analysts testify, they will be available for confrontation and cross-examination at trial. There is little likelihood of mistaken interpretation of the evidence—the reports are related to the visual characteristics of blasting caps and to the fact that the samples were explosives—by these witnesses or the jury. The expert's inability to produce the explosives or blasting caps, for reasons beyond the control of the United States, may affect the fact-finder's view of the credibility of the tests, but under these circumstances, the impossibility of production should not serve as a basis for excluding testimony related to the subject matter of the reports.

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[1] The United States repeatedly communicated this information to the defense from June 29, 2009 to December 23, 2009. On January 21, 2010, shortly before the scheduled visit, the United States further conveyed its disappointment that the defense had chosen not to take the necessary measures to facilitate its investigation.

WHEREFORE, the United States respectfully requests that the Court enter an order denying the defendant's motion.

Respectfully submitted,

MICHAEL J. MULLANEY
ACTING UNITED STATES ATTORNEY

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Certificate of Service

I hereby certify that on May 28, 2010, I caused the foregoing to be filed with the Clerk of Court, and to have sent a copy to the following by e-mail through the CM/ECF system, 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.

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ORDER

On this day, the Court considered the Defendant's Motion to Strike the Government's Explosives Expert Witness Report, and Exclusion of Testimony, Alternatively Motion for Production of Evidence for Testing by Defense Expert, filed on May 18, 2010. Upon due consideration, it is the opinion of this Court that the Motion should be **DENIED**.

SO ORDERED.

Signed this ___ day of _____, 2010.

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THE HONORABLE KATHLEEN CARDONE
United States District Judge