IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-21957-Civ-LENARD
(Crim. Case No. 98-721-Cr-LENARD)

GERARDO HERNANDEZ,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
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MEMORANDUM IN SUPPORT OF MOTION TO VACATE, SET ASIDE, OR CORRECT JUDGMENT AND SENTENCE UNDER 28 U.S.C. § 2255

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TABLE OF CONTENTS

MEMORANDUM IN SUPPORT OF 28 U.S.C. § 2255 MOTION

Movant Gerardo Hernandez, through counsel, respectfully submits this memorandum of law in support of his motion to vacate conviction and sentence under 28 U.S.C. § 2255:

I. INTRODUCTION.

The movant's Fifth and Sixth Amendment rights were violated and his convictions and life sentences should be vacated. Hernandez received life sentences upon his conviction of conspiracies charged in Counts 2 and 3. Although the court of appeals held that the life sentence on Count 2 was erroneous, this Court has not had an opportunity to revisit the sentencing decision, in that no claim of sentencing error was preserved as to Count 3. *United States v. Campa*, 529 F.3d 980, 1018 (11th Cir. 2008) (*Campa* III). Relief is warranted on several grounds, including ineffective assistance of counsel, due process violations, and denial of access to exculpatory evidence. Notably, none of counsel's deficiencies reflect strategic choices; instead, they derive uniformly from counsel's failure to satisfy the core obligations of consultation, investigation, research, and case analysis.[1]

II. INEFFECTIVE ASSISTANCE OF COUNSEL.

A. *Ineffective assistance of trial counsel as to the Count 3 conviction.*

There is no escaping the conclusion that Gerardo Hernandez is serving a life sentence because his lawyer failed to understand—and, in turn, failed to adequately investigate, prepare for, and litigate—the charge faced by Hernandez in Count 3 of the indictment. The government was required to prove beyond a reasonable doubt that Hernandez conspired with Cuba with the knowing intention of advancing a plan to commit murder—an unlawful killing with malice aforethought—regardless of whether a substantive offense ultimately occurred. In other words, Hernandez was on trial for what ***he*** purportedly agreed to do. But Hernandez's lawyer mistakenly believed that Hernandez's freedom instead rested upon demonstrating that the shootdown that occurred was in fact lawful. In

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[1] The standards for evaluating the ineffective assistance of counsel are well established. *See Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984) (two-part test for relief based on claim of ineffective assistance: (1) "counsel's performance was deficient," i.e., "representation [that] fell below an objective standard of reasonableness," and (2) prejudice, i.e., "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". A reasonable probability of prejudice is one that is sufficient to "'undermine confidence'" in the outcome. *Williams v. Taylor*, 529 U.S. 362, 391 (2000) (quoting *Strickland*, 466 U.S. at 694). The right to counsel's effective assistance applies at all stages of the case, and the *Strickland* standard applies to trial, sentencing, and appellate counsel. *See Matire v. Wainwright*, 811 F.2d 1430, 1435 (11th Cir. 1987) (appeal); *Williams v. Taylor*, 529 U.S. at 399 (sentencing)

other words, counsel endeavored to prove that the ***actions of others*** were in fact lawful. This fundamental misconception influenced counsel's every effort, and prevented him from taking essential steps in defense of his client. In short, Hernandez's lawyer was his worst enemy in the courtroom. Because the Constitution cannot tolerate a conviction obtained under such circumstances, Hernandez's conviction and sentence must be vacated.[2]

1. Hernandez's prosecution under Count 3 should have turned upon the government's specific proof of *his* precise thoughts, motives, understanding, and agreement. He was tried for conspiring with the Cuban government to commit the "unlawful killing of a human being with malice aforethought." *See* 18 U.S.C. §§ 1111, 1117. Because the statute requires the parties to "commit an act that is itself illegal"—that is, they "cannot be found guilty of conspiring to commit an act that is not itself against the law"—the government had to prove that the plan which Hernandez purportedly agreed to advance was nothing short of a plan to commit an unlawful killing. *United States v. Vaghela*, 169 F.3d 729, 732 (11th Cir. 1999). Moreover, because conspiracy to commit a particular offense "cannot exist without at least the degree of criminal intent necessary for the substantive offense itself," *Ingram*, 360 U.S. at 680, the government was obliged to prove beyond a reasonable doubt that Hernandez conspired to commit the unlawful killing "with malice aforethought." *Campa* III, 529 F.3d at 1010. Thus, in sum, Hernandez could face conviction only if the government could prove that (i) there was a conspiratorial Cuban plan to shoot down the planes in an unjustified, *unlawful* manner; (ii) Hernandez knew of the *unlawfulness* of the plan; and

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[2] The Eleventh Circuit described pertinent Count 3 facts as follows, *Campa* III, 529 F.3d at 988:

> Because the Cuban government believed that, during some flights, pilots of Brothers intentionally violated Cuban airspace, the Cuban government launched a special mission codenamed "Operation Scorpion" "in order to perfect the confrontation of" the "[counterrevolutionary] actions of [Brothers]." Cuban intelligence officers transmitted encrypted radio messages that directed Hernandez to instruct Gonzalez and Roque to determine the flight plans of Brothers.
>
> Hernandez was instructed to inform Cuban intelligence officials when Gonzalez and Roque would be flying in aircraft of Brothers. Gonzalez and Roque were not to fly from February 24 through 27, and they were instructed to use code phrases during radio communication with Cuban air traffic control if they could not avoid flying on those dates.
>
> On February 24, 1996, three aircraft of Brothers flew toward Cuba, but two did not return. While the planes were flying away from Cuba in international airspace, Cuban military jets shot down two of the aircraft and killed two pilots, Mario de la Peña and Carlos Costa, and two passengers, Armando Alejandre and Pablo Morales. A third plane, flown by Jose Basulto, the founder and leader of Brothers, escaped.

(iii) that he willfully agreed to the commission of such an *unlawful* killing as something that he specifically intended to bring about, with substantial certainty that murder would occur. *Id*.

It bears emphasizing what would constitute insufficient proof. A Cuban plan merely to confront invading planes could not support a conviction. Nor could Hernandez be found guilty if there was a plan to unlawfully shoot down the aircraft but he was unaware of it. Indeed, even Hernandez's intent to aid in a plan to destroy the planes in an *erroneous* belief that Cuba was acting in lawful defense of Cuban sovereignty would not constitute the crime charged. *Id.* ("assum[ing] that . . . an agreement to commit a justified killing would not be prohibited by the conspiracy statute"); *id*. at 1024 (Kravitch, J., concurring in part and dissenting in part) ("A country cannot lawfully shoot down aircraft in international airspace, in contrast to a country shooting down foreign aircraft within its own territory when the pilots of those aircraft are repeatedly warned to respect territorial boundaries, have dropped objects over the territory, and when the objective of the flights is to destabilize the country's political system. Thus, the question of whether the Government provided sufficient evidence to support Hernandez's conviction turns on whether it presented sufficient evidence to prove that he entered into an agreement to shoot down the planes in international, as opposed to Cuban, airspace."). Anything short of proof that Hernandez intended to aid the Cuban government in committing an unlawful killing required acquittal.

What would constitute an insufficient defense similarly bears emphasis. As far as the crime of conspiracy goes, the issues concern the defendant's intended objective and agreement, not the results obtained. That is the very essence of the offense. *See generally Developments in the Law, Criminal Conspiracy*, 72 Harv. L. Rev. 922 (1959). Thus, if sufficient evidence were adduced that Hernandez intended to aid the Cuban government in an unlawful killing, proof that the killing that resulted turned out to be lawful would help not at all. Indeed, Hernandez could have been convicted upon such theoretical proof absent any completed killing—he was tried for what he purportedly conspired to do, rather than for what actually happened. *See, e.g.*, *United States v. Villarreal*, 546 F.2d 1145, 1146 (5th Cir. 1977) (drug conspiracy conviction was valid whether or not conspirators "were unable to consummate the planned transaction").

2. Hernandez was convicted of Count 3 because his attorney misunderstand the offense charged, and as a result, counsel both (1) failed to present a legally relevant defense and (2) endeavored to present a legally irrelevant defense that was, at best, implausible in the extreme and in any event served only to prejudice his client. Hernandez was thus convicted without the constitutionally effective representation guaranteed by the Sixth Amendment, and his conviction

must be vacated. *Wiggins v. Smith*, 539 U.S. 510, 521-23 (2003) (failure to understand relevant legal issues precludes excusing ineffective assistance as mere strategic error).

Trial counsel simply failed to ensure that the government was put to its burden of proving its case. The omissions began before the trial. For example, counsel failed to challenge the defective and insufficient indictment or to compel the government to specifically identify the conduct that purportedly violated the statute. The omissions continued throughout the government's presentation. Counsel failed to properly raise before this Court essential challenges to the legal sufficiency of the evidence. Because counsel did not apprehend the prosecution's substantial burden, he could not and did not—even after the evidence concluded—ensure that the jury understood it. *E.g.*, *Campa* III, 529 F.3d at 999-1000 (noting that, on appeal, Hernandez argued that "the jury instructions allowed the jury to convict him on a finding of fewer elements than required for the charge of conspiracy to murder," but concluding that the argument necessarily failed because "[t]he district court gave the instruction that the defense requested during the charge conference").

Counsel similarly failed to prepare or mount a relevant defense. To begin, because he did not understand the prosecution Hernandez faced, counsel did not and could not properly advise his client to knowingly waive his right to take the stand in his own defense. Hernandez could and should have done precisely that; he could have clearly and convincingly stated that whatever wrongs he might have committed, he did not intend to aid the Cuban government in an unlawful murder. At the very least, Hernandez was constitutionally entitled to make an informed decision on that front.

Myriad other witnesses could have been called to testify to this issue, which was the only issue that was relevant. Hernandez's co-conspirators, for example, were well poised to cast doubt upon the government's theory as to Hernandez's intentions. Many had pleaded guilty before Hernandez faced trial. The remainder could have been called in Hernandez's defense had his counsel moved to sever Hernandez's trial; indeed, as explained below, counsel's failure to do so constituted ineffective assistance of counsel in and of itself for this and other reasons. *See Byrd v. Wainwright*, 428 F.2d 1017, 1019-20 (5th Cir. 1970) (where essential co-defendant witness will not testify at joint trial, but will testify upon severance, denial of severance is error). Friends, family, and colleagues could similarly have testified that Hernandez was driven by what he perceived as the patriotic defense of his nation, rather than by psychopathic evil.

The irrelevant defense that counsel did elect to mount was arguably more damaging than his failure to present a relevant one. From beginning to end, trial counsel pinned Hernandez's defense upon the theory that the shootdown was lawful because it occurred in Cuban airspace. As already

explained, as a matter of law, this ambitious, but misdirected, theory of defense was no defense at all. As a matter of fact, seeking to prove that notion was hopeless, and counsel's persistent pursuit of the impossible served only to obfuscate—in a highly prejudicial manner—the relevant issue upon which Hernandez's freedom depended. When he should have presented evidence to highlight the centrality of Hernandez's intentions notwithstanding the reality of the events that came to pass, he instead ignored Hernandez's intent and asked the jury to focus near-obsessively upon the minute details of the tragic events that ultimately transpired.

More precisely, he set out to convince the jury that it should (1) disbelieve the mountain of evidence pinpointing the location where each plane was shot down—again, a nondispositive point—and find that each occurred in Cuban airspace, and (2) blame the BTTR pilots and passengers killed in the confrontation for their own deaths. Rather than appealing to common sense in proving a relevant fact, counsel acted in disregard for the jury's intelligence by attempting to disprove an irrelevant one and inflamed their passions by casting aspersions on the motives of the dead victims.

3. There is only one explanation for trial counsel's perfectly backward defense: he erroneously believed that his client's acquittal demanded it. Admirably, counsel stands willing and eager to testify to this effect before this Court. He has in any event already confessed as much—to the jury, during his closing statement. The trial record demonstrates that some time after the presentation of evidence but before his closing, counsel realized the fundamental error of his defense. He elected to explain as much to the jury in his summation. As he told the jury, he took up "three quarters of the 7-month trial on where the shootdown occurred." DE-1583:14439. It thus seemed entirely too late—or in counsel's words to the jury, "crazy"—to set matters straight by explaining why the issue was actually irrelevant. Counsel nonetheless did just that; the location of the incident, he now told the jury, was "irrelevant because the crime the government charged was a conspiracy." *Id.* Thus, just before it began to deliberate on Hernandez's guilt, the jury learned that the defense presented by his counsel was irrelevant, but that counsel clung to it still.

4. Unfortunately, counsel's realization of the true limits of the charge was not even preserved in the instructional phase. Indeed, counsel's omissions and missteps when it came to instructing the jury constitute perhaps the most dramatic examples of the vast consequences of his failure to cabin the prosecution's case. Although the government vigorously resisted the idea that it was obliged to prove Hernandez's intention to advance a shootdown in a place where its occurrence would be unlawful—i.e., over international waters—this Court recognized the government's burden to prove an intent to commit an unlawful killing, and the Eleventh Circuit rejected the government's

unprecedented petition for a writ of prohibition on that front. *See* Gov't Emergency Pet. for Writ of Prohibition 21 (11th Cir. No. 01-12887) (describing "insurmountable hurdle for the United States" to prove intent to exceed limits of sovereign Cuban governmental authority). Despite the interlocutory appellate victory, and despite the government's dramatic admission of inability to prove the case that was to be submitted, counsel *failed* to ensure that the correct instruction made its way to the jury. As a result, and quite remarkably, the jury was never told what Hernandez had to have intended in order to have committed the offense.

Counsel instead sought to instruct the jury on inapplicable, irrelevant, and prejudicial standards of civil liability. Under these standards, he believed, the jury might conclude that Cuba's fighter jets correctly treated BTTR's light Cessna aircraft as "military" planes and reasonably shot them down. Notwithstanding the questionable wisdom of the premise, counsel again failed to appreciate the futility of its success. As stressed, counsel's legal theory was neither necessary nor sufficient to acquittal. Not even the government's invocation of the "last resort" rule—under which a shootdown is lawful for purposes of these civil standards only if it is the last resort and the targeted planes are military in nature—led counsel to recognize how far he had strayed. Faced with this unimaginably prejudicial standard, counsel maintained his erroneous reliance upon the irrelevant standards. As a result, the jury was asked to deliberate whether the Cuban fighter pilots shot down the BTTR planes as a last resort defense against military incursion—and to convict Hernandez of conspiracy to murder if it concluded that they did not.

5. That Hernandez suffered prejudice of constitutional proportions cannot seriously be disputed. On this score, it is sufficient to note that although trial counsel neither challenged the government's case as to the central issue concerning Hernandez's guilt nor adduced evidence of his own, and despite the muddled presentation of voluminous evidence that was as unconvincing as it was irrelevant, Eleventh Circuit judges disagreed on the question whether legally sufficient evidence could sustain Hernandez's Count 3 conviction. One member of a three-judge panel found it "evident" that the trial record presented "a very close case" as to the sufficiency of the government's unchallenged proof, but nonetheless voted to affirm the conviction in light of "[the] standards of review" that governed after the fact. *Campa* III, 529 F.3d at 1019 (Birch, J., specially concurring). A second judge disagreed, finding the government's untested case "not enough to sustain a conspiracy conviction." *Id.* at 1026 (Kravitch, J., concurring in part and dissenting in part). Only the third was confident that the conviction was "supported by sufficient evidence." *Id.* at 2004.

To put it mildly, counsel's actions and inaction "'undermine[ ] confidence'" in Hernandez's conviction. *Williams v. Taylor*, 529 U.S. 362, 391 (2000) (quoting *Strickland*, 466 U.S. at 694). Counsel stood to convincingly show a reasonable doubt in the minds of the jurors had he understood the nature of the prosecution. The defense to which Hernandez was constitutionally entitled was straightforward and quite compelling: whatever he might have intended, it was certainly not Hernandez's aim to advance an unlawful murder. As succinctly set out by Judge Kravitch:

> Here, the Government failed to provide sufficient evidence that Hernandez entered into an agreement to shoot down the planes at all. * * * At best, the evidence shows an agreement to "confront" BTTR planes. * * * Moreover, even assuming that Hernandez agreed to help Cuba shoot down the BTTR planes, the Government presented no evidence that Hernandez agreed to a shoot down in international airspace. It is not enough for the Government to show that a shoot down merely occurred in international airspace: the Government must prove beyond a reasonable doubt that Hernandez agreed to a shoot down in international airspace. Although such an agreement may be proven with circumstantial evidence, here, the Government failed to provide either direct or circumstantial evidence that Hernandez agreed to a shoot down in international airspace. Instead, the evidence points toward a confrontation in Cuban airspace, thus negating the requirement that he agreed to commit an unlawful act. * * * At most, the evidence demonstrates that Hernandez agreed to a confrontation in either Cuban or international airspace. But such an agreement is not enough to sustain a conspiracy conviction.

Campa III, 529 F.3d at 1024-25 (Kravitch, J., concurring in part and dissenting in part). The jury never heard this argument, and was never properly instructed as to its legal significance.

Instead, Hernandez's lawyer took on the Augean task of proving that no murder occurred, proceeded to fail utterly in completing that misguided task, and then summed up his case by informing the jury that it never really mattered. Finally, when it came to the jury instructions, he simply failed to enforce the Court's ruling on the unlawful nature of the killing. The Constitution cannot tolerate a conviction for conspiracy to commit murder—and an associated life sentence—premised upon such ineffective assistance. *See Proffitt v. Wainwright*, 685 F.2d at 1247 (seriousness of the charge is a factor that must be considered in assessing counsel's performance).

B. *Counsel's pretrial representation was unconstitutionally ineffective.*

"Pretrial investigation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps, the most crucial stage of a lawyer's preparation." *House v. Balkcom*, 725 F.2d 608, 618 (11th Cir. 1984); *see also Weidner v. Wainwright*, 708 F.2d 614, 616 (11th Cir. 1983) ("At the heart of effective representation is the independent duty to investigate and prepare."). For this reason, counsel's failure to adequately conduct a pretrial investigation is a well-recognized, independent basis for habeas relief. *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (failure to

conduct pretrial discovery); *Proffit v. Waldron*, 831 F.2d 1245, 1248-49 (5th Cir. 1987) (failure to secure documents and interview witnesses); *House v. Balkom*, 725 F.2d 608, 618 (11th Cir. 1984).

When, as here, counsel essentially uses the trial as a means to learn the applicable legal theory and discover the pertinent facts, his decisions must be presumed to be "the result of inattention, not reasoned strategic judgment." *Wiggins v. Smith*, 539 U.S. at 526; *Johnson v. Bagley*, 544 F.3d 592, 602 (6th Cir. 2008). When pretrial investigation is inadequate, a purportedly strategic decision "resembles . . . a *post hoc* rationalization." *Wiggins*, 539 U.S. at 525; *Holsomback v. White*, 133 F.3d 1382, 1387 (11th Cir. 1998). Counsel cannot reasonably reject a defense without first understanding and evaluating it. Thus, the failure to investigate a defense is assessed independently from the decision whether to present it. *E.g., Wiggins*, 522 U.S. at 522-24.[3] And "[o]nly choices made after a reasonable investigation of the factual scenario are entitled to a presumption of validity." *Rolan v. Vaughn*, 445 F.3d 671, 681-82 (3d Cir. 2006) (citing *Strickland*, 466 U.S. at 687).

In this case, the constitutional inadequacy of counsel's representation was settled before the trial began. *E.g.*, *Hardwick v. Crosby*, 320 F.3d 1127, 1163 (11th Cir. 2003); *Young v. Zant*, 677 F.2d 792, 798 (11th Cir. 1982). Because he did not understand the defense he was obliged to present, Hernandez's lawyer never prepared to mount that defense. He did not appreciate the elements of the crime charged, so he did not test the legal adequacy of the government's indictment, did not seek to clarify its factual allegations, and did not endeavor to limit the evidence to be presented (to the contrary, he himself later presented only irrelevant and prejudicial evidence). Similarly, he never mustered the evidence necessary to defend his client, nor did he conduct the investigations prerequisite to the discovery of such evidence. In short, counsel prepared to defend a different case. For this reason alone, he failed effectively to represent his client, and Hernandez's conviction must be vacated. *E.g.*, *Crawford v. Head*, 311 F.3d 1288, 1318 (11th Cir. 2002); *Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir. 1986); *Wilson v. Sirmons*, 536 F.3d 1064 (10th Cir.

[3] For example, in *Baylor v. Estell*, 94 F.3d 1321, 1324-25 (9th Cir. 1996), the Ninth Circuit found prejudice from defense counsel's failure to pursue certain expert evidence, even though the defendant had made a detailed confession of his crime. The rationale was that, had the other expert evidence been pursued, it might have called into question the overall impact of the government's damaging evidence. Similarly, in *United States v. Tarricone*, 996 F.2d 1414, 1419 (2d Cir. 1993), the court found prejudice from counsel's failure to pursue exculpatory handwriting evidence, despite other circumstantial evidence of guilt. And in *Foster v. Lockhart*, 9 F.3d 722 (8th Cir. 1993), the court found prejudice because "if the attorney had investigated further, he would have discovered objective medical evidence casting substantial doubt on the government's evidence."

2008); *Glenn v. Tate*, 71 F.3d 1204 n.5 (6th Cir. 1995); *Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993); *Chambers v. Armantrout*, 907 F.2d 826, 828 (8th Cir. 1990).

1. Although Hernandez was charged with violating 18 U.S.C. §§ 1111 and 1117, his indictment was insufficient to sustain that charge. As explained, those provisions make it a crime to conspire to commit the "unlawful killing of a human being with malice aforethought," and Hernandez could face conviction only if the government could prove that (i) there was an explicit Cuban plan to shoot down the planes in an unjustified, unlawful manner, (ii) Hernandez knew of this unlawful plan, and (iii) he willfully intended to advance such unlawfulness. However, Hernandez was indicted for allegedly conspiring "to support and help implement, including with Miami-based information, a plan for violent confrontation of aircraft of Brothers to the Rescue [(BTTR)]." DE-224. Moreover, all of the overt acts disclosed in the indictment occurred after the shootdown—after any purported conspiracy had concluded.

But joining "a plan for violent confrontation" does not necessarily amount to a crime, let alone reflect an intent to conspire to commit murder. A sovereign that plans a "violent confrontation" to defend its airspace from repeated invasions commits no crime. Nor do its agents. Well into the trial, the government was finally forced to admit as much. DE-1579:13869. Finally, because one cannot further a conspiracy by engaging in acts that take place after the allegedly criminal scheme has concluded, as a proposition of pure logic Hernandez was never properly indicted for participating in a conspiracy. Because counsel never understood the crime charged, he failed to appreciate that the government never properly indicted his client for that crime. He never moved to dismiss the indictment on those grounds, and he never sought to compel the government to clarify its allegations. Similarly, he never pursued motions in limine to limit the government to introducing only evidence that would be relevant to its conspiracy theory. Instead, he prepared to defend against a different charge and challenged only the court's jurisdiction.

2. The obvious factual investigations that were required went unconducted. Counsel did not pursue evidence as to the true objectives of the Cuban government. He did not seek to uncover the extent of Hernandez's knowledge as to those objectives. He made no effort to elicit testimony as to Hernandez's motivations or intentions. Counsel did not avail himself of the experts who could have further developed the case. He did not speak to international law experts to learn about a sovereign's defense of its airspace. He did not speak to intelligence experts to learn about the compartmentalization of information and the extreme implausibility of the government's suggestion that an intelligence-gathering agent would be aware of precise mission objectives or policy aims.

The government was able to surmount what it conceded was insurmountable because Hernandez's counsel let it work backwards. Generally, the government must charge a defendant for conduct constituting a known crime and then prove that such conduct occurred. Here, the government was allowed to set off on the basis of an indictment that was as factually vague as it was legally insufficient. And it met an opponent who never put it to its burden of proving the elements of the crime charged, but instead worked only to disprove elements of a different crime. When it became clear that the government never even intended to prove the crime it charged, the government responded with an *ex post* rationalization, contending that it had already done so. It was successful because Hernandez's lawyer simply failed to prepare a relevant defense. The government's success thus contravened Hernandez's Sixth Amendment rights.

The defense that Hernandez's trial counsel prepared was explained in his motion to dismiss Count 3 filed on February 29, 2001. First, he contended that despite all accepted evidence to the contrary—including a judgment by a judge of this Court in *Alejandre v. Republic of Cuba*, 996 F.Supp. 1239, 1247 (S.D. Fla. 1997), and the international judgment of the International Civil Aviation Organization (ICAO)—he would assume a burden to prove that the shootdown occurred in Cuban airspace. DE:406. Second, he contended that assuming Hernandez joined with Cuba in conspiring to shoot down the planes, it violates due process for the United States to exercise jurisdiction over the murder conspiracy. *Id*. These defenses, readily refuted by the government before trial, became the defense opening statement at trial, with counsel arguing that Hernandez was a "scapegoat" for actions of Jose Basulto. DE-1476:1624 ("Basulto had a reckless disregard for law. ... Mr. Basulto believes that the rules don't apply to him. [A]nd it is that disrespect for law that led him basically to bring those four men to their deaths, and I think in this case, it will be your respect for law that will mean Mr. Hernandez will be saved and he will not be the scapegoat for this tragic incident."). Counsel carried this premise so far as to call Basulto as a witness, *see* DE-1537:8836-37 (Basulto testifies as hostile witness), bolstering the government's case, while heightening the political theater of counsel's 'the-victims-had-it-coming-to-them' defense.

Thus, counsel's position at trial was that Cuba was right about everything leading to the shootdown and was right to shoot down the planes. DE-1476:1623 (defense offers justification argument in opening statement). Counsel relied on Cuban evidence and attitudes for every aspect of the defense, even calling a military expert to relate Cuban military attitudes. Counsel sought to dismiss U.S. government agency evidence, testimony of independent third parties, and the testimony of eyewitnesses from the Basulto aircraft. Counsel also sought to cast doubt on Hernandez's receipt

of certain messages sent to another agent's codename, but did so by inference only and called no witnesses to support that theory, his purpose being only to show that Hernandez did not know of the specific language used by his superiors in addressing efforts to confront flights by Basulto.

Trial counsel called witnesses to establish Cuban anger and threats regarding the flights and invoked ICAO principles and tenuous evidentiary premises to claim that Cuba's shootdown of the planes was authorized because they were *military* planes. DE-1476:1623 ('[T]he Cubans were *justified*, according to my expert, in shooting the plane down.") (emphasis added). But counsel did not explain how the planes could be *military* planes if they *never entered Cuban airspace* and were *shot down over international waters*. Nor did counsel object to the Court's voir dire instruction, as requested by the government, DE-608, that Count 3 related to the "incident in which the Cuban government shot down two *civilian* aircraft operated by a group known as Brothers to the Rescue." DE-1245:17, 137; DE-1470:289; DE-1471:445, 559 (emphasis added as to all six record citations).

The pointedly confrontational, Cuba-was-right-and-America-was-wrong defense adopted by trial counsel did not merely belittle the jurors' intelligence with his shootdown location and justification claims, *see* DE-1301, Ex. D (juror's post-trial interview); it distorted the issues for the jury. The government took advantage of the extreme defense tactics—in a closing argument, to which trial counsel, did not object that brutally compared trial counsel's skewed, confrontational defense to the horrific Nazi design for the Holocaust, DE-1583:14474 (government accuses counsel of believing in "the final solution," a term heard before "in the history of mankind")—and arguably eviscerated *with that one argument* any possibility that jurors would take defense counsel seriously. Counsel also failed to separate the conduct and knowledge of his client evidenced prior to the shootdown from that afterwards and failed to defend against use of evidence of his client's *post hoc* support for his government to expand the conspiracy's limits. Counsel's confusion of the legal issues and misunderstanding of the relevance of individual factual disputes doomed the defense.

Failure to file pretrial motions addressing the defective indictment. Counsel should have contested pretrial the sufficiency of the indictment's allegation of the sole object of the Count 3 conspiracy—"to support and help implement, including with Miami-based information, *a plan* for *violent confrontation* of aircraft of Brothers to the Rescue [(BTTR)] with decisive and fatal results"—in relation to the statutory requirement of an unlawful plan to kill, i.e., not merely to violently confront within the scope of Cuba's sovereignty and legal jurisdiction, but to exceed such jurisdictional authority by committing an unlawful homicide. Counsel thereby allowed for a conviction on the impermissible theory of a non-murder plan gone wrong. Counsel should also have

contested inclusion in Count 3 of "overt acts" consisting of three actions *by Cuba* directed *toward the movant* *after* the alleged homicide had already occurred, DE-224 (Count 3, overt acts 10, 11, and 12), allowing for conviction based on either a *post hoc* bootstrapping of conspiratorial agreement or an unfounded theory of accessory after the fact to a *completed* conspiracy. *See* 18 U.S.C. § 3 (accessory offense; punishable by 15 years imprisonment).

The filing of an appropriate motion to dismiss Count 3 would have compelled dismissal of the indictment or striking of components that impermissibly expanded the charge. But due to counsel's pretrial omissions, counsel failed to appreciate the actual limits of the charge and failed to address his defense to those limits and engage in the investigation and consultation necessary to adequately prepare a defense. In making his closing argument, counsel confessed that it was "crazy" for him to admit it, but having taken up "three quarters of the trial on where the shootdown occurred," he acknowledged that it was "irrelevant because the crime the government charged was a conspiracy." DE-1583:14439. Counsel's acknowledgment of a misdirected, quixotic defense, premised upon the largely "irrelevant" question of where the shootdown took place and an unelaborated theory of justification, rather than on the defendant's intent, addressed only part of the ineffectiveness. But counsel's admission to the jury reflected the inadequate preparation that left Hernandez to ultimately pin his hopes on the jury's ability to apply generic conspiracy and aiding and abetting instructions without the relevant evidentiary and legal framework.[4]

Counsel failed to evaluate legal issues raised by the Count 3 allegations and failed to file appropriate pretrial motions to aid in determining the scope of the offense.[5] Even if a dismissal motion had not been granted, litigating a dismissal or particulars motions would have alerted counsel to the limited nature of the cognizable allegations in Count 3, such as the insufficiency of the

[4] The problems for counsel began with a failure to understand the charges, as his pretrial motion showed, and thereby failing to take steps to make the issues at trial understandable from the beginning of the case. Thus, while counsel mentioned jurisdiction and sovereignty in his pretrial motion, he failed, until the close of the evidence, to raise the sovereignty defense of the Foreign Sovereign Immunity Act, so as to argue that vicarious liability for sovereign governmental actions are not subject to criminal prosecution. *See Campa* III, 529 F.3d at 1001 ("Hernandez waived any defense of sovereign immunity.").

[5] To the extent counsel's defense was that the act was justified as an incident of national sovereignty, counsel should have raised pretrial the defense of foreign sovereign immunity. The shootdown was recognized under federal law as an act attributed to Fidel Castro. 22 U.S.C. § 6046(b)(3). The Eleventh Circuit held that the issue was waived. *Campa* III, 529 F.3d at 1001.

government theory that a defendant need only conspire to take forceful action in order for liability to ensue where the force ultimately used is deemed excessive in the jurisdiction where it occurred.

The indictment charged a plan for a violent confrontation of aircraft, but counsel failed to challenge the sufficiency of the allegation of criminal intent in that, at trial, the government conceded that a mere plan for a forceful or violent confrontation was not illegal, undermining the central premise of the indictment. DE-1579:13869. The government sought, without opposition by the defense until after the close of the evidence, to try the defendant on the theory that an agreement to commit assault that would be unjustified by domestic law if it occurred within U.S. jurisdiction (but the lawfulness of which in other jurisdictions is not known) affords a basis for federal conspiracy prosecution if the assault ultimately occurs within U.S. jurisdiction, apart from any intention or expectation by the defendant that the assault occur in a time, place or manner that would violate the law. A pretrial motion by counsel would have led to a corrective definition of the scope of the allegations prior to commencement of the case and to appropriate jury instructions as to the elements of the offense. Here, counsel failed to object even when such instructions were omitted.

Specifically, counsel failed to litigate pretrial the scope of protected police action—such as conduct by a sovereign nation to confront illegal flights—as affecting whether the use of force is illegal, such that even a person who agrees with a government's stated intention to take forceful action, does not become a criminal conspirator merely because the force ultimately used becomes unlawful, such as here, due to location or jurisdiction. Thus, shooting a fleeing felon involved in a dangerous chase is permitted, but shooting a felon who has already fled is not permitted. *Long v. Slaton*, 508 F.3d 576, 584 (11th Cir. 2007) ("Defendants, in their individual capacities, are entitled to qualified immunity unless their 'supposedly wrongful act was already established to such a high degree that every objectively reasonable official standing in the defendant's place would be on notice that what the defendant official was doing would be clearly unlawful given the circumstances.'") (quoting *Pace v. Capobianco*, 283 F.3d 1275, 1282 (11th Cir. 2002)); *Hadley v. Gutierrez*, 526 F.3d 1324, 1332 (11th Cir. 2008) (rejecting argument that conspiracy to cover up excessive use of force constitutes viable theory of liability). The fundamental difference between individuals who have no right to use force to enforce the law and governmental, military, and law enforcement agencies that have the jurisdictional authority and right to use force to confront illegal conduct was lost in the government's presentation of the case, to which counsel failed to object.

The government was not called upon to admit this distinction until the close of the evidence. Once confronted, the government's theory for purposes of surviving a Rule 29 motion became one

of an initial illegal plan to exceed Cuban jurisdiction due to a concern about the dropping of leaflets that drift 12 miles into Cuba. But at this point, the case was over, and counsel had failed to interview a single witness to show that this was neither the plan, nor the understanding of his client.

Counsel's failure to research and pursue evidence and legal arguments relevant to Count 3, as a matter of both domestic and international law, includes: failing to research and present legal arguments, motions, and instructions concerning the law applicable to Count 3 as charged, as a matter of both domestic and international law; failing to file motions in limine to address the scope of the offense and the evidence and by failing to object that a conspiracy to commit second-degree murder is not an offense; failing to file a Foreign Sovereign Immunity Act (FSIA) motion to dismiss and to limit the scope of movant Hernandez's potential liability for Cuba's actions; failing to seek dismissal of Count 3 on the basis that the government indicted movant for second degree murder or manslaughter while pursuing a claim of first-degree murder; and failing to file motion to dismiss or clarify indictment allegations of a murder conspiracy extending beyond the date of commission of the crime, so as to eliminate the government theory that *post hoc* support of Cuba's actions constitutes a conspiracy to commit murder.

Loss of defendant's and co-defendants' testimony. Counsel failed to adequately consult with Hernandez concerning the right to testify and present evidence relevant to his own knowledge and intent concerning Count 3. Counsel erroneously discounted the legal significance of such evidence, failed to investigate the availability of corroborative testimony from persons who interacted with Hernandez, and instead persisted in a defense of Cuban actions rather than a defense of his own client's innocence in relation to Cuba's actions. Counsel thereby conveyed to the jury an inability to contest essential government allegations of *mens rea*. First, counsel failed to explain to the Hernandez that, due to the highly prejudicial and separate nature of the murder allegations of Count 3, he could seek a severance, which would give him the opportunity to offer exculpatory testimony as to those charges, including his right and ability to testify in his own behalf at trial. Counsel failed to evaluate the legal basis and reasoning for such a motion and thus failed to explain to the Hernandez his rights in relation to the two sets of charges. The joinder of a multiple-homicide count with charges of espionage independently presented a basis for severance, in that there were essentially two separate cases, one with deceased victims whose families attended and grieved at each day of trial; and another without individual victims and with vastly different levels of emotional prejudice as compared to the tragic loss of four lives, allegedly at Hernandez's hand.

Apart from the vastly differing levels of prejudice in relation to the charges, the substantial amount of separate time needed to try the murder case, and the different legal issues involved, the preeminent factors warranting a consideration of the need for severance, ignored by counsel, was Hernandez's interest in both testifying and exculpating himself,[6] and also calling co-defendants and other witnesses to exonerate himself. Had counsel evaluated and investigated such issues and consulted with his client, he would have been able to obtain a *Byrd* affidavit from Rene Gonzalez to show that whatever knowledge Hernandez may have had or conveyed regarding an impending confrontation of BTTR with Cuba was of the same general understanding as that in the public domain, that Cuba might attempt to shoot down aircraft if they continued to violate Cuban airspace and that he understood Cuba to have the lawful right to do so within Cuban territory. Hernandez was unaware of any plan to act unlawfully or to act in a manner that could legitimately provoke military retaliation. Gonzalez would have testified that if an illegal shootdown was anticipated, Hernandez would have conveyed instructions to prepare for such an event, but that nothing more than lawful sovereign action was feared, consistent with information Cuba had publicly pronounced in domestic and international forums. Gonzalez would have provided first-hand information as to Hernandez's state of mind and expressed intent and of Hernandez's reactions and statements in the aftermath of the shootdown as being consistent with an intent to act lawfully in relation to any confrontation with BTTR.

Indeed, had counsel conducted the necessary investigation, he would have learned that every other charged and uncharged defendant in the case could have testified (whether live or by deposition from Cuba), that Hernandez did not convey either a belief that Cuba would act illegally or a belief that Cuba had acted illegally (outside of its jurisdiction) even after the fact. Thus, the crucial elements of willfulness and the heightened mental state for murder would have been refuted if other defendants had been called as witnesses (including defendants who pled guilty) and if counsel had prepared to defend Hernandez's actual lack of knowledge of Cuba's plan to act *unlawfully.*[7] Also, counsel could have presented the testimony of Hernandez's family and others

[6] Hernandez's willingness to testify to his innocence of a conspiracy to commit murder was reiterated at sentencing, where he stated that he did not join a murder plan. DE-1450:63.

[7] The issue of whether a shootdown of BTTR aircraft over Cuban airspace would have been lawful or not was withdrawn from the jury when the government admitted that it had no basis to make a contention as to the legality of such an exercise of sovereignty. DE-1579:13869. But apart from the objective question of legality, the subjective issue of the defendant's willfulness remains, such that a belief by the defendant that Cuban sovereignty extended to protecting its borders by

who interacted with him in Cuba in 1996 to show that he neither learned of any murder plan at that time or of a plan by Cuba to exceed its territory in militarily confronting Cuban exiles (an action that counsel could have shown Hernandez never believed had happened before) nor participated in any such meetings. Counsel failed to seek leave to depose such Cuban witnesses on these points.

In addressing the question of whether "the killing that occurred would not have been unlawful had it occurred in Cuban airspace," the Eleventh Circuit assumed that "*an agreement to commit a justified killing would not be prohibited by the conspiracy statute*, 18 U.S.C. § 1117." *Campa* III, 529 F.3d at 1011 (emphasis added). The court thus assumed that to whatever extent a shootdown over Cuban airspace was contemplated, there would be an absence of the requisite unlawful intent required under § 1117. Counsel's failure to distinguish the jurisdictional nexus and unlawful intent components of the case was highly damaging to defense preparation and the trial defense where the government sought in its indictment to proceed on the theory that a shootdown of aircraft violating Cuban airspace would be deemed as unlawful as a shootdown of such planes over international waters, yet counsel never challenged the indictment's defects.

Apart from indictment defects, because the element of willfulness was not conceded, the government was required to prove a specific intent to violate the law, with bad purpose, such that evidence of a belief that actions were not unlawful, but were part of authorized national defense and thus justified, was essential to a complete defense. The applicability of such a specific intent defense is clear under Eleventh Circuit precedent, apart from any defective statement of the charge in Count 3, with the principle well established that acting under the direction of a government agency that has jurisdictional authority to enforce the law in a given area provides a defense to a specific intent charge. *See United States v. Rosenthal*, 793 F.2d 1214, 1236 (11th Cir. 1986); *United States v. Reyes-Vasquez*, 905 F.2d 1497, 1500 (11th Cir. 1990); *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1368 (11th Cir. 1994); *United States v. Ruiz*, 59 F.3d 1151, 1154 (11th Cir. 1995) (defendant "may lack the necessary criminal intent where he reasonably believed he acted in cooperation with the government"). Counsel failed to understand that given Cuban authority over its own airspace, and the absence of any evidence offered by the government as to how the lawfulness of such a shootdown of violating aircraft could be judged within the scope of Cuban legal authority, it was the government's obligation to show both a conspiracy to commit a shootdown outside Cuban jurisdiction and a belief by the defendant that any anticipated military action was not

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confronting, to the extent of a shootdown, aircraft that violated its territory in this circumstance was, in itself, a complete defense to the charge. DE-1583:14614 (instruction on subjective belief).

within the authority of the Cuban government. These two components—both an agreement to kill outside Cuban jurisdiction knowingly joined by Hernandez and a willful intent by Hernandez to violate the law—were the primary subjects that counsel should have addressed at trial, but counsel did not recognize this dual concept at any point during the representation.

There is no question but that in failing to seek a severance of Count 3 so as to allow Hernandez the opportunity to testify as to those allegations, and failing to understand and explain this option to the defendant, where the testimony would have affirmatively exculpated Hernandez and shown his *actual innocence*, counsel made a testimonial decision for the defendant, in violation of the Fifth Amendment. By failing to explain to Hernandez his rights with respect to testimony as to Count 3 if that count were tried separately, such that he could testify without incriminating himself or other defendants as to other counts, counsel directly infringed the right to testify.

Counsel's failure to seek a severance of Count 3 also prejudiced his ability to offer an individualized presentation of evidence and jury consideration of the espionage conspiracy charge (Count 2) and unregistered agent and related offenses in the indictment, where counsel experienced such difficulty in preparing for Count 3 that he failed to prepare for Count 2 and erroneously deferred to counsel for the co-defendants on all concerns relating to all espionage litigation. Thus, apart from failing to research and consult with the defendant as to how a trial of allegations of murder and espionage together presented too great a level of prejudice, impeding individualized consideration of the issues and overburdening the jury, counsel failed to investigate how essential it was to obtain testimony and evidence that would have been available in a separate trial, to allow counsel to defend all charges and not defer to conflicted co-counsel for his own defense, and to take appropriate steps to allow for individualized presentation of evidence and jury consideration of the separate offense.

Counsel made no attempt to verify the existence of such testimony favorable to the defense and simply excluded from consideration the possibility of calling Cuban agent defense witnesses. Counsel's failure to advise the defendant of his right to present all such agent testimony (including that of Roque and "A-4 or Miguel")—as well as testimony by Cuban officials—as to Hernandez's lack of knowledge of any illegal operational components of a planned confrontation deprived the movant of the right to testify and the right to compulsory process as to Count 3 and prejudiced him on the remaining counts of the indictment.

Litigation regarding jury selection issues. Despite the extreme prejudice to Hernandez of having the multiple-murder conspiracy charge tried in Miami, a community in which social and

governmental recognition of the victims and of the significance of the crime heightened the risk of unfairness and adverse predisposition, trial counsel never filed an independent motion for change of venue, never submitted proposed individual or group voir dire questions, never sought a community survey directed to the prejudice of the specific allegations against Hernandez, never sought to advise the jury venire of his anticipated confrontational, blame-the-victims defense, and never renewed the motion to change venue upon indications of substantial juror prejudice in relation to the shootdown. Remarkably, counsel never asked the Court to voir dire jurors as to whether they believed Cuba had acted lawfully in shooting down the aircraft, whether they remembered the shootdown (apart from the criminal case on trial), or whether they felt solidarity with BTTR rescue missions. *See*, *e.g.*, DE-1472:961 (questions relating to the shootdown and reactions to it were not posed; instead, the question asked of jurors was: "What do you remember hearing, reading or seeing about this *case* in the news media?") (emphasis added); DE-1474:1286 (same).[8] Thus, while, in individual voir dire, some jurors admitted knowing about the shootdown, counsel never asked the Court to specifically ask all jurors about familiarity with and attitudes about it, including if they believed *Cuba* committed murder and exceeded its jurisdiction.

Counsel's failure to actively participate in the venue issues, failure to submit voir dire questions, and failure to give the Court the opportunity to test for prejudice and prejudgment as to the shootdown facts that became counsel's trial focus—including where the shootdown occurred and whether jurors believed the shootdown was an act of state terrorism—was based on counsel's fundamentally erroneous decision to completely delegate venue issues to counsel for the co-defendants who did not know of—or agree with—the defense to be offered by Hernandez's counsel and were not focused on the issues arising from the shootown.[9]

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[8] Unsurprisingly, the government's seventy-one proposed voir dire questions also failed to inquire about jurors' knowledge of and attitudes regarding the shootdown. DE-608.

[9] Counsel's defense proceeded in seeming unawareness of the well-known facts, already found by a Court in this district, that as a result of the Cuban government military's shootdown of two United States-registered civilian aircraft, four members of BTTR—including three United States citizens who were doing nothing wrong—died. *United States v. Hernandez*, 106 F.Supp.2d 1317, 1318 (S.D. Fla. 2000). Their deaths were condemned as murders by the international community. Statements deploring Cuba's excessive use of force were issued by the United Nations and other international organizations and legislation (22 U.S.C. § 6046(1)) was passed in the United States "strongly" condemning the shootdown as an "act of terrorism by the Castro regime." *Alejandre v. Republic of Cuba*, 996 F.Supp. 1239, 1247 (S.D. Fla. 1997); *see id.* at 1242 (describing BTTR shootdown as an "outrageous contempt for international law and basic human rights" perpetrated by the Cuban government in murdering "four human beings" who were "Brothers to the Rescue

In failing to submit proposed voir dire questions relating to Count 3—the charge that was most likely to arouse passions and that required jury assessment of the intentions of the Cuban government and its Miami-based opponents, as well the credibility of Cuban witnesses contradicting U.S. witnesses—including voir dire questions relating to attitudes toward Cuban technical experts, the right of Cuban self defense under international law depending on facts and circumstances offered to justify such action, and the claimed right of Miami-based aircraft to violate both U.S. and Cuban laws, so as to foster pro-democracy movements inside Cuba, counsel failed to take the essential step of determining if his defense could fairly be presented to the jury. Similarly, in failing to make individualized BTTR-based arguments for change of venue as to Count 3, including a failure to undertake or participate in a survey to determine the nature of community attitudes regarding the illegality of the shootdown, counsel failed to defend effectively.[10] And in failing to request any voir dire specifically addressed to Count 3—e.g., that the defense would be of Cuban justification for the shootdown and that the U.S. claims about the shootdown itself were false—counsel left the jury to believe the defense would merely be that the defendant was not involved. Counsel did not survey the community as to the reaction to his defense that Cuba was right to kill the *four* Miami exile rescuers and did not consider the effect of such a violent defense on his defense of other charges.

Even if the results of such individual voir dire had not shown the need for a change of venue or a severance of Count 3, they would at least have alerted counsel to the grave risks of his defiant and confrontational defense of Count 3 and the risk that the jurors would reject counsel's attempt to rewrite the history of the shootdown. On appeal, the *en banc* court faulted the defense for failing to show prejudice relating to the underlying facts of the case, *see United States v. Campa*, 459 F.3d 1121, 1144 (11th Cir. 2006) (*en banc*) (*Campa* II) (counsel failed to offer evidence of prejudgment that he could "*relate directly* to the defendant's guilt for the *crime charged*") (emphasis added), but as to Count 3, the fault for that failure of showing was solely that of counsel for Hernandez who never filed a venue motion or submitted a voir dire request or explained that his defense was that

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pilots, flying two civilian, unarmed planes on a routine humanitarian mission, searching for rafters in the waters between Cuba and the Florida Keys"). The deceased were heralded as martyrs, their funerals attended by officials and many others in the community. Memorials were subsequently erected in their honor, and streets within the Miami-Dade County community were renamed for them.

[10] Counsel appeared to lack familiarity with the results of the community prejudice survey. Counsel for Medina sought to correct counsel for Hernandez—when the latter claimed that the voir dire did not show the existence of bias to be "the way we believe[d] it to be"—by asserting that the prejudice revealed in the venire confirmed prejudice found in the pretrial survey. DE-1474:1373.

Cuba was not guilty of an illegal shootdown. Counsel's lack of involvement was exemplified by the *en banc* Court's recognition that "only two questions in the entire [pretrial community] survey directly referenced the defendants" at all. *Campa* II, 459 F.3d at 1146. The *en banc* court noted Hernandez's counsel's virtual waiver of the venue issue. *Id*. at 1137 n. 112 (quoting DE-1563:12092). The *en banc* court's recitation of the "community impact" questions submitted to the venire showed that there was no inquiry regarding the shootdown and murder conspiracy issues or of a defendant's potential claim of legitimacy in the killing of innocent civilian humanitarians. *Campa* II, 459 F.3d at 1133 n. 72.[11] Nor did any of the "pretrial publicity" questions asked of the jury in the questionnaire speak of the shootdown and murder allegations. *Id*. at 1134 n. 73. Whether considered in terms of venue or simply jury selection and assurance of no prejudgment of the defense, counsel's failures in relation to the jury issues compel relief.

C. *Counsel failed to present a constitutionally adequate defense at trial*.

1. Because he neither understood what the government was obliged to prove beyond a reasonable doubt nor appreciated that the difficulties it faced in doing so were "insurmountable," counsel did nothing of relevance to test the government's proof before the jury. He did not, for example, ask the government's witnesses whether they could testify to an explicit Cuban plan to carry out an unlawful killing. Nor did he inquire whether any of the government's witnesses could swear that Hernandez was aware of such a plan. Critically, he failed to highlight the lack of testimony as to Hernandez's intentions.

Instead, he hammered away with questions pertaining to the precise details of the confrontation that came to pass. His "defense" was thus not only irrelevant and ineffective, but it also played right into the government's hand. A jury charged with determining the nature of Hernandez's intentions—inquiring what, if anything, Hernandez conspired to do—heard a defendant who obstinately refused to accept the reality of what transpired. The government happily proceeded with its case, content to face only the challenge of proving the (irrelevant) facts of an exhaustively documented and analyzed international incident.

2. Matters did not improve when counsel turned to his affirmative case. Many omissions are glaring. For example, counsel did not offer evidence or argument in support of the principal defense available to him: that his client did not intend to further an unlawful murder. Nowhere in his

[11] The *en banc* Court observed that jurors "who had been exposed to media coverage of the *case* vaguely recalled a 'shootdown,' but little else," *id*. at 1147 (emphasis added), a fact suggesting memories needed to be refreshed in questioning the jurors as to the murder allegations.

opening statement or closing argument did counsel address the purported "plan" Hernandez was said to have joined. Indeed, he never even uttered the word "conspiracy." With his witnesses and other evidence, he did not attempt to demonstrate that the Cuban government likely intended only a confrontation; that it was almost certainly convinced that its use of force would be lawful; that in fact it took the position after the incident occurred—a position it maintains to this day—that the planes were lawfully shot down in defense of Cuban airspace; that Hernandez would be expected unequivocally to adopt this party line regardless of his knowledge or intentions before the incident; or that Hernandez intended patriotically to aid his government in its defense, not to perpetrate an unlawful murder.

Myriad missed opportunities are obvious. Counsel could have put on evidence pertaining both generally to the vast range of lawful options available to a sovereign nation in defending its airspace and specifically to Cuba's need to do so in light of the various and frequent incursions into its territory with which it had been plagued—in missions expressly aimed at destabilizing Cuba's government. He could have taught the jury, had he known himself, that military defense and intelligence gathering is highly compartmentalized, and that an agent like Hernandez would in any event have had nothing to do with the execution of a military operation.

Most fundamentally, counsel could and should have focused the jury upon Hernandez's intentions. Hernandez allegedly participated in the homicidal venture through contact with Roque and Gonzalez, both of whom were made available to counsel. But he never asked them about their knowledge or intentions, to say nothing of his client's. And they were but two of the many purportedly murderous co-conspirators from whom counsel could and should have elicited testimony (or at the very least, spoken to in conjunction with the investigation). Most of them had pleaded guilty when Hernandez went to trial and could thus have been called to testify.

Hernandez's co-defendants likewise could have been his strongest witnesses had his counsel understood the case and moved to sever the conspiracy to murder charge. Rene Gonzalez, for example, would have explained that Hernandez's knowledge about a potential confrontation of BTTR planes was no more sophisticated than that recognized by the public at large; that he and Hernandez fervently believed in Cuba's lawful right to defend its airspace; and that Hernandez's reactions to the incident were wholly inconsistent with his involvement in a murderous plot. Friends, family, and colleagues similarly could have testified as to Hernandez's intentions.

Finally, Hernandez himself could have offered perhaps his strongest defense. He was never given the opportunity to do so. Because counsel did not understand the case, he never explained it

to Hernandez. Hernandez did not know, for example, that his conviction rested upon what the jury thought about his intentions before the incident, not the reality of what transpired—or that he could take the stand and explain these intentions directly. He was not advised that his conspiracy charge could be severed, sparing his co-defendants the potential prejudice of his own adequate defense. Nor was he told that once severed, his conspiracy trial might include testimony from those co-defendants. Hernandez thus forfeited both his right to testify on his behalf and his right to call witnesses in his defense because his counsel was ineffective.

3. The gross inadequacy of counsel's presentation is made clear by the government's protestations when it was finally obliged to recognize the "insurmountable" burden it should have faced all along. Only in response to a Rule 29 motion at the close of evidence did the government latch onto its far-fetched theory of a plan to commit an unlawful killing in international waters, a theory it was never compelled to have the jury evaluate because defense trial counsel failed to seek enforcement of the Court's order limiting the government to that theory—thereby allowing the government to proceed with its wide-ranging indictment theory of guilt based on *post hoc* recognition for service purportedly relating to the shoot down. The true crux of the prosecution—discovering Hernandez's true intentions—was litigated *ex post*, when the government was obliged only to postulate a conceivable manner in which the jury could draw inferences of guilt from the evidence presented. Had counsel understood the prosecution his client faced and either tested the government's evidence or introduced relevant evidence of his own, those inferences could not have been and would not have been drawn by the jury.[12]

The appellate record makes this much plain. A close reading of the *Campa III* opinion reveals that Hernandez's conviction ultimately rests upon the legal fiction that the jury could have, in theory, inferred that Hernandez intended to advance an explicit plan to commit an unjustified murder on the basis of (1) unchallenged government evidence suggesting that Hernandez was "instructed . . . to specify when Cuban agents were flying, tell the agents not to fly unscheduled or on the days of and around the shootdown, and tell the agents to transmit code words on the radio if they could not avoid flying"; and (2) evidence of "Hernandez's correspondence written afterward that endorsed the shootdown as a success." *Campa* III, 529 F.3d at 1008. Judge Kravitch's opinion compellingly

[12] For example, counsel could have introduced the Cuban government's official position—backed by its radar evidence—that BTTR's prior flights penetrated Cuban airspace. It is implausible in the extreme that Cuba would have anticipated that BTTR would discover a new respect for the country's borders—and implement a plan to shoot down its planes despite BTTR's contrition.

explains why this legal nicety should have been found insufficient to sustain a conviction for conspiracy to murder and a resulting life sentence.

The more important point is that Hernandez's freedom never should have depended upon a deferential judicial appraisal of this *ex post* legal argument by the government—made years after the jury was discharged. Whether the thread can bear the weight of Hernandez's conviction after the fact, the point is that counsel could and should have severed the thread long before; had counsel provided a relevant defense, Hernandez could not have been convicted. Had the jury understood that any reasonable doubt as to Hernandez's intentions would demand his acquittal, had counsel highlighted the absence of government evidence on that front, had counsel adduced evidence of his own, Hernandez's knowledge that Cuban agents were not to be present during a confrontation simply would not have amounted to proof beyond a reasonable doubt of a murderous intent.

The same is true of Hernandez's implicit acknowledgment of his "success." To this day, Cuba has maintained that it lawfully ended a hostile incursion into its sovereign territory—one aimed at overthrowing the government. Hernandez's failure to disavow his government's official position in response to its commendation after the incident does not prove his intentions before that incident. Counsel could have proved as much. Any effective defense would have done so.

Though success establishing a reasonable doubt as to Hernandez's intent, knowledge, and belief—with a relevant defense—would have been a near certainty, the more fundamental point for constitutional purposes is that Hernandez was at the very least entitled to counsel who would comprehend, prepare and present the defense. Hernandez is serving a life sentence because his lawyer did not do so, in contravention of the Sixth Amendment's guarantees.

Failure to investigate and present essential evidence and examination of witnesses at trial—expert witnesses. Trial counsel provided inadequate representation in failing to secure the advice and assistance of an international law expert, where the facts, circumstances, allegations in the indictment and investigations by international bodies all pointed to issues of international law as being relevant to the defense of Count 3. Even apart from pretrial judicial resolution of the scope of the offense, if counsel had consulted appropriate experts in this context, he could have presented a trial defense that would have enabled the jury to understand the limits of criminal liability in the context of a shootdown. Such fundamental defense needs could be rationally be discounted only *after* inquiry, including meaningful discussion with experts. *Hall v. Washington*, 106 F.3d 742, 749 (2d Cir. 1996). Thus, more than merely failing to directly address the limits of the government's evidence, counsel failed to address the need for expertise in the unique context of a military

confrontation at or near a nation's border. Experts were available, but not contacted. As explained in the attached affidavit of Professor John Quigley, Appendix A, under the facts alleged in the indictment, even if Hernandez had joined in an agreement to down planes, that would not have been an unlawful objective under the circumstances and for the reasons outlined in the Quigley affidavit.

The failure to consult experts undermined the entirety of counsel's preparation for trial. The Court ruled at the charge conference in a manner consistent with the law as explained by the international law experts, DE-1579:13869-70, but counsel, having failed to investigate and obtain testimony to bring this issue into the understanding of the jury, allowed the primary defense to go unused. Instead of studying the indictment, filing motions, and investigating the defense, counsel labored, uninformed and in disarray, during the investigative stage, and later at trial, to convince the jury that the shootdown did not happen where an international judgment said it did occur, an irrelevant and futile task. Counsel failed to analyze the indictment, enumerate the elements of the offense, particularly conspiracy, and draw an understanding of what the government must prove to gain a conviction. Had he done so he would have seen the glaring weakness of the prosecution's case as well as the opportunities for a relevant defense.

This critical failure at the outset impaired the defense in a cumulative manner, so that when trial counsel finally understood the charge and confessed to the jury that he had largely pursued an irrelevant defense, it was too late to help his client. That singular failure tragically misdirected the investigation, undermined effective pretrial practice, led to a hapless and offputting opening statement, ill defined and meandering cross examination of government experts when it could have been productive, a flailing defense case of unending duration for an impatient jury, a closing argument that offended the jury's intelligence and opened the door to devastating rebuttal and an inexplicable failure to assure an appropriate *mens rea* instruction. It doesn't matter how hard you work, if you don't understand the elements of the offense you will simply flail - and fail.

He chose to defend the shootdown location when he should have been defending the alleged agreement's objective;[13] and, secondly, Gerardo's utter lack of knowledge of its unlawfulness. Had he instead timely directed his attention to the fundamental limits of the movant's liability in this context, the jury would have agreed with the government's own assessment, made in a representation to the Eleventh Circuit as part of an emergency filing, that the evidentiary hurdle for the government was "insurmountable." Gov't Emergency Pet. for Writ of Prohibition (11th Cir. No.

[13] Counsel's investigation would have disclosed that the Cuban concern was with a flyover of a meeting of Concilio Cubano in Havana and not possible leaflet drifting from international waters.

01-12887) at 21 (having to prove an intent to confront aircraft beyond Cuban jurisdiction "presents an insurmountable hurdle for the United States in this case").

Counsel's shootdown-location defense addressed the *jurisdiction* issue when counsel should have pursued traditional conspiracy arguments that would have distanced the defense from—rather than embracing—the horror of what happened. Because counsel left aside the issue of the lawful scope any *known* objective of a Cuban confrontation plan and instead engaged in a misguided attempt to rewrite history, counsel failed to present evidence, argument, and instructions that would have prevented any impartial, properly instructed jury from returning a verdict of guilty and would likely have resulted in a full or partial judgment of acquittal prior to submission of the case.

Counsel's failure to develop and present expert testimony regarding the considerable range of lawful Cuban military confrontation responses to Brothers to the Rescue incursions—including expert testimony on international law as to state authority in regard to territorial incursions of civil and other aircraft, intending to destabilize the political order and create civil strife—was not the only failure to use and present expert evidence at trial. Thus, counsel failed to call a translation expert to counter impermissibly prejudicial testimony of an FBI translator, including false implications of plastic explosives, and to explain what was conveyed by "enfrentamiento" and other language associated with 1995 and 1996 high frequency messages. Likewise, counsel failed to seek a security clearance for a translation or decoding expert to review materials presented by the government as decoded and translated. Similarly, counsel failed to develop and offer evidence regarding intelligence norms and practices of compartmentalization regarding the unlikelihood of Hernandez being informed of any operational details or plans for a shootdown, whether expert, Cuban, or otherwise to pursue such issues through cross examination of government intelligence experts

Where counsel delays an investigation, as counsel did here, essentially conducting the bulk of his investigation during trial, it is more likely that counsel's failure to fully investigate the use of forensic and expert evidence "was the result of inattention, not reasoned strategic judgment." *Wiggins v. Smith*, 539 U.S. at 534; *see Johnson v. Bagley*, 544 F.3d 592, 602 (6th Cir. 2008). Counsel's failure to work closely with consultants and to insure that they were aware of all facts that might be helpful to the defendant is objectively unreasonable. *Glenn v. Tate*, 71 F.3d 1204, 1210 n.5 (6th Cir. 1995). Both the timing and the abbreviated nature of counsel's discussions with any other lawyer also shows that counsel's investigation was unreasonable. *Wilson v. Sirmons*, 536 F.3d 1064 (10th Cir. 2008) (late hiring of expert and first meeting expert during trial was deficient).

Counsel should have used pretrial filings to determine the precise scope of the indictment, including the jurisdictional limitations, and should have utilized expert and factual bases to establish the broad swath of legal rights of Cuba to confront and interdict BTTR flights implicating violations of Cuban sovereignty over its territory. Counsel could have presented abundant evidence that absent actual prior knowledge of an intent to shootdown the planes in international waters, acting on behalf of Cuba in confronting illegal flights was not unlawful and would be inconsistent with criminal intent, much less a specific criminal intent to commit murder. Counsel could have used other experts to show the limits of what was conveyed in coded messages, such that the reliability of the government's speculation would have been undermined. Counsel's failure to investigate and pursue such expert testimony fell below the constitutional minimum in the context of this case.[14]

Failure to investigate and present essential evidence and examination of witnesses at trial—lay witnesses. Counsel failed to consult with the defendant regarding, or independently investigate, numerous witnesses available to the defense to show Hernandez's lack of knowledge of an illegal plan. The government's theory was that Hernandez aided and abetted Cuba's actions by conveying messages to Roque and Gonzalez. These witnesses were made available to counsel, but he failed to question them regarding the supposedly incriminating interactions with Hernandez. Failing to secure evidence from available witnesses who knew Hernandez was not aware of an illegal plan, and who could show that his state of mind—as to the supposed warning by Cuba to stay off planes—was at most one of recognition of danger due to potential confrontation and not am agreement or intent to murder or to otherwise confront unlawfully. Cases are won or lost on the evidence presented. Evidence of Hernandez's actual face-to-face communications regarding the shootdown, his expressions of belief as to what was planned and what happened, and his lack of anticipation of a spectacularly public illegal act of murder were the best evidence of his state of mind and of his actual innocence. That counsel failed to investigate other witnesses or even consult in detail with Hernandez regarding such issues shows that his failure to present evidence of actual innocence was not strategic, but was based on a failure to understand the relevance of such evidence to the charges and the availability of the evidence and multiple corroborative witnesses.

The Sixth Amendment requires that defense counsel conduct a thorough and complete pretrial investigation. *Wiggins*, 539 U.S. at 522. "Pretrial investigation, principally because it provides a

[14] If counsel had intended to fight the shootdown location, he should have, but failed to pursue (as Appendix I, an affidavit by Col. David Buchner indicates) satellite evidence to prove his point. Such evidence would at least have aided in showing the events of February 24, 1996 accurately.

basis upon which most of the defense case must rest, is, perhaps, the most crucial stage of a lawyer's preparation." *House v. Balkcom*, 725 F.2d 608, 618 (11th Cir. 1984). The failure to investigate a defense, therefore, is assessed independently from the decision whether to present the defense, because counsel cannot reasonably reject a defense without understanding its scope and relative strength. *See Wiggins*, 522 U.S. at 522-24. "Only choices made after a reasonable investigation of the factual scenario are entitled to a presumption of validity." *Rolan v. Vaughn*, 445 F.3d 671, 681-82 (3d Cir. 2006) (citing *Strickland,* 466 U.S. at 687).

With regard to the pretrial investigation of the facts pertinent to the accusations made against Hernandez, counsel failed to appropriately direct and conduct essential pretrial investigation that would have led to an acquittal. Counsel failed to secure documentary and other evidence from Cuba proving that the term "Operation Venecia" as used in messages to agents was not *intended* to refer the shootdown of the BTTR planes, but instead to attempt to put Cuba in a position of revealing improper BTTR actions, a goal at direct odds with attacking BTTR in international airspace so as to undermine the political value of the return of a Cuban agent to Cuba to denounce BTTR. Thus, post-conviction counsel's inquiries of the Cuban government led to discovery of the attached document (Appendix B, attached hereto with accompanying translation from Spanish to English), which specifies that the purpose of Operation Venecia was in fact the return of "agent German" to Cuba, where he would denounce BTTR. (Alternatively, if the Court concludes that trial counsel could not have secured the production of such evidence if he had made such an effort, then the movant is entitled to relief on the ground that it constitutes newly discovered evidence establishing his innocence.) Counsel failed to request a CIPA hearing and CIPA procedures specific to Count 3 so that geographic and temporal questions of fact and leads regarding essential witnesses could be pursued and to avoid trial counsel's adopting unfounded approaches regarding historical facts. Counsel failed to investigate and present evidence of personal bias and interest of the FBI agent in charge of the investigation, including personal ties to intense political opponents of the Cuban government. In a multiple-homicide conspiracy prosecution, to fail to pursue conduct a complete pretrial investigation renders any government claim of strategy "a *post hoc* rationalization." *Wiggins*, 539 U.S. at 525; *Holsomback v. White*, 133 F.3d 1382, 1387 (11th Cir. 1998).

D. *The defense presented by counsel was irrelevant and prejudicial, and thus constitutionally ineffective.*

By his own admission—to the jury, no less—counsel spent "three quarters of the 7-month trial on where the shootdown occurred," an issue that was "irrelevant because the crime the government

charged was a conspiracy." DE-1583:14439. That it was irrelevant is the best that can be said of counsel's defense; in actuality, it was far worse.

1. Counsel needlessly and voluntarily sacrificed the credibility of Hernandez's defense. Among other things, the comprehensive ICAO report and U.S. radar evidence unequivocally established the location of the confrontation: international airspace. Because he wrongly believed his client's acquittal depended upon it, counsel defiantly set out to disprove this evidence. In a lengthy, tortured, rambling presentation, he insisted that the jury ignore the overwhelming weight of scientific evidence—adopted by its government and the international community at large—and accept his alternate reality. The linchpins of his argument were (1) an inaccurate interpretation of a private vessel's log and (2) a story about the currents that carried a magically unscathed photo bag from where it fell into the ocean, the moral of which supposedly was that the bag must have begun its fall from Cuban airspace.

Convinced that even this was not enough—that he had to further establish the lawfulness of the confrontation (purportedly in Cuban airspace)—counsel seized upon an entirely inapplicable standard for identifying airplanes and passionately argued that the small, single-propeller aircraft shot down by Cuba's jets were, as a legal matter, properly deemed "military" aircraft under that standard. The jury was, in short, asked to believe that two light Cessna aircraft shot down over international waters were in fact hostile military planes invading Cuban airspace. *E.g.*, DE-1476:1623. Worse, counsel incorrectly led the jury to misunderstand that Hernandez's acquittal rested upon their willingness to believe such fantasy. In this unfortunate respect, counsel was successful; juror interviews confirm that the jury focused its assessment of Hernandez's guilt upon the (irrelevant) non-question where the incident occurred. DE-1301, Ex. D.

2. Counsel coupled this affront upon the jury's intelligence with an assault upon their decency. The second prong of his attack was to vilify the victims and their humanitarian organization, insisting that they were entirely to blame for the killings and, in effect, that they had it coming. Inexplicably, in pursuit of this misguided objective, counsel called to the stand Jose Basulto, the leader of the organization and a local hero, who himself narrowly escaped being shot down. Unsurprisingly, Basulto's testimony failed to establish that the victims were part of a nefarious paramilitary organization devoted to overflying Cuba in suicide missions. Counsel's hostile questioning to that end, however, led the government to compare his argument, in its summation, to the philosophies of the Nazi regime (without objection). *See, e.g.*, DE 1537:8836 37 (Basulto

testifies as hostile witness); DE-1476:1624 ("Basulto . . . basically [brought] those four men to their deaths.").

Counsel's ill-conceived shootdown location defense. Counsel's ineffectiveness extended to presenting evidence and argument on the shootdown's geographic location, failing to develop facts relating to the location of the shootdown on the basis of an accurate legal understanding of the relevance of the location in light of the charges and applicable law; defiantly challenging the ICAO report and U.S. radar evidence; failing to seek information available from the government via discovery, *Brady* requests or subpoena, and from satellite imagery, as recommended by his expert; calling as a witness Jose Basulto, who offered evidence supporting the prosecution's theory; erroneously arguing claims derived from misreading the log of the Majesty of the Seas; relying on incredible evidence, including the supposed recovery of a pristine camera bag; failing to develop pertinent facts from other eyewitnesses; and failing to understand the legal significance of the shootdown location, thereby undermining the credibility of the defense.

Counsel's failure to address crucial evidentiary disputes as to what BTTR conduct was to be confronted by Cuba was reflected in all aspects of his defense. Counsel's failure to pursue these facts was a particularly grave error given the consistent US radar images, the physical evidence, and eyewitness accounts that made attacking the united world opinion on the shootdown location not a plausible line of defense, and at a minimum was not a plausible primary defense. Counsel's erroneous defense of Cuban defiance prejudiced the defendant. That the government ridiculed (without objection) and urged the jury to discount the defense's sudden change in argument at the close of the case, *see* DE:1583:14511 ("[H]e changes horses in the middle of the stream. He throws up what might be good day one and then uses what may be good day two."); *id*. at 14532 (defense counsel "put this kind of bogus evidence here before you guys"), illustrates the harm done by counsel's failure to prepare and to comprehend the charge and the defense.

Counsel's ineffectiveness in misdirecting the evidentiary focus and failing to present essential evidence and argument as to the events leading to the shootdown. Review of the record, in light of the inadequate case preparation, research, and pretrial litigation by counsel, show ineffective representation in mistakenly focusing the defense on whether a frame of a video showed a pass by a MiG without a credible basis or ultimate favorable relevance; failing to develop a valid defense premised on readily available U.S. radar data that showed that the Cuban air force, acting in defense of Cuban territorial airspace, did not confront the incoming BTTR flights until the lead plane entered Cuban airspace after diverging from the filed flight plan which would have taken it out over

international airspace and away from the Cuban coast; failing to distinguish the intent of the government of Cuba from the intent of movant Hernandez; failing to develop and prove that at least some elements of the Cuban government intended to act lawfully in shooting down the BTTR planes, including failing to introduce mapping evidence indicating evidence of Cuban understanding of ***prior*** incursions; failing to develop and prove that movant Hernandez did not intend to join an agreement to commit an unlawful killing or an unlawful killing with knowledge of its illegality; failing to secure available evidence and argument to refute the prosecution's argument that, prior to the shootdown, movant went to the Cuban Ministry of the Interior to pick up his paycheck, *see* Gov't Ex. DG 103, with the improper implication that he attended a meeting wherein he was informed of a Cuban plan to shootdown aircraft in international waters, where counsel failed to: show the actual meaning of the terms HQ, MX, and others pertinent to understanding the falsity of the implication as to movant's travel and meetings, introduce evidence of movant's vacation in that period, and introduce evidence that an undercover agent would not have gone to headquarters during such a vacation, but would have received payment in an informal encounter; failing to develop a factual record and to argue that Hernandez reasonably would have believed in the lawfulness of any orders he received from the Cuban government and would have accepted, obeyed, and credited post-event assertions of his government; failing to introduce facts regarding the lack of importance of a request to keep Juan Roque and Rene Gonzalez off the planes—including that movant was aware that Roque was to be returned to Cuba, that Gonzalez had not flown with BTTR for years prior to the shootdown, and that movant was not conscious of an illegal plan; failing to address the "without warning" shootdown concept with explanatory and other evidence as to warnings in the relevant context; erroneously focusing the defense on the theory that the BTTR pilots were responsible for their own deaths in a trial conducted amidst a community that honored the decedents as heroes; failing to properly investigate and present the defense with respect to the question whether movant Hernandez was involved in high frequency message traffic, including focusing the defense on whether movant Hernandez received certain high frequency message traffic, failing to pursue evidence relevant to whether and when such messages were received and what responses to such traffic were given, and failing to pursue evidence as to whether messages electronically signed by two agents were actually forwarded only by one agent or otherwise not attributable to the movant; failing to introduce evidence that the movant's promotion months after the shootdown was administratively ordinary and based on time of service; failing to introduce documentary evidence that showed that for months prior to movant Hernandez's allegedly writing that the operation "ended

successfully," the official position of the government of Cuba was that the aircraft were downed in Cuban territorial airspace, rebutting the inference sought by the government that the reference was to a shootdown over international waters; failing to establish the implausibility of the claim that Cuba would have intended to shootdown the planes unlawfully in international airspace; failing to develop an accurate and comprehensive understanding of the nature and elements of the conspiracy charged in Count 3, leading to his failure to present evidence and arguments so that the jury could distinguish between facts relevant to the nature of the plan, and his client's knowledge of it, as opposed to the ultimate result of what occurred on the day of the shootdown and the split second decisions made by others; failing to follow instructions given to counsel in handwritten notes from movant with regard to the calling of witnesses, presentation of evidence, and other fundamental trial decisions; failing sufficiently to develop a factual record regarding Cuba's intentions in planning and executing the shootdown; and failing to present objective evidence, including U.S. radar data and intercepted MiG pilot communications that the shootdown was intended as a lawful act of self-defense by Cuba.

Counsel erred in failing to learn and address prosecutorial theories. Counsel could have, but failed to rebut the government's purely speculative theories of Hernandez's knowledge of an extraterritorial Cuban plan:

Prosecution Argument 1. *The Cuban message traffic indicated an intent to confront BTTR planes in international waters while they were dropping leaflets*. The last BTTR flight prior to Feb. 24, 1996 occurred on Jan. 13 and was preceded by another on Jan. 9. Both these flights involved chucking leaflets out of the plane, the last involving a half million leaflets dropped onto the streets of Havana and beyond. The government's thesis at trial was that both flights released their cargo in international waters without penetrating Cuban airspace. Then, drawing on high frequency messages and an alleged message (DG-104) that asked agents who penetrated BTTR to report any planned "leaflet dropping missions *or incursions into Cuban airspace*," the government urged the disjunctive "or" as proof the Cuban plan included confrontation in international airspace to stop the leafleting. The Court, denying a post-trial Rule 29 motion, cited the importance of the disjunctive in the messages as proof an international shootdown was contemplated.

Counsel failed to rebut the inference of Cuban belief/knowledge as to these airdrops where Cuban radar maps, drawn in realtime, placed both leaflet droppings well within Cuban airspace, just as Jose Basulto had claimed in radio interviews. The "or" was used to mean, "any leaflet dropping missions or other incursions into Cuban airspace." Those maps (Appendix C, attached hereto),

turned over to the ICAO in 1996 and incorporated into the ICAO report (pages 46 and 47), were never argued by the defense, although readily available.[15] There were no U.S. radar maps or data to contradict the clear mapping.

To make matters even worse, the only evidence presented to the jury to counter this theory of innocence came when *the defense* called Jose Basulto as a hostile witness. He, of course, predictably claimed to have dropped leaflets just outside Cuban airspace, despite his remarks in a radio interview. Absent proof of Cuba's own belief that the leaflet dropping occurred in Cuban airspace the door was left open for the government to prevail on the illegal nature of the alleged plan.[16]

Prosecution argument 2. *Gerardo's message, in response to a commendation, that the operational plan, to which he contributed, "ended successfully."* The operation to which Hernandez expressly referred as successful was operation Venezia (return of Roque to Cuba to denounce BTTR). Conflation of that objective with the later-developed military confrontation operation—so as to argue to the jury that the shootdown was part of Roque's return and denunciation—should have been rebutted by available evidence and argument, including that even if Hernandez believed he had contributed to an operation that led to the shootdown, he would also have been expected to endorse Cuba's official position, backed by its radar, that the operation was a "success" as a lawful exercise of territorial sovereignty and not to endorse an illegality or ingraciously and imprudently claim to his superiors that they committed an illegal act. Evidence of Cuba's official position on the place of the shootdown–beginning with a formal statement by the Foreign Affairs Ministry the morning following the events, placing the shootdown six miles off the Cuban coast, within its airspace–was readily available (Appendix D, attached hereto), but not offered at trial by the defense, permitting the government to argue, without contradiction, that the "ended" reference, if to the shootdown, confirmed an unlawful agreement. This fallacious government argument was cited no fewer than five times by the court of appeals to uphold the conviction, as an uncontroverted proof sufficient to sustain the verdict. The defense disdained available contrary evidence of the logical interpretation

[15] Counsel could have used the cross examination of expert Charles Leonard to develop all the facts in the ICAO report, but failed to do so.

[16] This was further notable due to the failure to investigate: (a) eyewitnesses to the shootdown; none were produced by the defense, despite FBI interview of the Captain of the Majesty of the Seas and Tri-Liner; the Captain contradicted the First Officer as to location; (b) crew members of both the Majesty and Tri-Liner and 3000 passengers, with no effort to locate and interview any of them.

that a government agent wrote on the premise that his government's shootdown position was correct, at least until proven otherwise by international or other authorities.

Aside from isolated and speculative threads of ambiguous circumstantial evidence, the government made no attempt to show Hernandez's knowledge of the illegality of the alleged agreement.[17] When viewed together with other available and uncontradicted evidence that was neither offered nor marshaled coherently, the inference of Hernandez's knowledge of an extraterritorial plan becomes entirely speculative and, tragically, utterly false.

Counsel' failure to understand and delimit use of the ICAO report. The exhaustive 92-page ICAO report filed in June 1996 with 143 pages of background information was available to counsel.[18] A copy is attached hereto as Appendix E. Armed with such abundant investigative materials on the issues at trial, counsel's failure to use it to develop a readily available fact-based theory of his client's innocence is inexplicable. Moreover, the result of the ICAO investigation should have made clear that the exculpatory path he was pursuing, revising the place of the shootdown, would, in the absence of unbiased evidence, inevitably fail, while evidence of an intended defensible use of Cuba's military force–from U.S. sources–had a reasonable probability of prevailing.[19]

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[17] The government admitted in its extraordinary petition for writ of prohibition that its circumstantial evidence as to an illegal objective presented an "insurmountable obstacle" to conviction if the Court's instruction required the government to prove beyond a reasonable doubt that the illegal object of the conspiracy included a shootdown outside Cuban airspace.

[18] It included, *inter alia*, a comprehensive compilation of U.S. radar data, intercepted conversations of the MiG pilots, interviews of the captains of two vessels in the area during the incident–the Majesty of the Seas and the Triliner–and Cuban radar data and other information gathered professionally in a 4-month investigation with U.S. and Cuban government cooperation.

[19] Although some ICAO information was presented by a defense expert, most of that dealt with the irrelevant and harmful defense of shootdown location (occupying 3/4 of the trial, according to counsel), while critical information supporting the actual defense was ignored or underutilized. Counsel knew of its existence, but failed to investigate data contained in it. The Report revealed objective indicia that BTTR planes had either already entered Cuban airspace, or imminently would:

1. At 15:20 hours (time of interception of Costa aircraft), Basulto aircraft was already 1.5 miles inside Cuban territory**,** and 6.5 miles south of its filed flight plan, , (pp. 9, 54, Chart 2).
2. One minute later, and just two before being downed, Costa aircraft was following Basulto. It was already 12.8 miles south of its planned flight path heading toward Havana, within 2 miles of Cuban airspace. (pp. 9, 52, Chart 2).
3. The LaPeña aircraft followed; 4.9 miles south of its planned flight path, 3 miles behind Basulto and just 4.5 miles north of Cuban airspace (pp. 9, 53, Chart 2).
4. With the Cuban MiGs clocked by U.S. radar at 540 miles per hour, or 9 miles a minute, the

As the report showed, after flying for several hours from Opa Locka to Cuba's Flight Information Region (FIR)[20] at the 24th parallel, and crossing into a restricted zone at approximately 3 p.m., BTTR aircraft flew, according to U.S. radar, for nearly twenty minutes at 120 mph (2 miles a minute) due south, traversing that entire 40-mile-wide militarily restricted zone immediately north of Havana without confrontation by Cuban air forces. Only after they failed to turn east away from the Cuban coastline, as their flight plan had promised (copies of which had been provided to Cuban radar control), and continued on a direct line toward Havana that they were targeted. By then they were already12.8 miles and 4.9 miles, respectively, further south than their flight plan had indicated and closing fast on Cuban airspace. (ICAO report, page 52-55). It was then, nearly twenty minutes after the U.S. had first recorded their entering Cuban restricted space, that the first MiGs appeared at 3:19 p.m. According to a U.S. digitized recording of the Cuban pilots, upon seeing the southernmost plane, piloted by Basulto, as it was about to enter, or had already entered, Cuban airspace, one of the pilots called out, "Let's give it a pass. Let's give it a pass," which they did. Less than two minutes after the warning pass, U.S. radar detected the plane following Basulto, the Costa aircraft, disappearing from the radar at 3:21 p.m. By then, Basulto was already inside Cuban airspace, according to U.S. radar. Some five minutes later the second plane was shot down within 2 miles of the first.

Looking at nothing more that this basic information–all provided by US law enforcement and military sources–the defense had powerful, impartial evidence that instead of a conspiracy to murder in international airspace, this was a border incident in which Cuban air defense forces utilizing military aircraft flying at 540 miles an hour to meet intruding aircraft, either exceeded proper limits or miscalculated by less than a minute the invisible line in the air that marks Cuba's national border.

Presented simply, based on the ICAO investigation, and relying solely on U.S. sources, an effective defense would have rebutted the prosecution theory that Cuba intended an international showdown potentially incurring a crushing U.S. military response. Instead, relying mainly on sources that a jury would have difficulty accepting, and, further, relying on a mistaken

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three aircraft were either in Cuban airspace or less than a minute away when intercepted. While the U.S. radar also showed the two downed aircraft may have changed direction immediately prior to being shot down, they were both heading south toward Havana at 15:17 hours when Cuban ground control sent the MiGs into attack mode, first with a warning pass and then firing.

[20] While counsel pointed out that the BTTR aircraft violated their flight plan during initial stages of the flight, what mattered was the violation close to the Cuban air border sending Cuban air defense forces into action. That violation was neither established effectively by evidence nor argued.

understanding of the factual record and applicable law, trial counsel attracted attention to dubious and inaccurate claims,[21] in pursuit of an irrelevant defense while ignoring irrebuttable evidence that would not merely refute the inferences the prosecution needed to obtain a conviction, but support a fact-based complete defense to the conspiracy to murder charged in Count 3.

By failing to understand and fully investigate the ICAO issues, counsel erroneously proceeded to premise the defense on ICAO principles regarding the interception of civil aircraft, including by introducing ICAO principles into evidence and in jury instructions. Counsel thus premised the defense on the argument that the jury's task in deciding the legality of the Cuban plan and response to intruding aircraft would be to distinguish civil from military aircraft on the basis of aircraft design and structure rather than their intended usage, function and purpose. The ICAO course on which counsel rested much of the defense effectively shifted the burden of proof to the defense and lowered the government's burden to that of a civil standard.

Counsel's failure to determine evidence of planned versus actual conduct. Nowhere in his opening statement or closing argument does counsel address "the plan" that Hernandez allegedly joined knowing of its unlawfulness. Nowhere did counsel separate Hernandez from "the plan" the Cubans had. Nowhere is the word conspiracy mentioned in either his opening or closing. Just as the

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[21] Pursuing an irrelevant defense, counsel stumbled into errors, failing to understand the facts or fully investigate issues: (1) by having his sole expert, an experienced pilot with valuable expertise, testify incredibly about a frame of video from Basulto's plane, to suggest a MiG made a second pass on that plane, an irrelevant point, counsel exposed his expert to devastating rebuttal undermining the expert's entire testimony; (2) by calling an eyewitness to the shootdown a liar for having written an entry into his ship's log that placed the ship in international waters while observing the shootdown, counsel carelessly misread the log or failed to investigate the ship's position, giving a clear opening to discredit counsel in rebuttal closing argument; and (3) needlessly extending the trial for a jury sitting nearly 6 months (advised initially their jury service would be 2 months), counsel called unnecessary, irrelevant witnesses to testify at length about finding an item at sea 15 hours after the shootdown and plotting the sea currents through another witness working for the Cuban government whose opinion was readily challenged by a government expert in rebuttal. Countless hours were spent in a futile investigation and irrelevant trial presentation to show that the 12-mile Cuban air border extended beyond that proven by the U.S. government, that ocean currents carried an unidentifiable camera case to a position reflecting a shootdown closer to the coast, that Cuban radar data based on onionskin drawings was superior to U.S. radar, that the first officer of the Majesty of the Seas misled the jury as to the ship's location when it was counsel who had misread the ship's log, that a defense expert witness who had no experience in international law opined that the ICAO rules and regulations should be applied differently than applied by ICAO; and, in an interminable mind-numbing, irrelevant exploration of a frozen frame of a video tape toward the end of the trial, that a MiG made a second warning pass—all to no purpose, and as counsel confessed to the jury, largely irrelevant.

mens rea argument counsel made during the charge conference dwelled on knowledge of a shootdown location as opposed to Cuba's plan and knowledge of its unlawful purpose, counsel never analyzed the various components of unlawfulness that the government was required to prove—including: an unlawful *plan* by Cuba, rather than merely a plan to violently confront as stated in the indictment; conveying to Hernandez information from which he derived and *actually believed* that Cuba would pursue an *unlawful* plan; *agreement* with the *unlawful* objectives of the *plan*, not merely ambiguous actions in response to information—never let the jury understand that at each stage the government's evidence lacked evidence essential to proof of Hernandez's responsibility for Cuba's chosen means of confrontation on February 24, 1996.

E. *Jury Instructions*.

Like counsel, the jury was unaware that the fundamental element underlying the theory of prosecution was Hernandez's purported intention to aid a shootdown in international airspace.

As a legal matter, the bounds of the jury's deliberations should have been clear to counsel. The government was forced to admit that it could not prove even that an explicit plan to shoot down the planes in Cuban airspace would have constituted a crime. R120:13869 (government concedes it does not "know what the law in Cuba is" or under what conditions Cuba's actions would have been unlawful had a confrontation occurred in Cuban airspace). Over the government's strenuous objection, this court sensibly held that Hernandez was entitled to explain as much to the jury—to instruct the jury that his conviction turned upon proof beyond a reasonable doubt that he purposefully advanced a plan to shoot down planes in international airspace. The Eleventh Circuit agreed, denying the government's first-ever petition for a writ of prohibition to this district. *See United States v. Gerardo Hernandez*, 11th Cir. No. 01-12887 (11th Cir. June 1, 2001).

Notwithstanding these judicial "victories," counsel simply failed to ensure provision to the jury the critical instruction. His omission is staggering. Despite the government's zealous efforts, this Court ruled, and the Eleventh Circuit on interlocutory review upheld the ruling, that the jury should be instructed as to the most glaring vulnerability in the government's case. Yet counsel failed to take the hint. The government apparently noticed; in closing arguments it obfuscated the critical difference between the jurisdictional requirements of the statute—for which Hernandez's intentions were irrelevant—and the substance of the crime charged—for which Hernandez's intentions were of paramount importance. *E.g.*, DE:1583:14517-18. Still, counsel sought no curative instructions.

Worse, counsel fought a battle to include contradictory, prejudicial instructions. Inexplicably, he requested a theory of defense instruction premised upon ICAO civil liability standards, placing

upon his client, a criminal defendant, the burden of proving that Cuba had complied with inapplicable civil standards. The government cleverly responded by requesting a "last resort" counter-instruction premised upon these same irrelevant ICAO civil standards. The jury should be instructed, the government urged, that under ICAO's civil standards the

> [i]nterception of civil aviation [may]be undertaken only as a last resort. If undertaken, an interception will be limited to determining the identity of the aircraft, unless it is necessary to return the aircraft to its planned track, direct it beyond the boundaries of national air space, guide it away from a prohibited restricted or danger area or instruct it to effect a landing at a designated aerodrome . . . .

DE-1583:14610-11. Even the inclusion of this monumentally prejudicial and wholly irrelevant instruction was insufficient to bring clarity to counsel; he did not withdraw the ICAO instructions.

The result is difficult to fathom and painful to contemplate. The ICAO instructions were included, and Hernandez's jury was asked to deliberate whether Cuba's fighter jets properly identified BTTR's light Cessna aircraft as "military" planes under ICAO standards and, if so, whether those BTTR planes were in fact shot down as a "last resort," pursuant to a Cuban policy "designed to avoid any hazard." In this way, Hernandez's criminal prosecution for purportedly conspiring to bring about the "unlawful killing of a human being with malice aforethought" came to rest upon his ability affirmatively to convince the jury that Cuba's fighter pilots in fact complied with international standards for civil liability when they shot two light Cessna aircraft out of the sky.

That Hernandez's lawyer labored zealously to achieve precisely this result for his client is no comfort. Facing a charge of conspiracy to commit murder and a life sentence, Hernandez was as entitled to effective representation as any other defendant. It is the fulfillment of this constitutional guarantee that engenders the "'confidence'" in our legal system that is a prerequisite to its viability. *Williams v. Taylor*, 529 U.S. 362, 391 (2000) (quoting *Strickland*, 466 U.S. at 694). When, as here, a conviction is obtained in such blatant contravention of this elemental safeguard, our laws and conscious alike demand judicial recognition and appropriate relief.

Counsel's failure to request appropriate defense theory and offense instructions, erroneous submission of burden-lowering instructions, failure to preserve grounds of objection as to the final instructions, and failure to request cautionary and curative instructions. Counsel's representation with regard to the Count 3 jury instructions was deficient in several respects and had the effect of allowing Hernandez to be convicted on less than all of the essential elements of the offense, depriving the jury of the opportunity to consider valid theories of defense, and foreclosing determination of guilt of a lesser offense. Most significantly in terms of its effect on closing

arguments and jury deliberations, even though the Court announced that the government would be limited to proof of an intent to shoot down aircraft in international waters, counsel failed to object when the final instructions failed to include this instruction.

After the government conceded to this Court that it was not prepared to address the legality of a Cuban confrontation of BTTR aircraft *within* Cuba, *see* DE-1579:13869 (government concedes it does not "know what the law in Cuba is" or under what conditions Cuba's actions would have been unlawful had a confrontation occurred in Cuban airspace), this Court ruled that the jury would be instructed in a manner that required a finding of intent to shoot down while the planes were not in violation of Cuban territorial boundaries. Counsel mistakenly assumed that the final instructions included the territorial instruction that precipitated the government's filing of a petition for writ of prohibition in the Eleventh Circuit (11th Cir. No. 01-12887), but failed to object when the instruction was not included. Thus, counsel was left to fend off, by way of objection, government closing arguments that contradicted the territorial intent limitation. DE:1583:14517-18. Counsel then failed to request a curative instruction reinforcing the instruction that he mistakenly believed the Court had already included regarding the unlawfulness of intent to shoot down outside Cuban territory. The result of counsel's actions was that an instructional victory that so that concerned the government that—for the only time in the history of this District—the government sought emergency relief in the Eleventh Circuit, was abandoned through omission by counsel. That the jury failed to understand the missing element was seen in post-verdict comments indicating the jury's focus on the shootdown location rather than questions of intended action. DE-1301, Ex. D.

The omission of this elemental instruction and limitation on the theory of prosecution left the jury without any basis to understand that it could not convict based merely—as the indictment alleged—on a plan to violently confront aircraft as part of a sovereign defense, but that the intended violent confrontation had to have been *unlawful*—which required, in this case, an intent to shoot down the planes outside of Cuban sovereign territory and jurisdiction, because shooting down aircraft that were violating Cuban territory was not shown to be an unlawful act.[22] The issues—and the distinction between a federal jurisdictional element (as to which no location intent was required)

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[22] Hernandez's original conspiracy instruction request made no reference to location as affecting criminal intent. DE-1200. The sole theory of defense instruction submitted by counsel related to whether the shootdown occurred over international waters, without reference to criminal intent as affected by that location. DE-1199. A similar failure to address such intent is reflected in the original motion for judgment of acquittal. DE-1011.

and an unlawful intent requirement (as to which location outside of Cuban sovereignty was essential)—was complicated, and without instruction, the jury could not fully understand the issue.

That trial counsel—despite having won a victory in the Eleventh Circuit with the denial of the government's extraordinary petition for a writ of prohibition of a favorable jury instruction as to Count 3 and despite having ultimately requested some form of territorial intent instruction, DE-1232—failed to preserve a specific request for a jury instruction as to the unlawful intent element. Counsel simply failed to ensure that the jury instruction was given upon the Court's favorable, case-specific ruling as to unlawful intent in the context of this case. Counsel also failed to request, during rebuttal closing argument, a curative instruction that the government could not proceed on the theory of an intent to shoot down planes that were actually in violation of Cuban territorial limits. Counsel also erred in failing to request a theory of defense instruction with respect to Count 3 so as to eliminate the confusion created by the government's closing argument caricaturing the defense theory of a scope of non-application of the law as to confrontations not shown to be unlawful.

Second, counsel provided ineffective assistance by proposing inapt instructions relating to civil rules for the confrontation of aircraft within Cuban territory that contradicted the territorial instruction that counsel thought was to be given as to unlawful intent and reduced the government's burden of proof. Counsel reduced the government's burden of proof by requesting a theory of defense jury instruction based on ICAO civil standards, thereby irrationally assuming a defense burden of proving Cuban compliance with inapplicable civil standards and other international rules. Counsel aggravated his error by failing to withdraw that jury instruction request when the government's request for an ICAO counter instruction was granted. The ICAO instructional error was particularly damaging, in that it raised the "last resort" issue, shifting to the defense to show that Cuba not only acted without criminal intent, but as a "last resort" in killing the four BTTR members over international waters. *See* DE-1583:14610 (last resort instruction as requested by the government). Inexplicably, counsel proposed—despite the Court's ruling that an intent to shoot down over Cuban airspace would not be unlawful on the facts of this case—to instruct the jury that international rules concerning aircraft confrontation applied even in Cuban territory and that unless the BTTR aircraft flown by the victims in this case were deemed military, that the shootdown would be illegal. Such a request—borne of counsel's confused and untethered understanding of the jurisdictional, intent, and territorial issues in the case—reduced the government's burden to showing that the aircraft shot down in this case were not military, whether or not they were in violation of Cuban airspace. DE-1583:14610 (jury instructed: "International rules applicable to civil aircraft are

not applicable to state aircraft. . . . No *state* aircraft are permitted to fly over the territory of another nation without authorization. It is for you to determine whether or not an aircraft acted as a state aircraft or a civil aircraft.") (emphasis added). Counsel's own burden-lowering instruction was damaging enough, but because counsel was granted this instruction, the government was permitted the additional instruction that:

> Interception of civil aviation will be undertaken only as a *last resort*. If undertaken, an *interception will be limited to determining the identity of the aircraft*, unless it is necessary to return the aircraft to its planned track, direct it beyond the boundaries of national air space, guide it away from a prohibited restricted or danger area or instruct it to effect a landing at a designated aerodrome[;] navigational guidance and related information will be given to an intercepted aircraft by radio telephony, whenever radio contact will be established. States shall publish a standard method that has been established for the maneuvering of aircraft intercepting a civil aircraft. Such method shall be designed to *avoid any hazard* for the intercepted aircraft.

Id. at 14610-11 (emphasis added). The government's civil-liability-standard instruction, given to the jury as an *antidote* to the already harmful defense-requested instruction on interception of civil/state aircraft, went on for an additional page of qualifications to lawful civil aircraft interception, rendering it impossible for the defense to show lawfulness under the legal test in the instruction. *Id*. at 14611-12.

By introducing the impossible civil standard into the case—and making it the law that *governed* the jury's decision—and by assuming the impossible burden of showing that the two aircraft that never crossed Cuban territorial boundaries were "state aircraft," counsel foreclosed the possibility of jury evaluation of the case on the actual elements of the offense under the criminal law and eased the government's burden of proof unreasonably. In resolving the jury instruction issues adversely to Hernandez on appeal, the Eleventh Circuit concluded that the *invited error doctrine* precluded reversal and blamed counsel's own requests for lowering of the government's burden of proof. *Campa* III, 529 F.3d at 999-1000 (rejecting, under invited error doctrine, claim that instructions allowed jury to convict on a finding of "fewer elements than required for the charge of conspiracy to murder" and explaining that "[t]he district court gave the instruction that the defense requested during the charge conference. 'It is well established in this Circuit that to invite error is to preclude review of that error on appeal.' *United States v. Silvestri*, 409 F.3d 1311, 1337 (11th Cir. 2005). . . . Nothing that Hernandez identifies in other instructions or in closing argument suggests that the government bore a burden *lower than the burden stated in the murder-conspiracy instruction than the defendants requested*.") (emphasis added).

Counsel's focus on submitting jury instructions relevant to the wrongly-pursued defense of a lawful shootdown was in stark contrast with counsel's failure to request a jury instruction concerning the viable defense of lack of intent to join an unlawful agreement. Thus, counsel failed to request a jury instruction requiring the prosecution to prove that the alleged Cuban co-conspirators intended to enter into an unlawful plan to confront the BTTR aircraft, as well as an instruction requiring proof that Hernandez intended to join a plan knowing of its unlawfulness.

Counsel further erred in urging that the jury be instructed on a charge of first-degree murder when the conduct for which Hernandez was indicted encompassed lesser harms, including a conspiracy to commit manslaughter or to act as an accessory after the fact, where the question of premeditation was never one that counsel addressed in the defense case and never explained to Hernandez, and where counsel could have requested a manslaughter or "accessory after the fact" instruction that would have allowed the jury to find guilt for recklessly assisting in the shootdown or its aftermath without exposing Hernandez to a sentence any greater than that applicable to other indicted charges. Thus, because there was evidence that confronting BTTR aircraft that violated Cuban airspace would in itself be lawful, to the extent the government proceeded on a theory that agreeing to such a confrontation implied agreeing to a reckless course of conduct that might have been either legal or illegal, the agreement would have been one to commit a manslaughter violation under 18 U.S.C. § 1112(b), with a conspiracy charge under 18 U.S.C. § 371 standing as a viable lesser-included offense under a reckless use of excessive force theory.

Counsel additionally provided deficient representation in failing to request a final jury instruction that post-completion conduct does not constitute a conspiracy or overt act and in failing to request a cautionary or limiting instruction to that effect upon the introduction of evidence of post-shootdown conduct, apart from counsel's failure to objected to the introduction of such evidence irrelevant, unduly confusing, and as outside the scope of the indictment. Acts concealing or otherwise of benefit to the participants in an already executed conspiratorial agreement do not extend the life of the conspiracy and do not form overt acts. *Grunewald v. United States,* 353 U.S. 391, 405 (1957). Over a half century ago, the Supreme Court repeatedly addressed the issue of the duration of a conspiracy and expressed concern over the point at which a conspiracy legally ends. These cases make it clear that conspiracies are not immortal. *See, e.g., Krulewitch v. United States*, 336 U.S. 440 (1949) (noting once the central aims of the alleged conspiracy have been attained, the conspiracy ends); *United States*

v. Lutwak, 344 U.S. 604 (1953) (stating there can be no furtherance of a conspiracy that has ended); *Grunewald*, 353 U.S. at 405 (indicating that courts should view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions). The conspiracy to commit murder charged in Count 3 did not extend beyond completion of its object on February 24, 1996. The government's attempt to use *post hoc* discussion of the shootdown or purported recognition that actions affected the events of that date was improper.

Counsel erred as well in failing to object to the aiding and abetting theory as to a first-degree murder conspiracy instruction where there is no legal basis for such theory of liability. By alleging post-offense overt acts showing Hernandez's *post hoc* "agreement" with what Cuba did, the government was permitted to convict Hernandez merely on an accessory-after-the-fact form of an aiding and abetting theory that is insufficient to establish a conspiracy. *See* DE-1583:14608-09 (aiding and abetting instruction); *cf. United States v. Lechuga*, 994 F.2d 346, 349 (7th Cir. 1993) (*en banc*) ("A person who sells a gun knowing that the buyer intends to murder someone may or may not be an aider or abettor of the murder, but he is not a conspirator, because he and his buyer do not have an agreement to murder anyone."). *Post hoc* expansion of criminal liability was a great risk particularly here given the passion-filled nature of the issues. The intimation of Hernandez's *post hoc* support for the BTTR shootdown—particularly combined with counsel's full-throated support of it at trial—was subject to implicit vilification. Failing to seek appropriate instructional limitations on the use of such evidence—which the government placed in the indictment as an evidentiary justification, rather than a true overt act—badly prejudiced Hernandez.

F. ***Ineffective Assistance of Trial Counsel as to Count 2.***

In his opening statement, DE-1476:1603-24, counsel argued Cuba was justified, given Basulto's previous overflights, in shooting down the aircraft. He also assured the jury that Hernandez had no intent to injure the United States with respect to Count II, the espionage count, and therefore should not be found guilty. However, the espionage statute is written in the disjunctive: injure the United States *or* benefit a third country. Digging himself deeper into a hole from which the defense could not escape he went on to explain how much Hernandez's work had benefitted Cuba. Counsel improperly delegated the Count II defense to co-counsel, claiming he was preoccupied with Count 3 and delegated venue issue for the same reasons. Counsel's abandonment of independent investigation and review of Count 2 legal and factual issues compels relief. In terms of specific errors, counsel failed to investigate and present evidence as to Count 2 showing the

organization and structure of Cuban intelligence operations to establish that the operations in which he was involved were directed to obtaining non-classified information. Counsel also failed, in relation to specific criminal intent and the object of the conspiracy, to request jury instructions explaining the theory of defense that information he was tasked with obtaining was non-classified and distinguishing incidental from intended information gathering.

G. *Ineffective Assistance of Counsel in Failing to Preserve Objections on Issues Affecting All Counts of Conviction.*

In its final appellate briefing in the Eleventh Circuit, the government emphasized that the vast majority of the appellate arguments of unfairly prejudicial actions by the government at trial were not objected to (and not timely raised on appeal, *see* claim of appellate ineffectiveness, *infra*). *See* Gov't Supp. Br. 18 ("great majority" of the misconduct claims briefed by the appellants went without objection in the district court); *id*. at 19 n. 12 (contending that "appellants complain now that the government's translation of 'compañero' and 'plastilina' were misconduct, yet they did not object on that basis to introduction of the translations, R36:2651-2669); Gov't Resp. to Post-Argument Submission on Prejudicial Misconduct (same position as to scores of misconduct claims).

Counsel failed to make objections at numerous critical junctures of the case, including where objections to the government's arguments, offers of evidence, and failure to provide discovery were essential to preserve the defendant's right to due process of law. Counsel failed to raise and preserve objections to improper, inflammatory, and unduly prejudicial evidence and arguments. Counsel failed almost entirely to object to inflammatory evidence and argument by the government at trial, failing to recognize the damaging effect of such improprieties in a multiple-homicide case. On appeal, the government conceded—indeed exhaustively detailed trial (and appellate) counsel's failure to object to or timely raise as an issue the myriad instances of misconduct. The attached list of counsel's failures, Appendix F, was prepared by the government as part of a post-oral-argument submission to the Eleventh Circuit explaining just how badly counsel had failed to preserve misconduct issues. The government advised the Eleventh Circuit that counsel that between 70-87% of the misconduct matters were not objected to by counsel, and that on appeal only a small fraction of the misconduct issues were timely raised in an initial brief. Gov't Suppl Auth. Letter of 19, 2008. The government's own chart condemns the trial and appellate representation by counsel and boldly reflects the extent to which counsel failed to object.

The nature and number of attacks on the defendant and his counsel reflected the tenuousness of the government's case and the need to 'dirty up' the defendant to the greatest extent possible in

order to pull off the great prosecutorial coup of convicting an innocent man. Particularly given the speculative nature of the evidence offered by the government, the extreme forms of prejudicial misconduct—never previously raised by counsel for this Court's review—so contaminated the fountain of justice that counsel's reticence to object cannot be ignored. Nor can appellate counsel's inexplicable tardiness in failing to present the claims to the Eleventh Circuit.

To evaluate the prejudice of counsel's failure to object—as reflected on the attached diagram reflecting the government's concessions of counsel's failure to object—the Court should consider not merely whether, if objected to and cured by instruction, the government might have been more restrained on whether the jury would have realized the improprieties of the government's case thereby leading to acquittal or to this Court's granting of a mistrial or venue change motion. Apart from such trial determinations, the Court must also consider whether, in light of the Eleventh Circuit' specific reliance on counsel's errors as the means of resolution of the appellate claims—as opposed to resolution on the merits—there is a sufficient undermining of confidence in the ultimate resolution of the misconduct claims due to the unique attribution to Hernandez of liability for Cuban government actions that the Eleventh Circuit panel might have reversed based on prosecutorial misconduct. The record of actionable misconduct claims, as reflected with specific case references on the attached chart, is such that confidence that the appellate result would have been the same if all misconduct instances had been preserve and raised is sufficiently undermined to warrant relief.

H. ***Ineffective Assistance of Sentencing Counsel as to Count 3.***

Sentencing counsel failed to sufficiently research and investigate the factors relevant to sentencing on Count 3 and failed to properly object to and seek a departure from sentencing guideline calculations.[23] Just as counsel had, in his opening statement, DE-1476:1603-24, argued that Cuba was justified, given Basulto's previous overflights, in shooting down the BTTR aircraft flown by the victims, counsel once again, at sentencing and in presentencing filings, DE-1397; DE-1412, blamed the victims for the killings, even though the four men who died had nothing to do with such provocations. Counsel's failure to understand the legal factors pertinent to sentencing—which by cross-reference incorporated the sentencing guideline for first-degree murder—and failure to recognize the irrationality of blaming innocent victims, in combination with counsel's failure to

[23] At sentencing, the Court indicated that even it it considered granting a downward departure as to the Count 3 sentence, doing so would have no effect because of the concurrent life sentence on Count 3. DE-1450:21. The Eleventh Circuit having held that the Count 2 life sentence was imposed in error, this motion allows the Court to revisit the issues pertaining to Count 3.

conduct the necessary investigation, research, and consultation with the client to present a coherent sentencing defense compel relief in this case.

Under the government's theory of the case, Hernandez and another agent were sent messages by the Cuban government directing them to advise Cuban agents not to fly with BTTR planes because Cuba had decided it would no longer tolerate territorial incursions or the dropping of anti-government leaflets onto Cuban territory. The government alleges that Hernandez complied with the order and may have complied with an order to seek other information about incursions or political leafleting into Cuba. The government does not allege that Hernandez *knew* that BTTR was at risk outside Cuban territory or that he had anything more than the most rudimentary knowledge of a plan that was concocted by his government without solicitation of his input, advice, or opinion.

The government's theory is that Hernandez was an intelligence asset *used* by Cuba and that the Cuban government made its own decisions as to what to do with the information Hernandez was ordered to provide. According to the government, only by *defying* his own government could he have removed himself from the conspiratorial web. On these facts, it is clear that as to the shootdown that his government decided to undertake, he was not only not a leader, as the presentence report erroneously concluded, but that his role as a messenger of warnings of decisions made by his government qualified under the guidelines for a role reduction, taking his sentence below the level 43 that caused the Court to impose, the then-mandatory life sentence.

Treating the actors in the shootdown as members in a conspiracy, the government has recognized that the two Cessnas were downed by order of the Cuban Air Force, headed by Air Force General Ruben Martinez-Puente and that the two Cuban Air Force pilots were Lt. Colonel Lorenzo Perez-Perez and Lt. Colonel Francisco Pérez-Pérez, *see United States v. Ruben Martínez-Puente*, 03-20685-Cr-SEITZ (S.D. Fla), indictment returned August 21, 2003. Both MIG-29 pilots were 44 years old, both lieutenant colonels, with flying experience of over 1,000 hours, flying for over 20 years, including international assignments and more than 100 combat missions. *See* ICAO Report of the Investigation Regarding the Shooting Down of Two U.S. Registered Private Civil Aircraft by Cuban Military on 24 February 1996, Sections 1.5.4. and 1.5.5, C-WP/10441, Restricted, 06/20/1996. Clearly, Hernandez was not accused of actually taking part in the shootdown itself, the crime on which federal jurisdiction was ultimately premised.

Gerardo Hernandez was merely a Cuban illegal officer, 30 years old, just back from vacation in Cuba, residing at 18100 Atlantic Boulevard, # 305, Miami Beach, Florida. *See* DE-1481:2299.

He signed up to be an intelligence officer, not a murderer. Under the government's theory, he was told of Cuba's decision to confront "counterrevolutionary" flights and told to warn other agents off the planes and to report any information regarding flights. At the time of the shootdown, the only Cuban agent who had flown with BTTR in the preceding two years—Juan Pablo Roque—was already back in Cuba. The flight plan for BTTR was publicly filed for February 24, 1996 by BTTR with the FAA and thereby made known to Cuba. Concilio Cubano had been cancelled/ended by Cuba prior to the filing of the flight plan.

That Cuba shot down the aircraft *beyond* the lawful exercise of its jurisdiction rested on decisions and actions bearing ultimately no more than a tangential relation to anything said or done by Hernandez. His knowledge was limited to at most cryptic, ambiguous references regarding a potential border confrontation, and thus Hernandez's role—whether deemed knowing or not—in achieving a conspiracy to murder was of the lowest level of any potential conspirator.

Although Hernandez's role was not indispensable—in that the government concedes another agent, A-4, was given the exact same task and that there were other means of communicating with the agents, particularly over the month that passed from the first messages to the actual shootdown, and little if any risk that Rene Gonzalez would suddenly board a BTTR plane—and he lacked any decision making authority over the Cuban Air Force and had no power to change the Cuban political decision made to confront BTTR aircraft. Nor did he have any means to verify exactly what tactical or legal-justification plan Cuba had agreed upon. By comparison, a marijuana offloader occupies an essential, *hands-on* role in the actual commission of the offense as well as the conspiracy even when he or she *knows* every detail of the plan, but the Sentencing Guidelines contemplate a *minimal* role reduction for such an essential role in a one-time operation. Here, if under the government's theory, Hernandez had divined the future, anticipated a spectacularly public illegal act, and chosen to respond by withdrawing from the Cuban Intelligence Service (or effectively doing so by defying orders), that would not have prevented Cuba from a plan to publicly confront future flights by BTTR as it publicly warned that it would do. Nor would it necessarily have aided anyone if Hernandez had defied his government based on a suspicion that it planned to act illegally. Thus, however described, the Hernandez role as posited by the government was as a hired information source, a non-decision making information gatherer who did not make the choices or undertake the actions, but worked for his government in a limited role; he could have been a

nuisance and hindrance to Cuba, but he was not essential to Cuban Air Force plans as long as BTTR continued to fly to Cuba.

The premise for elevating Hernandez into more than a minimal player in the Cuban Air Force's dramatic actions is that if he had refused orders given to him, BTTR would never again have contemplated Cuban overflights. But no one believes that to be true; and indeed if it were true, Cuba might have chosen to use *that* method to stop the overflights. Instead, it is clear that the BTTR flights were made *in spite of the risks* of confrontation; nor did he encourage the high-level decision to confront the aircraft, a decision definitively made before any point at which he was asked to provide information. Similarly, Hernandez did not cause the BTTR flights or encourage them. He is a footnote in the great international drama in which he has been saddled with a life sentence. On this chess board, he was a pawn, and counsel's failure to use every means at his disposal to present a complete record of relevant facts and guideline and departure arguments concerning the unique role analysis in this case was ineffective representation that has resulted in a life sentence.

At an evidentiary hearing, counsel will concede errors in regard to all guideline aspects of the sentencing process, including erroneously failing to seek a role reduction specific to Count 3 and failing to explain to Hernandez the right to testify about and litigate his role in the underlying events. Counsel likewise erred in failing to seek a downward departure on role-related grounds, given the unusual theory of prosecution of an intelligence agent the agent's country chose to do with the information.

Just as counsel failed to develop the factual record for or otherwise seek a role reduction as to Count 3, counsel failed to raise a offense-group-specific guideline objection to the obstruction of justice enhancement where the obstruction enhancement for Count 3 was premised on conduct that occurred *before* he was even charged with or believed possible a charge based on murder conspiracy allegations. The obstruction enhancement under U.S.S.G. § 3C1.1 should have been limited to Hernandez's obstruction of the espionage conspiracy charges, not on unknown/unanticipated allegations of a murder conspiracy. That counsel deferred to counsel for Medina to preserve and present the obstruction argument shows counsel's failure to understand that he should have argued that the enhancement was not pertinent to the Count 3 group under the sentencing guidelines.

In light of the stakes faced by Hernandez as to the murder conspiracy, and in light of counsel's belief in the actual innocence of his client, counsel further erred in failing to present to the Court evidence to show such innocence. At sentencing, there was no bar to counsel's use of

evidence for fear of introduction as to other counts, because such evidence could not affect the conviction on such counts. Hence, he should have prepared and presented a case to establish that Hernandez never believed that Cuba—even if it were to take military action against BTTR—would do so in an illegal manner that could expose the whole nation, including his own family, to great risk. He would have testified, as he will at an evidentiary hearing, as to his actual belief and understanding from all information available to him prior to the shootdown that Cuba would act in a legally justified manner.

Counsel erred in failing to object to the application of U.S.S.G. § 2A1.5 in the context of this case to impose a first degree murder guideline where the guideline failed to take into account concepts pertinent to manslaughter and lesser offenses. The guideline turns second degree murder into a first degree murder based on the existence of a conspiracy. Such an elevation of the punishment—to a mandatory life sentence level—is unduly harsh in this context and counsel should have contested application of the guideline and sought a downward departure on that basis. The indictment charged a conspiracy to violently confront BTTR planes with fatal consequences. Viewed objectively, the indictment charged a manslaughter form of offense as to Hernandez, premised on ambiguous claims of *post hoc* approval; counsel failed to argue that Hernandez's sentence should have been premised on that charge.

Counsel's errors at sentencing were doubly prejudicial given that counsel failed to anticipate the possible reversal of the Count 2 sentence and thus erroneously treated the Count 3 questions as moot. Given the failure to make an objection that could be pursued on appeal, counsel failed to preserve for the defendant any independent potential benefit of the sentencing error preserved as to Count 2. The Supreme Court has recognized that ineffective assistance of counsel in guideline sentencing presents a basis for relief under 28 U.S.C. § 2255. *Glover v. United States*, 531 U.S. 198, 203 (2001) (reversing denial of relief for ineffective assistance in failing to make objection under guideline sentencing regime; "any amount of actual jail time has Sixth Amendment significance"); *cf. Mempa v. Rhay*, 389 U.S. 128, 135 (1967) (Sixth Amendment guarantees right to counsel in a sentence recommendation proceeding because "to the extent such recommendations are influential in determining the resulting sentence, the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent"); *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948) (holding pre-*Gideon* that absence of counsel to correct inaccurate information in sentencing violated

due process); *Turnbow v. Estelle*, 510 F.2d 127, 129 (5th Cir. 1975) (Sixth Amendment requires counsel even where judge has no power to select sentence and only has discretion to credit defendant with time spent in custody because "[t]he possibility that this discretion might have been exercised in favor of [the defendant] was sufficient to create a situation at the sentencing stage in which his 'substantial rights' might have been affected").[24]

The permanence of a life sentence is such that no stone (and no viable guideline-based argument) should have been left unturned, and particularly where it relates to the defendant's ability to present evidence showing his lack of knowledge and lack of intent to commit murder, counsel's failure to even undertake the requisite consultation with the defendant and explain his sentencing options was ineffective assistance and warrants relief.

I. *Ineffective Assistance of Appellate Counsel.*

Counsel failed to raise essential appellate issues, including unpreserved grounds of objection, concerning discovery, instructional error, and improper evidence and arguments offered by the government, such that issues were abandoned, and when belatedly raised, were not considered. The Eleventh Circuit recognized that the majority of the misconduct allegations raised in this proceeding were erroneously omitted from the appeal. *Campa* III, 529 F.3d at 989 (noting that belated "allegations that were not raised in the initial briefs of the defendants" would not be considered on appeal). Counsel failed to raise essential appellate arguments and thereby caused them to be abandoned, such that even where the appellate court expressed interest in such claims, it could not reach them because they had been abandoned. Thus, in resolving the issue of government misconduct, the *en banc* Court considered only the improper government comments to which objections were made (and sustained) and curative instructions given. *Campa* II, 459 F.3d at 1153 (citing DE-1583:14482-83, 14493); *see also id*. at 1171 (affording consideration only to the government "comments to which the defendants objected" and noting that "defendants' objections were sustained"). The panel observed that "[d]uring closing arguments, the government uttered several statements that the defendants now challenge[, but] did not object to ... in closing arguments." *Campa* III, 529 F.3d at 990 (listing series of inflammatory comments and accusations

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[24] In general, ineffective assistance of counsel in relation to the sentencing claims at either the sentencing or appellate stages excuses any procedural default in failing to earlier present the claims for review. *Coleman v. Thompson*, 111 S.Ct. 2546, 2567-2568 (1991) (ineffective assistance will excuse procedural default of underlying claim); *Murray v. Carrier*, 106 S.Ct. 2639, 2645 (1986)(same); *Reece v. United States*, 119 F.3d 1462, 1465 (11th Cir. 1997)(same).

by the government). The panel concluded that it could not address the issue on the merits because the en banc decision—addressing only misconduct claim preserved at trial and timely raised on appeal—"resolved these issues of prosecutorial misconduct." *Campa* III*,* 529 F.3d at 996.

The number and extent of misconduct instances in this case exceeds that of any other reported case.[25] Appellate counsel's failure to present such claims in the initial brief, and to rely instead on a mere sampling of a dozen instances, resulted in forfeiture on appeal of a issue of great likelihood of success. Indeed, it was the oral argument request of the appellate panel that all instances of misconduct be listed, and only when it was pointed out that nearly all such instances were not raised in the initial briefing was the issue rejected on that ground by the Eleventh Circuit.

III. COUNSEL'S DEFICIENT REPRESENTATION, IN THE PRETRIAL, TRIAL, SENTENCING, AND APPELLATE STAGES, WAS INDEPENDENTLY AND COLLECTIVELY UNREASONABLE AND PREJUDICIAL.

At every stage of the representation, counsel's failure to understand and prepare the address the evidence and legal issues pertinent to the prosecution undermined the reliability of the conviction and sentence.

The legal standard. "[A]n attorney's decision to limit his investigation ... must 'flow from an informed judgement.' Our case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice among them." *Lockett v. Anderson*, 230 F.3d 695, 714 (11th Cir. 2000) (quoting *Baxter v. Thomas*, 45 F.3d 1501 (11th Cir. 1995)); *see also Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991). Inadequate investigation and consultation leads to misguided defense tactical strategies that may render counsel's overall representation constitutionally defective. *See*, *e.g.*, *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974).

"The Supreme Court has recognized counsel's duty to consult with his client as one of the basic components of adequate representation." *White v. Godinez*, 301 F.3d 796, 804 (7th Cir. 2002). "Informed evaluation of potential defenses to criminal charges and meaningful discussions with one's client of the realities of his case are cornerstones of effective assistance of counsel." *Bower v. Quarterman*, 497 F.3d 459, 467 (5th Cir. 2007). Counsel in this case failed to undertake the basic elements of pretrial investigation, consultation, and preparation. "Adequate consultation between

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[25] These arguments are not premised on intentional misconduct by government counsel, but on the overall prejudicial effect that went unreviewed due to counsel's failure to preserve the issues.

attorney and client is an essential element of competent representation of a criminal defendant." *United States v. Tucker*, 716 F.2d 576, 581 (9th Cir. 1983); *see Adams v. Balkcom*, 688 F.2d 734, 738 (11th Cir. 1982); *United States v. Porterfield*, 624 F.2d 122, 124 (10th Cir. 1980); *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1980); *Wood v. Zahradnick*, 578 F.2d 980, 982 (4th Cir. 1978). Consultation must insure that the attorney obtains all legally relevant information known to the defendant and likewise conveys important legal and factual information. *See Tucker*, 716 F.2d at 581-82; *Saunders v. Ratelle*, 21 F.3d 1446 (9th Cir. 1994)(Failure of counsel to understand defenses is deficient performance.).

Effective assistance of counsel requires the investigation, presentation, and advocacy of mitigating evidence in the guilt and sentencing phase of a case. *King v. Strickland*, 748 F.2d 1462 (11th Cir. 1984) (granting habeas corpus relief in murder case where counsel failed to investigate or present mitigating evidence); *Dando v. Yukins*, 461 F.3d 791 (6th Cir. 2006) (remanding and issuing order to vacate guilty plea where attorney failed to investigate adequately the availability of a defense); *Harris v. Blodgett*, 853 F.Supp. 1239, 1269-71 (W.D. Wash. 1994) (failure to investigate and present mitigating evidence relating to defendant's history of "mental and emotional problems" is ineffective assistance). Counsel's strategic decisions made after less than complete investigation are reasonable only to the extent that the limitations on investigation are reasonable. *Zamora v. Dugger*, 834 F.2d 956, 958 (11th Cir. 1987). Nor was counsel justified in allowing conflicted counsel or lay witnesses or parties to conduct the investigation counsel was obliged to undertake. A shifting of counsel's professional responsibility onto lay witnesses is a substitute for investigation, but instead an avoidance of conducting such an investigation. *See Rompilla v. Beard*, 545 U.S. 374, 379, 383 (2005); *Esslinger v. Davis*, 44 F.3d 1515, 1529-30 (11th Cir. 1995); *Code v. Montgomery*, 799 F.2d 1481, 1483-84 (11th Cir. 1986) (failure to call alibi witness).

Counsel has acknowledged and will testify to his errors. At an evidentiary hearing, trial counsel is expected to concede a failure to defend based on an accurate understanding of the elements pertinent to the question of Hernandez's liability for Cuban actions and a mistaken attempt to defend the indefensible. Counsel likewise will concede that by focusing so completely on the impossible defense of asking the jury to trust uncorroborated Cuban claims above independent American and third-party evidence that had already been found reliable by international and domestic judgments, he substantially and prejudicially erred. Counsel will concede that he failed to consult with the defendant regarding his right to a severance of the murder charges, to lesser included offense instructions, to the client's right to testify as to the murder allegations if granted

a separate trial, and to introduce evidence showing how distanced he was from knowledge of Cuban decision making. Counsel also will concede a failure to seek appropriate jury instructions and an erroneous acceptance of the civil liability standards of ICAO in place of the due process based criminal liability standards applicable in this context.

This was a case in which the client knew he did not commit the offense because he did not know or predict that Cuba would commit murder on the high seas or any other unlawful homicide of U.S. citizens—acting in "spectacularly" public fashion, in plain view of the world, according the government's description of the conspiratorial plan, DE-1532:8080—but his counsel never spoke with him about such testimonial defenses, and never sought to call any witnesses to that effect, including other defendants and specifically Rene Gonzalez and Juan Pablo Roque who were affiliated with BTTR. Counsel's defense that the client was a scapegoat of Basulto was part of a defense of Cuba that was not the client's true defense, yet counsel never showed the true defense that Hernandez, to the extent he was being made a scapegoat, was a scapegoat for the actions of Cuba of which he had no foreknowledge and never agreed to.

The Sixth Amendment requires that defense counsel conduct a thorough and complete pretrial investigation. *See Wiggins v. Smith*, 539 U.S. at 521-23. "Pretrial investigation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps, the most crucial stage of a lawyer's preparation." *House v. Balkcom*, 725 F.2d 608, 618 (11th Cir. 1984). The failure to investigate a defense, therefore, is assessed independently from the decision whether to present the defense, because counsel cannot reasonably reject a defense without understanding its scope and relative strength. *See Wiggins*, 522 U.S. at 522-24. Accordingly, while courts afford deference to strategic choices, "[o]nly choices made after a reasonable investigation of the factual scenario are entitled to a presumption of validity." *Rolan v. Vaughn*, 445 F.3d 671, 681-82 (3d Cir. 2006) (citing *Strickland,* 466 U.S. at 687).

In the context of a multi-factor defense, counsel's failure to address each factor, including *mens rea* and defense theories, constitutes ineffective assistance. *See Combs v. Coyle*, 205 F.3d 290 (6th Cir. 2000) (finding prejudice from counsel's mishandling of scientific evidence of defendant's *mens rea*, even though the state presented other evidence of the purpose of defendant's actions); *Harrison v. Quarterman*, 490 F.3d 419 (5th Cir. 2007) (counsel prejudiced client's defense when counsel failed to call a witness who is central to establishing the defense's theory of the case).

"[I]t is sufficient that a petitioner must show only a reasonable probability that the outcome would have been different; he 'need not show that counsel's deficient conduct more likely than not

altered the outcome in the case.'" *Brownlee v. Haley*, 306 F.3d 1043, 1059-60 (11th Cir. 2002) (quoting *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067); *see DeLuca v. Lord*, 77 F.3d 578, 590 (2d Cir. 1996) ("The *Strickland* test does not require certainty that the result would have been different."). "When evaluating this probability, 'a court hearing an ineffectiveness claim must consider the totality of the evidence.'" *Brownlee*, 306 F.3d at 1060 (quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069). In *Smith v. Dugger*, 911 F.2d 494, 497 (11th Cir. 1990), the Court explained that "the proper standard for determining prejudice under *Strickland*, however, is whether the failure to investigate . . . rendered the proceeding itself unfair, even if such failure cannot be shown by a preponderance of the evidence to determine the outcome."

Quixotically focusing exclusively on location and justification for the killings was unreasonable because it was doomed, undercut counsel's credibility, annoyed and exasperated the jury by its disingenuousness and overlong presentation, and opened the door to proof beyond the limited charge in the indictment. Counsel failed to defend on the sole defensible ground: that Cuba's actions should not be attributed to Gerardo Hernandez where the overwhelming available evidence would show that he could not have known of an illegal plan, was never advised of an illegal plan, and did not assent to the commission of an illegal act beyond Cuban sovereign authority. Counsel could and should have begun to present this defense and prepare the legal framework for resolution of the case in pretrial motions, where the indictment itself failed to allege any form of criminal foreknowledge by Hernandez of an illegal plan, much less a plan to commit an unlawful homicide.

Instead of choosing any of the reasonable avenues for establishing the absence of agreement by Hernandez to commit a crime in relation to BTTR, and in the face of even the government's contention that the confrontation of the BTTR aircraft was to be part of a public showing by Cuba of BTTR's illegal actions, counsel defended on the unsound and unreasoned basis of justification for murder and the unrealistic attempt to overcome overwhelming documentation, evidence, and court findings as to the location of the shootdown. Despite the futility of the arguments made by defense counsel, the presentation of this misguided theory further alienated the jury from the defense in that the waste of time and energy on matters that merely chipped away at the credibility of the entire defense was not merely a failure to defend but a direct undermining of the defense.

By properly investigating and understanding the facts and law applicable to Count 3, counsel could have limited admission of unfairly prejudicial evidence, narrowed the disputed issues, obtained appropriate jury instructions, presented essential evidence and obtained crucial discovery,

separated the movant from issues of Cuba's improper actions, explained the structure of knowledge that governed movant's actions and statements, and presented the case that the government acknowledged would be insurmountable. Counsel could readily have presented a compelling defense that whatever knowledge Hernandez may have had of Cuba's intent to confront the BTTR flights, he had not agreed to participate in an illegal, much less homicidal, attack on innocent planes.

IV. DUE PROCESS VIOLATION DUE TO WITHHOLDING OF EXCULPATORY EVIDENCE.

The government failed to disclose the entirety of the message traffic recovered in searches of the defendants, including message to and from Hernandez. Because the issues of knowledge and understanding of the meaning of coded messages and because the patterns of the entirety of the messages provided context for showing Hernandez's habits and practices with respect to directives by his government, including a showing that he did not debate assertions of fact by his government and consistently acted in a manner that was non-violent and did not urge violence, was all relevant to the reliability of the government's attempt to derive from evidence of compliance with his government's requests concerning confrontation of BTTR reflected his approval of an unlawful plan to commit murder.

The government also possessed evidence consisting of recorded and intercepted communications of persons with authority over the decision to shoot down the BTTR aircraft, including statements made by Cuba's then armed forces leader, Raul Castro, showing that Cuba was not concerned with leaflet dropping from international waters, but with territorial overflights—i.e., illegal activity by BTTR as to which Cuba had a lawful right of interdiction—and that Cuba's concern was to militarily confront such aircraft that are in violation of Cuban sovereignty and not other aircraft. *See* Appendix G (transcript of tape recording).

The government failed to disclose numerous intelligence files concerning evidentiary findings regarding the shootdown, including files to which the Justice Department had the ability to request access. Such reports analyzing the chain of command decision making that led to the decision to shoot down the aircraft were not disclosed, but were reviewed by government officials prior to the return of the indictment in *United States v. Martinez Puente, et al.*, No. 03-20685-Cr-SEITZ (S.D. Fla.). Classified information utilized in that grand jury proceeding yielded a different object of the alleged murder conspiracy. Specifically, the *Puente* indictment alleges:

> It was the object of the conspiracy, known as "Operation Escorpion," to support and implement a plan to kill a U.S. national, utilizing information which included Cuban spy sources from within the Southern District of Florida, the *goal of which was to*

> *terrorize, intimidate and retaliate against the Cuban exile community* as well as to intimidate the Cuban populace, through a violent confrontation with aircraft operated by BTTR, with decisive and fatal results.

DE-1 (emphasis added). By asserting a different goal—that includes "utilizing" spy sources for a terrorism goal—reflects the government's access to additional information regarding the political operation involved and shows that "spy" information was *used* by officials as opposed to officials confiding in the "spies" as to the actual, newly-stated unlawful purpose of the conspiracy. That the government now alleges a goal other than territorial protection—a goal that the government knows was not communicated to Hernandez and that reflects that alleged co-conspirators did not trust Hernandez with any information indicating an illegal purpose in their intended actions shows the extent to which the government has withheld complete discovery of the nature of and participation in the now-transformed conspiracy alleged. Given the present characterization of the conspiracy, it is clear that Hernandez's proffered testimony to the effect that such a conspiracy would have been well beyond his knowledge, would have been (and was)concealed from him, and would not have had him as a member. This *using* of sources to undertake actions of which the sources were not aware is at the core of Hernandez's claim of actual innocence. The government's clearly has evidence to support its terrorism claims and the evidence will show that Hernandez was not a member of such a conspiracy.

Additional *Brady* violations to be addressed at an evidentiary hearing or by way of discovery in this case include the government's failure to produce: (A) evidence relating to Cuba's intention with respect to protecting its territorial integrity; (B) materials relating to Cuba's (and any nation's) right to confront intruding aircraft (particular post-2001 governmental recognition of such rights based on further investigation); (C) evidence relating to the illegality of Basulto's actions; (D) information relating to the government's unwillingness to stop Basulto from violating Cuban sovereignty and/or its inability to do so; (E) evidence relating to high-frequency messages, including additional messages themselves; (F) additional high-frequency messages that revealed that the scope of so-called Operation Venecia was different and more long-standing than any operation related to the shootdown; (G) additional high-frequency messages reflecting on movant's lack of intent to violate the law; (H) materials relating the status of Roque's mission as separate from any operation to shoot down the planes; (I) evidence relating to the situs of shootdown that would have led counsel not to pursue the line of defense that it occurred in Cuba's territorial waters; (J) evidence relating to the government's inability to recover and translate additional transmissions that left gaps in the

communication history; (K) evidence relating to the Cuban communications regarding the shoot down; (L) evidence, including satellite imagery, that would have demonstrated where the shootdown occurred and that the Majesty of the Seas was not in the position claimed in support of the government's theory on where the shootdown occurred;(M) evidence relating to the knowledge of U.S. officials regarding Cuba's objections to the Brothers to the Rescue incursions and plans to defend its territorial integrity; (N) evidence relating to local officials in the Miami office of the FAA, who failed to stop the Brothers to the Rescue flights of February 24, 1996; and (O) evidence relating to the compartmentalization of intelligence operations by Cuba indicating that espionage cells operated under a different set of parameters than the Avispa network and that the goal of Avispa was what Cuba and the U.S. government's view as non-espionage-grade material.

By separate motion, movant will submit his request for discovery of such items in the interest of justice and in order to complete the story of the events pertinent to adjudication of trial and sentencing issues.

V. THE MOVANT'S ACTUAL INNOCENCE OF COUNT 3 IS ESTABLISHED BY PREVIOUSLY UNAVAILABLE EVIDENCE RELATING TO THE SHOOTDOWN, CUBA'S INTENTIONS, AND PARTICIPANT WITNESSES.

Hernandez is actually innocent of the charge of conspiracy to commit murder. He never had knowledge of a plan to commit an illegal homicide and will so testify at an evidentiary hearing in this case. In addition, he will offer testimony of (A) other witnesses explaining Hernandez's lack of knowledge relating to the shootdown plan or intent to violate the law, including people who spoke with him in this time period about a possible BTTR shootdown and the superior officers who communicated with him; (B) evidence newly discovered from Cuba demonstrating Cuba's actual intent was not to commit an unlawful killing; and (C) evidence proving that when Hernandez was tasked with responding to communications regarding Operation Venecia he believed that the subject matter was limited to that operation and did not involve him in responsibility for the shootdown of the BTTR planes. *See* Appendix B (Cuban intelligence memorandum on Operation Venecia).

VI. DENIAL OF A CHANGE OF VENUE PRECLUDED A FUNDAMENTALLY FAIR TRIAL.

For numerous reasons, including information that has come to light since the trial in this case, the denial of a change of venue *as to Count 3*, in light of the impossibility of any assurance of eradicating deep-seated biases and their impact in the course of a lengthy trial principally through voir dire directed at pretrial publicity and general attitudes about the case. Despite the extensive

nature of voir dire and even if voir dire were sufficient to satisfy the requirements of a fair venue as to other charges, voir dire, particularly in light of counsel's ineffectiveness, *see supra*, was insufficient to provide a remedy equivalent to a change of venue in light of the substantial showing of ingrained antipathy to the movant's defense. Because considering all of the factors—including those not presented in the course of the appeal relating to Count 3 concerns—confidence in the appropriateness of trial of the shootdown case in Miami as the fair means of resolving such contentious issues is so undermined as to compel that § 2255 relief be granted.

VII. THE MOVANT WAS DENIED DUE PROCESS OF LAW BECAUSE THE GOVERNMENT SURREPTITIOUSLY FUNDED A HIGHLY INCULPATORY, ANTI-CUBA PROPAGANDA CAMPAIGN IN THE COMMUNITY IN WHICH THE DEFENDANTS WERE TRIED.

The movant has alleged an unequaled violation of the premises of a fair trial where: (A) the government secretly paid highly influential journalists in the trial venue to deliver its propaganda message in the guise of objective journalism; (B) government-funded media inculpated the defendants by, among other things, purporting to link the defendants to myriad Cuban conspiracies-fictitious and otherwise-and highlighting and/or misrepresenting purported evidence against the defendants; (C) government-funded media published prejudicial evidence that the district court ruled was inadmissible; (D) the government's propaganda campaign was both prejudicial and inflammatory; (E) the government's misconduct undermined the fundamental structure of movant's trial and movant's convictions must thus be vacated; and (F) the government's misconduct created an unconstitutional probability that the movant was deprived of a fair trial.

A. Facts.

Before trial, the movant sought a change of venue, arguing that it would be impossible to receive a fair trial in a community so saturated with anti-Cuba media coverage and bias. The government vigorously opposed the motion, and the Court denied it. Unsurprisingly, the defendants were subjected to speculative and damning commentary in the media prior to and throughout their trial; journalists proclaimed the defendants' guilt in newspaper articles and over the airwaves and linked the defendants to purported Cuban plots as horrific as they were fictional. The most inculpatory evidence presented at trial saturated the media, cast in the most inculpatory light. Indeed, even evidence excluded at trial made its way to the community through the media. For example, in a piece run during the trial entitled "Cuban Spies," a news station broadcasted a Brothers to the Rescue video the defendants had successfully excluded in court earlier that day. Videotape: *Noticias 23* (WLTV-23 Local News Jan.31; Feb. 1, 2001).

More than five years after their convictions, the defendants learned that the government was not merely a beneficiary of the media assault, but also one of its underwriters. The Miami Herald first reported that the U.S. government had been paying at least ten Miami journalists—regarded as "among the most popular in South Florida"—to advance an anti-Cuba propaganda campaign. Oscar Corral, *10 Miami Journalists Take U.S. Pay*, Miami Herald, Sept. 8, 2006, at A1. Since the Reagan Administration, the U.S. government has dedicated significant resources to the promotion of democracy in Cuba, most prominently through USAID, the National Endowment for Democracy, and the Office of Cuba Broadcasting. Kirsten Lundberg, *When the Story is Us*, The Journalism Knight Case Studies Initiative, Columbia Univ., 2000 at 6-7.

The Office of Cuba Broadcasting is an administrative and marketing arm of the Broadcasting Board of Governors ("the Board"), the government agency in charge of all non-military international broadcasting sponsored by the U.S. government, including Radio Free Europe and Voice of America. The Office of Cuba Broadcasting is responsible for directing the operations of Radio and TV Martí, both of which broadcast anti-Castro propaganda to Cuba and parts of the United States, including South Florida. At the time of the defendants' trials, the U.S. government was funneling approximately $37 million to Radio/TV Martí each year, to say nothing of its numerous other anti-Castro efforts. *Id.* at 7.

Corral's article revealed that prominent Miami journalists were paid through Radio and TV Marti and were frequently featured by those programs as purportedly independent journalists delivering anti-Castro messages. *Id.* at 9. Many Miami journalists have been vocal in their disapproval of these arrangements. Two of Corral's ethics experts compared the Radio/TV Martí payments to those made by the Bush Administration to TV personality Armstrong Williams to promote No Child Left Behind, payments reviled by the public as government manipulation and bribery of the media. *Id.* As Tom Fiedler, then-Executive Editor and Vice-President of The Miami Herald said, [these journalists were] in effect giving a contribution in kind, [their] time and [their] expertise, to carry out the mission of the U.S. government, a propaganda mission." *Id.* at 11. Fiedler's distaste was well warranted, as it is now evident that the journalists' endorsement of the government's anti-Castro message on Radio/TV Martí soon bled over into their everyday reporting on the trial and the government's Cuba policy in general.

Prominent and widely-read Miami journalists were on the government payroll in the months leading up to and throughout the defendants' trial, and the stories they published asserted the defendants' guilt and/or linked the defendants to events and speculations beyond the evidence

adduced at trial. In addition to their widespread reporting on inadmissible speculation and accusation, many journalists on the government payroll published fear-mongering anti-Castro and anti-Cuba pieces during the period of trial. As Corral lamented, they "'just kind of fell in line with everything the federal government did.'" *Id.* Despite adamant efforts by the defendants, much remains unknown about the full extent of the government's media program. Yet the sparse information thus far uncovered leaves no doubt the defendants faced a government-stacked deck.

For example, Ariel Remos of Diario las Americas earned around $25,000 from the U.S. government, approximately $5,000 of which was paid during the defendants' trial. Letter from Martha Diaz-Ortiz, FOIA and Privacy Act Officer, Broadcasting Bd. of Governors, to Gloria La Riva, Nat'l Comm. to Free the Cuban Five (Mar. 11, 2009) (App. H-1). In the months leading up to the trial, she published a story in which she quoted a BTTR "legal representative" at length, characterizing him as someone with "extensive experience as a criminalist and prosecutor." Ariel Remos, *Castro Could be Arrested and Prosecuted in the United States*, Diario las Americas, Nov. 28, 1999, at 14B. Remos's expert "opine[d] that" there "'exist[ed] elements of fact and law to prosecute dictator Fidel Castro in the U.S., and to find him guilty of murder of the 4 members of [BTTR] who died in the downing of two small aircraft by MIGs of the Castro regime.'" *Id.* He further stated: "'At this very moment there are conspirators accused but not being prosecuted for the downing of the small aircraft of [BTTR] including Fidel Castro.'"

During the defendants' trial, Remos published three additional stories. The first contended that "Cuba represents a continuous challenge to the security of the US," and it reported the "surpris[e]" of a commentator "at the little attention that had been given to . . . the most important fact, among those which came up in the trial of the Cuban spies of the 'Wasp Network,'" namely, "the order of the Cuban intelligence service to one of its agents to find a place in south Florida to unload explosives and weapons," which, the article stressed, "could be chemical or bacteriological weapons." Ariel Remos, *Castro Represents a Continuous Challenge to the Security of the U.S.*, Diario las Americas, Jan. 16, 2001 at 1A.

Three days later, she claimed that "[t]hrough the trial in question it has not only become known that the Cuban regime planned to disembark arms and explosives on United States territory, but also planned the murder of prominent Cuban exiles because of their opposition to the regime." Ariel Remos, *Castro Planned the Assassination of Jesus Cruza Flor in the U.S.A.*, Diario las Americas, Jan. 19, 2001, at 1A. The "file of the trial of those from the 'Red Wasp,'" her story went on, "talks about a 'Parallel Operation' whose objective is to 'develop a series of actions" against the

CIA. *Id.* "Other Cuban exiles," she maintained, "discuss[ed] Cuban 'orders to kill in the USA and in other countries.'" *Id.* (citation omitted). The article dramatically concluded: 'It's not anything new, like having available four or five specialized men to murder in Latin America those that are believed to have betrayed guerilla movements.' Azpillaga also recalls, among other crimes committed in the south of Florida which he attributes to the Castro regime, the murder of Torriente, as well as that of the astrologer and her husband who were killed when leaving the radio station which carried her program. *Id.*

Finally, a few weeks later Remos described a letter asking the U.S. government to prosecute Cuban political leaders, noting that it "says that in the upcoming trial of five Cuban officials in Florida, evidence has come forward that the murders were premeditated." Ariel Remos, *Jeane Kirkpatrick Asks Ashcroft to Prosecute Cuban Officials for International Terrorism*, Diario las Americas, Feb. 27, 2001, at 1A. She opined that "[a]s part of the upcoming trial of the five employees of the Castro government who spied in the United States for the Castro regime, referred to in the letter headed by Dr. Kirkpatrick, the recordings of the pilots who chased the two small aircraft have come to light again in an impressive way, where they are vociferously asking for permission to down them, and having obtained it, their vulgar exclamations of satisfaction with the consummated act, after having committed the murder." *Id.*

Similarly, Wilfredo Cancio Isla, a reporter for El Nuevo Herald, earned approximately $22,000 to parrot the government's message, approximately $5,000 of which he received while the defendants were being tried. Letter from Diaz-Ortiz to La Riva (Mar. 11, 2009). Isla attributed to an unnamed defector the claim that Cuba's "Wasp network," to which [some of the] defendants allegedly belonged, was "a part of the espionage work that was conceived to infiltrate the United States on a long-term basis," along with the accusation that the Cuban government had Used hallucinogens to "modify the behavior" of agents. Wilfredo Cancio Isla, *Cuba Usó Alucigenos al Adiestrar á sus Espios*, El Nuevo Herald, June 4, 2001 at 1A. Isla also publicly advertised information about the trial to which the jury was not privy. In one of his articles, he revealed that on April 18, 2001, the prosecution had sought to block another trip by the defense to Cuba to interview witnesses on the grounds that the Cuban government was somehow controlling the defendants' trial. Wilfred Cancio Isla, *La fiscalia teme que Cuba controle el juicio a espias*, El Nuevo Herald, Apr. 19, 2001, at 15A. The prosecution did indeed express such a concern, and the jury was not present at the discussion. DE-1560:11743.

To compliment the "reporting" delivered by its paid journalists, the U.S. government enlisted the help of opinion writers. Most notably, Helen Ferre, the opinion page editor for Diario las Americas, earned at least $5,800 in total from the U.S. government, nearly $1,000 of which was paid to her during the defendants' trial. Letter from Diaz-Ortiz to La Riva (Mar. 11, 2009). During the trial, she published a piece entitled "The Totalitarian Tyranny of Fidel Castro Is Indeed a Danger for the U.S.," in which she opined that "[a]nyone who says that Cuba does not represent a danger for the cause of world democracy certainly does not understand what the concept of danger entails in the case of Cuba, or deliberately wants to favor the totalitarian tyranny of Fidel Castro which has been enslaving the Cuban people for over forty-two years and which has discredited, also causing considerable harm, the United States of America." Helen Ferre, *The Totalitarian Tyranny of Fidel Castro Is Indeed a Danger for the U.S.*, Diario las Americas, Feb. 16, 2001, at 4A.

"The Fidel Castro dictatorship has been responsible for many serious problems, many tragedies," she went on, "not only for the United States but also for many countries of this Hemisphere and also of Africa, such as the case of Angola." Id. "The American taxpayer has had to spend astronomical amounts of millions of dollars because of the presence of Castro," she protested, and "many worthy American citizens have lost their lives because of the criminal whims of the Havana regime." Id. As an "example" of these "criminal whims," she stated that "on February 24th, Castro killed four Cuban Americans whose unarmed light planes were shot down while flying in international air space." *Id.*

The list of influential journalists on the government payroll goes on. For example, Enrique Encinosa, a popular radio host on Radio Mambí, has received over $10,000 from the government since the start of the defendants' trial. Letter from Diaz-Ortiz to La Riva (Mar. 11, 2009). And Carlos Alberto Montaner, a famous exiled Cuban author and journalist with a weekly column in The Miami Herald, has received over $40,000 since the beginning of the trial. *Id.* Given the government's failure to make candid disclosures—despite its obligation to do so– the defendants have no way of knowing where this list ends.

Lest these few examples leave any doubt as to the impact of such coverage, the government itself described what was affirmatively at stake when it sought enforcement of a gag order for witnesses involved in the trial. On December 23, 2000, a Miami Herald article alleged that the FBI had intercepted Cuban radio calls indicating that the Brothers to the Rescue plane would be shot down. Gail Epstein Nieves, *Messages may have warned of shoot-down*, The Miami Herald, Dec. 23, 2000 at 1A. The article contained comment by trial witness Richard Nuccio, the advisor on Cuba

to President Clinton at the time of the shootdown, in which Nuccio expressed shock and fury that the FBI had not shared these interceptions with him. *Id.*

In its motion, the government decried the "supposed facts" alleged, as well as the "one-sidedness of the commentary." United States' Mot. To Enforce Ct.'s Directive Concerning Witness Comments to the News Media at 1-2, Dec. 26, 2000. The government disputed the facts contained in the article and complained that it had been "severely prejudiced" by the reporting. *Id.* Most importantly, however, the government's motion intimated that something additional to jury bias was at stake, admitting that

> [t]he jury in this trial has been strictly instructed not to read press accounts of the case, and there is no reason to believe that they have disregarded their instruction. Nonetheless, unbridled comment by persons who are designated witnesses in this matter, contrary to the Court's clear directives, *poses risks to the process* that none of the parties should have to endure.

Id. at 3 (emphasis added). The government's brief thus looked beyond the danger of jury bias to condemn a corruption in the trial process itself. Such a corruption actually materialized for the defendants when the government poisoned their trial venue by paying Miami's reporters to encourage anti-Cuba sentiment.

Once it came to light that the government had been paying prominent Miami journalists to participate in anti-Cuba reporting, the National Committee to Free the Cuban Five ("the Committee") launched an impressive yet ultimately thwarted FOIA effort on behalf of the defendants. The resulting FOIA request process has been an arduous, unproductive and unending one. To date, the Broadcasting Board of Governors has refused or ignored most of the components of the FOIA requests made on behalf of the Cuban Five on January 23, 2009.

In January of 2009, the Committee made a FOIA request to BBG seeking "data, contracts, memoranda, letters, alerts, correspondence, applications, bulletins, e-mails, electronic postings, reports, notes, images, balance sheets or any other materials" pertaining to "all grants, payments and/or transfers to U.S. citizens, organizations and vendors, and Cuban citizens who are employed by U.S. media communications entities in television, newspaper, radio and Internet." The request also sought "all records, including correspondence and contracts, regarding the purpose of those grants, payments and/or transfers from the BBG and OCB to those individuals, organizations and vendors." Letter from Gloria La Riva, Coordinator, Nat'l Comm. to Free the Cuban Five, to FOIA Officer, Broadcasting Bd. of Governors (Jan. 23, 2009) (App. H-2). The request encompassed records from January 1, 1996 to the present. *Id.* In addition to the record request itself, the request

sought a public interest waiver of the production fees, as well as expedited processing due to the urgent need to inform the public about possible unlawful government activity. *Id.* Finally, the Committee asked that the Board justify any denial with reference to the relevant section of the FOIA. *Id.* Realizing that the request might cover a considerable amount of information, the Committee asked the Board to prioritize the production of the contracts of 34 specific journalists, for which the Committee provided the journalist and vendor names, contract date, and contract number. Letter from Diaz-Ortiz to La Riva (Mar. 11, 2009). The Board has since stubbornly refused to comply with even this preliminary request, sometimes in the form of an explicit denial, and sometimes by ignoring the request outright.

When the Board finally responded to the FOIA request on March 11, 2009, it incorrectly characterized the list of names as a "revised request" and even then only provided cursory information for 16 of the reporters. *Id.* The requested contracts were not produced. Though these records were produced for free, no mention was made of the fee waiver or expedition requests, and the Board informed the Committee that any further name searches would incur charges. *Id.* The Committee responded on March 19, 2009, writing to protest the fee imposition, incomplete processing of the request and failure to address the fee waiver request. Despite its objections to the handling of the request, the Committee offered to pay under protest for 34 contracts it requested. *See* Letter from Mara Verheyden-Hilliard, P'ship for Civil Justice Fund, to Martha Diaz-Ortiz, Broadcasting Bd. of Governors (Mar. 11, 2009) (App. H-3). This time the Board outright ignored the correspondence—and a follow-up letter of March 31, 2009—breaching its obligation to respond to each FOIA request or appeal within 20 business days.

On May 4, 2009, the Committee submitted an appeal to the Access Appeal Committee ("AAC") of the Board, reiterating each of its previous points and renewing its requests. Letter from Mara Verheyden-Hilliard, P'ship for Civil Justice Fund, to Timi Kenealy, Chief FOIA Officer, Broadcasting Bd. of Governors (May 4, 2009) (App. H-4). Completely ignoring the Committee's offer to pay provisionally for the information relating to the 34 reporters, a June 3, 2009 letter from the Board announced a non-itemized estimate of $31,192.80 to process the entire January 23 request. Facsimile from Martha Diaz-Ortiz, FOIA and Privacy Act Officer, Broadcasting Bd. of Governors, to Mara Verheyden-Hilliard, P'ship for Civil Justice Fund (June 3, 2009) (App. H-5). That same day, the AAC issued a decision denying the fee waiver and expedited processing request, having determined that disclosure was not in the public interest. Letter from Marie Lennon, Chair, Access Appeal Comm., Broadcasting Bd. of Governors, to Mara Verheyden-Hilliard, P'ship for Civil

Justice Fund (June 3, 2009) (App. H-6). This was the first direct response to the January 2009 fee waiver and expedition requests. Again, the AAC made no mention of the 34 requested contracts and failed to estimate the production cost. This despite that, because the information on the 16 reporters' contracts was compiled from a database, contracts identified by the Committee could easily have been identified and located through a similar search with nominal cost.

In its June 26, 2009 response, the Committee reiterated its request for the specific contracts and its offer to pay for them under protest. Letter from Carl Messineo, P'ship for Civil Justice Fund, to Martha Diaz-Ortiz, FOIA and Privacy Act Officer, Broadcasting Bd. of Governors (June 26, 2009) (App. H-7). It also asked for clarification of the cost estimation and threatened litigation if this "final demand" was ignored. *Id.* Finally, the Committee even offered to reformulate its request in order to get timely production of the documents. *Id.* In a separate letter on the same day, the Committee issued a second appeal to the AAC which reiterated all of its past requests and asked for reconsideration of a fee waiver, this time as a "representative of the news media." Letter from Carl Messineo, P'ship for Civil Justice Fund, to Marie Lennon, Chair, Access Appeal Committee, Broadcasting Bd. of Governors (June 26, 2009) (App. H-8). To this end, the Committee included extensive supplementary information supporting its designation as a media representative and set forth its plan to publish and disseminate the requested subject matter. *Id.*

The Board's July 15, 2009 response arbitrarily focused on the Committee's willingness to reformulate its FOIA request. Six months after the request, the Board changed its approach and asserted that it kept records for only three to six years, and that therefore the earlier dates contained in the original request would not produce results. Facsimile from Martha Diaz-Ortiz, FOIA and Privacy Act Officer, Broadcasting Bd. of Governors, to Carl Messineo, P'ship for Civil Justice Fund (July 15, 2009) (App. H-9). Similarly, the Board for the first time asserted that the parties to the requested contracts would have to be notified and given the opportunity to object to production, citing Executive Order 12600. *Id.* The Board offered to reassess the cost after the scope was narrowed and recommended a "focus on exactly what [the Committee is] looking for." *Id.* The Board's recommendation included a suggestion that the Committee request all contracts for the period of the defendants' trial which, of course, it had done a mere four days after its initial request in January, actually requesting *specific* contracts. Most galling, the AAC again denied the fee waiver request on July 27, 2009, *citing the Committee's purported unwillingness to pay*. Letter from Marie Lennon, Chair, Access Appeal Committee, Broadcasting Bd. of Governors, to Carl Messineo, P'ship for Civil Justice Fund (July 27, 2009) (App. H-10). As to the inordinate delay, the letter asserted the

remarkable position that "[b]ecause [the Committee had] not agreed to pay the estimated costs at th[e] time, the time limits ha[d] been waived." *Id.* Whether oversight or willful ignorance of the Committee's numerous offers to pay under protest for production of the requested documents was to blame, the contention was without merit.

The Committee has since filed suit in the U.S. District Court for the District of Columbia to effect the production of its request. Additionally, the Committee submitted a newly fashioned two-pronged FOIA request (FOIA Requests "A" and "B") on January 25, 2010 in an attempt to highlight and prioritize the requested contracts. The request also reiterated its fee waiver and expedition requests. Despite having encouraged the Committee to make a more specific request, the Board thwarted this simplification attempt by aggregating the two requests to "insure proper processing fees are paid." Facsimile from Martha Diaz-Ortiz, FOIA and Privacy Act Officer, Broadcasting Bd. of Governors, to Radhika Miller, P'ship for Civil Justice Fund (Feb. 5, 2010) (App. H-11). The Board has since again denied the fee waiver requests, but on May 17, 2010 agreed to begin processing the prioritized request and to suspend payment requirements pending the outcome of the District Court ruling. Facsimile from Martha Diaz-Ortiz, FOIA and Privacy Act Officer, Broadcasting Bd. of Governors, to Radhika Miller, P'ship for Civil Justice Fund (Mar. 12, 2010) (App. H-12); Facsimile from Marie S. Lennon, Chair, Access Appeal Comm., Broadcasting Bd. of Governors, to Radhika Miller, P'ship for Civil Justice Fund (May 17, 2010) (App. H-13).

B. Argument.

1. "One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence *produced in court* and under circumstances *assuring an accused all the safeguards of a fair procedure.*" *Irvin v. Dowd*, 366 U.S. 717, 729 (1961) (Frankfurter, J., concurring) (emphases added). The United States' claim to this "rightful boast" is reflected in the Constitution's Fourteenth Amendment, which guarantees a criminal defendant due process of law. At its core, due process assures every defendant "his day in court." *In re Oliver*, 333 U.S. 257, 273 (1948). It is a promise of deceptive simplicity, for the contours of the proverbial day in court "embod[y] the fundamental conceptions of justice which lie at the base of our civil and political institutions." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

Though these fundamental conceptions are numerous and diverse, they derive from the "theory of our system" of justice, that a criminal conviction "will be induced only by evidence and argument in open court, and not by any outside influence." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (Holmes, J.); *see Estes v. Texas*, 281 U.S. 532, 540 (1965) ("Court proceedings"

conducted "for the solemn purpose of endeavoring to ascertain the truth" are "the *sine qua non* of a fair trial."); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals."). Implementing this theory "provides concrete substance for the presumption of innocence–that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." *In re Winship*, 397 U.S. 358, 363 (1970) (internal quotation omitted). The myriad rights guaranteed a criminal defendant–e.g., the "right to examine the witnesses against him, to offer testimony, and to be represented by counsel," *In re Oliver*, 333 U.S. at 273–flow from, and presuppose, realization of this promise. The very notion of a fair trial assumes convictions will rest solely upon its proceedings; protections accorded a defendant at trial are without meaning if he is also to face the government beyond the courtroom without those protections.

More fundamentally, we "protect and facilitate" the "high function" of the criminal trial from outside government influence, *Estes*, 381 U.S. at 540, in order to "safeguar[d] the liberty of the citizen against deprivation through the action of the state," *Mooney*, 294 U.S. at 112. The "balance of forces between the accused and his accusers" finds calibration only in the courtroom, *Wardius v. Oregon,* 412 U.S. 470, 474 (1973); government efforts to incriminate outside the courtroom "are apt to carry much weight against the accused when they should properly carry none," *Berger v. United States*, 295 U.S. 78, 88 (1935). Due process thus ensures that the accused must meet his accuser only in that arena. *See*, e.g., *Donnelly v. DeChristoforo*, 416 U.S. 637, 651 (1974) (Douglas, J. dissenting) ("Those who have experienced the full thrust of the power of government when leveled against them know that the only protection the citizen has is in the requirement for a fair trial."). In sum, if it requires anything at all, due process demands, as this court succinctly put it, that the government convict only with "[e]vidence [that] comes from the witness stand." *United States v. Eyster*, 948 F.2d 1196, 1207 (11th Cir. 1991).

2. It cannot seriously be disputed that a government campaign surreptitiously to fund highly prejudicial media—in the very community in which a defendant must stand trial—runs afoul of the Due Process Clause. When the government advances its case outside the courtroom, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose v. Clark*, 478 U.S. 570, 577-78 (1986) (citations omitted)**.** Because the Constitution "guarantee[s] that the accused [is] fairly dealt with and not unjustly condemned," *Estes*, 381 U.S. at 538-39, "[i]t is as much [the government's]

duty to refrain from improper methods," the Supreme Court has stressed, "as it is to use every legitimate means to bring about a just [conviction]," *Berger*, 295 U.S. at 88; *see ibid.* ("The United States is "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."); *Estes*, 381 U.S. at 540 ("[T]he primary concern of all must be the proper administration of justice." (internal quotation omitted)). The government unquestionably breaches this duty when, as here, it delivers its message of guilt directly to the community that is to sit in impartial judgment of the defendant—before and during the trial proceedings constitutionally designed and required to produce a just verdict. *E.g.*, *Berger*, 295 U.S. at 88 ("[W]hile [the government] may strike hard blows, [it] is not at liberty to strike foul ones.").

A government campaign to advance in the media an inculpatory message undermines not only the defendant's, but also "'the public's interest in fair trials designed to end in just judgments.'" *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982) (quoting *Wade v. Hunter,* 336 U.S. 684, 689 (1949)). "It is critical that the moral force of the criminal law not be diluted" and "important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt." *In re Winship*, 397 U.S. at 364. The government's strict adherence to our fundamental principles of due process is "indispensable" to these ends. *Id.* at 364; *see also Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("our system of the administration of justice suffers when any accused is treated unfairly."); *United States v. Harbin*, 250 F.3d 532, 543 (7th Cir. 2001) ("The procedures and constitutional protections afforded defendants operate to provide a fair process for adjudicating the defendants' guilt or innocence, but also to ensure that society perceives the process to be fair, thus promoting respect for the rule of law."). Thus, when the government circumvents due process safeguards, both the defendant and society at large bear constitutionally intolerable costs. *See*, e.g., *Offutt v. United States*, 348 U.S. 11, 14 (1954) (to perform its high function effectively "justice must satisfy the appearance of justice").

Whether the government officials responsible for perpetrating the media campaign intended to influence the trial or not "is irrelevant," *Eyster*, 948 F.2d at 1207; as the Supreme Court has repeatedly explained, "[t]he touchstone of due process analysis" is "the fairness of the trial, not the culpability of the [government]." *Smith v. Phillips*, 455 U.S. 209, 209 (1982). Because "[t]he principle of" due process "is not punishment of society for misdeeds of [the government] but avoidance of an unfair trial to the accused," *Brady*, 373 U.S. at 87, the "constitutional obligation"

of due process cannot be "measured by the moral culpability, or the willfulness," of the government misconduct, *United States v. Agurs*, 427 U.S. 97, 110 (1976). In short, a government media campaign that deprives a defendant of due process cannot be justified on the ground that it was advanced with good intentions, and a defendant's right to a fair trial cannot be sacrificed to advance the government's contrary objectives, however noble.

3. The defendants' convictions are fundamentally irreconcileable with the Constitution's guarantee of due process. Government-sponsored stories—printed during the trial—directly referred to, and inculpated, the defendants. *E.g.*, Ariel Remos, *Jeane Kirkpatrick Asks Ashcroft to Prosecute Cuban Officials for International Terrorism*, Diario las Americas, Feb. 27, 2001, at 1A ("[E]vidence has come forward that the murders were premeditated."); *id.* (referring to "the upcoming trial of the five employees of the Castro government who spied in the United States for the Castro regime"). Some commented on the trial, highlighting the government's "best" evidence and intensifying its effect with speculation and innuendo. *E.g.*, *id.* ("[R]ecordings of the pilots who chased the two small aircraft have come to light again in an impressive way, where they are vociferously asking for permission to down them, and having obtained it, their vulgar exclamations of satisfaction with the consummated act, after having committed the murder."); Ariel Remos, *Castro Represents a Continuous Challenge to the Security of the U.S.*, Diario las Americas, Jan. 16, 2001 at 1A. (claiming that "the most important fact, among those which came up in the trial of the Cuban spies of the 'Wasp Network'" was "the order of the Cuban intelligence service to one of its agents to find a place in south Florida to unload explosives and weapons," which, the article stressed, "could be chemical or bacteriological weapons"); *Castro Represents a Continuous Challenge to the Security of the U.S.*, Diario las Americas, Jan. 16, 2001 at 1A. ("Through the trial in question it has not only become known that the Cuban regime planned to disembark arms and explosives on United States territory, but also planned the murder of prominent Cuban exiles because of their opposition to the regime.").

Worse, the defendants were linked, as was their trial, to propaganda that painted a picture of a radical, dangerous Cuba at our shores. *E.g.*, *Castro Represents a Continuous Challenge to the Security of the U.S.*, Diario las Americas, Jan. 16, 2001 at 1A. ("Cuba represents a continuous challenge to the security of the US."). Defendants, the campaign asserted, were "part of the espionage work that was conceived to infiltrate the United States on a long-term basis." Wilfredo Cancio Isla, *Cuba Usó Alucigenos al Adiestrar á sus Espios*, El Nuevo Herald, June 4, 2001 at 1A. And their actions, readers were told, were "not anything new, like having available four or five

specialized men to murder in Latin America those that are believed to have betrayed guerilla movements," like "the murder of Torriente, and that of the astrologer and her husband that were killed when leaving the radio station that had her program," and Like "other crimes committed in the south of Florida" by "the Castro regime." Ariel Remos, *Castro Planned the Assassination of Jesus Cruza Flor in the U.S.A.*, Diario las Americas, Jan. 19, 2001, at 1A.

This inflammatory depiction of the defendants and the significance of their trial was built upon "reporting" of "facts" that were at best dubious rumor and at worst pure fiction. E.g., Ariel Remos, *Castro Planned the Assassination of Jesus Cruza Flor in the U.S.A.*, Diario las Americas, Jan. 19, 2001, at 1A (discussing a "Parallel Operation whose objective is to develop a series of actions" against the CIA And "Cuban orders to kill in the USA and in other countries" (internal quotations omitted)). And it was bolstered by vitriolic, government-purchased "opinions" voiced by leading, respected journalists in the community. "Anyone who says that Cuba does not represent a danger for the cause of world democracy," the government-sponsored campaign maintained, "certainly does not understand what the concept of danger entails in the case of Cuba, or deliberately wants to favor the totalitarian tyranny of Fidel Castro which has been enslaving the Cuban people for over forty-two years and which has discredited, also causing considerable harm, the United States of America." Helen Ferre, *The Totalitarian Tyranny of Fidel Castro Is Indeed a Danger for the U.S.*, Diario las Americas, Feb. 16, 2001, at 4A. "The American taxpayer," the campaign asserted, "has had to spend astronomical amounts of millions of dollars because of the presence of Castro," and "many worthy American citizens have lost their lives because of the criminal whims of the Havana regime." *Id.* Lest any confusion remain in the minds of the readers, that "Castro killed four Cuban Americans whose unarmed light planes were shot down while flying in international air space" was explicitly labeled an "example" of these "criminal whims." Helen Ferre, *The Totalitarian Tyranny of Fidel Castro Is Indeed a Danger for the U.S.*, Diario las Americas, Feb. 16, 2001, at 4A.

Thus, the U.S. government sponsored a media campaign—during the defendants' trial and aimed at the community in which they were tried—that both passionately asserted their guilt for the offenses at issue and linked those events to propaganda about the Cuban government that bordered on the outrageous and the hysterical. For **at least four** independent reasons, this gross deprivation of due process requires reversal of defendants' convictions.

First, though "the formalities of trial were observed," the government-sponsored media campaign that has come to light "negate[d] the fundamental conception of trial" enshrined in the

Due Process Clause. *Estes*, 381 U.S. at 564 (gathering cases). That the government has not mounted an inculpatory media campaign can safely be labeled "a requisite to the very existence of a fair trial." *Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972); *cf. Rose*, 478 U.S. at 578 ("Harmless-error analysis . . . presupposes a trial" that is fundamentally fair.). To sanction a conviction notwithstanding such a campaign is to "cas[t] the [government] in the role of an architect of a proceeding that does not comport with standards of justice," *Brady*, 373 U.S. at 88, in a drama that "tell[s] more about the power of the state than about its concern for the decent administration of justice," *Chandler v. Florida*, 449 U.S. 560, 580 (1981). It is "essential to the very concept of justice" that such a production earn no endorsement from the courts. *Lisenba v. California*, 314 U.S. 219, 236 (1942).

Second, the government's media campaign "created a constitutionally intolerable probability" of influencing the defendants' trials. *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252, 2262 (June 8, 2009); *see Estes*, 381 U.S. at 542-43 ("[A]t times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process."); *In re Murchison*, 349 U.S. 133, 136 (1955) ("[O]ur system of law has always endeavored to prevent even the probability of unfairness."); *cf. Eyster*, 948 F.2d at 1207 ("Implying the existence of additional evidence not formally before the jury severely impairs the *likelihood of a fair trial*." (emphasis added)). *Caperton* is highly instructive. In *Caperton*, the Supreme Court asked whether the Due Process Clause might "bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Caperton*, 129 S.Ct. at 2265 (internal quotation omitted).

It answered yes; an "unconstitutional potential for bias," the Court held, arises when "there is a serious risk of actual bias-based on objective and reasonable perceptions." *Caperton*, 129 S.Ct. at 2263 (internal quotations omitted). Despite "[t]he difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one," the Court reaffirmed the general rule that "most matters relating to judicial disqualification," such as "kinship, personal bias, state policy, [and] remoteness of interest," do not "rise to a constitutional level" in the absence of proof of actual bias. *Id.* at 2259 (internal quotation omitted). However, it also recognized that "objective standards" also "require recusal" when circumstances "pos[e] such a risk of actual bias or prejudgment that the [government] practice must be forbidden if the guarantee of due process is to be adequately implemented"—"whether or not actual bias exists or can be proved." *Id.* at 2255, 2265 (internal quotation omitted). Finding present in the case before the Court "circumstances in which experience

teaches that the probability of actual bias" is "too high to be constitutionally tolerable," the Court concluded "as an objective matter" that the movant had been deprived due process of law. *Id.* at 2259 (internal quotation omitted).

Similarly, when it insists upon mounting a prosecution in the very community in which it is simultaneously funding an inculpatory media campaign, The government creates "such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Caperton*, 129 S.Ct. at 2255 (internal quotation omitted). As with judges, the "ascertainment of [the jury's] mental attitude of appropriate indifference" is at best a difficult task not susceptible to a "formula." *Irvin*, 366 U.S. at 724-25 (quotation omitted). Indeed, even if a "juror was sincere when he said that he would be fair and impartial," he may in fact harbor "deep and bitter prejudice," as "the psychological impact requiring such a declaration [of impartiality] before one's fellows is often its father." *Id*. at 728 (quotation omitted). Nonetheless, as he must for judges, a defendant challenging a juror's bias must generally "sho[w] the actual existence of [a predisposition] in the mind of the juror" in order to "raise the presumption of partiality." *Id.* at 723. Critically, however, as is true of the general rule governing judicial recusal, The Supreme Court's "adoption of [this] rule" of jury bias does not, and could not, "foreclose inquiry as to whether, in a given case, the application of [the] rule works a deprivation of the prisoner's life or liberty without due process of law." *Id*. at 723 (internal quotations omitted). That is, "in the light of [other] circumstances," *id.* at 728, due process may demand more than the lack of proof of actual bias; a government practice may be "so inconsistent with the conception of what a trial should be and so likely to produce prejudice" that it is "unconstitutional even though no specific prejudice [is] shown." *Estes*, 381 U.S. at 562.

It is difficult to imagine government misconduct that would more directly raise "objective and reasonable perceptions" of unfairness, *Caperton*, 129 S.Ct. at 2263, than the government media campaign that has come to light. This is not simply a case of prejudicial news coverage; it concerns a media "plan [that] was carried out with the active cooperation and participation of the [government]." *Rideau v. Louisiana*, 373 U.S. 723, 725 (1963). The federal government spent as much as hundreds of thousands of dollars to advance an anti-Cuba propaganda campaign in the very community in which the defendants were to be tried. A considerable portion of that money was spent during the trial itself. In exchange for government funding, "the most popular [journalists] in South Florida" wrote scathing pieces that not only inculpated the defendants in the crimes for which they were charged, but also tied them to decades of purported Cuban wrongdoing, implicated them

in vast conspiracies, and heaped upon them the prejudice of rumors and speculation. In such circumstances, due process cannot tolerate the suggestion that "reversal is inappropriate . . . because the jury that actually sat was impartial, based on the fiction that the challenges for cause eliminated all biased jurors." *Harbin*, 250 F.3d at 549.

Third, the deprivation of due process at issue "unquestionably qualifies as 'structural error'" because it results from government misconduct "with consequences that are necessarily unquantifiable and indeterminate." *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993). As the Supreme Court has held on numerous occasions, A finding of structural error may "rest . . . upon the difficulty of assessing the effect of the error." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 (2006) (citing *Waller v. Georgia,* 467 U.S. 39, 49, n.9 (1984) (violation of the public-trial guarantee is not subject to harmlessness review because "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance"); *Vasquez v. Hillery,* 474 U.S. 254, 263 (1986) ("[W]hen a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained")). Each defendant "cannot put his finger on [the] specific mischief" caused by the government "and prove with particularity wherein he was prejudiced," and some aspects of the "actual unfairness" caused are "so subtle as to defy detection by the accused or control by the judge." *Estes*, 381 U.S. at 544-45; cf. *Caperton*, 291 S.Ct. at 2261 ("what degree or kind of interest is sufficient to disqualify a judge from sitting cannot be defined with precision." (internal quotation omitted)). But the "untoward circumstances" that have been uncovered "are inherently bad," and "prejudice to the accused [must be] presumed," *Estes*, 381 U.S. at 544, because "[h]armless-error analysis in [this] context would be a speculative inquiry into what might have occurred in an alternate universe," *Gonzalez-Lopez*, 548 U.S. at 150.

Fourth, if reversal is not always required when government misconduct of the type at issue here is demonstrated, "the specific circumstances presented by the case" certainly warrant it. *Caperton*, 129 S.Ct. at 2262. "[T]he 'totality of circumstances'" may "le[ad] to a denial of due process." *Chandler*, 449 U.S. at 574, n.8; *see also*, e.g., *Murphy v. Florida*, 421 U.S. 794, 799 (1975) (referring to "indications in the totality of circumstances that [a] trial was not fundamentally fair"); *Estes*, 381 U.S. at 544 (describing cases where "circumstances were held to be inherently suspect," requiring automatic reversal). And the "nature, context, and significance of [a] violation" of due process "may determine whether automatic reversal ... is appropriate." *Harbin*, 250 F.3d at 544 (internal quotation omitted) (citing *United States v. Pearson,* 203 F.3d 1243, 1261 (10th Cir.

2000); *Yarborough v. Keane,* 101 F.3d 894, 897 (2d Cir.1996)); *see also Hegler v. Borg,* 50 F.3d 1472, 1476 (9th Cir.1995).

In this case, the government's media campaign contributed to coverage of defendants' trial that was inflammatory, pervasive and persistent. "In the overwhelming majority of criminal trials," the Supreme Court has explained, "publicity presents few unmanageable threats to" due process. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 551 (1976). However, when a "criminal case . . . generates a great deal of publicity" there is "a heightened risk that "the right of the defendant to a fair trial" will be "compromise[d]," and as a result, "courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law." *Chandler*, 449 U.S. at 574.

This case was "a 'sensational' one," *Nebraska Press*, 427 U.S. at 551; it concerned events "widely known throughout the community" and there was "Massive pretrial publicity," which "emphasized the notorious character" of the crimes "and, therefore, set [it] apart in the public mind as an extraordinary case or, as Shaw would say, something 'not conventionally unconventional.'" *Estes*, 381 U.S. at 535-36, 538; cf. *Caperton*, 129 S.Ct. at 2263 ("Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case."). Indeed, the extent of the prejudicial publicity was cataloged in detail in pleadings before and during the trial—including, for example, a motion by the government for a gag order—and several judges of the Eleventh Circuit concluded that the volume and character of the coverage was constitutionally problematic. *See United States v. Campa*, 419 F.3d 1219, 1223 (11th Cir. 2005) (*Campa* I)("pervasive community prejudice against Fidel Castro and the Cuban government and its agents and the publicity surrounding the trial and other community events combined to create a situation where [the defendants] were unable to obtain a fair and impartial trial"), *overruled* by *United States v. Campa*, 459 F.3d 1121 (11th Cir. 2006) (*en banc*).

Moreover, by surreptitiously paying purportedly objective journalists to deliver its message, the government fraudulently imbued that message with unearned and unwarranted reliability. As the Supreme Court has recognized, the mainstream media's service as "[a] responsible press" is "documented by an impressive record of service over several centuries," and has made it a "handmaiden of effective judicial administration, especially in the criminal field." *Nebraska Press*, 427 U.S. at 559-60. In short, people rightly place trust in the reports of mainstream media—certainly, they assume that it delivers objective reporting consistent with basic ethical standards, not the unattributed press releases of the federal government.

However, as this case went to trial, and during that trial, the government bought the public trust in secret deals with unethical reporters, and it abused that trust, by design, to cloak its propaganda in the garb of the journalist. The government's conduct "resulted in a public presentation of only the State's side of the case" in media considered objective and reliable by the community. *Estes*, 381 U.S. at 551. Articles presented as "largely factual" were, in fact, both "invidious [and] inflammatory." *Murphy*, 421 U.S. at 801, n.4.

In sum, if due process means anything, it guarantees that the government cannot mount a propaganda campaign that assumes a defendant's guilt; ties him to decades of international tensions; smears him with rumors, speculation, innuendo and fiction; and inflames community passions—while it simultaneously prosecutes that defendant. For this reason, the movant's convictions must be vacated.

4. At the very least, the defendants are entitled to an evidentiary hearing and to insist that the government prove that its deprivation of their due process rights did not cause prejudice. Pursuant to 28 U.S.C. § 2255, a habeas petitioner is entitled to an evidentiary hearing "[u]nless the [Section 2255] motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." As the Eleventh Circuit has made clear, "[a]lthough . . . a district court is not required to hold an evidentiary hearing where the petitioner's allegations are affirmatively contradicted by the record," "if the petitioner 'alleges facts that, if true, would entitle him to relief, then the district court should order an evidentiary hearing and rule on the merits of his claim.'" *Aron v. United States*, 291 F.3d 708 (11th Cir. 2002).

The movant has alleged—and both newspaper reports and government records confirm—that the federal government spent tens (and perhaps hundreds) of thousands of dollars to mount an anti-Cuban propaganda campaign that prejudged movant's guilt and sought to bolster the case against them with arguments and evidence not adduced at trial. These allegations are neither "affirmatively contradicted by the record" nor "patently frivolous," *Aron*, 291 F.3d at 715; to the contrary, they implicate the government in a pervasive and systematic effort to deprive the defendants of their rights under the Due Process Clause. An evidentiary hearing is warranted to allow movant to further develop these allegations and counter any arguments by the government concerning prejudice from the government's attempts to sway their trial.[26]

[26] An evidentiary hearing is particularly appropriate given steadfast government resistance of efforts to obtain more information as to payments to journalists via the Freedom of Information Act.

VI. THE MOVANT'S DUE PROCESS AND FAIR TRIAL RIGHTS WERE VIOLATED BY THE GOVERNMENT'S ABUSE OF THE CIPA PROCESS AND ITS FAILURE TO COMPLY WITH *BRADY* AND THE GOVERNMENT UNDERMINED THE EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE.

The government's withholding of material evidence in relation to claims of national security and the use of the CIPA process skewed the totality of the evidentiary presentation. The movant's rights of due process and procedural fairness under CIPA were at issue where, over his objection, an *ex parte*, in camera CIPA hearing to determine the discoverability and admissibility of the large volume of classified information involved in this prosecution left the government in a position to control the flow of essential evidence needed to complete the telling of the story pertinent to the movant's knowledge and intent and the surrounding circumstances under which his actions should be judged. Because the movant and his counsel (who had received the appropriate security clearance to review the classified information) were excluded from the process, and the Court was placed in the position of relying on the government's good faith, the movant was deprived of the constitutional right to present a defense in that he was denied the opportunity to identify and seek to introduce classified materials that were favorable to the defense at trial and at sentencing.

For example, the government's manipulation of the CIPA regime prevented the movant from establishing the existence of a number of classified high frequency messages, as well as other classified communications, that undermined and contradicted the government's theory of prosecution as to Count 3. Had movant known of the existence of these high frequency messages (it was later known that the government disclosed only 44 out of approximately 350 intercepted messages) and the additional classified communications, he would have sought to introduce them into evidence to show that he had no knowledge that the government of Cuba intended to illegally shoot down the Brothers to the Rescue aircraft.

Notwithstanding its well-established *Brady* obligations, and based on its abuse of the CIPA process, the government failed to provide discovery or inform the movant of the existence of the large number of high frequency messages (over 300) and other classified communications, many of which were favorable to movant at trial and sentencing. The government failed to disclose the existence of several classified high frequency messages that clearly illustrated the differences between Operations Escorpion, Venecia, and Giron, which involved distinct innocuous activities that the government successfully and unfairly portrayed as mere components of a single unified

operation to destroy the Brothers to the Rescue aircraft and commit murder. Movant has recently been able to identify at least ten classified high frequency messages and other communications that should have been disclosed pursuant to CIPA and the government's *Brady* obligations. Had the government complied with its *Brady* obligations and turned over the set of favorable and exculpatory high frequency messages and other classified communications, movant would have been able to place the messages the government did turn over and introduce into evidence at trial in their proper context and show that movant Hernandez did not knowingly and willfully participate in the alleged Count 3 conspiracy to commit murder.

The Classified Information Procedures Act, 18 U.S.C. App III ("CIPA") was enacted in 1980 to regulate the use classified information in criminal trials. CIPA did not alter the obligations of the government or diminish the discovery rights of defendants. *See, e.g., United States v. Johnson*, 139 F.3d 1359, 1365 (11th Cir. 1998) ("CIPA has no substantive impact on the admissibility or relevance of probative evidence"); *United States v. Noriega,* 117 F.3d 1206, 1215 (11th Cir.1997); *United States v. Baptista-Rodriguez,* 17 F.3d 1354, 1363-64 (11th Cir.1994). Instead, CIPA was designed to create a procedural framework in which the use of classified information in trials could be regulated. *United States v. Smith*, 780 F.2d 1102, 1105 (4th Cir. 1985).

On December 15, 1998, ostensibly pursuant to CIPA Section 4, the government filed a motion to set an *ex parte, in camera* hearing to address discovery issues concerning the large volume of classified information involved in this prosecution. The Court promptly granted the government's request, describing the proceeding to be held as a "meeting," rather than a "hearing." *See* DE-158; DE-181. On April 16, 1999, upon receiving the security clearances that allowed defense counsel to review the classified materials, Mr. Hernandez and his co-defendants filed a motion to reconsider the Order granting an *ex parte* hearing. *See* DE-210; DE-219. Defendants were particularly worried that questions concerning the relevance of certain materials would be unfairly resolved against them without their input. Mr. Hernandez and his co-defendants expressly argued that the Court "*should have the benefit of defendants' views* on the admissibility of evidence before making evidentiary rulings that will affect trial." DE-210:3. This was "particularly true," defendants contended, "given that the *government may not understand the defendants' theory of defense* (especially at this early stage in discovery), or given the *government's traditionally narrow view of its Brady obligations.*" *Id.* (emphasis added). As the Supreme Court stated in *United States v. Dennis*, 384 U.S. 855, 875 (1966), "[i]n our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate." Thus, requesting

reconsideration of the setting of an *ex parte* hearing, the defendants argued that "counsel should be heard as to what is relevant and, therefore, discoverable." DE-219.

The Court denied reconsideration, *see* DE-232, and the *ex parte*, *in camera* Section 4 "meeting" or "hearing" was held on May 26, 1999. DE-247. Important decisions concerning discoverability and admissibility of classified information were made at the lengthy *ex parte* proceeding that day. Although defense counsel have never received any information concerning what actually took place on May 26, 1999, the gnawing belief that potentially helpful information may have been kept from the defendants as a result of the government's one-sided presentation was confirmed during trial, when it became apparent that only a few of numerous intercepted high frequency messages relevant to this prosecution had been turned over to Mr. Hernandez and his co-defendants. For example, government witness Myron Broadwell, an official at the facility that intercepted and stored the high frequency messages, testified that he created a disc containing *approximately 350* intercepted high frequency messages. DE-1483:2561.

Prior to trial, however, the government had only provided the defendants with approximately 50 of those messages, and *only introduced 40* such messages into evidence at trial. *See* GX HF-152 (copy attached). The discovery that the defendants had only been shown the tip of the iceberg as far as high frequency messages were concerned resulted in Mr. Hernandez filing a "*Brady* Motion for Disclosure of Classified High Frequency Messages," specifically requesting production of any *"additional high frequency messages that are in existence"* and relevant to Count 3. *See* DE-1138 (emphasis added). The government expressly responded that there were "no [additional] high frequency classified messages that contain arguable *Brady v. Maryland* material on the issues that go to Count 3 of the Indictment," DE-1149, and the motion was denied.

The disturbing realization that Mr. Hernandez and his co-defendants had been provided with only a fraction of pertinent classified information also resulted in the defendants filing a post-trial motion for a transcript or other disclosure of what had transpired at the *ex parte* proceeding. *See* DE-1622; DE-1624; DE-1639. That motion was denied as well. DE-1676**.** On appeal, Mr. Hernandez argued that his constitutional right to due process of law was violated, in part, by the holding of the *ex parte* proceeding. CIPA expressly provides only that the government may be permitted to submit an *ex parte*, *in camera* written request for authorization to suppress or substitute classified information. Furthermore, the very statutory language that authorizes *ex parte* submissions underscores that *ex parte* submissions are neither automatic nor necessarily the norm:

> 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. If the court enters an order granting relief following such an ex parte showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

18 U.S.C. App. 3, § 4 (emphasis added).

The conditional language used to authorize the *ex parte* submissions amply demonstrates that Section 4 also contemplates the possibility that defense counsel will participate in such a hearing. Thus, in *United States v. Rezaq*, 156 F.R.D. 514 (D.D.C. 1988), the court denied the government's request for an *ex parte* CIPA hearing. In doing so, the court heavily relied on the fact that *ex parte* hearings are disfavored and that the government had failed to articulate why defense counsel's presence would prejudice the government. *Id*. at 526. However, the court did prevent the defendant from viewing the government's CIPA submissions. In deciding to shield the government's submissions the court was especially concerned that much of the classified matters that were the subject of the Section 4 hearing were documents the defendant had never seen.

Here, the Eleventh Circuit held that the district court did not err in conducting the *ex parte* proceeding at which decisions concerning the discoverability and admissibility of classified information were made. *See Campa* III, 529 F.3d at 994. The Court held that ordinarily, and especially with respect to arguably *Brady* materials, it is the government alone that decides whether materials in its possession must be turned over to the defense. "[B]are assertions" by the defense that "they did not receive unspecified information" were insufficient to establish a discovery violation, the Court observed. *Id.* at 996. "Unless the defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final" *Id*. at 995 (*quoting Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987)).

Well, newly discovered evidence has now made it clear that the defendants' early worries were justified and that the *ex parte* proceeding operated to deprive Hernandez of a great deal of information and materials necessary to his defense on Count 3. In particular, *newly discovered evidence that has always been in the government's possession* plainly shows that Operations Venetia (or Venecia) and Escorpion were entirely distinct operations having entirely distinct origins and objectives, and that they were not, as the government charged in the Indictment and argued to the jury, simply two components of an overarching, unlawful plan to shoot down BTTR aircraft.

The newly discovered evidence which the government failed to turn over to the defendants consists of several high frequency messages and other communications between Hernandez (a/k/a

"Giro") and other Cuban agents in the United States, and their superiors in Cuba. As shown in greater detail below, the newly discovered evidence shows that Operation Venetia concerned *only* the safe return of Juan Pablo Roque (a.k.a. "German" or "Vedette") to Cuba on February 23, 1996; *i.e.,* one day prior to the date of the shootdown. Contrary to the government's repeated suggestions at trial, Operation Venecia had *nothing* to do with the "confrontation" with BTTR on February 24. Responding to the BTTR incursions into Cuban airspace was the subject of Operation Escorpion. Simply put, the newly discovered evidence belies the government's theory of prosecution, succinctly stated in closing argument by the lead prosecutor, that Operations Escorpion, Venecia, and Giron "are interlinked and they *cannot be separated*." DE-1581:14072 (emphasis added); *see also* Indictment at DE-224 at 14-16 (intermixing Operations Venetia and Ecorpion as to Count 3).

It was extremely important to Hernandez at trial to have the jury understand the differences between operations Escorpion and Venecia. It was also extremely important to be able to show that he was *much more deeply involved* in the plan to return German successfully to Cuba ("Venetia") than in any plan to respond to BTTR's continued unlawful incursions into Cuban airspace ("Escorpion"). (Indeed, it is undisputed that Hernandez was in Cuba and not in Miami to participate in Operation Escorpion throughout most of the relevant time period.)

The need to have the jury correctly understand the differences between the two operations was especially acute because of how the government emphasized and mischaracterized one particular communication from Mr. Hernandez to the Cuban authorities concerning the events in February 1996. Thus, sometime after German's successful return to Cuba had been accomplished, but also sometime after the shootdown of the BTTR aircraft had occurred, Mr. Hernandez wrote the following: "Message No. 10 ABOUT 46. IT'S A GREAT SATISFACTION AND SOURCE OF PRIDE TO US THAT *THE OPERATION* TO WHICH WE CONTRIBUTED A GRAIN OF SALT *ENDED SUCCESSFULLY*." GX:DG127 (emphasis added).

At trial, the government was able to convince the jury that Mr. Hernandez's reference to the "operation" which "ended successfully" and for which he was admittedly proud was a reference to Operation Escorpion, which involved the "confrontation" with BTTR and formed the basis of Count 3. On appeal, the Court of Appeals also attached great weight to this piece of evidence and the government's misinterpretation of it in affirming Mr. Hernandez's conviction on Count 3. Indeed, the Court expressly held that "the correspondence from Hernandez written after the shootdown that recognizes that the operation 'ended successfully' *establishes Hernandez's guilt*." *Campa* III, 529

F.3d at 1010 (emphasis added). Similarly, the Court found that "Hernandez's statement after the shootdown that the operation ended successfully *alone allows a finding by a reasonable jury that the conspirators intended to commit an unlawful killing.*" *Id.* at 1011 (emphasis added).

The messages the government failed to produce would have helped Mr. Hernandez demonstrate to the jury that the "operation" he was proud had "ended successfully" was actually Operation Venecia, solely involving German's return to Cuba on February 23, 1996, rather than Operation Escorpion, involving a "confrontation" with BTTR the following day. Without the additional messages and communications, the government was able to convince the jury and the Court of Appeals that the praise and recognition Mr. Hernandez actually received for his involvement in the plan to return German to Cuba was recognition for his role in carrying out the unlawful shootdown. *See* GX HF136-G3 (Giraldo receiving recognition by head of D.I.).

The following is a list of several communications, including high frequency messages, which the *government possessed at the time of trial and did not turn over* to the defendants, which would have allowed Mr. Hernandez to show the jury the distinct and independent long trajectory of Operation Venecia, which "ended successfully" on February 23, 1996, when German arrived in Cuba. These additional communications also illustrate Mr. Hernandez's much greater involvement in Operation Venecia than in Escorpion. The government's failure to produce the contacts summarized below deprived Mr. Hernandez of his right to present a defense to the principle charge against him, which resulted in a term of life imprisonment:

– Report dated November 30, 1993, reflecting agent Roman's contact with German, in which German asks when he will be allowed to return to Cuba;

– Message No. 40, dated August 10, 1994, from A-4, reflecting A-4's contact with German on August 9, in which German states that he wishes to return to Headquarters and that his decision is irrevocable;

– Message No. 57, dated August 18, 1994, from Headquarters to A-4, informing him that the various possible scenarios for German's return to Cuba will be delivered by mail;

– Mailing dated August 29, 1994, from Headquarters to A-4, analyzing German's return to Cuba;

– Report dated September 22, 1994, reflecting A-4's contact with German, in which A-4 explains Headquarters' decision concerning German's return to Cuba, and the three scenarios that were being contemplated;

– Report dated November 27, 1994, reflecting Giro/A-4's contact with German, in which German explains that everything will soon be ready for his return and that the operation for his return may be completed in January 1995;

– Instructions dated April 21, 1994, but delivered between April 27 and April 30, reflecting Headquarters' communications with Giro, informing him that German's return to Cuba has been approved, and explaining how the plan is to be executed, and describing steps that need to be taken before German's return;

– Message No. 49, dated April 13, 1995, from Giro to Headquarters, stating that German was desperate because he had been told that he would be returning before the wedding;

– Report dated November 5, 1995, reflecting meeting between A-4 and German, in which German states that: "I am ready to leave. I want to be in Cuba by February 26, 1996, my son Alejandro's birthday." German also states he has absolutely made up his mind to return to Cuba;

– Report dated November 21, 1995, reflecting meeting between A-4 and German, during which German delivers a letter in which he states that he will be in Cuba on February 26, 1996.

These documents, which have never been produced by the government despite the repeated *Brady* requests of Mr. Hernandez and his co-defendants, show that the planned return of Mr. Roque to Cuba (i.e., Operation Venetia) originated well before Operation Escorpion was ever conceived, and had nothing to do with the confrontation with BTTR. Had Mr. Hernandez been provided with this information he has only recently discovered on his own, he would have been able successfully to debunk the government's claim at trial that Operations Venetia and Escorpion were essentially identical ("interlinked" and inseparable, according to the government) and revolved around the shooting down of the BTTR aircraft.

Because it was able to blur the distinctions between the two independent operations, the government at trial successfully relied heavily on a series of carefully selected high frequency messages, most dealing with Operation Venetia, to establish Mr. Hernandez's role in the shootdown of the BTTR aircraft on February 24, 1996. By blurring the fundamental distinctions between the two operations, the government was able to mislead the jury, and later the Court of Appeals, into believing that Mr. Hernandez's important and celebrated role in Operation Venetia reflected his central role in the government of Cuba's decision to shoot down the BTTR aircraft.

Nothing, however, could have been further from the truth. As the previously-undisclosed messages and classified reports of meetings between A-4 or Giro and German demonstrate, Operation Venetia had nothing to do with the BTTR shootdown. It dealt solely with Mr. Roque's long-awaited return to Cuba. Furthermore, there is no telling how many *other* pertinent communications also favorable to Mr. Hernandez remain undisclosed by the government and undiscovered by Mr. Hernandez.

The extent of the government's breach of its *Brady* obligations goes beyond its failure to disclose the various high frequency messages and other classified communications identified here. It also includes the government's failure to provide particular materials and information that would have allowed Mr. Hernandez to place other messages in their correct context and, therefore, present them in a favorable light. For example, at trial the government introduced into evidence a declassified high frequency message dated June 7, 1996, that stated, in pertinent part, that "ON JUNE 6, GIRO AND CASTOR WERE PROMOTED TO CAPTAIN … CONGRATULATIONS." *See* GX HF-140-G-3. The government relied on that post-shootdown message, in conjunction with the other post-shootdown messages congratulating Mr. Hernandez on the successful conclusion of the operation the government claimed involved the "confrontation" with BTTR, to suggest that Mr. Hernandez had been promoted to Captain *because* of his role in Operation Escorpion. *See* Indictment at p. 16 (alleging in Count 3 that Giro was promoted to Captain on June 6, 1996, in connection with his role in the shootdown).

VIII. THE TOTALITY OF FIFTH AND SIXTH AMENDMENT VIOLATIONS COMPELS RELIEF.

Government actions to secure the conviction in this case, including discovery violations and the presentation of unfairly prejudicial evidence and argument violated the defendant's right to due process of law and a fundamentally fair trial. A criminal defendant has right to due process of law in a trial untainted by unfair prejudice. A § 2255 movant is entitled to relief based on such constitutional violations. Section 2255 provides for "an independent and collateral inquiry into the validity of the conviction." *United States v. Hayman*, 342 U.S. 205, 222 (1952). The "provision of federal collateral remedies rests … upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief." *Kaufman v. United States*, 394 U.S. 217, 226 (1969); *id.* at 228 ("Congress has determined that the full protection of [a defendant's] constitutional rights requires the availability of a mechanism for collateral attack."). The "established standards of collateral attack" were described

in *United States v. Addonizio*, 442 U.S. 178, 185-86 (1979), as being challenges to the validity of the conviction or sentence because of jurisdictional, constitutional, or other fundamental errors in the proceedings. In the movant's case such errors include the right to disclosure of potentially exculpatory and otherwise material evidence, without unfair attacks by the government in its presentation of inflammatory evidence and argument—turns on establishing cause and prejudice for the failure to previously raise such claims and for reconsideration, such as based on newly discovered evidence, of claims previously addressed on direct appeal.

IX. MOVANT'S RIGHT TO AN EVIDENTIARY HEARING AND REASONABLE DISCOVERY.

In establishing the right to an evidentiary hearing, Section 2255 states that "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall [upon notice to the government] grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. § 2255. *See* Advisory Committee Note, Rule 8, Rules Governing § 2255 Proceedings (showing statutory intent to incorporate the standards governing evidentiary hearings in habeas corpus cases articulated in *Townsend v. Sain*, 372 U.S. 293, 312 (1963)).[27]

In *Townsend*, the Supreme Court held that an evidentiary hearing must be held: (1) if the prisoner alleges facts that, if true, would warrant relief; and (2) the relevant facts have not been reliably found after a full and fair hearing. *Id.* Proof of facts alleged in the motion is not required in order to show entitlement to a hearing. *Aron v. United States*, 291 F.3d 708, 715 n.6 (11th Cir. 2002) (emphasizing that "petitioner need only allege—not prove" facially valid claim).

Once the movant has alleged facts which, if true, would entitle him to relief, a hearing is required where: (1) the district court did not resolve the merits of the factual dispute in a full and fair hearing; (2) the district court determined the facts, but that determination is not fairly supported by the record; (3) the district court determined the facts, but the procedure was inadequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) material facts were not adequately developed in prior federal proceedings; and (6) if, for any other reason, the district court did not provide the movant with a full and fair hearing on the merits. *See Townsend*, 372 U.S. at 313.

[27] The Advisory Committee Note states: "The standards for § 2255 hearings are essentially the same as for evidentiary hearings under a habeas petition, except that the previous federal fact finding proceeding is in issue rather than the state's."

Thus, unless the relevant facts have been reliably found at a full and fair hearing and those facts conclusively show the movant is not entitled to relief, a hearing is required. *See Fontaine v. United States*, 411 U.S. 213, 215, 93 S.Ct. 1461, 1463 (1973) (relying upon § 2255's language to reverse summary dismissal and remanding for hearing where record did not "'conclusively show' that under no circumstances could the petitioner establish facts warranting relief under § 2255"); *Aron*, 219 F.3d at 715 n.6 ("If the [movant's] allegations are not affirmatively contradicted by the record and the claims are not patently frivolous, the district court is required to hold an evidentiary hearing. It is in such a hearing that the [movant] must offer proof"); *Arredondo v. United States*, 178 F.3d 778, 782, 788-89 (6th Cir. 1999) (hearing required because movant's allegations were not "contradicted by the record, inherently incredible, or conclusions rather than statements of fact").

As a result, a hearing is generally required if the motion presents a colorable claim that arises from matters outside the record. *See United States v. Magini*, 973 F.2d 261, 264 (4th Cir. 1992) (hearing is necessary"where material facts are in dispute involving inconsistencies beyond the record"); *Shah v. United States*, 878 F.2d 1156, 1158 (9th Cir. 1989) (need for evidentiary hearing focuses on whether motion is "based on alleged occurrences outside the record").

It is settled law that resolution of factual disputes on which the merits of a claim hinge must be resolved by hearing. *United States v. Jolly*, 252 Fed.Appx. 669 (5th Cir. 2003). A hearing is required if the motion presents a colorable claim that arises from matters outside the record. *See United States v. Magini*, 973 F.2d 261, 264 (4th Cir. 1992) (hearing is necessary"where material facts are in dispute involving inconsistencies beyond the record"); *Shah v. United States*, 878 F.2d 1156, 1158 (9th Cir. 1989) (need for evidentiary hearing focuses on whether motion is "based on alleged occurrences outside the record"). *See Gallego v. United States*, 174 F.3d 1196, 1198 (11th Cir. 1999) (movant's assertions, even where not bolstered by defense counsel, require a § 2255 evidentiary hearing so that credibility determinations can be made). Merely assuming the affidavit of trial counsel to be false is improper. *Harris v. Dugger*, 874 F. 2d 756, 761 n.4 (11th Cir. 1989) (absent evidence to the contrary, "we do not, and cannot, second guess the credibility" of trial counsel's statements regarding the representation.); *cf. United States v. Espinosa-Hernandez*, 918 F.2d 911 (11th Cir. 1991) (providing for right of discovery as to motion for new trial based on presentation of false evidence relating to informant and agent misconduct).

Denial of access to fundamental underlying historical records, such as the geographic and message evidence in this case, that permit the movant to conclusively establish his claim is reversible error. *See Hansen v. United States*, 956 F.2d 245, 248 (11th Cir. 1992) (reversing denial

of post-conviction movant's request for access to "original sound tapes of the sentencing proceeding"). Where the movant has made a showing that the records are necessary to the resolution of an issue or issues he has presented in a non-frivolous pending collateral attack, there is plainly good cause for discovery. *Id.*)"We agree with the Seventh Circuit that prisoners have a right of access to the court files of their underlying criminal proceeding." (citing *Rush v. United States*, 559 F.2d 455, 459-60 (7th Cir.1977)). Thus, the Third Circuit has held that mere doubt as to whether a tape will show alteration is not a basis to excuse counsel's failure to undertake a forensic examination of an undercover recording. *United States v. Baynes*, 687 F.2d 659 (3d Cir.1982) (granting relief under § 2255 based on failure to obtain scientific examination of contested audiotape; "mere possibility that investigation of the exemplar might ... have produced nothing of consequence for the defense cannot serve as a justification for the failure to perform such an investigation in the first place").

While the grant or denial of a request for discovery in collateral proceedings generally is discretionary, *Bracy v. Gramley*, 520 U.S. 899, 909, 117 S.Ct. 1793, 1799 (1997), an abuse of discretion is shown where a petitioner demonstrates good cause for the discovery request. *Arthur v. Allen*, 459 F.3d 1310, 1310-11 (11th Cir. 2006) ("Good cause is demonstrated 'where specific allegations ... show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he ... is entitled to relief.'") (quoting *Bracy*, 520 U.S. at 908-09; *Harris v. Nelson*, 394 U.S. 286, 300 (1969)).

Similarly, the Fifth Circuit has held that although it is generally within a district court's discretion to grant or deny discovery requests in habeas proceedings, a court's denial of discovery is an abuse of discretion if discovery is "indispensable to a fair, rounded, development of the material facts." *East v. Scott*, 55 F.3d 996, 1001 (5th Cir.1995) (quoting *Townsend v. Sain*, 372 U.S. 293, 322, 83 S.Ct. 745, 762 (1963)); *accord Toney v. Gammon*, 79 F.3d 693, 700 (8th Cir. 1996) (recognizing that district court must allow discovery where petitioner's specific allegations, if developed, provide reason to believe that the petitioner may be entitled to relief). Application of these straightforward standards in this case establishes the need for discovery.

CONCLUSION

For all of the reasons expressed in this memorandum as well as its attachments, and for the reasons articulated in the motion for relief under 28 U.S.C. § 2255, Gerardo Hernandez prays that the Court will grant him relief from his convictions and life sentences in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on October 12, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/ *Richard C. Klugh*
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