

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 05-60307-CR-COHN/LYNCH

UNITED STATES OF AMERICA,

Plaintiff,

v.

SANTIAGO ALVAREZ and
OSVALDO MITAT,

Defendants.

**DEFENDANTS' JOINT OBJECTIONS TO AND APPEAL FROM
MAGISTRATE JUDGE'S ORDER DENYING 'BRADY' REQUEST FOR
FAVORABLE EVIDENCE WITH INCORPORATED MEMORANDUM OF
LAW AND REQUEST FOR EVIDENTIARY HEARING**

Defendants Santiago Alvarez and Osvaldo Mitat, pursuant to Rule 4 of the Magistrate Judge's Rules of the Southern District of Florida and 28 U.S.C. §636 (b)(1)(C), object to the April 13th, 2006 Report and Recommendation on Defendants' Specific *Brady* Motion for Production of Favorable Evidence [D.E.# 111], and respectfully appeal to the United States District Judge. The Defendants ask this Court to grant an evidentiary hearing on this matter for reasons more fully set forth below and thereafter to grant the requested *Brady* Motion for Production of Favorable Evidence. With trial only three weeks away, it is essential that the defense be given all evidence of the contacts between the Cuban government and the United States regarding this investigation and Santiago Alvarez. Since Fidel

Castro and the Cuba propaganda machine have reported knowing about the defendants' arrests before they occurred, the defense request for specific information is both founded and supported.

1. Defendants Santiago Alvarez and Osvaldo Mitat filed an extensive *Brady* Motion on March 10, 2006, in which they requested production of favorable evidence regarding contacts between the Government of Cuba and any law enforcement agency of the United States related to the investigation of the instant case. We subsequently learned during the April 11-12, 2006 suppression hearing that the government has been aware of contacts between the government of Cuba and CS-1. But the Government has offered only vague and indefinite responses regarding its own contacts with Cuba about this matter.

2. Previous to the filing of the above mentioned motion, the undersigned counsel by letter dated January 23, 2006, set out a number of specific discovery requests under *Brady*. Two items are of particular interest to the *Brady* Motion (a copy of this letter is attached as **Exhibit A**). Paragraph 4 requested the following information:

“With regard to Gilberto Abascal, please provide any and all evidence, records, documents, reports, letters, correspondence, memos, notes, etc...that would reflect any contact, direct or indirect, between Mr. Abascal and any agent, official or representative of the Cuban government.”

In addition, the letter requested any and all evidence "*known to the Government of Mr. Abascal's trips to Mexico, Cuba and Panama*", and also "*any and all evidence...of any direct or indirect contacts between any representative and/or agents of the United States and Cuban governments regarding Osvaldo Mitat and Santiago Alvarez and/or the investigation in this case*".

3. The Government took a full month to respond, having done so only on February 27, 2006. In their response (a copy is attached as **Exhibit B**) the Government indicated at paragraph 4: "*We are presently unaware of any record or documentation of any contact between Gilberto Abascal and any agent, official or representative of the Cuban Government.*" This carefully couched response was not accurate, as defense counsel subsequently discovered, totally false. The Government also negatively responded to the request for contacts between Cuba and U.S law enforcement authorities, stating: "*At present, we fail to see any relevance of any contacts which there may or may not have been between the Government of the United States and the Government of Cuba regarding the Defendants or this investigation.*"

4. At the time, the Defendants had no opportunity but to accept the Government's denial of any knowledge of Abascal's contacts with Cuban authorities. The Defendants did file a *Brady* request in opposition to the Government's relevancy objection. The *Brady* request made the following request

of the Court: “ The Defendants seek disclosure of any evidence that may be found in the form of records, memorandums, law enforcement reports such as FBI 302’s, files or other documents that reflect any collaboration between law enforcement and the Cuban government in the investigation of the Defendants”[see D.E.# 111].

5. The Government responded on March 24, stating that the defendants’ *Brady* motion was “misleading and unwarranted” because the defendants had not clarified their earlier request for “contacts” between the U.S. authorities and Cuban government and were now asking for something different by requesting evidence of “collaboration”. Behind the semantic game playing was the desire to avoid the merits of the request. The Government denied that there was any evidence of collaboration and stated once again “*The Undersigned AUSA’s have inquired with the appropriate federal agencies involved in this investigation and are presently unaware of any records, files, reports, or documents showing that governments of these two countries collaborated in this investigation.*”

6. The Defendants quickly responded that the term “collaboration” included “contacts” between the two countries related to the investigation, and that these contacts were relevant to determine if Cuba had pre-knowledge of the arrests of these Defendants. Based on the Government’s denials, the U.S Magistrate Judge on April 13, 2006 denied the *Brady* requests. The issue of Gilberto Abascal’s contacts with Cuba remained settled as a result of the Governments unequivocal

response of February 27, in which they stated that they were presently unaware of any.

7. All remained settled until April 6, 2006, when the Government sent a letter containing astonishing information that contradicted its earlier statements of February 27 (a copy of this letter is attached as **Exhibit C**). The Government stated that they had 'recently received' official records of the informant's travels that included three trips to Cuba in 2004 and 2005 and various trips to Mexico, Grand Cayman, Panama and Bahamas. More importantly, the Government admitted that its informant had contacts with Cuban State Security agents dating back to the year 2001. The letter in pertinent part stated:

*“The informant was also contacted several times by a Cuban official...the informants brother related to the informant that Suris had been detained in Cuba and that Suris, after being captured, had identified the informants brother as a point of contact with exiles and, he (the brother) was now being **pressured** to cooperate with a Cuban Intelligence officials. Several days later, the informant related to the FBI, he was called by a Cuban official who identified himself only as” Daniel”. That official referred to the informant's brother as having been “compromised” and then queried the informant....He also tried to enlist the aid of the informant in obtaining more information about the incursion, as well as to provide information about other individuals in the United States involved as conspirators for purposes of assisting the Cuban government...the informant estimated that that “Daniel” ended up having contact with him at least six times and provided the FBI with a telephone number...”*

This information was known to the informant at the outset of this case, and was known or should have been known by the Government well before the April 6, disclosure.

8. The letter goes on to detail additional contacts between the informant and Cuban officials. It is stark evidence that the informant indeed did have contacts with Cuban intelligence agents, just as the Defendants *Brady* request stated on January 23, 2006. Yet the Government in its response of February 27, 2006, specifically denied any knowledge of these contacts. The Government continued this false position until thirty days before trial and five days before the suppression hearing when they had no choice but to disclose this evidence to the defense. During the suppression hearing and while under cross examination, FBI case agent Omar Vega admitted that he was aware of these contacts, and that he had learned about them through FBI 302's that had been authored by other agents. It is inconceivable and unacceptable that the Government would not have contacted its case agent to inquire about this matter in the thirty days following the Defendants request of January 23, and before its response flatly denying any knowledge on February 27. Without these recently revealed facts, it is understandable the U.S Magistrate Judge would have accepted the Governments semantic parsing of the words 'contacts' and 'collaboration' on the issue of whether or not there was any form of communication between the U.S and Cuban officials about this case. A

careful reading of the Government's response to *Brady* request reveals that it never stated that these contacts did not occur.

9. In light of the evidence of Cuban Intelligence influence over the informant in this case, and that the Government failed to disclose this shockingly relevant information until thirty days before trial, it is respectfully submitted that an evidentiary hearing is necessary. At such a hearing, the FBI Agent may be questioned on the issue of whether there was contact between Cuban and U.S. officials, as well as when did the Government have this information available to it. See *United States v. Burnside*, 824 F. Supp. 1215 (N.D.Ill., 1993) (Court granted post-trial motion for new trial based on AUSA's deliberate ignorance of impeachment evidence under *Brady* wherein the Court stated: "the fact that other U.S. Attorney's Office personnel were aware of the Brady makes knowledge of the Brady material attributable to the Government under the precise holding in *Giglio*.")

10. Under *Brady* and its progeny the Government may not deliberately ignore exculpatory evidence in order not to produce it. See also *Brady v. Maryland*, 373, U.S. 83 (1963); *United States ex rel. Smith v. Fairman*, 769 F.2d 386 (7th Cir. 1985) (The Seventh Circuit held that a state prosecutor's ignorance of the withheld *Brady* material did not justify the nondisclosure of the *Brady* material which had been known to a police ballistics expert, but which was not included in the official

report the expert prepared and provided to the prosecutor.); *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984) (“a prosecutor’s office cannot get around Brady by keeping itself in ignorance, or compartmentalizing information about different aspects of a case.”). In fact, the Government is obligated to exercise due diligence in searching its files and those of its agencies to determine if the requested information exists.

11. Accordingly, the Defendants respectfully request this Honorable Court reverse the U.S. Magistrate’s Order and order an evidentiary hearing wherein FBI case agent Omar Vega can be questioned regarding the informant’s contacts with Cuba, the contacts of law enforcement with Cuba, and the Governments knowledge of these facts. Such a hearing is consistent with the interests of justice and the Defendants rights under *Brady* to obtain evidence that is clearly exculpatory.

Respectfully submitted,

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SUSAN DMITROVSKY

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By: /S/ Arturo V. Hernandez for
PETER PRIETO
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on this 19th day of April 2006 to: Randy A. Hummel AUSA, Office of the United States Attorney, 99 N.E. 4th Street, Miami, FL 33132 and Richard E. Getchell, AUSA, 99 N.E. 4th Street, Miami, FL 33132.

/S/Arturo V. Hernandez
Arturo V. Hernandez, Esq.

EXHIBITS

ARTURO V. HERNANDEZ, P.A.

ATTORNEYS AT LAW

One Datran Center

9100 S. Dadeland Blvd.

Miami, Florida 33156

Telephone (305) 670-3433

Facsimile (305) 670-3437

January 23, 2006

Via Facsimile and Mail

(305) 536-4675

Randy A. Hummel, AUSA
Office of the United States Attorney
99 N.E. 4th Street
Miami, FL 33132

Re: United States of America v. Santiago Alvarez
Case No.: 05-60307-Cr-Cohn/Lynch
Discovery

Dear Mr. Hummel:

Please accept this letter as a formal request for production of evidence pursuant to the Standing Discovery Order, Rule 16, and Giglio v. United States, 405 U.S. 150, (1972), Napue v. Illinois, 360 U.S. 264 (1959), United States v. Agurs, 427 U.S. 97 (1976), Kyles v. Whitley, 514 U.S. 419 (1995), and Brady vs. Maryland, 373 U.S. 83(1963).

With regard to the confidential informants we would request the following:

1. All documents, records, letters, memos correspondence or a statement from the government that would reflect any agreements, promises of immunity, or any benefits, or any understandings between the two confidential informants and the government.
2. With regards to the confidential informants please provide any prior records of convictions or any reports that would contain admissions of

EXHIBIT "A"

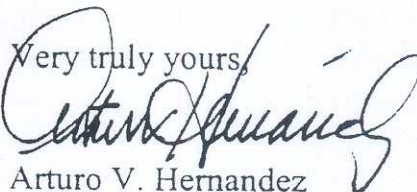
Randy A. Hummel, AUSA
January 23, 2006

prior criminal conduct by the informants.

3. Please provide the identity of CS#2.
4. With regard to Gilberto Abascal, please provide any and all evidence records, documents, reports, letters, correspondence, memos, notes, etc.... that would reflect any contact, direct or indirect, between Mr. Abascal and any agent, official or representative of the Cuban government.
5. With regard to Gilberto Abascal, please provide any and all evidence known to the government of Mr. Abascal's trips to Mexico, Cuba and Panama.
6. Please provide any and all evidence known to the government of any direct or indirect contacts between any representatives and/or agents of the U.S. and Cuban governments regarding Osvaldo Mitat and Santiago Alvarez and/or the government's investigation in this case.

In addition to the above categories of evidence, that we would respectfully submit to you are controlled by the cited authorities, we ask that you contact the confidential informants and convey to them our desire to conduct an interview regarding their knowledge of the instant case.

It is our desire to resolve as many of these questions as possible without the necessity of filing motions; however, given the deadlines on pretrial motions, we ask you respond to our requests as soon as possible. Thanking you in advance for your assistance, I remain,

Very truly yours,

Arturo V. Hernandez



U.S. Department of Justice

United States Attorney
Southern District of Florida

99 N.E. 4 Street
Miami, FL 33132
(305) 961-9281
(305) 536-4675

February 27, 2006

VIA HAND DELIVERY

Mr. Arturo V. Hernandez, Esq.
One Datan Center
9100 S. Dadeland Blvd.
Miami, FL 33156

Re: United States v. Santiago Alvarez, et al.

Dear Mr. Hernandez:

The following information is provided in response to your letter of January 23, 2006, seeking disclosure of information regarding potential government witnesses in this case.

1.
 - a. A signed copy of an agreement between the Federal Bureau of Investigation and Gilberto Abascal is attached, along with an English version of the same standard agreement.
 - b. A signed copy of an agreement between the Federal Bureau of Investigation and Gilberto Abascal authorizing him to engage in illicit activities on a limited basis is attached, along with an English version of the same standard agreement.
 - c. Payments of \$8,800.00 for services and \$5,610.00 for expenses, including relocation expenses, have been made to Gilberto Abascal as of January 31, 2006. Additional sums have been paid for housing expenses for Mr. Abascal, who has been relocated temporarily for his protection. Details regarding these sums and any future reimbursements or payments will be provided when available.
 - d. CS#2 is not a party to any informant agreement or cooperation agreement with the United States. In the event the government intends to use the testimony of CS#2 at trial, we will provide promptly any agreements, benefits, grants of immunity or understandings between the government and CS#2 which would be responsive to your request.
2. The government is presently unaware of any record of convictions or other criminal conduct committed by Gilberto Abascal, other than the following: Prior to migrating to the United States.

EXHIBIT "B"

ARTURO V. HERNANDEZ, P.A.

ATTORNEYS AT LAW

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Telephone (305) 670-3433

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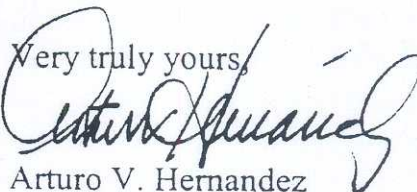
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EXHIBIT "B"

unsuccessful attempt to flee the country aboard a vessel owned or controlled by the government. In connection with the present case, Mr. Abascal assisted Santiago Alvarez in moving crates of firearms and explosives. He also traveled with Santiago Alvarez on Alvarez's boat to Mexico and back during the successful alien smuggling venture which resulted in Luis Posada's illegal entry into the United States. Mr. Abascal also traveled with Santiago Alvarez to Guinchos Cay, Bahamas, where Alvarez maintained a cache of firearms. The government is unaware of any criminal convictions or other criminal activity of CS#2, other than any involvement he may have had in helping Santiago Alvarez and Osvaldo Mitat store or move weapons and explosives associated with this case.

3. CS#2 is Miguel Vergara, a current or former employee of Santiago Alvarez.
4. We are presently unaware of any record or documentation of any contact between Gilberto Abascal and any agent, official or representative of the Cuban government.
5. Gilberto Abascal traveled to Mexico with Santiago Alvarez during the Luis Posada smuggling venture. He traveled to Panama at Santiago Alvarez's expense at the time of the criminal prosecution of Luis Posada. According to Mr. Abascal, he returned to Cuba twice during the nineties to visit his family. We presently are unaware of any other visits Mr. Abascal may have made to Cuba after migrating to the United States.
6. At present, we fail to see any relevance of any contacts which there may or may not have been between the Government of the United States and the Government of Cuba regarding the defendants or this investigation. If you wish to pursue this request, please provide some justification for it.

Mr. Abascal does not wish to be interviewed by counsel for the defense in this case. It is our understanding that members of the defense team and/or Santiago Alvarez's family have been in contact with Mr. Vergara and his attorney, Mr. Grover Moscovitz. Should you wish to interview Mr. Vergara, you may contact Mr. Moscovitz.

Thank you for your interest in this matter.

Very truly yours,

R. Alexander Acosta
United States Attorney



Richard E. Getchell
Assistant United States Attorney

cc: All Counsel of Record

EXHIBIT "B"

**U.S. Department of Justice**

*United States Attorney
Southern District of Florida*

99 Northeast 4th Street
Miami, Florida 33132
Telephone: (305)961-9043
Facsimile: (305) 536-7214

April 6, 2006

Via Facsimile and Mail

Counsel of Record (see attached service list for distribution)

Re: Additional Confidential informant Disclosures
U.S. v. Alvarez and Mitat

Dear Counsel:

As I alerted Mr. Coffey over the telephone a few days ago, enclosed in the body of this letter, along with an attachment, is additional information that has become known to the government regarding the informant. Specifically, this letter outlines the current status of payments made to, or on behalf of, the informant and provides notice of what, in an abundance of caution by the government, might constitute impeachment matters concerning the informant. By the disclosure of the materials below, the government does not concede the admissibility at trial of any or It also attaches a form that the informant has recently provided the Federal Bureau of Investigation, an Immigration and Naturalization Service Form N-648 (Titled Medical Certification for Disability Exceptions) that he signed and a medical professional filled out. I am aware that you have already issued subpoenas for the informant's medical records, so you may already have the Form N-648 as well as some or all of the other medical information included in this letter, but same are provided to you in an abundance of caution by the government.

First, as to payments received by, or on behalf of the informant, by or from the FBI, the latest (as of 3/24/06) figures are as follows: Services payments (from 8/1/2005 to 10/21/2005): \$8,800.00; Expense payments: \$4,970.00; Protection and Relocation: \$11,768.90.

Second, the informant is hoping for favorable consideration of his application for U.S. citizenship. He is concerned that, unless his application is favorably acted on by August 2006, he will lose access to U.S. government benefits that he is currently a recipient of.

Moving to another area, the informant has disclosed to the government that following an on-the-job injury that he sustained in 2000, after a period of time that he was the recipient of workmen's compensation payments, and during part of the period of time that he has been the recipient of

unsuccessful attempt to flee the country aboard a vessel owned or controlled by the government. In connection with the present case, Mr. Abascal assisted Santiago Alvarez in moving crates of firearms and explosives. He also traveled with Santiago Alvarez on Alvarez's boat to Mexico and back during the successful alien smuggling venture which resulted in Luis Posada's illegal entry into the United States. Mr. Abascal also traveled with Santiago Alvarez to Guinchos Cay, Bahamas, where Alvarez maintained a cache of firearms. The government is unaware of any criminal convictions or other criminal activity of CS#2, other than any involvement he may have had in helping Santiago Alvarez and Osvaldo Mitat store or move weapons and explosives associated with this case.

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6. At present, we fail to see any relevance of any contacts which there may or may not have been between the Government of the United States and the Government of Cuba regarding the defendants or this investigation. If you wish to pursue this request, please provide some justification for it.

Mr. Abascal does not wish to be interviewed by counsel for the defense in this case. It is our understanding that members of the defense team and/or Santiago Alvarez's family have been in contact with Mr. Vergara and his attorney, Mr. Grover Moscovitz. Should you wish to interview Mr. Vergara, you may contact Mr. Moscovitz.

Thank you for your interest in this matter.

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R. Alexander Acosta
United States Attorney



Richard E. Getchell
Assistant United States Attorney

cc: All Counsel of Record

EXHIBIT "B"

**U.S. Department of Justice**

*United States Attorney
Southern District of Florida*

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Telephone: (305)961-9043
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April 6, 2006

Via Facsimile and Mail

Counsel of Record (see attached service list for distribution)

Re: Additional Confidential informant Disclosures
U.S. v. Alvarez and Mitat

Dear Counsel:

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Second, the informant is hoping for favorable consideration of his application for U.S. citizenship. He is concerned that, unless his application is favorably acted on by August 2006, he will lose access to U.S. government benefits that he is currently a recipient of.

Moving to another area, the informant has disclosed to the government that following an on-the-job injury that he sustained in 2000, after a period of time that he was the recipient of workmen's compensation payments, and during part of the period of time that he has been the recipient of

disability payments, he nonetheless engaged in employment as an "off the books" employee of, among others, your client, Santiago Alvarez. In fact, the majority of the informant's "off the books" employment was for your client. The work performed by the informant for Mr. Alvarez included repairing or rebuilding the Santrina's engines, laying tiles on a porch and in the garage area of the home of Marisela Manzanilla, another job at the home of Mrs. Posada, and maintenance work at Inverrary. In that regard, the informant was paid by your client either in cash or by using the name and SSN of another individual, after defendant Alvarez first told the informant to "find a name" that he could use to issue him (the informant) checks under. In fact, defendant Alvarez personally signed the checks issued to the informant under that false name after they were prepared by Scott Allen. The informant did not report the monies paid to him by defendant Alvarez and others "off the books" to the United States Internal Revenue Service, nor did he file any tax returns.

The informant, as you are, I'm sure, aware from your access to his medical records, is, and has been, on several medications for the chronic effects of his on-the-job back injury that he suffered as the result of a fall. To the best of the government's knowledge none of these medications, taken pursuant to prescription, would have a pronounced effect upon the informant (or another individual's) cognitive abilities. Nonetheless, they are provided in an abundance of caution. While the government has not yet received access to a number of the informant's medical records, in addition to the current roster of medications it is now aware of (Paxil (anti-anxiety); Seroquel (ph?) (Insomnia); Zocor (anti-cholesterol) and Ibuprophen 800mg (pain)) he has also been prescribed these other medications in the past: Keflex, Tylenol #3, and Restoril (in August 2001); Zyprexa (March 2002) and Percoden in the past. In addition, an individual interviewed by the government has reported a conversation between the individual and the informant concerning his (the informant's) medical problems. The individual told the informant, after hearing the informant's complaints, about what the individual understood to be the symptomology of bi-polar disorder. After hearing that explanation, the informant indicated that he thought that disorder might be applicable to him. It should be noted that said individual holding the conversation with the informant and attempting to describe the disorder is a lay person and has no medical or psychiatric schooling or training. Neither does the informant.

The undersigned has recently received official records of the informant's travel outside of the United States. Specifically with respect to travel to and from Cuba, those records reflect that the informant made three approximately two-week long trips back to Cuba to see family members in 2004, the last of which occurred over the Christmas holiday season and ended with his return in early 2005. At least two of those trips arose as the result of medical issues occurring with family members in Cuba. Those same records also document concurrent travel by the informant with your clients (by boat) with a terminus in Miami on 3/18/05, travel to Mexico in 2004 (one trip of short duration), and travel to the Cayman Islands in 2005. The informant has also indicated making a trip to defendant Alvarez's house in the Bahamas by boat to take hurricane supplies there after one of the hurricanes had gone through the Bahamas and a short trip to Panama, along with defendant Mitat and several other associates of defendant Alvarez, during the time frame of the trial in that country of Luis Posada Carilles and others.

what he did in terms of employment in the United States, how much money he earned, and similar background type questions.

The informant was also contacted several times by a Cuban official after the arrest of Ihosvani Suris and two other Cuban men during an incursion carried out by the three men in the early part of 2001. The informant reported these contacts to the FBI several months after the incursion. The informant told the FBI that the first call was preceded by a call that he received from one of his (the informant's) brothers in Cuba. The brother related to the informant that Suris had been detained in Cuba and that Suris, after being captured, had identified the informant's brother as point of contact with exiles and, he (the brother) was now being pressured to cooperate with Cuban Intelligence officials. Several days later, the informant related to the FBI, he was called by a Cuban official who identified himself only as "Daniel." That official referred to the informant's brother as being "compromised" and then queried the informant about whether he had been aware of Suris' incursion activities and other matters related to his knowledge, or lack thereof, of what Suris had been doing. He also tried to enlist the aid of the informant in obtaining more information about the incursion, as well as to provide information about other individuals in the United States involved as conspirators for purposes of assisting the Cuban government. The informant was not happy about being contacted by "Daniel" and, as set forth earlier, in fact reported the contacts to the FBI. In that interview the informant estimated that "Daniel" ended up having contact with him at least six times and provided the FBI with a telephone number that "Daniel" had provided as his telephone number.

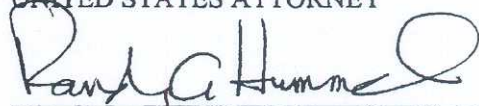
Additionally, prior to the matters recounted above in the last paragraph, not long after the ~~circumstances in the United States, including his separation from his family, and he, along with~~ several other Cuban emigres, attempted to return to their families in Cuba. That trip was interdicted before the group ever progressed outside U.S. waters. However, the individual who had instigated the trip later tried again to return to Cuba via boat and this time was successful. Upon his return to Cuba that individual contacted the informant via telephone. After the two men spoke briefly, the individual in Cuba turned over the phone to a Cuban official who asked the informant questions about the individual who had returned to Cuba and about the prior abortive trip.

Should you have any questions about the above information, please do not hesitate to call.

Very truly yours,

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

By:


RANDY A. HUMMEL
ASSISTANT UNITED STATES ATTORNEY