IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 01-17176-BB, 03-11087-BB

United States of America,

Appellee,

- versus -

Gerardo Hernandez,
John Doe No. 2, a/k/a Luis Medina III,
Rene Gonzalez,
Antonio Guerrero, and
John Doe No. 3, a/k/a Ruben Campa,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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United States of America v. Ruben Campa, et al.,

Case No. 01-17176-BB, 03-11087-BB

Certificate of Interested Persons

Undersigned counsel for the United States of America hereby certifies that the following is a complete list of persons and entities who have an interest in the outcome of this case who were not included in the Certificates of Interested Persons previously filed with the Court:

Kathleen M. Salyer

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Caroline Heck Miller
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Statement of Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1291.

Statement of the Issues

The government respectfully restates issues I, III, IV, V, and VII, as stated in its original brief to the panel (hereafter "GOrigBr") at 1, with this addition: Whether appellants' prosecutorial-misconduct claims are procedurally foreclosed by the law-of-the-case doctrine, and are substantively without merit.

Statement of the Case

1. Course of Proceedings

The government respectfully relies upon, and hereby incorporates by reference, the **Course of Proceedings** statement in its *en banc* brief (hereafter "GEnBancBr") at 1 -2, with this addition:

A panel of this Court reversed all convictions and remanded for new trial, due to a merger of pervasive prejudicial community sentiment and extensive publicity with improper prosecutorial references, *United States v. Campa,* 419 F.3d 1219, 1263 (11th Cir. 2005)(per curiam), *vacated*, 429 F.3d 1011 (11th Cir. 2005) (hereafter "*Campa 1"*). In *en banc* rehearing, the trial court's venue and new-trial rulings were affirmed, and the case was remanded for panel consideration of additional outstanding issues, *United States v. Campa,* 459 F.3d 1121 (11th Cir. 2006) (hereafter *"Campa 2"*). By letter request, the panel directed the parties to file supplemental riefs to advise the Court of the issues they consider to be remaining in the case.

2. Facts

The government respectfully relies upon, and incorporates by reference, the **Statement of the Facts** in GOrigBr:4-29, attached as Appendix A.

3. Standards of Review

The government respectfully relies upon, and incorporates by reference, the **Standards of Review** at GOrigBr:29-30, with these changes:

Jury instructions are reviewed *de novo*, *United States v. Grigsby*, 111 F.3d 806, 814 (11th Cir. 1997), but instructions not objected to are reviewed for plain error.

The district court's interpretation of the sentencing guidelines is reviewed *de novo* and its factual findings must be accepted unless clearly erroneous. *United States v. Jordi*, 418 F.3d 1212, 1214 (11th Cir.), *cert. denied*, 126 S.Ct. 812 (2005).

Argument Summary

The government respectfully relies upon the summary of arguments at GOrigBr:30-31as to issues referenced *supra*, and adds this additional summary:

The law-of-the-case doctrine bars consideration of the merits of appellants' prosecutorial-misconduct claims, virtually all of which were argued to the *en banc* Court, which rejected them.

Argument

I. APPELLANTS' CLAIMS OF PROSECUTORIAL MISCONDUCT ARE PROCEDURALLY FORECLOSED, AND ARE SUBSTANTIVELY WITHOUT MERIT

A. Because the *en banc* Court explicitly and by necessary implication decided virtually all the government-misconduct claims as not requiring a new trial, the law-of-the-case doctrine bars relitigation of those issues.

The Court has directed the parties to file supplemental briefs in which the parties "shall advise the court of the issues they consider to be remaining in the case."[1] Because appellants already submitted virtually the entirety of their government-misconduct claims to the *en banc* Court, and because *Campa 2* necessarily considered all those claims implicitly, and addressed several explicitly, and found them "'so minor that they could not possibly have affected the outcome of the trial,'" *Campa 2, supra,* 459 at 1153, those government-misconduct claims have been decisively rejected as a ground for reversal. That rejection is the law of the case, and appellants' arguments on those claims are precluded from reconsideration, and must fail.

The law-of-the-case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. *Klay v. All Defendants*, 389 F.3d 1191, 1197 (11th Cir. 2004), quoting

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[1] Appellants have largely bypassed this directive, using their supplemental briefs almost entirely to re-state and re-argue their claims. There is a glancing discussion, *see* Guerrero Supplemental Brief ("SuppBr") at 1,1n.1, of what issues remain open following *Campa 2.* The government addresses this discussion *infra.*

Christianson v. Colt Ind. Operating Corp., 486 U.S. 800, 816 (1988). The doctrine encompasses both findings of fact and conclusions of law. *This That and the Other Gift and Tobacco, Inc. v. Cobb County*, 439 F.3d 1275, 1283 (11th Cir. 2006), *Heathcoat v. Potts*, 905 F.2d 367, 370 (11th Cir. 1990). The doctrine applies to criminal cases. *United States v. DeJesus*, 752 F.2d 640, 642-3 (1st Cir. 1985); *see, e.g., United States v. Jordan*, 429 F.3d 1032 (11th Cir. 2005). Because *Campa 1* was vacated, and because *Campa 2* is the determination of the *en banc* Court, *Campa 2*'s findings of fact and conclusions of law govern in the subsequent resolution of this case.

The law-of-the-case doctrine does not extend to every issue that could be ever raised in a given litigation, but rather is limited to those issues previously decided. "[T]he law is clear, however, that the law of the case doctrine 'comprehends things *decided by necessary implication* as well as those decided explicitly.'" *Heathcoat v. Potts, supra*, 905 F.2d at 370 (emphasis in original; quoting *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1440 (11th Cir. 1984)(per curiam)).

Thus it has been said that a law-of-the-case determination calls for two basic questions to be addressed: (1) What issues were decided by the prior appellate decision, which parties present to the subsequent panel; and (2) Whether any of three recognized exceptions to the doctrine are available and permit reconsideration of an issue previously decided. *Morrow v. Dillard,* 580 F.2d 1284, 1290-91 (4th Cir. 1978).[2] *See also Riley v. Camp*, 130 F.3d 958, 981 (11th Cir. 1997)(*appended unpublished*

[2] The three exceptions, set forth in *Morrow v. Dillard* and other cases, do not apply here, *see* discussion *infra.*

opinion, Kravitch J., concurring in part and dissenting in part)(subsequent panel must determine whether prior panel decided issue by necessary implication, in addition to explicitly-decided issues).[3]

Campa 2, then, must be analyzed as to what issues it decided. The first step is to identify what *Campa 2* said it was deciding, the explicit issues. *Campa 2* said that it granted rehearing en banc to consider whether the defendants were denied a fair trial, in light of *Campa 1*'s conclusion that the defendants were denied a fair trial by a convergence of pretrial publicity, pervasive community sentiment, and the government's closing arguments:

> In a published opinion addressing only the motions for change of venue and motions for a new trial, a panel of this Court concluded that the defendants were entitled to a pretrial change of venue and were denied a fair trial because of the "perfect storm" created by the pretrial publicity surrounding this case, the pervasive community sentiment, and the government's closing arguments. We vacated the panel opinion and granted the government's petition for rehearing en banc to consider whether the defendants were denied a fair and impartial trial.

Campa 2, *supra,* 459 F.3d at 1142 (footnotes omitted). As prelude, in its statement of the trial and procedural history, *Campa 2* described certain facts and trial matters appellants continue to press as issues in this appeal: defense witness Basulto's retort asking defense counsel if he was doing the work of the Cuban intelligence service, *id.* at 1138, 1140; the government's closing arguments, mentioning specifically these government comments: "final solution . . . . heard before in the history of mankind;"

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[3] *Riley v. Camp* lacks precedential value because it addressed the denial of a petition for rehearing, *see id.* at 983, n. 7 (Birch, J., concurring), but its extended discussions of the law-of-the-case doctrine contain detailed analysis with persuasive value.

defendants "bent on destroying the United States" and "paid for by the American taxpayer;" defendants in a "hostile intelligence bureau . . . that sees the United States of America as its prime and main enemy;" "jury not operating under the rule of Cuba, thank God." *Id.* at 1139, 1140, 1141.[4]

Then, in its "Discussion" section, *Denial of Motions for New Trial* subsection, *id.* at 1151-54, *Campa 2* addressed, and rejected, misconduct claims:

> Nor are the defendants entitled to a new trial in the interests of justice under Rule 33(b)(2). The defendants timely filed their initial motion by the court-extended August 1, 2001, deadline for filing post-trial motions, arguing that a new trial was warranted in the interests of justice due to the prejudice inured to them from the venue and the prosecution's misconduct at trial. The district court denied the motion, citing the numerous curative measures it implemented to guarantee the defendants' right to a fair trial. The record reflects that any potential for prejudice against the defendants was cured by the court's methodical pursuit of a fair trial. Basulto's comment that Hernandez's counsel was a spy for Cuba did not prejudice the defendants because it was merely a single remark during a seven-month trial by the defense's own witness, which the court struck and instructed the jury to disregard. Moreover, the prosecution's closing arguments did not prejudice the defendants because the court granted the defendants' objections and specifically instructed the jury to disregard the improper statements. These alleged incidents of government misconduct "were so minor that they could not possibly have affected the outcome of the trial."

Id. at 1153 (footnotes, including citation to *United States v. Alvarez*, 755 F.2d 830, 859 (11th Cir. 1985), omitted).

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[4] *Campa 2* also discussed, at great length, the allegation of government misconduct with regard to the subsequent civil litigation *Ramirez v. Ashcroft.* The *en banc* Court's resolution of this matter in favor of the government is clearly law of the case. Since appellants do not reargue this issue in their supplemental briefs, apparently they too consider this issue foreclosed.

Based on these excerpts, it is clear that matters which the *en banc* Court found so minor that they could not possibly have affected the outcome of the trial included the specific prosecutorial comments it enumerated at *id.,* 1139, as well as the Basulto retort to defense counsel. This forecloses these matters, individually or cumulatively, from being a ground for reversal due to prosecutorial misconduct. Arguable[5] prosecutorial misconduct that could not possibly have affected the outcome of the trial does not meet the threshold for reversal. *See United States v. Calderon*, 127 F.3d 1314, 1335 (11th Cir. 1997); *United States v. Rodgers,* 981 F.2d 497, 499 (11th Cir. 1993); *United States v. Eyster*, 948 F.2d 1196, (11th Cir. 1991). *See also United States v. Alvarez*, *supra,* 755 F.2d at 859.

It is further clear, from these excerpts, that *Campa 2* considered, and decided in favor of affirmance, all the components of what *Campa 1* denominated the "perfect storm," which *Campa 2* described as "created by the pretrial publicity surrounding this case, the pervasive community sentiment, and *the government's closing arguments*," *Campa 2* at 1142 (emphasis added), and which *Campa 1* described as "created when the surge of pervasive community sentiment, and extensive publicity both before and during the trial, merged with *the improper prosecutorial references*," *Campa 1, supra,* 419 F.3d at 1263 (emphasis added). It is clear that *Campa 2* ruled on, and thus

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[5] The government does not concede that there was prosecutorial misconduct; *see* discussion *infra*. Indeed, *Campa 2* referred to "[t]hese *alleged* incidents of government misconduct," 459 F.3d at 1153. The qualification withholds condemnation, but does not change the law-of-the-case preclusion: Even if the incidents were misconduct, *Campa 2* holds, they could not possibly have affected the outcome of the trial, and so are not a ground for reversal.

foreclosed from further review, all these components because that is what *Campa 2* said it was deciding: those aspects of the case which *Campa 1* concluded had compromised the fairness of the trial, *see Campa 2* at 1142.Thus *Campa 2* addressed, in general but still explicit terms, *all* the claims as to the government's closing arguments, and as to what *Campa 1* deemed improper prosecutorial references. This is also reflected in *Campa 2*'s general, but nonetheless explicit, determinations that the defendants are not entitled to a new trial in the interests of justice, pursuant to Rule 33(b)(2), notwithstanding defense claims of "prejudice inured to them from the venue *and the prosecutor's misconduct at trial*," and that "*the prosecution's closing arguments* did not prejudice the defendants," *Campa 2* at 1153 (footnotes omitted)(emphasis added).

Campa 1, and the dissent to *Campa 2* which closely tracked *Campa 1*, enumerate with specificity many of the points comprehended within *Campa 2*'s explicit generalities.[6] All these specific points, and the conclusory assessment of them

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[6] In addition to trial incidents and prosecutorial comments mentioned specifically in *Campa 2,* noted *supra*, the following points were specified in both *Campa 1* ("C1") and the dissent to *Campa 2* ("C2D"): ***In-trial references:*** Castro head of intelligence pyramid (C1:1251, C2D:1168-69); death penalty for ejecting things from airplane; "repressive" and "dictatorship" (C1:1251, C2D:1169); ***closing argument references:*** Cuban government "huge" stake in outcome; jurors would abandon community unless convicting; spies "sent to . . . destroy" U.S.; Cuban government sponsored "book bombs," "telephone threats of car bombs," "sabotage," "killed four innocent people"; Cuban government used "goon squads" to torture critics; "dead babies" and "stealing the memories of families"; claim of monitoring exile groups false because agents on U.S. military bases, spying on U.S. military, FBI, Congress (C1:1251, C2D:1171); Cuban government not cooperating with FBI (continued...)

by *Campa 1* and the *Campa 2* dissent, are foreclosed from consideration as prosecutorial misconduct, as they illuminate further what *Campa 2* had under consideration when it found the "alleged incidents of government misconduct" too minor to have possibly affected the trial outcome, *Campa 2* at 1153. A dissenting opinion can serve to show the parameters of what issues were decided by the main opinion, *see Morrow v. Dillard, supra,* 580 F.2d at 1291 (analysis of what issues are law of the case, in light of concurring and dissenting opinions), especially where, as here, the dissent is to a precedential ruling and unambiguously refers to points and issues that were raised and argued to the deciding majority. *Compare, Harris v. Luckey*, 918 F.2d 888 (11th Cir. 1990)(no law-of-the-case preclusion for abstention issue never presented to or decided by panel, and raised for first time by judge dissenting from denial of *en banc* rehearing, and where denial does not carry precedential weight).

Further defining the issues precluded by the law-of-the-case are the points expressly argued to *Campa 2*'s *en banc* Court by the appellants as prosecutorial

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[6] (...continued)
(C1:1251-52, C2D:1171); Cuba "not alone" in shooting civilian aircraft; they "are friends with our enemies," including Chinese and Russians; Libyan shootdown; Cuban government uncaring of occupants and shot planes although could have forced Basulto to land; Cuba "repressive regime [that] doesn't believe in any [human] rights"; defendants joined "intelligence bureau" that considers U.S. "prime and main enemy" (C1:1252, C2D:1171)(footnotes, some expanding on these points, omitted).

Both *Campa 1* and the *Campa2* dissent observed generally that "the government's arguments regarding the evils of Cuba and Cuba's threat to the sanctity of American life only served to add fuel to the inflamed community passions" (C1:1261, C2D:1177).

misconduct. This is especially so where the appellants urged the *en banc* Court to make a totality-of-the-circumstances, cumulative-effect analysis.[7] That is, by arguing to the *en banc* Court that many myriad factors and incidents comprised the harm that prejudiced their clients, by presenting these elements in detail and with specificity, and by asking the Court to consider each and every element, both singly and in synergy with all the others, appellants laid the foundation for a correspondingly broad preclusion should the *en banc* Court reject their position, as it did, and determine that notwithstanding these claims, appellants received a fair trial. Accordingly, all the specific points argued by appellants to the *en banc* Court as prosecutorial misconduct

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[7] Appellants expressly sought, or argued for, broad and cumulative review of misconduct issues as part of aggregate circumstances denying them a fair trial in their *en banc* briefs [hereafter identified by appellants' initials followed by "EnBancBr" and "EnBancRepBr" for the main and reply briefs, respectively] at, e.g., LMEnBancBr:13-14, 13-14n.9; GHEnBancBr:iv, 23-24, 34-36, 56-58, 66-70; AGEnBancBr:39, 43-45; RGEnBancBr50, 52-54, 55, 55n.8; GHEnBancRepBr:29; RCEnBancRepBr:19-20, 28-29; RGEnBancRepBr:23. They especially relied upon *United States v. Williams,* 523 F.3d 1203 (5th Cir. 1975), and expressly called on the *en banc* Court to emulate *Williams'* "tandem" approach, *id.* at 1209, of widening the breadth of consideration to marry pretrial-publicity and prosecutorial-misconduct concerns as jointly requiring a new trial, even if neither factor alone did. *See* LMEnBancBr:13-14n.9; GHEnBancBr:57, 69. *Campa 2* examined not a "tandem" but a "triumvirate" of factors: the three components of the "perfect storm" that *Campa 1* said mandated reversal. *Campa 2* found to the contrary, expressly, as to each of the three components – pretrial publicity, pervasive community prejudice and government misconduct. Since the three factors together could not compel reversal, it follows logically that none of the three alone could, but that is exactly what appellants argue for in continuing to press government-misconduct claims.

are foreclosed from reconsideration, as they have been deemed, both individually and as a collectivity, too minor to have possibly affected the trial outcome.[8]

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[8] Besides specific misconduct claims already noted as mentioned by *Campa 2*, *see supra* and by *Campa 1* and the *Campa 2* dissent, *see* n.6 *supra,* appellants also argued and referenced specifically, in their *en banc* briefs: references to "our community" (GHEnBancBr:9) as victims (RGEnBancBr2-3); acquittal would undermine Cuban resistance (GHEnBancBr:10); Pearl Harbor (GHEnBancBr:10, 35, 57; RGEnBancBr48; GHEnBancRepBr:9; RCEnBancRepBr:22); attacking defense witnesses for Cuba connection (GHEnBancBr:10); eliciting justification for hostility to Cuba, testimony regarding political persecution (GHEnBancBr:10, 67n.13; RGEnBancBr38039); justifying anti-Castro groups (RGEnBancBr4, 36-38); post-conviction "Castro's tentacles" remark (GHEnBancBr:13, 34); "bosses in Havana" (GHEnBancBr:13, 34; RGEnBancBr44; RCEnBancRepBr:22, 25); government gratuitously went on and on about Cuba (GHEnBancBr:67-68); Adlai Stevenson (GHEnBancBr:67-68n.13); government repeatedly referenced Fidel Castro, including enlarged photograph (RCEnBancBr:8-9; RGEnBancBr31, 34; RCEnBancRepBr:21, 29) and focused on defendants' pro-Castro zeal (RGEnBancBr3); case really about Castro (GHEnBancRepBr:6-7); government ennobled shootdown victims (RCEnBancBr:47n.18, 54; RGEnBancBr5, 42); defendants crucial to survival of Cuban government (RGEnBancBr3); gratuitous testimony on deceased-baby identities (RGEnBancBr28-30); active measures "squarely relevant" (RGEnBancBr30); mistranslation of "companero" (RGEnBancBr31) and "plastilina" (RGEnBancBr32); Operacion Paralelo memorandum (RGEnBancBr31-32); Cuban DCI internal control (RGEnBancBr34-36); Gonzalez disparaged faith and prayer (RGEnBancBr36); *Invasion of the Body Snatchers* (RGEnBancBr40); "propaganda" (RGEnBancBr41; GHEnBancRepBr:23); Cuba rejection of due process (RGEnBancBr41); emotional description of Cuban pilots' shootdown reaction (RGEnBancBr41); putting Cuba on trial (RGEnBancBr41); "extremely important" case (RGEnBancBr42; RCEnBancRepBr:21); praising FBI (RGEnBancBr41; RCEnBancRepBr:25); communist Cuba (RGEnBancBr42); "Disney World defense" (RGEnBancBr42); defendants required government to prove guilt (RGEnBancBr43; GHEnBancRepBr:22); Castro wiped out witness's family (RGEnBancBr43; RCEnBancRepBr:25); "do your job" (RGEnBancBr43); Cuban government point of view not proper for decisionmaking (RGEnBancBr43); government would prosecute (continued...)

This outcome comports with the law-of-the-case doctrine. *See This That and the Other Gift and Tobacco, Inc. v. Cobb County, supra,* 439 F.3d at 1284; *United States v. Jordan, supra,* 429 F.3d at 1035 (rejection of arguments, by necessary implication, is enough to bring them within the scope of doctrine, even if arguments not addressed in words). *Jordan, id.* at 1035, explained that an argument "is rejected by necessary implication when the holding stated or result reached is inconsistent with the argument." That occurred in this case: *Campa 2* held that alleged government misconduct had not deprived the defendants of a fair trial, and could not have possibly affected the trial outcome, which result is inconsistent with any of the matters

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[8] (...continued)
terrorism (RGEnBancBr43-44); "tune up" (RGEnBancBr44; RCEnBancRepBr:25); defense attorneys dance around plain English (RGEnBancBr44); "My God, these guys are spies. What do you think they are doing here in this country?" (RGEnBancBr44); jury asked to use own arguments that refute defense arguments (RGEnBancBr44); changing defenses midstream as burden-shifting (RGEnBancBr45; RCEnBancRepBr:21,23; LMEnBancRepBr:21-22); "jurisdiction" and shootdown location (RGEnBancBr45-46); people in Cuba standing up for rights (RGEnBancBr46-47; GHEnBancRepBr:9); "in for a penny, in for a pound" (RGEnBancBr47, 48;RCEnBancRepBr:22); defendant promoted for murder (RGEnBancBr47); Castro pleased (RGEnBancBr47); what did Cuban government do in this case? (RGEnBancBr47); defense expert comment (RGEnBancBr47); Thanksgiving, Memorial Day (RGEnBancBr48), "blood promotion" (RGEnBancBr48); "do the right thing" (RGEnBancBr48; RCEnBancRepBr:25, 29; LMEnBancRepBr:21); defense counsel argued, called witnesses and cross-examined (GHEnBancRepBr:22); inflammatory appeals to God and anti-communism (RCEnBancRepBr:20-21); defense counsel disparaged (RCEnBancRepBr:21, 23, 25; LMEnBancRepBr:22); suggesting Campa engaged in espionage (RCEnBancRepBr:26-27). Cuba wants acquittal (LMEnBancRepBr:21).

appellants briefed and argued having deprived the defendants of a fair trial or affected the outcome, either singly or cumulatively.

This also is consistent with *Campa 2*'s first footnote, in which it sets forth "additional issues on appeal" remanded to the panel "for consideration of these outstanding issues," *Campa 2* at 1126 n. 1. The footnote, which is a compressed version of *Campa 1*'s similar first footnote, states as the first additional issue "prosecutorial misconduct regarding the testimony of a government [*sic*][9] witness and during closing argument." These and the other matters listed at footnote 1 are remanded to the panel "for consideration," but consideration does not necessarily mean consideration on the merits. Determination whether there are procedural bars, including law-of-the-case bars, to merits-consideration is not a matter for the court generating the antecedent opinion, but for the subsequent panel, as Judge Kravitch pointed out in *Riley v. Camp, supra,* 130 F.3d at 981. Further, there could still be prosecutorial-misconduct claims outstanding, had appellants not elected to include them all in the *en banc* litigation, an analysis outside the scope of the *en banc* Court's responsibility, but within this panel's. Indeed, it is doubtless for the purpose of assisting that analysis that the panel requested the parties to "advise the court of the issues they consider to be remaining in the case."

Having chosen to inject all its prosecutorial-misconduct claims into the *en banc* litigation, the defense cannot now complain that its loss there has foreclosed it from

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[9] This likely should be "defense," referring to Jose Basulto. Confusion over Basulto's status carried over from *Campa 1*, which described him variously as a defense and a government witness. The record is beyond dispute: Basulto was called by the defense, as a hostile witness.

arguing the same claims again. "Litigants must use their best judgment when mapping out strategy" in appeals, including consideration of law-of-the-case preclusion if an outcome is not what they hope for. *See Litman v. Massachusetts Mutual Life Insurance Company*, 825 F.2d 1506, 1516 (11th Cir. 1987)(en banc). Here, as in *Litman*, appellants "should have assessed and evaluated that risk," before adopting a shotgun-approach to the *en banc* litigation.

Litman also teaches, *id.* at 1512, with several cited case examples, "that there are cases wherein a seemingly specific mandate such as an order for a new trial may wind up with a different result on remand. However, in such cases the opinion, when viewed in its totality, supports the alternative resolution." That is the situation here: *Campa 2* has remanded additional issues including "prosecutorial misconduct . . . during closing argument" for the panel's consideration, but that consideration by the panel, and careful comparison to the totality of the *Campa 2* opinion, will compel the conclusion that virtually[10] all the prosecutorial-misconduct claims have been

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[10] As discussed *supra*, any prosecutorial-misconduct claims that were not submitted to the *en banc* Court might survive for further review. The government has identified no trial incidents or remarks raised in the original briefs as prosecutorial misconduct that were not also so argued to the *en banc* Court. There was a claim, made in the original briefs but not the *en banc* briefs, that the government's rebuttal argument vitiated jury instructions concerning the shootdown, *see* GHBr(01-17176):48, 55-58. Because this argument was not presented to the *en banc* Court, it is less clear than with the other misconduct claims that it is within *Campa 2*'s law-of-the-case preclusion. The substance of the rebuttal argument was addressed by *Campa 2* as not constituting reversible misconduct, and so this panel would be within its rights to treat the ancillary argument of instruction-vitiation as precluded as well, but the government will address the vitiation claim on its merits (continued...)

considered, and rejected, by the *en banc* Court as part of its fair-trial analysis and holdings, and are foreclosed from further merits consideration by the law-of-the-case doctrine.

Appellant Guerrero's glancing discussion, *see* n.1, *supra*, of what issues remain does not address law-of-the-case doctrine, relying simply on *Campa 2*'s footnote one as reopening all misconduct claims. But, as discussed *supra,* footnote one is consistent with preclusion of issues which *Campa 2* decided, both explicitly and by necessary implication, including the vigorously and explicitly litigated misconduct claims. Nor is it correct, as Guerrero states, AGSuppBr:1, that *Campa 2 "expressly* held that it was *not* deciding the many non-venue-related claims raised on appeal, including: (1) prosecutorial misconduct unrelated to the venue issue" (emphasis in original). In actuality, the language about issues "unrelated to the change of venue" comes from *Campa 1*'s footnote one, and is conspicuously omitted from *Campa 2*'s footnote one, which otherwise tracks *Campa 1*'s footnote closely. Thus, *Campa 2* took pains to

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[10] (...continued)
infra, showing that the claim is without merit. In addition, the government has identified one misconduct assertion in appellants' supplemental briefs which was not also presented to the *en banc* Court (or at any other stage of the litigation): the claim, *see* AGSuppBr:8, that the jury was gratuitously reminded nearly 300 times that Castro is the Cuban head of state. This claim, as to which no record citations are provided, is simply another species of the Castro-overemphasis argument appellants repeatedly made to the *en banc* Court, and as such is likely also precluded by the law of the case, but the government will address the claim, *infra*, on its merits. (It has none, and has procedural infirmities distinct from law-of-the-case, due to its untimeliness, *see infra.*)

remove the very argument that Guerrero makes, of *Campa 2* "expressly" reserving prosecutorial misconduct as unrelated to *Campa 2*'s holdings.

A further fallacy in Guerrero's discussion appears, AGSuppBr.:2, at his discussion of standards of review, where he suggests that *Campa 2* afforded a more deferential abuse-of-discretion review of misconduct claims, which merit *de novo* review when raised as an independent ground for relief. What Guerrero overlooks is that *Campa 2* made a *de novo* review of the misconduct claims. *Campa 2* ruled that the "alleged incidents of government misconduct 'were so minor that they could not possibly have affected the outcome of the trial'," *Campa 2* at 1153 – not merely that the trial court had discretion so to find, but that the *en banc* Court itself so found. Guerrero's argument turns against him, because *Campa 2* made a *de novo* review. Guerrero also argues, AGSuppBr:1n.1, that the government tried to keep the *en banc* Court to a narrow review. But the government mounted a broad defense, *see* GEnBancBr:44-49, against the appellants' misconduct broadside. Appellants asked for a broad review, and cannot complain that *Campa 2* afforded them what they sought, albeit with an outcome they don't like.

The law-of-the-case doctrine "serves several important purposes. It protects against the agitation of settled issues by promoting finality, assures the adherence of trial courts to the decisions of appellate courts, and avoids waste of judicial resources." *Riley v. Camp, supra,* 130 F.3d at 981 (*appended unpublished opinion*, Kravitch J., concurring in part and dissenting in part). These purposes are all in play here. Appellants sought the scrutiny of the *en banc* Court for their detailed and prolific claims of misconduct. Ten members of the Court, a strong majority, found the claimed

incidents to be so minor that they could not possibly have affected the outcome of the trial, which necessarily means that they could not be a basis for reversal. To reconsider that finding would work a tremendous judicial inefficiency, reagitate a matter that should have finality, and promote the deviation of individual panel decisions from *en banc* decisions. Failure to honor the doctrine, it has been noted, "'can only result in chaos'." *Schiavo v. Schiavo*, 403 F.2d 1289, 1292 (11th Cir. 2005), *quoting Litman v. Mass. Mut. Life Ins. Co., supra*, at 1511.

The doctrine has three exceptions, but none applies. *See Klay v. All Defendants, supra,* 389 F.3d at 1198: (1) new and substantially different evidence emerges at a subsequent trial; (2) subsequent controlling contrary authority; or (3) clearly erroneous ruling which would work a manifest injustice if implemented. The third exception is not meant to be a broad catchall for merely differing opinions; "only in the rarest of cases will a subsequent panel be forced to conclude that a prior panel was clearly erroneous such that its ruling would result in manifest injustice. This circuit follows a strict policy of following prior panel opinions unless such are overruled by the court sitting en banc." *Riley v. Camp, supra,* 130 F.3d at 982 (*appended unpublished opinion*, Kravitch J., concurring in part and dissenting in part).[11] "'[M]anifest injustice does not simply mean that a reasonable argument exists that the first panel's decision was wrong. Otherwise, the exception swallows the rule: If the doctrine of law of the

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[11] Here, of course, we deal not with successive panels but with a panel subsequent to an *en banc* decision. It is not clear that the third exception could even apply in that circumstance, given the non-reciprocal power of the Court *en banc* to trump a panel. Certainly any application of the third exception to an *en banc* decision would have to be even more extraordinary and rare than with successive panels.

case applies only where the second appellate panel believes that the first was absolutely correct, the doctrine means nothing. . . . [W]hatever 'manifest injustice' means, it surely does not simply mean that the prior panel's decision was incorrect; rather the doctrine stands for the proposition that, absent extraordinary circumstances, a panel of this court should adhere to a previous panel's decision in the same case *even if that decision is erroneous*." *Id.* at 988 (Birch, J., concurring)(emphasis in original).

Here, by contrast, *Campa 2*'s conclusions were not erroneous, let alone clearly erroneous or unjust in any way. The government's conduct at this trial, as to which the trial "court maintained strict control," *Campa 2* at 1149, and which trial "'comported with the highest standards of fairness and professionalism,'" id., met the requirements of law and due process.

B. The government's conduct in this case was proper.

The government previously has argued the propriety of its conduct, addressing appellants' myriad unwarranted claims. The government respectfully relies upon, and incorporates by reference, those prior arguments, stated at GOrigBr:72-76 and GEnBancBr:44-48, attached as Appendices B and C, respectively.

Generally, the government notes the well-founded conclusion of *Campa 2* that the trial judge exerted careful and strict control of the proceedings, with meticulous solicitude for defendants' rights. Further, defense counsel were very alert and active, and objected vigorously to matters they perceived as impinging on trial fairness, such as the Basulto retort to counsel, and government reference to a defendant's sojourn in North Carolina that brought a curative instruction, *see* GOrigBr:72-73. Yet the great majority of what appellants now argue as misconduct passed without objection at trial,

see GEnBancBr:44n.44.[12] As the reviewing Court fulfils its mission to "relive the whole trial imaginatively," and not to extract conduct-conclusions from episodes in isolation, *see United States v. Young*, 470 U.S. 1, 16 (1985)(quoting *Johnson v. United States,* 318 U.S. 189, 202 (1943)(Frankfurter, J., concurring), these generalities, and the record, lead to one conclusion: This trial was conducted with great care and professionalism, and the lurid, rabble-rousing atmosphere appellants now describe was not observed, and not objected to, because it didn't exist.

The government will not repeat arguments, as to many misconduct claims, addressed at Appendices B and C. Appellants seek to undercut some of those arguments in their supplemental brief, but to no avail.[13] More often, appellants make

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[12] Additional to that footnote's enumeration, appellants complain now that the government's translation of "companero" and "plastilina" were misconduct, yet they did not object on that basis to introduction of the translations, R36:2651-2669

[13] AGSuppBr:25 argues that the government cannot excuse its reference to taxpayer-funded counsel because only one defense attorney acknowledged his appointed status yet all were tarred in rebuttal On the contrary, numerous defense counsel disclosed their appointed status to the jury both in opening statements, R29:1604,1626,1658, and closing argument, R122:14165; R123:14326. The government's remark cast no aspersion on public appointment of counsel, but rather noted the irony of the government providing counsel, just as defense counsel had argued, R123:14326, and as the sentencing court itself later observed, R129:90.

Guerrero also challenges, Br.:40, the government's explanation, GEnBancBr:47, of the "final solution" remark, by arguing that defense counsel's "final option" reference addressed not its sinister overtones but rather the government's repeated use of that concept as referring to a last-resort military option. This is without foundation. The term "military option" appears nowhere in 14,672 pages of trial transcript, and "final option" appears nowhere except in defense (continued...)

no serious effort to address the government's arguments, especially the arguments putting the government's remarks in the context of the trial and the defense closing arguments.

Context, however, is critical to assessing claims of prosecutorial misconduct. *Darden v. Wainwright,* 477 U.S. 168, 179 (1986); *United States v. Young*, *supra*. This is so not only to assess whether improper prosecutorial remarks, as in those cases, unfairly prejudiced a defendant but also because the context of the remarks, and of the arguments they respond to, may show that the remarks were permissible and not misconduct. *See, e.g., United States v. Calderon, supra; United States v. Rodgers, supra.*

A fair reading of the defense's opening and closing statements, and trial strategies, establishes the fairness and propriety of the government's rebuttal. For instance, appellants ignore that the rebuttal about defendants' focus on destruction of the United States followed extensive defense arguments seeking to excuse, and even praise, their conduct as limited to investigating and fighting Miami-based terrorism against Cuba. Aren't we better off, the defense argued to the jury, with individuals like

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[13] (...continued)
counsel's argument, where he linked it to "somebody in a command bunker [being] given authority to exercise the final option and the final option was exercised," R124:14433. Further, it was the defense itself that insisted to the court that *interception* of civil aircraft as a *last resort* had nothing to do with the shootdown, *see* R71:7343, 7374-75; R72:7471, R117:13521-22, contrary to the gloss appellants now put on the defense's "final option" argument. There is nothing in the International Civil Aviation Organization's rules, or in the jury instructions derived therefrom, that references or allows for a shootdown. *See* R70:7191-92, 7228; R71:7389, R117:13521-25.

the defendants working to neutralize potential violence and risk to both the United States and Cuba? *See* GOrigBr:73-74; GEnBancBr:45-46, 46 n.47,n.48. These defense arguments were coupled with the defense's unbridled demonization of the defendants' supposed terrorist targets, and open appeals to juror fear and self-interest. *See* GEnBancBr:46n.47, 48n.49. The defense argued that the defendants needed to perform this anti-terrorist function because of the inattention, inability or unwillingness of U.S. law enforcement to do its duty. *See* R122:14125-27, 14149, 14162. Further, the issue of the defendants' intentions toward the United States was properly in play because Count 1 charged a conspiracy to deceive the United States, and because Count 2's espionage-conspiracy had among its contested elements what the court properly charged the jury as the defendants' "intent or . . . reason to believe that the information would be used to the injury of the United States or to the advantage of a foreign nation," R125:14594.

In this context, it was permissible for the government to respond in rebuttal to the arguments that the defendants were here with benign purpose. There was overwhelming evidence of the defendants' viewing and dealing with the United States government as their nemes is, including deceiving every immigration official they

encountered with false identification;[14] federal law enforcement;[15] Congressional offices;[16] and including their bellicose expressions that the United States, and specifically its military installations and law enforcement, was the "enemy;"[17] and including their persistent plans and operations to obtain advance notice of any United States military invasion of Cuba. In light of all this, the government could properly rebut the arguments as to defendants' benevolence with the opposite well-supported conclusion, that they wanted to hurt and destroy the United States.

Similarly overlooked by appellants are important contexts such as that the government's reference to "sabotage" quoted the defendants' writings;[18] the reference

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[14] *See,* e.g., GX:DAV-119 (Campa account of entering U.S. with false documentation, recognized by the Cuban Directorate of Intelligence ("DI") as "half of the battle," DX:R24:1; *see also* GX:DG-135, GX:DG-136, GX:DG-105 for Hernandez's detailed account of outwitting immigration officials suspicious of his entry to U.S. at Memphis, TN.

[15] *See, e.g.,* GX:DG-107:67 (Gonzalez boasting how he "thwarted [F.B.I. Agent Alonso] diplomatically . . . . I think that I was very convincing and my 'sincerity' impressed him.")

[16] *See* GX:DAV-118:2 (goal to penetrate U.S. Congresspersons of Cuban origin); DX:R24:74; DX:R51:9; DX:R52:5-7; GX:DAV-118:1-5; R50:4618-4619 (plan to inject DI agents into re-election campaign of Cuban-American Congressman); GX:DG-107:31-33 (manipulation of Congressional office to assist unwittingly in entry to United States of spy).

[17] *See* GEnBancBr:45 n.46.

[18] *See* GX:DG-139:11 (Hernandez suggests to headquarters that BTTR's hangar "BE INVESTIGATED TO SEE IF SOME KIND OF SABOTAGE IS FEASIBLE (AND CONVENIENT)." Another exhibit discussing the prospect of interfering with BTTR's hangar and planes, GX:DHo-101, was incorrectly described, (continued...)

to the government having obtained court orders for searches was appropriate response to the defense's opening-statement claim that the government had been breaking into Medina's home and stealing his computer files, R29:1629; the reference to the "huge" stake of the Government of Cuba was a classic, and permissible, argument of witness-interest with regard to Government of Cuba officials who testified, *see* R122:14103-14105, 14137; R124:14442-14446, 14457, including about such hotly contested matters as the shootdown location;[19] and the prosecutor's remark about "rules of Cuba" followed defense counsel's repeated arguments that the shootdown should be viewed from the perspective of the Government of Cuba's consternation at BTTR's flouting that government's tight control over dissent.[20]

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[18] (...continued)
AGSuppBr:9, as by an "unindicted" agent. That individual – illegal officer "Horacio" – was indicted, although not arrested, and the document states that the BTTR-related matters were to be analyzed by appellant Gonzalez, GX:DHo-101:3.

[19] Trying to cover two alternative positions, counsel for Hernandez argued both that the Cuban evidence that the shootdown occurred in Cuba's territorial airspace was reliable, R124:14446-14457, and that the shootdown location was legally irrelevant and the jury could ignore it, R124:14459. The government was within its rights to respond to both arguments; properly argued many logical flaws in the Cuban radar and other location-evidence, R124:14529-14532; and properly noted that an important witness supporting the international-airspace location, an officer of a passing cruise ship, with no government affiliations, had no stake in the case, whereas the Cuban government (and, by fair implication, its testifying officials who presented conflicting evidence), had a stake, "a huge one," R124:14532.

[20] *Campa 1, supra* at 1252, and *Campa 2, supra* at 1139, quote this remark as the prosecutor telling the jury they were "not operating under the *rule* of Cuba, thank God," whereas the record and the context are clear that the statement was "not (continued...)

Defense counsel's argument that people in Cuba are not free to criticize Castro is one of many instances where the defense injected the Castro persona into the case. Appellants have added to their many misconduct claims the allegation, not previously made,[21] that the jury was reminded 300 times at trial that Castro is the Cuban head of

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[20] (...continued)
operating under the *rules* of Cuba, thank God," R124-14475 (emphases added). The prosecutor was making a focused response to the defense's argument that the shootdown should be judged from the standpoint of Cuba's rules. *See* defense arguments at R124:14390 (" Ladies and gentlemen, in this country, you could say or do whatever you want. You could call Castro a murderer, an assassin, you could call him a torturer; you could have demonstrations, you can speak out, have protests, carry placards, you could say anything you want in this country because it is protected by our law; but that is not the way it is in Cuba . . . . They have certain rules and laws that you have to respect. Ladies and gentlemen, the Brothers to the Rescue and Basulto don't respect the laws in that manner."), 14398, 14402.

[21] The untimeliness procedurally bars the claim. This circuit follows a "prudential rule of declining to consider issues not timely raised in a party's initial brief," *United States v. Britt*, 437 F.3d 1103, 1104 (11th Cir. 2006). The Court here requested supplemental briefs, but for the parties to advise the Court of issues they consider to be remaining in the case, not to raise new issues, in contravention of the prudential rule. Parties cannot properly raise new issues at supplemental briefing. *United States v. Levy,* 416 F.3d 1273, 1276 (11th Cir. 2005). Nor is there any excuse for appellants – whose briefs to the original panel and *en banc* Court total 222,452 words, not including the latest supplemental briefs – to be adding new claims at this stage.

Levy is part of a wave of cases remanded by the Supreme Court to the Court of Appeals "'for further consideration in light of *United States v. Booker*,'" *Levy*, *id.* at 1279. This Court's conclusion in *Levy* – that merits-application of *Booker* was precluded, due to the procedural bar of the issue not having been timely raised – is exactly consistent with, and illustrates, the government's law-of-the-case argument, *supra*, that *Campa 2*'s remand to the panel for consideration in light of additional (continued...)

state, AGSuppBr:8, implying that this is government misconduct. Appellants provide no record citations, and simply substitute scalding rhetoric for record-based analysis. The government word-searched the trial record, and there are 308 trial references to "Castro," subsequent to jury empanelment. Of those, 239 were in the jury's presence, and the great majority of these references – 193, or 81% – were by the defense. Only 46 (19%) were by the government.[22] The references, and the rest of the record, reflect that the government consistently sought to minimize political aspects of the case, whereas the defendants sought to make Castro, and exile politics, an issue. The government moved *in limine* pretrial, R6:719, 737, which motion the defense opposed, R6:729, 732, 738, and the court denied, 2SR1:754; *see also* RBox1:1062 (in-trial motion). At trial, the defense focused much more than the government on Castro,[23] often over government objection, *e.g.,* R45:384; R57:5824; R84:9389-9390, and often in the context of examining hostile defense witnesses whose animosity to

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[21] (...continued)
issues does not necessarily mean consideration on the merits of issues that are procedurally barred.

[22] Of the defense's 193 references to Castro, in the presence of the jury, 15 were during their closing statements; seven in opening statements; 131 stated or elicited by the defense during defense witness testimony; 18 during government witnesses. Of the government's 46 references to Castro, in the presence of the jury, seven were during their closing statements; none in opening statement; 16 during defense witness testimony; 23 during government witnesses. Attached Appendix D provides record citations.

[23] This was so also outside the presence of the jury. Of 69 "Castro" references with jurors not present, 51 were by the defense, 11 by the government. *See* Appendix E citations.

Castro they sought to establish, *e.g.,* R80:8296, 8825, 8830, R81:8968, R91:10530 - R92:10659,[24] and whom they sought to draw into politicized testimony, *e.g.,* R84:9389-9390. The defense focus was such that in closing argument the government reminded the jury that it was not its job "to resolve the political history of the United States and Cuba. It is not your job to make moral judgements on Fidel Castro [and others]," R121:13923. The government's references to Castro were infrequent and temperate, and were not misconduct.

Finally, if the Court were to reach the merits of the misconduct claims, and to assess any of the government's conduct as improper, it was not prejudicial to a substantial right of the defendants, *see United States v. Snyder,* 291 F.3d 1291, 1294 (11th Cir. 2002); *United States v. Wilson,* 149 F.3d 1298, 1301 (11th Cir. 1998); *United States v. Chandler*, 996 F.2d 1073, 1093 (11th Cir. 1993); *United States v. Jacoby*, 955 F.2d 1527, 1541 (11th Cir. 1992); *United States v. Beale*, 921 F.2d 1412, 1437 (11th Cir. 1991); *United States v. Obregon*, 893 F.2d 1307, 1310 (11th Cir. 1990); *United States v. Bascaro*, 742 F.2d 1335, 1353 (11th Cir. 1984),and did not "'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.'" *United States v. Eyster*, *supra*, 948 F.2d at 1206 (citation omitted). Improper argument rises to the level of a denial of due process when there is a reasonable probability that the outcome of the proceeding would have been different but for the prosecutor's improper remarks. *Id.; United States v. Calderon*, *supra*, 127 F.3d at 1335. "'A reasonable probability is a probability sufficient to undermine

[24] Frometa testimony, during which defense stated or elicited "Castro" 30 times, compared to government's zero times.

confidence in the outcome.'" *United States v. Adams*, 74 F.3d 1093, 1097 (11th Cir. 1996) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). In this case, where a watchful[25] and meticulous court presided over a carefully conducted trial of seven months, where the evidence on all counts was strong, and where the defense invited many of the arguments they complain of, the government's conduct is consistent with a fair trial.

II. SUFFICIENT EVIDENCE SUPPORTS ALL COUNTS

Appellants challenge the sufficiency of evidence on Counts 2 (espionage conspiracy), 3 (murder conspiracy) and 7 (possession of fraudulent passport.) The ample evidentiary support for these counts was previously argued, and the government respectfully relies upon, and incorporates by reference, its sufficiency argument in GOrigBr:31-49, attached as Appendix F. The government also respectfully refers this Court to the trial court's three careful, analytic orders, finding evidence sufficient on all counts, R11:1259, R13:1391, 1392. Additional discussion on each challenged count follows:

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[25] Appellants focus this Court on the trial court's criticism of the government for "outright misrepresentation," R121:13918, (misquoted by Guerrero, Br.:17, as "outrageous misrepresentation)" in its emergency papers to this Court. The government regrets drawing the trial court's criticism in this regard. It notes that the matter at issue related not to the substance of trial proceedings, but rather to the finality of the instruction-draft the government referenced in its papers, and of the court's pronouncement of findings, and that as to the latter the court noted that the government's representation "may be technically correct," R121:14025. The government respectfully submits that the episode illustrates that the trial court held the government to very exacting standards, further assurance that the government's conduct was consistent with the defendants receiving a fair trial.

A. Count 2 (espionage conspiracy)

Appellants persist in their insupportable claim that without proof of completed espionage[26] or a charge of substantive espionage, there can be no conviction for espionage conspiracy. They cite no authority, and there is extensive contrary authority that conspiracy is a crime distinct from the substantive offense, *see, e.g., Iannelli v. United States,* 420 U.S. 770 (1975), and distinct from the crime of attempt, *United States v. Anderson*, 651 F.2d 375 (5th Cir. Unit A July 981). Appellants' arguments that the United States proved neither completed nor attempted espionage are off the mark.

What the United States proved, overwhelmingly, is that appellants agreed and sought to communicate, deliver and transmit non-public national defense information to Cuba, with reason to believe it would be used to the injury of the United States or to the advantage of Cuba. The government will not repeat the many facts detailed at GOrigBr.:32-40, and by the trial court at R11:1259:13,26-29; R13:1392, but notes

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[26] Appellants also persist in asserting as a fact that the defendants did not commit espionage. The government forthrightly told the jury that it would not see evidence of passage of classified documents in this case, R121:13999, but that is not the same as exonerating appellants. Indeed, Guerrero's proven penetration and dissemination of non-public national defense information, *see* e.g., "greenhouse" radio frequencies, GOrigBr.: 37n.26, is part of the evidence supporting conviction for Count 2's conspiracy.

Appellants repeat their failed jury argument that the government could not have perceived the defendants as dangerous, since they left them in place, unarrested, for a lengthy time. But counterintelligence work always must balance the risks and timing of whether, and for how long, to leave a known spy in place vs. alerting a foreign intelligence service that it is compromised.

that appellants ignore almost all in their supplemental briefs, except those related to Building A-1125.[27] The ample testimony documenting the espionage conspiracy concerned not only A-1125 but also other targeted or acquired non-public national defense information regarding pre-arrival aircraft movements, the greenhouses, command center at building 290 of the Joint Inter-Agency Task Force and its computer-monitoring stations, and, especially, the Southern Command, a secure and tightly controlled facility with a vast amount of classified material, *see* GOrigBr.:14-20. Penetration of Southern Command was "THE NUMBER ONE TASK OF THE DIRECTORATE [OF INTELLIGENCE]," GX:DS103:2,4, Medina wrote. Other discussion of Southern Command graphically illustrated the conspiracy's goal to penetrate what was secret and withheld from public access, to the injury of the United States: *See* GX:DA113:4, where the DI told Medina, through "THAT VALIANT TROOP" of agents, "TO TAKE THE OFFENSIVE AND MAKE A 'FURROW' THAT WILL TAKE US TO ITS [Southern Command's] VERY INNARDS." The jury had ample evidence on which to convict.

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[27] As to A-1125, their arguments trying to sanitize appellants', and the DI's, targeting of its "top secret" functions for penetration either failed with the jury, or are so weak that they were not even broached at trial. A new argument, *see* LMSuppBr.:31, is that Guerrero put "top secret" in quotation marks because he doubted it, rendering the evidence inherently ambiguous. This unsupported speculation was not argued to the jury, which was free to accept the government's more sensible articulated argument, R121:14014-14015, that the setting off of "top secret" in English in the Spanish-language reports reflects appellants appreciated it as a term of art referring to government-protected information, a reading further supported by Guerrero describing his floor-plan sketch as "BUILDING A-1125 . . . .WHERE REMODELING HAS BEEN DONE FOR SOME 'TOP SECRET' ACTIVITY (STRICTLY SECRET) . . ."(GX:DG138:14).

United States v. Rosen, 445 F.Supp.2d 602 (E.D. Va. 2006), cited by appellants, does not help them. The cited point – that national defense information must be closely held by the government and of a type whose disclosure could threaten national security – is unremarkable; was fully conveyed in the jury instructions, R125:14595; and was proved through the testimony of NAS's Captain Hutton and Southern Command's military intelligence officer Winne. Indeed, *Rosen* also makes the points, inimical to appellants' position, that information need not always be classified, 445 F.Supp.2d at 623, or unavailable to the public through other sources, *id.* at 620-621, to be within the reach of 18 U.S.C. 793's protection of national defense information.

B. Count 3 (murder conspiracy)

It is not disputed that the evidence showed that Hernandez played a role in the events of February 24, 1996. He received commendation from the chief of Cuba's Directorate of Intelligence for the outstanding results achieved on that date, and was promised it would be noted on his service card, GX:DG108:34-35. On April 29, 1996, Hernandez wrote of his recognition "IT'S A GREAT SATISFACTION AND SOURCE OF PRIDE TO US THAT THE OPERATION TO WHICH WE CONTRIBUTED A GRAIN OF SALT ENDED SUCCESSFULLY. IT IS OUR GREATEST HOPE IN THIS JOB, FOR WHICH WE WILL CONTINUE TO WORK SO THAT IT WILL ALWAYS BE LIKE THAT, " GX:DG127:1. Appellants argue, however, that no evidence would allow a jury to conclude that Hernandez understood and agreed to those events, appreciating them as a plan for murder.

But the evidence showed that Hernandez was a willing and involved participant in a plan for BTTR to be fatally confronted that day, punished by the Government of

Cuba, and with the deaths made an object lesson for the Cuban populace, including Cuban dissidents who had been growing in strength. The government will not here repeat all the evidence, *see* GOrigBr:24-29, 40-48, but notes that it includes Hernandez's involvement over many weeks before the shootdown. Hernandez was in Cuba, on leave and also visiting DI headquarters, GX:DG103:3-4,[28] between November and January 1996. On January 9 and 13, 1996, BTTR's distribution of leaflets from the air bearing U.N. Human Rights declarations drove Cuba to a new pitch of animus against BTTR. On January 25, 1996, the DI was considering a plan to use agent Roque ("German") to "denounce BTTR's role with spectacular proof and raise the spirit of the population facing BTTR's impunity" (GX:HF112). Hernandez returned to Miami January 26, GX:HF113, and on January 30 the DI began broadcasting to his radio signal a three-part encrypted message, GX:HF115, 116, 117, that announced "Operacion Escorpion," approved by Superior Headquarters "to perfect the confrontation of CR [counter-revolutionary] actions of BTTR." The DI charged Hernandez to set Roque and Gonzalez (code-name "Castor") to providing detailed information about BTTR flights and activities, with an emphasis on "always specify[ing] if agents are flying," GX:HF115. The agents were to avoid at all costs flying with BTTR without advance word to Cuba, and if they found themselves on a

[28] Hernandez's counsel argued to the court that there was no evidence that the trip to Cuba included DI headquarters, and the district court sustained objection on that point to the government's argument, R122:14078-79. The government did not have the citation at its fingertips at the moment of objection, but the evidence is unequivocal: GX:DG103:3-4 is Hernandez's expense report for his return trip from the "CP" (DI headquarters) to Miami, referencing money "I RECEIVED AT HEADQUARTERS," *id.* at 4. *See also* R129:4-5.

flight without such notice having been given, they were to recite enumerated code-phrases into the radio, GX:HF116. From these messages, the jury was entitled to conclude that Hernandez knew that Cuba's plan to address BTTR's "impunity" had escalated from Roque simply flying to Cuba with "spectacular proof" against BTTR, *see* HF118 ("BTTR plane variable cancelled"), to belligerent and confrontational action, imperatively inconsistent with DI agents being on board.

Additional messages ratcheted up the urgency and prioritization of *Operacion Escorpion*, GX:HF119. At the same time, the messages tasked Hernandez (and unarrested codefendant "A-4") to prepare for the propaganda-exploitation of Roque's return to Cuba, by filming Roque at a political exiles' Miami building and by assisting with Roque's false-identity "legend" preparatory to travel, GX:HF118, 120, 121, 122, 124.

The messages reached a peak with the February 18, 1996, broadcast to Hernandez's radio call-sign warning that DI head "MX" ordered that under no circumstances should Roque or Gonzalez fly with BTTR February 24 - 27,[29] "in order to avoid any incident of provocation that they may carry out and our response to it." Notwithstanding that the message speaks of this as a contingency, the simultaneous scheduling of Roque's departure to arrive in Cuba February 24, 1996, GX:HF126, allowed the jury to conclude that the convergence of dates reflects Cuba's determination, communicated to Hernandez, that the bellicose confrontation of BTTR

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[29] These were the dates that dissident group Concilio Cubano was planning an unprecedented demonstration in Cuba. The Government of Cuba's crackdown on the group was conveniently eclipsed from attention by the shootdown. *See* testimony of Concilio Cubano founder Morejon, R58:5989ff.

flights, which agents could not be on, would definitely occur at that time, with Roque arriving to play his propaganda part. Hernandez knew that between February 24 - 27, 1996, the Government of Cuba would fatally confront BTTR.[30]

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[30] Hernandez's counsel persuaded the court that the murder conspiracy also required proof that Hernandez agreed that the shootdown occur in international airspace. To reflect this, Hernandez requested, and the court granted (over government objection) jury instructions that recited the elements of the substantive offense of murder in the special U.S. jurisdiction, and advised the jury that this was what it had to find was agreed on. R125:14596-14600. The government's closing argument did not vitiate this, or any other, jury instruction. The defense's sensitivity to this issue led it frequently to break in to the prosecutor's rebuttal with objections, that were sustained, before the prosecutor could complete a sentence. (This is reflected in the court reporter's punctuation, showing sentence fragments ending in dashes. Appellants purport to reproduce these interchanges, but have changed the dashes to periods, undermining the government's argument, GOrigBr.:74-75, with these improper changes. *Compare* AGSupp.Br.:14-16 *with* R124:14517 lines 9, 23; R124:14518 lines 6, 10; R124:14514, line 25.) When the prosecutor later distilled his international-airspace argument without interruption, it was proper and drew no objection: "Everything changed after the leaflets. Was the defendant a partner in the conspiracy to shoot those planes down in international air space? Absolutely" (R124:14520-21). The court sustained Hernandez's prior objections, and he requested no curative instruction or further modification to the instructions he now says were vitiated.

The trial court, which was well situated to evaluate the nature and impact of the interrupted rebuttal arguments, considered Hernandez's similar instruction-vitiation claim in his Motion for Post-Verdict Judgement of Acquittal, R11:1301:8-12, and rejected it, R13:1391:6-7. Hernandez also argued, R11:1301:4-5,12, and the trial court rejected, the claim that the government's emergency papers to this Court factually conceded a lack of evidence. This Court gives "'considerable weight to the district court's assessment of the prejudicial effect of the prosecutor's remarks and conduct.'" *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1198 (11th Cir. 2000) (quoting *United States v. Herring*, 955 F.2d 703, 710 (11th Cir. 1992)). The trial (continued...)

Hernandez was given tasks to fulfil in connection with this plan, a threefold mission : overseeing the gathering of information about BTTR plans, confirming that no DI agents would fly with BTTR during the anticipated confrontation, and helping get Roque back to Cuba for the post-shootdown propaganda spin. Appellants' claim that there is no evidence he was a "decisionmaker" is beside the point; as a proven active and agreeable participant in the shootdown plan, his conviction is based on ample evidence regardless whether he was a leader or a follower.

C. Count 7 (possession of fraudulent passport)

The government respectfully relies upon, and incorporates by reference, its previous argument at GOrigBr:48-49. Campa's persistent challenge to this count illustrates the context in which the government argued, in rebuttal, R124:14480, 14482, that the defendants clearly disputed the charges, and required the government to prove them guilty. That is, defendants argued in closing that they didn't dispute much of the case against them, including their use of false identities, yet they put the government to its proof on every charge, and forced the government to prove each element beyond a reasonable doubt. Appellants' characterization of themselves as cooperative and concessionary could be properly rebutted with a simple reminder that appellants' not-guilty plea required the government to prove its case. Appellants sought to have the benefit of scoffing at how much proof the government adduced of

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[30] (...continued)
court's order also closely analyzed, and found sufficient, the evidence that the shootdown was planned, and anticipated by Hernandez, to occur in international airspace. *See also* R11:1326, government's response to Motion for Judgement of Acquittal, marshaling evidence of anticipation of international airspace.

supposedly uncontested matters, while resisting to the utmost such basic showings as that Campa knew of and constructively possessed his own fake passport bearing his photo, in an apartment he occupied for months. Indeed, the government's proof, including these photos, of his occupancy of the apartment where the passport was secreted, GX:560, 565, 563, R122:14116-14117, was belittled in Campa's closing argument, R124:14121, as superfluous government misdirection, yet he also argues that there was insufficient evidence to associate him with the passport.

III. THE JURY INSTRUCTIONS WERE FREE OF ERROR, INCLUDING PLAIN ERROR

The court's jury instructions, prepared during and following detailed discussions with counsel, R117-120, were correct. Notwithstanding counsel's many discussions with the court and submission of proposed instructions, R10:1197-1200, 1214, 1216, 1218, 1223, 1230-36, R11:1242, 1256, 1262 (defense); R8:1003 (government) and memoranda, R10:1229, R11:1261 (defense); R10:1215, 1224-25, 1228, 1240, R11:1255, 1264 (government), appellants failed to preserve their objections. At the end of the extended charge conference, the government formally stated its objections, R120:13889-90, and appellants said they would file something, R120:13890, but they did not. (The government did, R11:1266.) After instructing the jury, the court called for objections, R125:14619, and appellants either were silent or said they had none, *id.* After considering some typographical objections by the government, the court asked for further objections, *id.,* and the government referenced its earlier stated objections. Appellants were silent.

This was not adequate to preserve objections and claims pursuant to Fed.R.Crim.P. 30(d). Appellants' protracted discussions of instruction issues during the weeklong charge conference did not in themselves preserve their objections; indeed, the many modifications, negotiations and concessions that transpired during that week create exactly the uncertainty and ambiguities that an objection-requirement like Rule 30(d)'s is meant to avoid. The claimed instructional errors should be reviewed for plain error. *See, e.g., United States v. Bear Ribs*, 722 F.2d 420 (8th Cir.)(mere offer of jury instruction did not preserve error for appeal).

The court's instructions here were not error at all, let alone plain error affecting appellants' substantial rights and resulting in a miscarriage of justice.

A. Necessity instruction.

The government respectfully relies upon, and incorporates by reference, its argument of this issue at GOrigBr:67-69.[31] The trial court's finding in denying a necessity instruction, R119:13718, was sound in that defendants had presented no evidence of causal connection between the harm from south Florida exile groups they

[31] However, the government wishes to correct the statement that "[a] jury instruction on necessity is not warranted unless the defense *proves by a preponderance of evidence* each element of such affirmative defense," which incorrectly conflates the standard for giving the instruction with the standard for proving certain affirmative defenses. The italicized words should be *"presents some evidence of*." This correct standard was argued to the trial court, in considering the necessity issue, by the defense [R117:13566-67 ("some evidence")] and by the prosecution [R117:13582 (no necessity defense where "no evidence" of imminent peril), R117:13583 ("no evidence of imminence" in this case), 13586 ("no information, no evidence" of imminent emergency), R118:13610 ("no evidence of futility"), 13610 ("no causal connection"), 13645 ("no direct causal connection")] .

claimed required their covert action on behalf of Cuba here and many aspects of their crime, such as their presence on military installations, penetration of Southern Command, and of public office holders such as United States Congresspersons. There were multiple other bases to warrant the court's ruling, such as the absence of evidence of a present, imminent and impending threat, and the absence of evidence of no legal alternative to their action, *see United States v. Posada-Rios*, 158 F.3d 832, 873-875 (5th Cir. 1998). Moreover, the theory-of-defense instruction the court agreed to give,R125:14614-15, gave appellants ample basis to appeal, as their closing arguments strongly reflect, to the jury for assessment of appellants' claims in light of their supposedly good intentions. Appellants' citation of *United States v. Opdahl*, 930 F.2d 1530 (11th Cri. 1991) is inapt; the theory-of-defense instruction there was denied, whereas appellants' was granted, and there was no basis to give the necessity instruction.

B. § 951 instruction.

The government respectfully relies upon, and incorporates by reference, its argument of this issue at GOrigBr:69-72. Appellants' citation of *Lambert v. California*, 355 U.S. 225 (1958) is unavailing. The rationale of *Lambert, id.* at 229, that it proscribed non-registration "unaccompanied by any activity whatever, mere presence being the test," distinguishes this case, where the crime is not mere presence, but *acting* as an agent of a foreign government, without notification to the Attorney General. In any event, *Lambert*'s "application has been limited, lending some credence to Justice Frankfurter's colorful prediction in dissent that the case would stand as 'an isolated deviation from the strong current of precedents – a derelict on the waters of

the law,'" *Texaco v. Short*, 454 U.S. 516, 537n.32 (1982)(quoting *Lambert* dissent). Rather, the mainstream is the Supreme Court cases, cited in GOrigBr, applying the principle that ignorance of the law is no excuse, even to the extent of limiting this circuit's contrary trend, abrogating *United States v. Sanchez-Corcino*, 85 F.3d 549 (11th Cir. 1996);*see Bryan v. United States*, 524 U.S. 184 (1998).

The government notes that appellants sought, and received, a special interrogatory verdict that required the jury to state which of Count 1's conspiracy-objects it found, *see* R120:13803. The jury found that each defendant had conspired to both objects, to act as agents of a foreign government without notifying the Attorney General as required by law, and to defraud the United States of and concerning its governmental functions and rights, R11:1291, 1293, 1295, 1297, 1299. This provides further assurance that the convictions were not on the strict-liability basis appellants claim.[32]

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[32] Appellants also make an ill-defined objection to an instruction the government requested, concerning rules of engagement for aircraft interceptions. They omit, however, that the government's request was an alternative position to its objection to an instruction Hernandez got concerning foreign states' sovereignty over airspace. *See* R10:1231, 1234-36 (defense requests), 1240 (government objection, and alternatively requesting counterbalancing instruction). After the court overruled the government's objection and agreed to give a version of the sovereignty instruction Hernandez sought, R117:13519, the government argued, and the court agreed, R117:13520-13533, that a balancing instruction was needed to prevent the impression that "sovereignty" alone equated to a right to shoot down aircraft. Both defense and government instructions were drawn from International Civil Aviation Organization rules that had been the topic of extensive testimony. The court was correct to instruct in a balanced way.

IV. THE TRIAL COURT'S CIPA AND FISA RULINGS WERE CORRECT.

A. CIPA

The government respectfully relies upon, and incorporates by reference, its argument of this issue at GOrigBr:62-65.[33] Appellants persist in their efforts to pierce material properly reviewed by the court *in camera* and *ex parte* pursuant to the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App.3 §4. The case they cite, *United States v. Mejia,* 448 F.3d 436 (D.C. Cir. 2006), does not support this. On the contrary, *Mejia, id.* at 458, found "no support for the defendants' claim of the right to participation" in CIPA §4 proceedings. Nor does *Mejia* support appellants' proposal that non-classified portions of the §4 proceedings be disclosed; *Mejia* issued an order notifying parties that *ex parte* filings had taken place, but "[t]he order did not disclose *anything* about the materials that were reviewed by the district court," *id.* at 454 (emphasis added).

Appellants' claim that CIPA §4 allows only *ex parte* written submissions, not a hearing, is procedurally barred. Campa objected to exclusion from any hearing where evidentiary rulings would be made, 4SR1:210, 2SR1:210, (which objection the court properly overruled, noting that no determinations of admissibility of relevant evidence would be made at such a hearing, R1:232; *see also* 2SR1:212, RBox1:313). But neither he nor any appellant made the statutory claim until much later, when he first raised it in a motion to unseal the *ex parte* transcript, a year after trial ended,

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[33] GOrigBr:63 cited several pleadings by their Docket Entry numbers. The government subsequently caused the appeal record to be supplemented. Correct citations are 2SR1:156, 158, 212, 219; 4SR1:210, R1:232, RBox1:313.

R14:1622. This was far too late for the trial court to consider the statutory objection, which can be reviewed now only for plain error.

The statutory claim lacks merit. *See United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998)(*ex parte* CIPA hearings in which only government participates are proper; statutory reference to written submissions does not rule out such hearings). Appellants' effort to distinguish and limit *Klimavicius-Viloria* to situations where the court has questions is not valid, and not shared by courts that cite the case as holding that CIPA procedures apply to testimony as well as written statements, without the qualification appellant claims. *See United States v. Marzook*, 435 F.Supp.2d 708, 745 (N.D. IL 2006)(court may properly receive classified testimony *ex parte* pursuant to CIPA); *Kasi v. Angelone*, 200 F.Supp.2d 585, 595 n. 6 (E.D. VA 2002), *United States v. Tibbs*, 225 F.3d 665, table decision at **1 (9th Cir.)(unpublished). *See also United States v. Yunis*, 867 F.2d 617, 620 (D.C. Cir. 1989)(*ex parte in camera* proceedings).

Appellants' speculation that because the trial court said that information "material to the defense" had been provided to the defense, R35:2469, it must have used an incorrect legal standard in CIPA §4 proceedings is without merit. Materiality to the defense is the touchstone of Fed.R.Crim.P. 16 discovery, *see, e.g.,* Fed.R.Crim.P.16(a)(1)(E)(i); is broader and more inclusive than just *Brady* material, *see United States v. Lloyd*, 992 F.2d 348, 350-51, 352 n.2 (D.C. Cir. 1993); and is at least as inclusive as *United States v. Yunis*'s stated requirement for discovery of CIPA material, *supra*, 867 F.2d 617. Appellants' effort to project the remark as a disclosure of the *ex parte* proceedings is baseless, as is the claim that the government implied the

nature of the *ex parte* material. The cited record reference, R36:2665, is a transcript portion where the government said nothing at all, let alone made a disclosure of classified proceedings.

B. FISA.

The government respectfully relies upon, and incorporates by reference, its argument of this issue at GOrigBr:65-67. The government also addressed this issue in its response, R3:385, to Campa's motion, R2:288, to suppress fruits of FISA searches. The trial court properly considered the matter and found the searches duly authorized by the U.S. Foreign Intelligence Court in compliance with FISA (R5:639).

V. THERE WAS NO *BATSON* VIOLATION.

The government respectfully relies upon, and incorporates by reference, its argument of this issue at GOrigBr:61-62. The government did not engage in purposeful discrimination in striking any venireperson, including Kenneth McCollum, on whom appellants' supplemental brief exclusively focuses.

Appellants first raised an issue pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986) after the government had accepted two black venirepersons (Page, R28:1493, and Barnes, R28:1494), struck two white persons (Gair R28:1494 and Peterson R28:1496), struck two black persons (Greene, R28:1495, and Cromartie, R28:1496), and one person whom the defense described as black, but whom the government denied to be of African descent (Barahona, R28:1494,1502). Upon the government's striking black venireperson McCollum, the defense moved for the government "under Batson to give some racially neutral reason" for striking McCollum and Cromartie (R28:1496-97), which is not the correct standard, since the objector must first make

a prima facie showing that the peremptory challenge is exercised on the basis of race, *United States v. Allen-Brown*, 243 F.3d 1293, 1297 (11th Cir. 2001). The government noted the procedural default to the court, which asked the government to state its race-neutral reasons as to McCollum and Cromartie, but without evincing any conclusion that a *prima facie* case of discrimination had been established (R28:1498).

The defense argued that corrections officer McCollum worked in law enforcement, and there could be nothing objectionable about him, R28:1497. The government stated it did not want a corrections officer, someone intimately familiar with the prison system and who guards prisoners. The defense doubted the explanation, because the government had not objected to another venireperson (referring to Sabater) who was from the Federal Detention Center. The government pointed out that Sabater was a clerk, not a guard. The court found the government had stated a race-neutral reason (R28:1500-01). Great deference is to be afforded the trial judge's determination that a peremptory strike was not racially motivated. *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1198 (11th Cir. 2000). Nor does the defense's disagreement with the government's reasoning about corrections officers undermine the court's determination; "'a legitimate reason is not a reason that makes sense, but a reason that does not deny equal protection,'" *United States v. Steele*, 178 F.3d 1230, 1235 (11th Cir. 1999); *see also Purkett v. Elem*, 514 U.S. 765, 767-68 (1995). *See* Gary Delsohn, *The Prosecutors* 48 (Dutton 2003)(prosecutors disfavor corrections officers as jurors, due to occupational tendency to accommodate prisoners).

Comparison with Sabater, a white venireperson who worked as a security specialist at the Federal Detention Center, R23:298-299, 322-324, does not help appellants' claim. Sabater was struck for cause, R23:388, over the government's objection, after the defense learned that he knew that the defendants were incarcerated, had himself been assaulted by inmates, participated in their prosecution, and was satisfied at having worked with prosecutors in that regard, *id.* The very things the defense didn't like about Sabater are the hallmarks of his non-comparability to McCollum. His security-specialist desk job put him in a different relation to prisoners than a guard's; *see* Delsohn, *supra.* Finally, since Sabater was struck for cause, there is no record how the government would have exercised its strikes regarding him. It has been "recognized that 'failing to strike a white juror who shares some traits with a struck [non-white juror] does not itself automatically prove the existence of discrimination.' That is certainly true where there are relevant differences between the struck jurors and the comparator jurors." *United States v. Novaton*, 271 F.3d 968, 1004 (11th Cir. 2001). That is true here, with relevantnon-racial differences between McCollum and Sabater.

IV. APPELLANTS WERE PROPERLY SENTENCED

The government respectfully relies upon, and incorporates by reference, its sentencing arguments at GOrigBr:76-85, attached as Appendix G, with additions to individual claims:

A. Consecutive sentences, GOrigBr:76-77

Gonzalez agreed, R130:90, that there were no guidelines promulgated for or analogous to Count 15's 18 U.S.C. §951 offense. His only other count of conviction

was the Count 1 dual-object conspiracy, as to which the interrogatory jury verdict made clear he had been convicted of both conspiratorial objects, to defraud the U.S. and to violate §951. His argument, that the existence of a guideline-calculable object (defraud the U.S.) within the conspiracy count robbed the court of its ability to sentence him to consecutive terms on the two counts. is legally wrong, and makes little sense. For one thing, the district court accommodated his request to compute a guideline level for the defraud-the-U.S. object, R130:97-98; entertained all of his arguments for guideline-defined adjustments and made findings thereon, R131:41-43; and agreed to consider guideline-related matters advisorily in fashioning the sentence, R130:97-98. Thus whatever benefit could accrue to Gonzalez from a guidelines calculation was provided. For another thing, Gonzalez's position is inherently illogical: Having been convicted of a guideline-related goal within Count 1, he seems to argue, he must be sentenced only to concurrent terms, notwithstanding that, had he been convicted only of the non-guideline §951 object and acquitted of the defrauding-U.S. object, he could have been sentenced to consecutive terms and the court would have had more discretion. Thus, a partial acquittal would put him in a worse sentencing situation than total conviction – wholly illogical, and a good illustration why the Probation Office said it would be unduly cumbersome to apply guidelines to one conspiracy object while relying on the statutory term of imprisonment for the other, *see* GOrigBr:77n.56. Gonzalez admitted he could find no case law for his argument on hybrid guideline/non-guideline sentencing, R130:101-102.

The court carefully, and expressly, considered the factors enumerated at 18 U.S.C. §3553, *see* R131:43-44, noting the defendant's expressed lack of remorse,

R131:44, in fashioning a sentence sufficient but not greater than necessary to comply with the statutory purposes of sentencing. Its selection of the maximum period of punishment and incapacitation was well supported by the record. *See, e.g.,* R131:29-40, R14:1426 (government argument and memorandum marshaling evidence of seriousness of Gonzalez conduct); R131:13-26 (Gonzalez allocution, declaiming "why I have no reason to be remorseful," R131:24, and "I am on the right path" to make more "improvement" in a world that needs it, R131:16.)

B. Special skill, GOrigBr:77-78.[34]

The district court's thorough factual findings supporting this adjustment were not clearly erroneous. *See* R134:14-16 (Guerrero's specialized training in radio intelligence, encryption, decryption utilized to commit and conceal offense; civil engineering degree with advanced work in airport installations is "a legitimate specialized skill not possessed by the general public" which defendant used in reporting on Building A1125 and making written blueprint based on mental blueprint, and for which skill he was tasked to penetrate the Naval Air Station). The district court's legal foundation, and reference to special-skills caselaw, *see* R134:15, 45-46, also support the soundness of its findings. *See also* R14:1443:8-12, R134:6-11 (government memorandum, argument stating facts, law supporting special-skills).

[34] §3B1.3 (cmt. 3), cited at GOrigBr.78, refers to the pertinent Nov. 1, 2001, guideline manual; it has since been renumbered to Application Note 4.

C. Obstruction of Justice, GOrigBr:78-79.[35]

GOrigBr:78 describes Medina's furnishing a false name post-arrest to numerous entities. However, the enhancement clearly was applied to him and to Hernandez for giving false names to the magistrate judge, specifically, calling into play the conclusion of *United States v. Ruff*, 79 F.3d 123 (11th Cir. 1996)(obstruction adjustment warranted for lying to magistrate judge about material matter, regardless of effect on investigation or prosecution).[36] *See* R128:10-12, R130:9-11 (court's factual findings, not clearly erroneous, as to Hernandez and Medina, respectively, giving false names to magistrate judge, under oath and after receiving advice of right to refuse to make statements and that any statements could be used against them; also, court's legal conclusions, aptly citing *Ruff* and *United States v. Mafanya,* 24 F.3d 412 (2nd Cir. 1994)). *Mafanya*, and common sense, support the court's finding that giving a false name to a magistrate judge was material to the determinations the magistrate judge had to make at an initial appearance, including bond and appointment of

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[35] GOrigBr.:78n.57 is incorrect. This issue pertains only to Hernandez and Medina. Guerrero did not receive this enhancement; Campa received it, but did not object, *see* R127:4-5.

[36] *United States v. Banks*, 347 F.3d 1266, 1269-71 (11th Cir. 2003), cited by appellant, is inapposite because it is based on a different application note that specifically requires that the "conduct actually resulted in a hindrance to the investigation or prosecution of the instant offense," *see* § 3C1.1, comment.(n.5(a)). *Banks* distinguishes that note from Application Note 4(f), applicable here, which deals with "providing materially false information to a judge or magistrate" and has no such additional requirement.

counsel. *See also* R14:1409:10-14, 1415:18-22 (government memoranda on Hernandez, Medina obstruction of justice).

D. §2M3.1, GOrigBr:79-82

Appellant claims that the court was categorical, not individualized, in its consideration of facts related to §2M3.1 considerations, and that it acquiesced in a government effort to remove its discretion to consider a downward departure for revelation of information of "little or no harm," pursuant to §2M3.1(cmt.2). This is incorrect, and at odds with the record. The record reflects full and nuanced consideration, assessment and findings by the court of pertinent facts specific to the defendants' participation in the espionage conspiracy, their aspiration to penetrate top-secret national security protections, and associated harms. *See* R128:37, 46-47. R129:50-51, 110-116 (court overrules objection by Medina to PSR statement, about DI prizing classified information, which Medina concedes is part of record-basis for court's conclusions as to §2M3.1, R129:113), R130:37-39, R134:13-14, 47-48.

Appellant's argument that the base offense level should have been §2M3.1(a)(2) [level 37] rather than §2M3.1(a)(1) [level 42] overlooks the clear intent of the guideline to reflect the higher stakes associated with top secret information. Appellant cites no case construing this guideline in this regard.[37] His analysis of espionage-conspiracy case *United States v. Pitts,* 176 F.2d 239 (4th Cir. 1999) is similarly inapt. Unlike the conspiracy here, which aspired to top secret information, "Pitts attempted

[37] *But see United States v. Chastain*, 198 F.3d 1338, 1353 (11th Cir. 1999), rejecting argument, similar to government's here, in context of narcotics specific offense characteristic §2D1.1(b)(2)(A).

to provide or made preparations to provide . . . information classified as 'Secret'. . . ." *Id.* at 243.

E. §2X1.1, GOrigBr:82-84.[38]

Cases cited by appellant are distinguishable. Although this Court has held §2X1.1 applicable to money-laundering conspiracies, *see United States v. Khawaja*, 118 F.3d 1454, 1458 (11th Cir. 1997); *accord United States v. Puche*, 350 F.3d 1137, 1155 (11th Cir. 2003), it has done so relying on *United States v. Acanda*, 19 F.3d 616, 618 (11th Cir. 1994). There, the offense was committed prior to the 1992 amendment to 18 U.S.C. §1956, adding a subsection prohibiting conspiracy to commit money laundering, currently codified at 18 U.S.C. § 1956(h). *See* Pub. L. 102-550, § 1530, 106 Stat. 4066 (1992). Accordingly, *Acanda*'s defendant was charged with violating 18 U.S.C. §371 and properly sentenced pursuant to§ 2X1.1.*See Guidelines Manual*, App. A (Statutory Index). Similarly, Medina's reliance, LMSuppBr:27n.8, on *United States v. Reifler*, 446 F.3d 65, 105 (2d Cir. 2006) is inapposite because those defendants were also convicted of a §371 conspiracy. *Thomas* pre-dates *Acanda, Khawaja* and *Puche* and, to the extent they are inconsistent with *Thomas*, *Thomas* controls. *See United States v. Hornaday*, 392 F.3d 1306, 1316 (11th Cir.), *cert. denied*, 125 S. Ct. 2591 (2005). *See also* R14:1415:12-18 (government memorandum discussing §2X1.1).

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[38] GOrigBr.:83's reference to (Section 2E1.5) should be (*former* Section 2E1.5). GOrig.Br.:84's citation to *United States v. Martinez* should be updated to 342 F.3d 1203, 1207-08 (10th Cir. 2003).

F. Campa role enhancement, GOrigBr:84-85

The district court did not plainly err by enhancing Campa's sentence by three levels pursuant to USSG § 3B1.1(b), which applies where the defendant was a manager or supervisor of criminal activity that involved five or more participants or was otherwise extensive. Ample evidence, which was argued by the government at sentencing, supported the enhancement, R132:17; *see also* R14:1417:12-15, 16-17 (government memorandum discussion). The fact that the district court's ruling on this issue was based on Campa's management of "the assets of the search by Allen . . .," (*see* R132:21) in apparent contravention of *United States v. Glover*, 179 F.3d 1300, 1303 (11th Cir. 1999), which requires management of participants, not assets, does not compel reversal.

First, despite the claim to the contrary, LMSuppBr:56, Campa did not specifically object to the court's reliance on his management of assets as a basis for the role enhancement, either contemporaneously or at the end of the hearing, in response to the court's *Jones* inquiry (R132:21-22; R133:133-35). *See United States v. Jones*, 899 F.2d 1197, 1102-03 (11th Cir. 1990); *United States v. Maurice*, 69 F.3d 1553, 1557 (11th Cir. 1995) (*Jones* requires clear explanation of basis of objection). This is especially so because the Addendum to Campa's PSR referenced his management responsibility over "property, assets and activities" of offense conduct, putting him on notice of the issue. He should have raised the point objecting to asset-management "in such clear and simple language that the trial court may not misunderstand it," *United States v. Massey,* 443 F.3d 814, 819 (11th Cir. 2000)(quoting *United States v. Riggs*, 967 F.2d 561, 565 (11th Cir. 1992). Moreover, Campa cannot

show that the error affected his substantial rights where ample evidence in the record supports a finding that his management activities in the identity-fraud extended to a participant in the offense. *See* R132:17, *see also*,GX:DAV-107 and GX:DAV-108, which reflect Campa's oversight and direction to agent V.5.1a (codename "Luis") to help with countersurveillance of Medina's arrival from California, in completion of Operation Texaco to gather data for future false identities. Further, even if the role-enhancement were inapplicable, he would be subject at resentencing to the alternative enhancement for special skill, *see* § 3B1.3.

Conclusion

For the foregoing reasons, the district court's decision should be affirmed.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing Supplemental Brief for the United States was sent via Federal Express to the Court of Appeals on this 20th day of December, 2006, and a true and correct copy of same was delivered by Federal Express to: Richard Klugh and Orlando do Campo, Federal Public Defender's Office, 150 West Flagler St., Suite 1500, Miami, FL 33130-1555; Paul A. McKenna, McKenna & Obront, 2940 First Union Financial Center, 200 South Biscayne Blvd., Miami, FL 33131; William M. Norris, P.A., 8870 SW 62 Terrace, Miami, FL 33173-1616; Philip Horowitz, Suite #1910 - Two Datran Center, 9130 South Dadeland Boulevard, Miami, FL 33156; and Leonard I. Weinglass, 6 West 20th Street, Suite 10A, New York City, NY 10011 on the same day. I further certify that on this 20th of December, 2006, the foregoing brief was electronically uploaded to the Eleventh Circuit Court of Appeals' Internet web site at www.ca11.uscourts.gov.

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Caroline Heck Miller.
Assistant United States Attorney

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