**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

**CASE NO: 1:09-cr-21010-JEM**

**THE UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.**

**CARLOS RODRIGUEZ,**

**Defendant.**

# DEFENDANT CARLOS RODRIGUEZ's JUDGMENT OF ACQUITTAL OR NEW TRIAL BASED UPON NEWLY DISCOVERED EVIDENCE

The Defendant, CARLOS RODRIGUEZ, through undersigned counsel, moves this Court pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure to grant a judgment of acquittal, or alternatively, a new trial, based upon newly discovered evidence, and as grounds therefore states:

## I. STATEMENT OF FACTS:

The Indictment the Grand Jury issued on December 4, 2009 charged Joel Esquenazi and Carlos Rodriguez with violations of the foreign corrupt practices act (FCPA), a 371 conspiracy, wire fraud and money laundering offenses based upon the alleged FCPA violations. An essential element and factual predicate for each

offense charged was that Telecommunications D'Haiti ("Haiti Teleco") was a Haitian State owned instrumentality, and thus the individuals employed at Haiti Teleco were Haitian government officials whom the Esquenazi and Rodriguez allegedly bribed in order to: (i) influence an act or decision of a foreign Haitian official in his/her official capacity; (ii) induce the foreign Haitian official to do or omit to do any act in violation of that official's lawful duty; (iii) induce that foreign Haitian official to use his/her influence with the Haitian government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality; or (iv) to secure any improper advantage with the Haitian government or instrumentality, such as more favorable tax treatment or telephone rates, or obtaining or retaining business with the government of Haiti or its instrumentality. Indictment, ECF No. 3 at pp. 1-27. See also, Jury Instructions, ECF No. 520 at 21-22, 25-26, 30,

On July 25, 2011, the Government called its expert witness, Gary Lissade, to testify regarding Haitian law and his opinion as to whether Haiti Teleco was a State owned public entity/instrumentality of the Republic of Haiti and whether its employees were, therefore, government officials. Although Mr. Lissade was unable to review the bylaws or stock certificates of Haiti Teleco, or find any document establishing Haiti Teleco as a "S.A.M." entity, he opined that because the Haitian central bank reportedly owned 97 percent of the stock, plus his

observations of "[c]ustom, the practice" and "the letterhead of Teleco," that Teleco was a Haitian government entity/instrumentality. See, Tr-7-24-2011 at 65-69, 95-97. Lissade further opined that because he concluded that Teleco was a public entity, all employees of Teleco were government officials or employees (*Id*. at 92), even though no law designated government employees at locations such as Teleco as government employees or agents. *Id.* at 78, 87, 89-90.

On July 26, 2011 – ten days before the jury rendered its August 5th verdict and 19 months after the filing of the Indictment – the Minister of Justice and Public Safety of the Republic of Haiti issued a Declaration regarding the Legal Status of "Télécommunications S.A. (Téléco)," which was translated into English on August 5, 2011 and provided to defense counsel on August 10, 2011. In stark contrast to the trial testimony of the Government's expert, the Minister of Justice and Public Safety of the Republic of Haiti unequivocally stated in the Declaration that Téléco "has never been and until now is not a State enterprise." See *Exhibit A* at p. 4 (emphasis added). The Declaration further stated that "[s]ince its formation to date, it [Téléco] has and remains a Company under common law." In reaching this conclusion, the Minister of Justice and Public Safety tracked both formation and history of Téléco and the application of Haitian law, as follows:

(1) On August 22, 1968, private individuals founded Téléco as a Limited Company under the common law of the Republic of Haiti.

(2) In order to change Téléco from a private company to a State enterprise, the laws of the Republic of Haiti required both (a) the Republic of Haiti to acquire shares in the company *and* (b) a change the by-laws to convert the company from an S.A. to a S.A.M. The Declaration provides that "[t]his change is *essential* to allow the State to appoint representatives to the Board of Directors." (emphasis added).

(3) Téléco "never underwent legal change and kept its old bylaws of Limited Company."

(4) The presence of the Central Bank as a shareholder in a Limited Company does not in any way change the legal status of a Limited Company, and clarified that it would remain a company under common law.

The Government's August 10, 2011 letter offered no explanation or reason why it did not and could not have obtained the Declaration or information contained therein during the Grand Jury proceedings, before trial, or before the jury deliberated and rendered its verdict on August 5, 2011. See *Exhibit "A"* at p. 1.

## II. MEMORANDUM OF LAW:

The Foreign Corrupt Practices Act prohibits payments that are corruptly made to induce a foreign official to use his influence to affect a government act or decision in order to obtain or retain business or to direct business to any other person. See 15 U.S.C. § 78dd-2(a) and *United States v. Kay,* 513 F.3d 432 (5th Cir. 2007). In *Kay,* the Fifth Circuit outlined the essential elements of the offense as follows: The Foreign Corrupt Practices Act, 15 U.S.C.S. §§ 78dd-2, 78ff, makes it a crime to (1) willfully; (2) make use of the mails or any means or instrumentality of interstate commerce; (3) corruptly; (4) in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to; (5) any foreign official; (6) for purposes of either influencing any act or decision of such foreign official in his official capacity or inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official or securing any improper advantage; (7) in order to assist such corporation in obtaining or retaining business for or with, or directing business to, any person.

In the instant case, two essential elements of the FCPA charges hinge on whether Teleco is an instrumentality or agency of the Republic of Haiti. The first is whether employees of Teleco, due to their capacity as officers or employees of Teleco, were officers or agents of the Republic of Haiti. The second is whether

the payments that the Indictment alleged were made to the officers or employees of Teleco influenced any official government act in the Republic of Haiti charged in the Indictment. The factual predicate the prosecution relied upon at trial for proving both of these elements was that Teleco was an agency or instrumentality of the Republic of Haiti. See testimony of Gary Lissade, Tr-7-24-2011 at 65-69, 95-97.

The Declaration of the Minister of Justice and Public Safety of the Republic of Haiti attached as Exhibit A demonstrates that the factual predicate for the FCPA offenses and related charges is absent and never existed. More particularly, the Declaration unequivocally states that Téléco "has never been and until now is not a State enterprise." See *Exhibit A* at p. 4 (emphasis added). The Declaration further states that "[s]ince its formation to date, it [Téléco] has and remains a Company under common law." The Declaration further demonstrates that "facts" the Government's expert relied upon to opine that Teleco was an agency or instrumentality of the Republic of Haiti do not exist, and that the basis for his opinion would have been completely impeached if Exhibit A was provided during Lissade's testimony. See, Rule 703 of the Federal Rules of Evidence. Inasmuch as the Declaration addressed two essential elements of the FCPA offenses, there is a reasonable likelihood that this new evidence would have affected the judgment of

the jury, and, therefore, at a minimum, a new trial is required pursuant to Rule 33, or the entry of a judgment of acquittal under Rule 29.

In the alternative, an evidentiary hearing must be ordered to address when the prosecution learned from the Minister of Justice and Public Safety of the Republic of Haiti or other Haitian government officials that Teleco never was or has been a State enterprise and always was a company under common law. The Government sought an obtained an indictment in this cause in December 2009. Rather than presenting the testimony from a Government official regarding the status of Teleco as a private or governmental entity, the Government presented the testimony of an individual who based his opinion on “custom and usage” of “S.A.M.” on the letterhead of Teleco and the purported ownership interest of the central bank of shares of stock in Teleco, which the Minister of Justice declared was irrelevant to the determination of whether a company was a public entity in the Haitian government. See Exhibit A. The Government did not inform this Court or the defense that it had sought a formal declaration from the Republic of Haiti, or that the Republic of Haiti had informed the Government that a declaration addressing these essential elements of the charged offenses would be forthcoming. If such notice had been timely provided, defense counsel would have sought appropriate relief from this Court in order to protect Mr. Rodriguez’s right to a fair trial in this cause.

When deciding a Rule 33 motion for a new trial, a trial court is provided more discretion than that afforded under Rule 29.[1] Under Rule 33, the Court may grant a new trial "in the interest of justice." When the motion attacks the weight of the evidence, the court's authority is much broader than when it is deciding a motion to acquit on the ground of insufficient evidence. In deciding a motion for a new trial, the district court is not constrained by the requirement that it view the evidence in the light most favorable to the government. Thus, the court may evaluate the credibility of the witnesses. When the evidence weighs so heavily against the verdict that it would be unjust to enter judgment, the court should grant a new trial. See *Tibbs v. Florida,* 457 U.S. 31, 38 n. 11 and 44 n. 20, 72 L. Ed. 2d 652, 102 S. Ct. 2211 (1982); *United States v. Shipp,* 409 F.2d 33, 36-37 (4th Cir. 1969); 3 Wright, Federal Practice and Procedure § 553 (1982). If the court concludes that, "despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury." *United*

[1] As the Eleventh Circuit explained in *Butcher v. United States*, 368 F.3d 1290 (11th Cir. 2004), "[t]he Rule 29 [Judgment of Acquittal] and Rule 33 [New Trial] standards are not identical. In a proper case -- a case in which the evidence of guilt although legally sufficient is thin and marked by uncertainties and discrepancies -- there is room between the two standards for a district court to reweigh the evidence and re-evaluate the credibility of witnesses." *Butcher*, 368 F.3d at 1297 n.4.

*States v. Martinez,* 763 F.2d 1297, 1312 (11th Cir. 1985), *citing United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980). *Martinez* observed that courts have granted new trial motions based upon the weight of the evidence where the credibility of the government's witnesses had been impeached and the government's case had been marked by uncertainties and discrepancies. *Id.* at 1312. In the instant case, the evidence demonstrating that Teleco was not a government entity was not only impeached before the jury's verdict, the evidence the Government produced post-verdict demonstrates that the evidence was indeed false. Accordingly, the interests of justice require that a new trial be granted.

Additionally, a motion for new trial based upon newly discovered evidence may not be denied without conducting an evidentiary hearing if the Defendant "has made sufficient allegations so that it cannot be *conclusively* stated that he is entitled to no relief." *United States v. Yizar,* 956 F.2d 230, 234 (11th Cir. 1992) (emphasis in original; remanding for evidentiary hearing on motion for new trial). *See also United States v. Gates,* 10 F.3d 765, 768 (11th Cir. 1993)(holding that defendant's motion for a new trial based upon newly discovered evidence "could not be denied without a hearing to explore further and determine whether it has any merit"); *United States v. Fernandez,* 136 F.3d at 1434, 1438-40 (11th Cir. 1998) (remanding for evidentiary hearing on

newly discovered evidence and *Brady* claims); *United States v. Espinosa-Hernandez,* 918 F.2d 911 (11th Cir. 1990) (holding that district court abused its discretion in not convening an evidentiary hearing on motion for new trial alleging government misconduct and remanding for hearing); *United States v. Schwarz,* 259 F.3d 59 (2d Cir. 2001) (ordering evidentiary hearing on motion for new trial).

In addition, as the Eleventh Circuit also recognized in *Espinosa-Hernandez,* discovery may bring to light when the prosecution initially came to know of that the Minister of Justice of Haiti possessed exculpatory evidence demonstrating that Teleco was never a governmental entity under the FCPA. *Id.* at 914. See also *United States v. Fernandez*, 136 F.3d 1434, 1438 (11th Cir. 1998)(district court abused its discretion in failing to afford evidentiary hearing on defendant's motion for new trial based on claim that government failed to disclose impeaching or exculpatory evidence) and *United States v. Rivera-Pedin,* 861 F.2d 1522, 1526 (11th Cir. 1988) (in circumstances where government knew or should have known of falsity of witness testimony, new trial required if there is "any reasonable likelihood" false testimony would have affected jury). All of these considerations, viewed additionally in light of the "hotly contested" testimony of other prosecution witnesses, *Espinosa-Hernandez*, 918 F.2d at 914, militate unequivocally in favor of allowing discovery and an evidentiary hearing, at which new evidence may be

garnered that could "easily extend beyond that of mere impeachment and ... might be likely to lead to [the defendant's] acquittal in a second trial." *Id.*

WHEREFORE, Defendant Carlos Rodriguez respectfully moves this Court to grant him a judgment of acquittal as to all counts due to insufficient evidence to prove that Teleco was a government entity or that any act or decisions that Teleco, its employees or officers made were made by a foreign official in his official capacity or induced such foreign official to do or omit to do any act in violation of the lawful duty of such official or securing any improper advantage. Alternatively, the Defendant requests that this Court grant him a new trial, or an evidentiary hearing on this motion for new trial.

Respectfully submitted,

*/s/ Arturo V. Hernandez*_________
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 24th day of August, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all parties, including the following:

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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/ Rhonda A. Anderson*__________
**RHONDA A. ANDERSON, ESQ.**