NO. 01-17176-BB, 03-11087-BB

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/appellee,

v.

RUBEN CAMPA,
Defendant/appellant.

On Appeal from the United States District Court
for the Southern District of Florida

REPLY BRIEF OF THE APPELLANT RUBEN CAMPA

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THIS CASE IS ENTITLED TO PREFERENCE
(CRIMINAL APPEAL)

STATEMENT REGARDING ORAL ARGUMENT

Campa renews his request for oral argument. Given the extensive record in this case - including a trial that lasted more than six months - oral argument is essential to the just resolution of the appeal. Due to the nature of the case and the record, the defendant requests that the Court grant additional time for oral argument.

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To place the asterisk in the margin, put the cursor on the first letter and hit SHFT-TAB. Type the asterisk and then type TAB.

REPLY ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT SHOULD HAVE GRANTED CAMPA'S MOTION FOR A CHANGE OF VENUE.

The government relies heavily on the potential jurors' claims that they were immune to anti-Castro prejudices and their assurances that they could be fair. The government's brief, however, mischaracterizes what actually took place during the jury selection process, and reflects a fundamental misunderstanding, shared by the district court, of the principal issue in this appeal and the applicable law.

The jury selection process actually exposed the deep-seated, widely-held community prejudices against Castro and his supporters that Campa feared would make a fair trial in Miami impossible. According to the government's own count, 22 out of 82 prospective jurors who survived the first round of questioning were excused for cause due to their admitted inability to be fair to Campa and his co-defendants.

Although the government's calculation of the percentage of potential jurors who were admittedly biased is disturbingly high (27 percent), the government's methodology is unreliable and its numbers grossly understate the true extent of jury prejudice. The government correctly notes that only 82 (out of a total of 168) prospective jurors were actually questioned about their attitudes toward Cuba.

This group, therefore, constitutes the relevant population for assessing prejudice within the venire.

The government's methodology for determining "Cuba-related partiality"among jurors, however, is unduly narrow and self-serving. For example, the government ignores five additional prospective jurors who were excused for cause for other reasons (such as personal hardship), but also held personal views undermining their ability to be fair. **Luis Mazza**, who did not like Castro and "specially that he is a friend of my Venezuelan president," said he could not believe witnesses associated with the Cuban government: "If he is from ... the Cuban government, how could you believe him?" R27:1166, 1168. **Peggy Beltran** was excused after stating that she "wouldn't believe" any witness who admitted he had ever been a Cuban spy. R25:782, 789. **James E. Howe** was "very much committed to the security of the United States" and believed the Cuban government was "a repressive regime that needs to be overturned"; he also said he "would disbelieve" or "would certainly have some doubt" about whether he could believe witnesses who were members of the Cuban military or government. R27:1278, 1272-74. **Jose Tejeiro**, who thought that Castro "messed up the country a lot" and that Cuba "was perhaps one of the worst governments that exist right now on the planet," also lamented that Elian "had the misfortune of being born in

Cuba and had to go back." R26:1001-04. **Jenine Silverman** believed "Fidel is a dictator and that "there are things going on in Cuba that people are not happy about." R28:1453, 1455.

In addition, **Connie Palmer** is excluded from the government's list of biased jurors presumably because she was a leftover juror. Mrs. Palmer, however, should be counted among potential jurors fairly expected to be biased against Campa. Mrs. Palmer believed "Fidel Castro is a very bad person" and was equivocal about whether or not she would be able to consider the evidence fairly. R28:1424-25. Furthermore, she and her family knew Sylvia Iriondo (who was listed as a government witness) and her family for about eight years. Mrs. Iriondo was a passenger in Jose Basulto's airplane on the day the shoot-down occurred. Mrs. Palmer knew that Mrs. Iriondo was "very involved with the Brothers to the Rescue and very strongly keeping the Cuban community together in Miami. R28:1437. **Elizabeth Angulo** also was not counted by the government because she too was never reached. Ms. Angulo, however, believed that Elian Gonzalez, the little boy whose fate divided this community, should not have been returned to his father in Cuba. R28:1448.

Furthermore, defendants were required to use 16 peremptory challenges to excuse additional prospective jurors whose answers revealed biases against the

defendants but did not result in dismissals for cause. Indeed, the reason the district court granted, over the government's objection, defendants' request for additional peremptory challenges (for a total of 18) was precisely due to the number of "very close decisions" it had to make on challenges for cause respecting jurors whose claims of impartiality were difficult to believe. See R27:1382-83; see also R27:1248-49.

Thus, defendants removed the following additional 16 jurors, who ultimately claimed they could be fair, but should be included in any list accurately measuring jury bias against the defendants: **Haydee Duarte**, who saw "Castro as a dictator" and had three relatives involved in the Bay of Pigs invasion (R27:1239-47); **Leilani Triana**, whose grandfather had been a political prisoner in Cuba, whose parents fled Cuba as political refugees, and whose grandmother contributed money to the Cuban American National Foundation, one of the organizations Campa and his co-defendants monitored (R27:1248-50); **Angel de la O**, who had "heard a lot about the case. I heard about it on the news, I heard people talking about it" and was concerned about what the Cuban government might do to his relatives in Cuba if he were on the jury (R27:1139, 1190); **Lilian Lopez**, who was "always for the U.S." and "against the Republic of Cuba," and did not like the fact that Cuba, where relatives still lived, was "a communist country" (R27:1148-

1151); **Barbara Pareira**, who had heard about this case: "The plane was shot down, several men died. ... It was frightening," and whose husband's business partner was involved in organizations and remained "very much involved with the activities" of persons who "were taking boats to Cuba to try to rescue some of the people" (R27:1175-77, 1181, 1188); **Ileana Briganti**, who said she came from a closely-knit Cuban family with whom she had already discussed this case and was "a little biased" for the United States and did not know if she could be fair to the defendants (R25:829-834); **Maria Gonzalez**, who said she was "against communism" and did "not approve of the regime they have in Cuba" directly in response to being asked whether there was any reason why she might be prejudiced against the defendants (R25:790, 849-52); **Luis Hernandez**, who could only "guess [he] would" be able to listen fairly to the testimony of someone who was a member of the Cuban communist party (R27:1306); **John McGlamery**, who believed the Cuban government was "guilty of assorted crimes in the area of human rights and frankly my opinion is not favorable" (R26:1013); **Joseph Paolercio**, who did not like the way Cubans were allowed so easily to come into the United States or how he often got "spoken to in Spanish" before English and sometimes felt like "a stranger in my own country" (R25:818-20); **Jess Lawhorn**, a banker, who was worried about how his "ability to generate loans" and business

dealings with "members of the local Hispanic communities that are developers" would be affected by a verdict favorable to the defendants (R26:1073-74); **Florentina McCain**, who said she was "sympathetic" and felt for "the people that live there" in Cuba, and knew about the airplanes that had been shot down in Cuba and remembered that "a few weeks ago there were some families that gathered to remember the anniversary of the incident" (R26:992-95); **Rosa Hernandez**, who had "been brought up all along knowing how it is in Cuba" and had the "strong opinion" that the Cuban government "is oppressive to the people", and thought that if she were any of the defendants she might not select herself as a juror because her "dad left Cuba because of communism" (R27:1228-31); **Belkis Briceno-Simmons**, who had the "very strong" opinion that she did not believe in the Cuban system of government, and repeatedly wavered on whether her opinion would affect her ability to consider the evidence fairly (R25:880); **John Gomez,** who had traveled to Cuba with his parents to take "medicine and goods to friends", and remembered hearing about "Brothers to the Rescue, a group that flies and a few years back one person was a spy in the group and he informed the Cuban government" (R25:842-43, 846); and **Miguel Hernandez**, whose answers about his feelings toward Cuba were simply incredible and suggested a hidden agenda (R27:1133-39).

Thus, the more accurate number of prospective jurors who admitted or betrayed personal prejudices against the defendants is 45 (rather than 22), and the resulting percentage of tainted jurors (55 percent, or 45 out of 82) is twice the figure the government claims. Of course, none of the jurors expressed a favorable opinion of Cuba or the defendants on trial.

The fact that the defendants did not exhaust their total supply of peremptory challenges also does not mean, as the government contends, that the defendants' venue motions should be denied. Defendants exercised a total of 17 peremptory challenges; i.e., virtually all the peremptory challenges allowed and more than the 12 challenges authorized by Fed. R. Crim. P. 23. Secondly, the applicable law does not support the government's overstated position that the defendants were required to use all their challenges. Cf. United States v. Alvarez, 755 F.2d 830, 859 (11th Cir. 1985) (merely noting that where defendant "completely failed" to provide any evidence of actual or presumed prejudice, failure to use up peremptory challenges supported inference that defendant had not suffered actual prejudice due to pretrial publicity).

The failure to use the last of their peremptory challenges also does not mean that the defendants were entirely delighted with the jurors ultimately selected to serve. Indeed, several of the jurors admittedly held views on Castro or Cuba that

made it difficult to accept them as jurors. For example, **David Buker**, who would become the jury's foreman, said: "I believe Castro is a Communist dictator and I am opposed to communism so I would like to see him gone." R27:1296-97. **Eugene Yagte** had a "strong opinion" about the Cuban government, and said, "I cannot reconcile myself to [the Cuban] form of government" R27:1296-97. **Sonia Portalin** was strongly "against communism." R25:861.

Jury selection, however, is tricky business, and defendants are often required to accept jurors who are less than ideal in order to avoid having others who are even worse sit on their jury. Here, given the district court's unfavorable rulings on numerous cause challenges, defendants needed to keep peremptory challenges in reserve. For example, defendants needed, if necessary, to be able to strike Mrs. Palmer, discussed above, whom the district court declined to excuse for cause. R28:1442. Also waiting in the wings was **Sister Susan Kuk**, whom the district court also declined to excuse for cause. R24:535-36. Sister Kuk was the principal of the predominantly (90 percent) Cuban high school attended by the daughter of one of the BTTR pilots who was killed. Sister Kuk went to the father's funeral and to the daughter's home to give her "condolences and talk with the family and pray with them." R24:519-21.

Sister Kuk, like other potential jurors with personal ties to the pilots or their families, see, e.g., **Jessica de Arcos**, (knew Basulto), R21:139; R23251; **Daniel Fernandez** (knew Basulto), R24:458, 508-10, **Tim Healey** (knew Basulto), R21:139; R23:254; **Carolina Rodriguez** (knew daughter of deceased BTTR pilot) R23:373, 385-86, is not included in either tally of biased jurors because she was never questioned in Phase II. Furthermore, defendants also had to spend a peremptory challenge on **Lazaro Bareiro**, who had worked with the United States Attorney's Office in a lengthy grand jury investigation when he worked with the Office of the Comptroller as a National Bank Examiner. R25:655, 690, 709.

Thus, the government's claim that defendants expressed any satisfaction with the jury, as evidence that their venue motions were properly denied, must be taken with a grain of salt. The government's examples of such expressions of "satisfaction" also must be placed in context. In one example, counsel for Medina was not expressing satisfaction with the jury at all; indeed, the jury had not yet been selected. He was, instead, simply congratulating the district court for how efficiently it was moving the lengthy (by federal court standards) voir dire along.

At the same time, however, Medina's counsel observed how the prospective jurors' answers actually confirmed the conclusions in Professor Moran's survey, which had been filed in support of defendants' motions for a change of venue. In

particular, counsel remarked that several jurors' claims of impartiality defied credulity and clearly confirmed Professor Moran's opinion that prospective jurors in this community "were subject to pressure within the community that they couldn't really come to grips with." R27:1375.

In the government's other example, counsel for co-defendant Hernandez said he did not want to alter the jury's composition, but only in the context of an argument concerning whether or not to dismiss a juror who wished to have two days off to attend her daughter's graduation. R104:12092. Counsel's comment about the jury, therefore, was not made in connection with the several motions for a change of venue that had been filed before and during trial.

More fundamentally, the government's emphasis on the jurors' basic assurances that they could be fair and impervious to local anti-Castro sentiments reflects a basic misunderstanding, shared by the district court, of the essence of the defendants' motions for a change of venue. Campa and his co-defendants requested a change of venue because they were entitled to "a trial before a jury drawn from a community free from inherently suspect circumstances" and prejudices, see Pamplin v. Mason, 364 F.2d 1, 7 (5th Cir. 1961), and Miami-Dade County did not constitute such a community.

In cases such as this one, in which defendants claimed there existed "pervasive community prejudice" against persons, such as themselves, who were fiercely loyal to the Cuban government, courts considering a motion for change of venue are required to place "emphasis on the feeling in the community rather than the transcript of the voir dire." Id. "It is immaterial that voir dire did not demonstrate community prejudice." Id. at 6. The district court had already, of course, been provided with ample evidence (including Professor Moran's survey, and a large volume of newspaper clippings) compelling the conclusion that Campa and his co-defendants could not receive a fair trial in Miami.

Relying solely on United States v. Yousef, 327 F.3d 4 (2d Cir. 2003), the government suggests that defendants' failure to renew their venue motions at the conclusion of voir dire undermines their venue motions. Of course, defendants could fairly be expected to have renewed their motions for a change of venue at the conclusion of voir dire, if none or only an insufficient number of the potential jurors had said they could be fair, because the basis for the motion would have become one of actual prejudice in the jury box, rather than pervasive prejudice in the community.

However, defendants were curtailed in their arguments by two written orders of the district court (dated July 27, 2000, and October 24, 2000), which

expressly limited any further reconsideration of the venue issue. Specifically, the district court had previously and explicitly held that, "**[I]f the Court determines** during voir dire that a fair and impartial jury cannot be empaneled, **Defendants may renew** [their] Motion and the Court shall consider a potential change of venue at that time." R4:586:17, R6:723:2-3 (emphasis added). The district court, however, determined that it could, in fact, seat an impartial jury and, therefore, never invited defendants to renew their venue motions at the conclusion of voir dire. This fact alone distinguishes Yousef.

Nevertheless, as additional grounds in further support of the venue motions surfaced during trial (such as witness Jose Basulto's red-baiting of counsel for co-defendant Hernandez) and even after the defendants' convictions (such as the government's impermissible flip-flop on the applicability of Pamplin), defense counsel renewed their requests for a change of venue and later a new trial.

Despite the number of times the issue has been raised and argued, neither the district court nor the government has ever properly addressed Campa's claim that he was entitled to a change of venue on the "pervasive community prejudice" theory. Both have largely dealt with Campa's motion as being based primarily on adverse pre-trial publicity directed at a specific person or crime, which is how motions for change of venue tend to surface.

For example, although stating in its order denying defendants' venue motions that it recognized that defendants' motions were based chiefly on a theory of "pervasive community prejudice", see R4:586:10 n.2, the district court improperly discounted the large number of newspaper articles Campa filed in support of his request for a change of venue because the clippings "relate[d] to events other than the espionage activities in which Defendants were allegedly involved." R4: 586:11. Leaving aside the fact that neither Campa nor co-defendant Rene Gonzalez was ever accused of espionage, the district court's Order shows that it improperly ignored Campa's submissions because it misconstrued the motions as dealing mainly with narrowly-defined pre-trial publicity.

However, it was precisely these articles and exhibits (including Professor Moran's survey, which the district court also felt focused unduly on matters beyond the narrowly-defined, specific trial issues), rather than those dealing only with the prosecution and the trial itself, that provided the best measure of the depth and extent of the widespread community prejudice against Campa and other persons associated with the Castro regime. Many of these articles are discussed and reproduced in Campa's initial brief on appeal from the district court's denial of his motion for a new trial. The district court's finding that such evidence was

largely irrelevant reflects a profound misunderstanding of the grounds for Campa's motion for a change of venue.

To the extent that the government addresses Campa's "pervasive community prejudice" claim at all, it does so by attempting unsuccessfully to distinguish Pamplin v. Mason and its progeny. Contrary to the government's contention, Pamplin does not require a showing of extensive, adverse pretrial publicity (although there was considerable adverse pretrial publicity in this case). Indeed, Pamplin was based on a "climate of opinion" concerning race that was more deeply rooted and pervasive than can be quickly generated (and just as easily dissipated) by the media. 364 F.2d at 6-7.

Pamplin also undercuts the government's argument that "appropriate voir dire" was the solution to the venue issue. This Court in Pamplin expressly held that voir dire "can hardly be expected to reveal the shade of prejudice that may influence a verdict," and vacated the conviction despite the jury's assurances that they could be fair. Id. at 7. Similarly, this case, which also involved deeply-rooted prejudices that took decades to form, did not lend itself to conventional safeguards, such as individualized voir dire, that might be considered adequate under other circumstances. Cf. United States v. Capo, 595 F.2d 1086, 1092 (5th Cir. 1979)

(pretrial publicity case, in which jury's acquittal of four of eight defendants supported district court's finding that jury was unbiased).

II. THE GOVERNMENT FAILED TO ADDRESS, MUCH LESS REBUT, CAMPA'S ARGUMENTS PERTAINING TO THE ABUSE OF CIPA.

A. Procedural Issues.

The government led the district court into error by incorrectly asserting that CIPA **required** ex parte submissions. The government's answer brief adopts the same style of argument used in the district court, seeking to justify the district court's ruling by reiterating the entirely uncontroversial proposition that section four of CIPA permits ex parte submissions. The plain text of CIPA section four sets forth that ex parte submissions are permitted; that same plain reading, along with relevant case law, clearly states that even such limited ex parte submissions are not required and should only be permitted upon sufficient showing.

The fact that ex parte submissions are contemplated by section four, but only on a showing of need, is explained in United States v. Rezaq, 156 F.R.D. 514, 527 (D.D.C. 1994). The government glosses over Rezaq, and fails to make any coherent effort to distinguish Rezaq's application to Campa's contention that the district court's acceptance of lengthy and argumentative ex parte hearings was unauthorized. In Rezaq the district court, while acknowledging that ex parte

submissions were authorized upon a sufficient showing, declined to exclude security-cleared defense counsel based on the government's failure to articulate any damage to national security that would be caused by the presence of defense counsel in the section four hearing. Id. at 526-27.

Rezaq amply supports Campa's argument that while ex parte submissions are contemplated by section four, ex parte proceedings should never be employed absent an extraordinary showing of need. However, nowhere below did the government ever provide a shred of justification for excluding security-cleared defense counsel from the CIPA proceedings; nowhere did the district court ever make any finding that the section four proceeding needed to be ex parte; and nowhere in its answer brief does the government, even now, attempt to justify the exclusion of security-cleared defense counsel from the hearing.

The prejudice in conducting ex parte proceedings was exacerbated when the district court erred in having a behind-closed-doors meeting with the government that appears to have taken nearly an entire day. The plain language of section four provides: "The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone." 18 U.S.C. App. III, § 4 (emphasis provided). It is clear that CIPA does not contemplate that the government and the district court will meet behind closed

doors to decide the fate of a defendant's discovery. Instead, CIPA provides that any ex parte communication will proceed by way of written submission. It cannot be disputed that all of the concerns with ex parte proceedings are aggravated when the ex parte communication consists of a private, tΛte-B-tΛte meeting between the government and the district court wherein crucial issues material to the defense are decided.

In its argument that Campa waived the issue, the government incorrectly asserts that Campa did not object to the hearing until post-trial proceedings. Prior to holding the section four hearing, however, Campa filed a motion urging the district court to reconsider its prior ruling granting the government an ex parte section four hearing. R1:210. Campa argued that defense counsel had now been cleared to view and possess classified materials and that there was no longer any justification for excluding counsel. Id. Further, Campa argued that exclusion of defense counsel from the hearing would prejudice his client. Id.

The clear import of Campa's objection was to the district judge's meeting with the government without the presence of defense counsel. Obviously, if defense counsel had been permitted to participate there would be no objection to conducting an adversarial section four hearing. The fact that the relief Campa requested was to participate in the hearing cannot be construed as somehow

nullifying his objection to the government and the district court meeting together in a sealed proceeding where decisions material to his case would be made.

In addition to its ill-founded waiver argument, the government defends the district court's holding of an ex parte hearing by arguing that such hearings have previously been sanctioned by other courts. The government cites United States v. Klimavicius-Viloria, 144 F.3d 1249, 1261 (9th Cir. 1998), and United States v. Yunis, 867 F.2d 617, 619-620 (D.C. Cir. 1989), for the proposition that face-to-face, section four hearings have been upheld. However, careful reading of those two decisions shows they are distinguishable.

This issue is one of first impression in this circuit, and neither Klimavicius nor Yunis compels the conclusion urged by the government here. The propriety of proceeding by in-person hearings was not at issue in Yunis. That case, therefore, provides no persuasive authority for this Court on this issue. See United States v. Aguillard, 217 F.3d 1319, 1321 (11th Cir. 2000) (holdings of a prior decision reach only facts and circumstances presented to court). Although Klimavicius found an in-person, section four proceeding permissible, it did so under circumstances in which the district court first concluded that the ex parte submissions were insufficient to allow it to resolve CIPA issues. 144 F.3d at 1261 ("Such a hearing is appropriate if the court has questions about the confidential nature of the

information or its relevancy.") (emphasis added). The hearing here was not so premised. Furthermore, Klimavicius' holding is otherwise bereft of legal support for such an expanding the plain text of section four. This Court, therefore, should decline to use Klimavicius, as a guide to resolution of the issue here.

B. Substantive Misapplication of CIPA.

Campa's principal substantive CIPA claim is that he was deprived of voluminous discovery that he was rightfully entitled to pursuant to Fed. R. Crim. P. 16. While the procedural violations of CIPA are significant, the denial of relevant discovery goes to the very heart of any defendant's ability to prepare a defense.

In its response, the government does not even address Campa's claims regarding the discovery he was denied and the impact that denial had on his defense at trial. The government's failure to deny Campa's assertion that CIPA was improperly used to deny discovery permits this Court to treat the government's silence as a waiver. See Beckwith v. City of Daytona Beach Shores, 58 F.3d 1554, 1564 (11th Cir. 1995) (issues not addressed in the answer brief are considered abandoned). Campa's brief, supported by substantial authority of this Court on the right of the defense to tell the whole story and fill in the incomplete picture presented by the government, stands unrebutted. See Initial Brief at 39 (citing, inter alia, United States v. Word, 129 F.3d 1209 (11th Cir. 1997).

C. Continued Procedural Unfairness

Campa also asserts that his ability to prepare his appeal has been hampered by the district court's unwillingness to unseal the non-sensitive portions of the ex parte, in camera, section four hearing. The government's answer brief completely fails to address this issue as well.

In a post-trial motion, Campa sought to have the non-sensitive portions of the hearing unsealed so that the issues on appeal could be framed more precisely. R14:1622. The government opposed this partial unsealing claiming that any unsealing would harm national security. R15:1623. In reply to the government's opposition, Campa articulated sixteen simple—and innocuous—queries regarding the nature of the ex parte hearing. R15:1652:6-7. These sixteen questions were reproduced in Campa's initial brief. Campa Br. 32-33. The answers to these questions would have absolutely no implications on national security, yet could have helped Campa formulate and refine his issues on appeal much more effectively.

The government has never explained why unsealing the section four hearing to the extent of answering those sixteen questions would pose a threat to national security. Its failure to address this issue should also be deemed a waiver. See Beckwith, supra.

III. CAMPA'S FISA CLAIMS WERE PRESERVED FOR APPEAL AND THE FISA SEARCHES WERE CONDUCTED UNLAWFULLY.

Campa has asserted that there were numerous irregularities in the government's use of FISA searches, including circumstantial evidence that the government did not follow necessary minimization procedures. See 50 U.S.C. § 1801. The government argues that there was no record developed below of items retained in violation of minimization procedures. The government disregards the fact that it has never provided the appellants with a complete inventory of items seized pursuant to the FISA searches.

In fact, through its use of CIPA to restrict discovery practices, the government placed appellants in the untenable position of not knowing exactly what the government seized. Surely, Campa's failure to articulate what has been seized from him in violation of the minimization procedures cannot be held against him when he is laboring under the disadvantage of not knowing the scope of the government's seizures that span over two years.

Campa's initial brief also asserts the FISA searches were not conducted to uncover foreign intelligence activities, but rather for law enforcement purposes. The government erroneously contends this argument was not raised below and is waived. Campa's motion to suppress the fruits of the unlawful FISA searches

specifically argued the searches were conducted in violation of the requisite provisions of 50 U.S.C. § 1801, et. seq. (FISA), R2:288:4. In these provisions, FISA compels, as an essential element, that searches be conducted for the purposes of obtaining foreign intelligence information. 50 U.S.C. § 1802(b). Campa's claim that the searches violated the plain dictates of FISA preserved that issue for this Court's de novo review.

The government seeks to narrow the scope of this Court's review of the permissible uses of FISA searches. In In re Sealed Case No. 02-001, 310 F.3d 717, 725 (U.S. Foreign Intell. Surveil. Ct. Rev. 2002), the Foreign Intelligence Surveillance Court of Review questioned the validity of the primary purpose test. The government cites this case in an attempt to lower the procedural requirements its FISA searches must meet. Regardless of the holding of In re Sealed Case, the law in this circuit is that FISA searches must be conducted for the primary purpose of gathering foreign intelligence information. See United States v. Badia, 827 F.2d 1458, 1464 (11th Cir. 1987). For the reasons set forth in Campa's initial brief, there is strong evidence the FISA searches here were improperly conducted primarily with a law enforcement objective.

Finally, Campa also argued that no matter how slight the procedural requirements are for a valid FISA search, the government could not have met its

burden vis-B-vis Campa, because the government did not even know he existed when it sought the warrant and searched his effects. Although the government learned of a "Ruben" after the FISA applications had been made, they did not determine that this "Ruben" was Campa until after he was arrested, and not until well after all the FISA searches had been completed. In its answer brief, the government does not address this issue, and its opposition to this argument should be deemed waived. See Beckwith, 58 F.3d at 1564.

IV. CAMPA'S CONVICTION SHOULD BE REVERSED DUE TO PROSECUTORIAL MISCONDUCT.

Even as it attempts to downplay its repeated violations of the district court's orders that it desist from improperly suggesting that Campa was spying on military bases in Fayetteville, North Carolina, the government still simply cannot refrain from engaging in such improper innuendo on appeal. Thus, for example, for no apparent reason other than again to suggest unfairly that Campa was engaged in espionage, the government goes out of its way to inform this Court that Cuba had once been within the area of responsibility of the Atlantic Command located in Norfolk, Virginia, and that Campa traveled to Norfolk in January, 1998. See Government's Brief at 17-18, n.16.

However, as the government admits, Cuba was already within the area of responsibility of SouthCom in Miami, Florida, at the time the government claims

Campa was in Norfolk. Furthermore, the meager evidence the government relies upon to claim that Campa traveled to Norfolk in January consists of a joint expense account prepared by co-defendant Hernandez which reflects a $119 expenditure for "bus fare Norfolk-Hollywood" and does not even identify who incurred the expense See DG117:18. This exemplifies how far the government is willing to go in its attempt unfairly to prejudice first, the jury, and now, this Court, against Campa and his co-defendants.

Contrary to the government's contention on appeal, its repeated, unsupported, and thinly-veiled suggestions that Campa was engaged in espionage in Fayetteville can hardly be described as "innocuous," especially in a case in which the government explicitly portrayed Campa and his co-defendants as "people bent on destroying the United States." R124:14482. The unfairly prejudicial impact these suggestions had on the jury can be measured by the harshness of the district court's criticisms of the government's continued misconduct.

For example, when the government once again sought improperly to suggest that Campa was spying on Fort Bragg, the district court sternly stated that it "was very disappointed" that government counsel had chosen to go into that impermissible area of testimony again, and felt compelled to remind the

government that it "has an affirmative duty [of good faith and fairness] in how it presents its case to the jury." R77:8372.

Although the government continued to flaunt the authority of the district court, the district court attempted to reign in the government and make it clear that no further abuses would be tolerated. For example, the district court noted that "[the prosecutor] should not have gone down that road where Fort Bragg was ... [He] saw what he thought was a door opening, whether it was advertent or inadvertent, and attempted to elicit testimony from the witness on an area the Court specifically had prohibited the government from going into after determining, based upon the government's proffer, that the government could not enter into that area because it was a [Fed. R. Evid.] 403 violation and I had made that very clear." R77:8372. The district court then agreed that the government's continued abuses were unfairly requiring defense counsel to jump up repeatedly and "yell and try and prevent something from coming out" that should not have been gone into at trial to begin with, thereby giving the jury the unfair impression that Campa had something to hide with respect to the evidence on this matter. R77:8371-72.

The district court then instructed the jury that it should disregard the government's suggestions "that Mr. Campa's presence in North Carolina was related to a military installation." R77:8373. Of course, even a strongly-worded

cautionary instruction to the jury cannot always "unring the bell," especially where, as here, the government persisted in its campaign to convict Campa on the basis of improper suggestions and innuendo. See R124:14471-536 (rebuttal argument).

The government's claim that its admitted transgressions were relatively minor is further belied by the district court's finding that governmental misconduct almost required a mistrial after seven months of trial. Thus, in response to the government's rebuttal closing argument, in which the prosecutor first improperly referred to Cuban "spies" being "everywhere," and in particular "in our community in Tampa, in Fayetteville, North Carolina, in Norfolk, Virginia, on our military bases, and in Miami, Florida too, and in Key West," R124:14477, and then personally challenged Campa, who did not testify at trial, to explain what he was doing in Fayetteville, the district court denied Campa's motion for a mistrial but not before agreeing that it presented a "close" question. R124:14544. The government's contention, therefore, that its rebuttal argument (which evoked 28 sustained objections) was a "fair response" to the evidence concerning Campa's role in the United States trivializes the district court's grave concerns about is misconduct at trial and contradicts the record before this Court.

The government's other specific responses to Campa's appeal are equally flawed. For example, contrary to the government's contention, the redirect of Agent Giannotti was not, in fact, proper. There were sustained objections to questions to Agent Giannotti designed again to suggest a sinister motive for Campa's brief residence in Fayetteville. R54:5253. Indeed, these questions expressly formed the basis for Campa's motion for in limine to preclude any further unwarranted suggestions that Campa was spying on military facilities in Fayetteville, which the district court granted. R54:5277-82.

The map of the Fayetteville area, which the district court found prominently displayed military installations in the area, including Fort Bragg, and which the government sought to introduce into evidence even after the district court had granted Campa's motion in limine, was not admitted into evidence. R68:6933, 6935. It was, however, paraded in front of the jury and brought to their attention. R77:8365.

Finally, the government's assertion that Campa, through his objections, was responsible for establishing "the only explicit link between Campa, Fayetteville, and military bases," and that its suggestion that Campa, therefore, has only himself to blame for the issue he raises on appeal can hardly be taken seriously. As the district court recognized, defense counsel was forced to object numerous times due

to the government's repeated violations of the district court's orders. When Campa's objections were sustained but his motions for mistrials were denied, Campa had no choice but to seek curative instructions to the jury in an effort to undo the prejudice created by the government's misconduct.

Of course, as the government asserts, curative instructions often only remind the jury of the impermissible testimony the government sought to put before it, and do more harm than good to the defendant. That, however, is another reason why this Court should find that Campa was unfairly prejudiced by the government's misconduct and vacate his conviction.

V. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT CAMPA POSSESSED A FALSE PASSPORT.

Contrary to the government's assertion, the evidence at trial was plainly insufficient to sustain the jury's finding that Campa was in constructive possession of a counterfeit passport bearing Oscar Reina's name. The government's several record citations falsely create the impression that there was evidence from which a reasonable jury could find that Campa knew that the Oscar Reina passport existed and that he exercised or sought to exercise "ownership, dominion, or control" over the counterfeit passport, as is necessary to sustain the conviction. See United States v. Glasgow, 658 F.2d 1036, 1043 (5th Cir. 1981).

The passport, of course, was found several weeks after Campa's arrest in co-defendant Hernandez's apartment. Campa had only briefly stayed in Hernandez's apartment a year before his arrest. The Reina passport also was not found lying around in plain view in Hernandez's apartment. It was found hidden within a false compartment in a leather binder discovered in a drawer in Hernandez's closet. See R34:2333-34.

The two physical exhibits and thirty-one pages of trial testimony cited by the government in support of its contention that the evidence "amply established that Campa knowingly possessed" the passport, see Government's Brief at 48, merely consist of: the counterfeit passport itself GX7), the leather binder in which it was hidden (GS55), and the testimony of an expert forensic document examiner who testified that the passport was false, (R69:6976-7025). That evidence does not even show that Campa knew the passport existed.

The only evidence arguably supporting the government's tenuous theory of constructive possession consists of an undated declassified document authored by an unknown individual (possibly "Allan," co-defendant Luis Medina) and addressed to an equally unidentified person concerning a wide range of subjects, including operations "Aeropuerto", "Giron", and "SouthCom", and how to go about using the internet to obtain desired information. See DAV118. The

document , however, also contains biographical outlines for Ruben Campa, James Hernandez, and Osvaldo Reina Quintero, next to whose name the words, "Outline of Legend for Reserve Documentation" appear. DAV118:12. The government contends that the document's mere reference to Osvaldo Reina "Reserve Documentation" shows that Campa "possessed" the Reina passport found in Hernandez's apartment.

This evidence, however, does not explain what is meant by "reserve documentation." Furthermore, unlike the section in the document dealing with identification documents actually available for Ruben Campa, which specifically identifies a birth certificate, a social security card, and other personal identification documents, see DAV 118:9, there is nothing in the declassified document suggesting any so-called Osvaldo Reina"reserve documentation" existed at all, let alone that such documentation was waiting for Campa in Hernandez's apartment.

VI. THE DISTRICT COURT ERRED IN IMPOSING A THREE-LEVEL UPWARD ADJUSTMENT UNDER U.S.S.G. § 3B1.1.

The government concedes that the district court violated the holding of United States v. Glover, 179 F.3d 1300, 1303 (11th Cir. 1999), and erred in imposing a Section 3B1.1 role enhancement based on an asset management theory. See Gov't Br. 85. The government, however, argues that this clear error "does not

compel reversal" because there may be evidence in the record from which this Court may find that other grounds support application of the guideline provision.

There is, however, as the district court found, no other evidence to support a Section 3B1.1 enhancement, especially as it relates to the conviction dealing with identification documents. See R133:111. Nor has the government yet to show that Campa could be viewed as holding a supervisory role over any other person in this case, especially since Campa was not charged in the espionage conspiracy count. Specifically, the district court rejected the government's argument that Campa could have managed co-defendant Medina, whom the government conceded was at least his "co-equal." R132: 19- 21. This matter, therefore, should be remanded for resentencing without the role enhancement.

If this Court finds, however, that there may be some evidence to support the enhancement on other grounds, this Court should, contrary to the government's request that it affirm without remanding for reconsideration under the correct legal standard, remand the matter to the district court with appropriate instructions. See, e.g., United States v. Dodds, No. 03-10578, 2003 WL 22290325 at *7 (11th Cir. Oct. 7, 2003) (where some evidence might, if credited, support proper enhancement, but district court based enhancement on improper ground, better

course is to remand to district court "in the first instance" to resolve factual issue); United States v. Jones, 36 F.3d 1068 (11th Cir. 1994).

The government's argument that Campa did not "specifically" alert the district court that its role enhancement constituted error is plainly belied by the record. Campa objected, before and after imposition of sentence, to the Section 3B1.1 enhancement. For example, Campa specifically argued at sentencing that: "The Court in order to sustain this enhancement must find vis-B-vis someone, Mr. Gonzalez [Campa] played this managerial role. There is no evidence he had any control over Mr. Medina nor did he have any control or supervisory responsibilities over anyone who has been identified to this Court." R132:19 (emphasis added). Campa also preserved the objection under United States v. Jones, 899 F.2d 1097, 1102-03 (11th Cir. 1990). See R133:133, see United States v. Antonietti, 86 F.3d 206, 208 (11th Cir. 1996).

CONCLUSION

Wherefore, Campa requests that this Court reverse his conviction and remand for entry of a judgment of acquittal on count 7 and a new trial on the remaining counts. Alternatively, Campa requests that the Court remand for resentencing without the role enhancement.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7). According to the WordPerfect program on which it is written, the numbered pages of this brief contain 6,977 words.

Joaquin Mendez