Nos. 01-17176

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/appellee,

v.

LUIS MEDINA,

Defendant/appellant.

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

SUPPLEMENTAL BRIEF OF THE APPELLANT LUIS MEDINA

WILLIAM M. NORRIS
William M. Norris, P.A.
8870 SW 62nd Terrace
Miami, FL 33173
Tel: (305) 279-9311
Fax: (305) 279-9024
Attorney for Luis Medina

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SUPPLEMENTAL ISSUE STATEMENT

I. Whether the district court misapplied the completed-act top secret transmittal guideline, U.S.S.G. § 2M3.1; failed to properly apply the lesser harms provisions of § 2M3.1; and erroneously failed to apply the conspiracy cross-reference guideline, U.S.S.G. § 2X1.1.

II. Whether the district court erroneously imposed, as to defendant Guerrero, an enhancement for abuse of a special skill under U.S.S.G. § 3B1.3 based on his intelligence training and engineering studies.

III. Whether the district court erroneously imposed consecutive sentences beyond the authorization and instruction of the sentencing guidelines.

IV. Whether the district court erroneously applied the U.S.S.G. § 3C1.1 enhancement for obstruction of justice based on the name used by the defendant at an initial appearance following arrest.

V. Whether the district court erroneously imposed, as to defendant Campa an aggravating role enhancement under U.S.S.G. § 3B1.1 based on temporary management of assets.

PRELIMINARY STATEMENT AND ADOPTION OF BRIEFS

The Court has requested supplemental briefs addressing the issues remaining for resolution. Appellant Luis Medina adopts the supplemental briefs filed by his co-appellants, Guerrero, Hernandez, Campa, and Gonzalez, seeking reversal of convictions based on insufficiency of evidence, on the Count 2 charge of conspiracy to transmit national defense information, and trial and pretrial errors warranting reversal and remand for a new trial on other counts of the indictment.

In the present brief, however, Medina addresses solely the *sentencing* issues remaining in this appeal as to each appellant, with particular focus on case law that has developed following the initial briefing, recognizing that if the Court reverses the convictions on some or all of the counts of conviction, resort to the sentencing issues may be obviated.[1]

Issues I and II relate to calculating the base offense level (Issue I) and

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[1] Medina hereby withdraws his previously-raised challenge to a sentencing guideline enhancement for role in the offense, *see* Medina Br. 48-49, without prejudice to his right, if the Court grants a *de novo* resentencing based on other issues, to present such arguments to the district court in light of the record developed at a resentencing. Also, the Court, in September 2004, entered an order denying appellants' motion to brief constitutional issues relating to *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004). Hence, those issues are not presently before the Court. However, this Court has the authority to *sua sponte* reach an issue under Fed. R. Crim. P. 52(b) if judicial economy or the interests of justice warrant it.

sentence enhancements (Issue II) as to Count 2 of the indictment, charging Medina, Guerrero, and Hernandez with conspiracy to transmit national defense information. As to Issue I, the district court erred by applying U.S.S.G. § 2M3.1(a)(1), the guideline applicable only to completed acts of espionage where the gravest damage to national security has occurred. This guideline was inapplicable because these defendants did not obtain or transmit, or attempt to obtain or transmit, classified information of any level, despite having been in the United States for years.

The defendants further contend that under the conspiracy cross-reference guideline, U.S.S.G. § 2X1.1, an uncompleted conspiracy merits a 3-level reduction from § 2M3.1(a)(2), where, at a minimum, it was not reasonably certain that the defendants intended to complete all acts necessary to gather and transmit top secret material. Finally, apart from the offense level decision, the district court erred in categorically barring them from a downward departure and from obtaining essential evidence to show the defendants' actions caused no harm to the national security.

Issue II addresses a special skill enhancement erroneously applied to Guerrero due to his presence on a naval air base. The district court concluded that an educational degree in civil engineering qualified Guerrero for a skill enhancement as to the offense of conspiracy to obtain national defense information, even though Guerrero employed no engineering skills, and instead was a laborer at the base. The government accused Guerrero of nothing more than visual observations that did

not require engineering. Further, even if Guerrero used intelligence training skills, that is not within the scope of the abuse-of-special-skill concept in U.S.S.G. § 3B1.3, but is excluded as being, at most, part and parcel of the offense itself, i.e., conducting foreign intelligence observations and communications.

Issue III addresses the appropriate calculation of a sentence for a dual-object conspiracy, Count 1 of the indictment, where the district court erroneously imposed consecutive sentences on substantive and conspiracy counts without factoring in the appropriate guideline analysis, in that one part of the Count 1 conspiracy offense was clearly covered by a sentencing guideline base offense level, and the remaining conduct of conviction consisted of "related conduct" with the meaning of the guidelines that should have yielded a concurrent sentence.

Issue IV concerns erroneous obstruction of justice enhancements in the guideline calculations as to Medina, Hernandez, and Campa, based on their self-identification, at their initial magistrate court appearance, using the names under which they were living in the United States, where in the particular context of the information before the magistrate, and under which all parties were operating at the initial appearance, the defendants' statements were not materially false.

Issue V addresses Campa's role in the offense as to his possession of false identification documents (Counts 7-8), where the district court erroneously imposed the enhancement based on his management of assets, rather than management of

persons criminally involved in the offense, as required under U.S.S.G. § 3B1.1.

SUPPLEMENTAL ARGUMENT ON SENTENCING ISSUES

Issue I: Misapplication of the Completed-Act Top Secret Transmittal Guideline as to Count 2, National Defense Information Conspiracy; Failure to Properly Apply the Guideline's Lesser Harms Provisions; and Failure to Apply Conspiracy Cross-Reference Guideline.[2]

Standard of Review: The district court's interpretation of sentencing guidelines is reviewed *de novo*. *United States v. Miller*, 166 F.3d 1153, 1155 (11th Cir. 1999).

Argument: At sentencing, the district court ruled that the object of the Count 2 conspiracy – of which Guerrero, Hernandez, and Medina were convicted – was to acquire "top secret" information, and that conspiracies encompassing such an object must be assigned the highest base offense level under U.S.S.G. § 2M3.1(a)(1), specifically, level 42, resulting in life sentences for these three defendants. R128:46.

The district court also ruled that U.S.S.G. § 2X1.1, the guideline for conspiracies not expressly covered by another guideline, was inapplicable to convictions under 18 U.S.C. § 794 because the underlying statute criminalizes

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[2] These issues were raised in Medina' initial brief, pages 36-45, and argued in his reply brief, pages 13-19. The issues were adopted by Guerrero and Hernadez, who, like Medina, were convicted of the Count 2 national defense information conspiracy.

conspiracies as well as substantive offenses and the guideline statutory reference directs application of § 2M3.1 for offenses under 18 U.S.C. § 794. R129:2. Finally, the district court concluded that application note 2 to § 2M3.1, providing for downward sentence adjustment if there was no significant damage to the national security interests of the United States, is categorically inapplicable to a defendant whose base offense level is 42, a classification that, in the district court's view, precluded consideration of lack of harm to the United States.[3] R134:14-16, 45-46.

1. Erroneous application of U.S.S.G. § 2M3.1(a)(1), the guideline applicable where top secret material has been "gathered or transmitted."

Reviewing the guideline language *de novo*, it is clear that U.S.S.G. § 2M3.1(a), sets a base offense level of 42 *if* the defendant "transmitted" or "gathered" information classified as "top secret," and level 37 "otherwise." This terminology clearly directs application of level 42 – a guideline authorizing a life sentence – only if significant harm has occurred, and does not apply to the uncompleted, ill-defined conspiratorial goals charged in Count 2 of the indictment, even if the object of that conspiracy is characterized in the most open-ended fashion,

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[3] *See* Medina PSI ¶ 140 (U.S. probation officer advises district court: "A possible mitigating issue that was not contemplated by the United States Sentencing Commission during the formation of the sentencing guidelines has been identified. The defendant states he came to the United States under an assumed identity not to harm the citizens of this country or the government, but in an effort to protect his country from the terrorists acts of individuals operating against his homeland.")

as the government sought to do at sentencing. Indeed, as to the charged conspiracy, only the "otherwise" category of § 2M3.1(a)(2), base offense level 37, makes sense. For several reasons, applying § 2M3.1(a)(1) to these defendants was erroneous.

A. The district court did not find that top secret information was gathered or transmitted as specifically required by U.S.S.G. § 2M3.1.

U.S.S.G. § 2M3.1 simply and straightforwardly provides:

(a) Base Offense Level

(1) 42, *if* top secret information was *gathered* or *transmitted*; or

(2) 37, otherwise.

§ 2M3.1(a) (emphasis added).

The district court's ruling rested on the flawed assumption that the words used in the guideline did not mean what they said. The district court rejected the plain meaning of the guideline in favor of an interpretation that placed no weight at all on whether top secret information was gathered or transmitted, eliminating the "if" clause.

The district court's ruling contravenes the first premise of statutory and guideline interpretation: The terms of the sentencing guidelines must be given their "plain and ordinary meaning." *United States v. Maung*, 267 F.3d 1113, 1119 (11th Cir. 2001) ("In interpreting a sentencing guideline, we must adhere to its plain

meaning."; holding that "plain meaning" of guideline requiring enhancement when "defendant was in the business of receiving and selling stolen property," U.S.S.G. § 2B6.1(b)(2), "is that the defendant himself, and not just his co-conspirator, must have received and sold stolen property'"); *United States v. Pompey*, 17 F.3d 351, 354 (11th Cir. 1994) ("[L]anguage in the Sentencing Guidelines is to be given its plain and ordinary meaning."); *United States v. Strachan*, 968 F.2d 1161, 1163 (11th Cir.1992) (recognizing the "wealth of precedent in this circuit that seeks to remain faithful to the plain language of the sentencing guidelines"); *United States v. Wilson*, 993 F.2d 214, 217 (11th Cir.1993) (sentencing guidelines commentary must be afforded its plain and ordinary meaning).

The district court did not find, nor did the government suggest, that any top secret information was transmitted or gathered in this case. Instead, the district court ruled: "I find that as the presentence report indicates, the base offense level under 2m(3).1(a)(1) is the appropriate base offense level. The defendants by their own words conspired to acquire top secret information at Boca Chica airbase." R128:46. The presentence reports adopted by the district court simply state that "the offense involved an attempt to collect top secret information." PSI (for Guerrero, Hernandez, and Medina).

The plain language of § 2M3.1 was not satisfied by the factual conclusions

stated by the district court and referenced in the presentence report.[4] There obviously was no top secret information gathered or transmitted in this case.

Nor could there have been any evidence that top secret material was gathered or transmitted given the government's representations regarding discovery. Responding at sentencing to the defendants' continued reliance on motions under CIPA for disclosure of documents seized by the government in this case (motions that were denied after lengthy *ex parte* proceedings between the government and the district court, which still remain sealed, leaving the district court's reasons for denial of discovery unknown to the defense), the government again asserted that it was *not* attempting to prove that top secret information was gathered or transmitted and that if it were making such a claim, the defendants would have been entitled to disclosure of any documents on which the government was relying: "MS. MILLER [prosecutor]: … [B]ut [defense] counsel's point is well taken that if there is some mystery the government is sitting on top of he is entitled to know and needs to know in order to litigate the sentencing issues." R127:10. The government explained that its sole argument was based on the theory of uncompleted conspiracy, rather than

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[4] Those factual conclusions were clearly erroneous. The effort to find out what future use was to be made of the facility did not involve or necessitate gathering any closely-held information. The government admitted in closing that "as the government told you in opening statement, what you would not be seeing in this case is documents that say classified on them and that were being passed back and forth." R121:13999.

actual gathering or transmittal: "This is a conspiracy case and that answers the point the defendant makes." *Id.*

If the Sentencing Commission had wanted offense level 42 to apply based solely on the hopes or intent of the defendant, or some other form of the object-of-the-conspiracy interpretation used by the district court, it could have easily done so, as indeed it did in drafting other provisions in which enhanced guidelines were expressly made applicable based on the "object of the offense." Thus, in the robbery guideline, U.S.S.G. § 2B3.1, an enhancement is to be applied "[if] the property of a financial institution or post office was taken, *or*, if the taking of such property was an *object* of the offense." § 2B3.1(b)(1) (emphasis added).

Similarly, in the fraud and theft guideline, U.S.S.G. § 2B1.1, loss is specifically defined as the "greater of the actual or *intended* loss." § 2B1.1, comment. (n. 3(A)) (emphasis added).

Throughout the guidelines, there are offense levels set for completed conduct, such as firearm possession, injury or death, or effects on particular institutions. However, absent specific direction, no guideline or commentary provides for a firearm-possession enhancement where no firearm was possessed, or for an if-death-results enhancement where death does not actually result; nor is there any guideline or commentary provision for other "harm" enhancements, such as bodily injury, that could have but did not occur, whether or not the defendant intended to possess

a weapon or to inflict injury.

Policy arguments also support using level 37, not 42:

- The statute, 18 U.S.C. § 794(a), requires "transmittal" of secrets, and in this case no secrets were even gathered, much less actually transmitted;
- For nearly two years from early 1997 until late 1998, the defendants operated with the knowledge of the U.S. government, which deemed there to be no genuine risk of transmittal or gathering of any government secret, and certainly no risk of access to top secret information;
- Although the district court concluded, by a preponderance, that an inference could be drawn that top secret information was the goal of the conspiracy, the record of communications to and from the defendants showed a wide range of non-secret activity and no directive to these agents to obtain any classified information;
- That a 10-year maximum sentence applies under 18 U.S.C. § 793 for conduct essentially indistinguishable from the charged offense conduct here–in that no secret material was gathered–lends support for application of the lower range of level 37 in this case; and
- The severe, life-sentence effect of level 42, for *transmitted* top

secrets, suggests that mere speculative possibilities of acquisition of such material should not be enough to warrant this guideline range, so that not every low-level agent operation would lead to a life sentence.

The Court need not even reach these policy questions, however, because the espionage guideline, § 2M3.1(a), plainly sets a base offense level of 37 in all cases in which top secret information was not gathered or transmitted; and this plain meaning governs. Importantly, the Sentencing Commission knew how to create a more inclusive category than the specific completed-act terms used in § 2M3.1(a)(1). But the Commission did not do so, and *particularly given the mandatory-life sentence effect of the guideline*, it would be unreasonable to expand the offense level 42 category beyond the limits set by the Sentencing Commission.

Based on the district court's finding that the offense conduct here involved at most an unsuccessful conspiracy with an object to gather top secret information, the district court's application of a level 42 guideline was contrary to law and an erroneous application of the guideline. The Court should reverse this sentencing ruling and remand for resentencing.

B. <u>The district court did not identify any "top secret" material toward which the defendants directed their conspiracy, but erroneously relied on the government's open-ended-goal theory of the conspiracy as encompassing possible top secret material</u>.

The district court's ruling that top secret material was an object of the

conspiracy rested exclusively on the court's finding that in advising defendant Guerrero to "expand on why they say [future use of Boca Chica airbase building A1125] is for 'top secret' and anything else you can get related to the use of that building," the Cuban government was telling Guerrero to obtain top secret information. R128:46. The plain meaning of these words, however, refutes the district court's conclusion. Guerrero was asked to try to find out what the future "top secret" use of building A1125 was related to, not to gather or transmit top secret material that might at some later date come into the building. Directing an agent to find out why "they say" that a building is going to be used for "'top secret'" activity in the future is not directing the agent to obtain the top secret information that might one day be found in the building.[5]

Significantly, the government never suggested that the general intended use of the building, which included storing classified documents, was a top secret

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[5] With regard to the district court's focus on Guerrero's observations of this *unfinished* building that was in the remodeling stage, the government presented no witness at trial or sentencing to say that any building was itself a secret; indeed, it generally is common knowledge that secure government buildings may contain some form of classified information. In fact, the actual building plans for the unfinished A1125 building at Boca Chica were not stamped "classified." And Guerrero never gathered or sought to gather *any* document, whether secret or not, from the building in question or elsewhere. He simply was not tasked to engage in such conduct during the entire time he was on the base.

matter, nor would it be expected to be so. R:74:7928-29 (after remodeling to install security, building was illuminated "to make sure everyone understood it is a restricted area"); R103:11866 (public knowledge that building was used for high security activity). It was a public airbase, *see* R75:8130 (government argues "Boca Chica Air Station … is open to the public"); anyone could see and photograph the persons entering that building and surmise from the identities and responsibilities of those persons the general area of military purpose served by the building. Learning that security was installed in the remodeling of the building may be intelligence gathering, but it is wholly distinct from the gathering of any top secret material that might subsequently end up being closely guarded inside the building.

The statute protects against the gathering of classified information, not of information about buildings and people that contain or handle classified information. Nor did the district court suggest that it was relying on a 'casing the bank' theory: there was never any evidentiary indication or even suggestion that once Guerrero found out what type of activity was to take place in the building, he was then going to break in and steal classified material of any kind, much less top secret material. At sentencing, the district court conceded that the request to Guerrero could be interpreted as "to provide information as to the type of security arrangement being planned and carried out in building A1125." R134:16. That description of the direction to Guerrero is, however, inconsistent with the government's argument that

Guerrero was to obtain top secret material from inside the building.

Describing visible security measures may give some idea of the type of activity for which a building will be used. That information can be processed by an intelligence service for whatever purpose they may wish. But noting such features of a building does not automatically imply an intent to *breach* the security. And as to Guerrero, the evidence consistently disproved any supposed effort to obtain secret documents, in that Guerrero was left by the government, unarrested, on the airbase for more than a year thereafter and yet neither Guerrero nor any of the other defendants did anything with respect to building A1125.

If Guerrero had taken any action to actually approach any type of classified information, the government presumably would have disclosed it in the CIPA material provided *ex parte* to the district court. In fact, however, that type of intelligence gathering was contrary to the overriding Cuban instruction to Guerrero not to engage in such endeavors, because his utility to Cuba was as a long-term, eyes-and-ears agent on the ground. *See* R48:4286 (testimony of FBI agent Giannotti: Guerrero was "here for the long term").

The government speculated that Cuba may not have intended to use the agents in this case to obtain classified materials, but rather to lay the groundwork for *possible* future endeavors by others at some unknown time. *See* R45:3809 (government direct examination of FBI specialist Hoyt: any such future decision to

seek to obtain secret material might be "years" away, such that preliminary information-gathering might or might not later lead to more serious intelligence gathering). But in light of the absence of any such risk-taking by these defendants, the characterization of the defendant's *plan* as being to obtain top secret information is actually nothing more than a mere possibility that some such material would come into their hands while they conducted open-source intelligence gathering – a theoretical possibility that is wholly insufficient for application of the life-sentence guideline invoked by offense level 42 under § 2M3.1(a)(1). Although the district court used the term "object of the conspiracy" to justify application of § 2M3.1(a)(1), the only clear object here was the gathering of non-top secret material, both at Boca Chica and elsewhere, as the disclosed CIPA documents (and likely the undisclosed documents) show.

C. The erroneous denial of a three-level reduction for an uncompleted conspiracy, under U.S.S.G. § 2X1.1, was premised on grounds that contradict the district court's ruling in applying § 2M3.1(a)(1).

In ruling that the three-level reduction under U.S.S.G. § 2X1.1 for uncompleted conspiracy offenses that are not "expressly covered" by specific offense guidelines did not apply, *see* § 2X1.1(c), the district court concluded that national defense conspiracies are "expressly covered" by § 2M3.1. R129:2-3. But the plain meaning of section (a)(1) of the guideline, § 2M3.1(a)(1) (gathered or

transmitted top secret material), is limited to specific completed acts, such that the only possible *express* covering of conspiracy would be in § 2M3.1(a)(2)'s "otherwise" section, i.e., level 37, because that is the only provision in § 2M3.1 that does not explicitly refer to successfully completed acts. Thus, even if the district court were correct as to the "expressly covered" exception to the 3-level reduction, *see infra* at 22, that would simply offer an additional reason for finding error in the application of § 2M3.1(a)(1), rather than § 2M3.1(a)(2), as argued by the defense.

2. Erroneous fact-finding process by the district court in categorically precluding consideration of the absence of harm to the national security interests of the United States and in failing to afford requested relevant discovery.

A. Departure under application note 2 to U.S.S.G. § 2M3.1.

Application note 2 to U.S.S.G. § 2M3.1 provides: "When revelation [of the information obtained by the defendant] is likely to cause little or no harm, a downward departure may be warranted." The Sentencing Commission explained that this departure authority was meant to apply to those cases which technically fall into the offense level settings of the guideline, but as to which the information gathered ultimately does not bear "a significant relation to the nation's security," such that without regard to the technical applicability of the guideline, the issue *for the district court to determine* is whether "the revelation will significantly and

adversely affect the security interests." § 2M3.1, comment. (n. 2).

The government successfully argued to the district court that despite the plain language of this provision, the district court had no authority to independently seek to determine whether the "revelation is likely to cause little or no harm," notwithstanding any technical classification given to the documents by the government. In other words, the government asked the district court to abdicate its independent departure authority under the sentencing guidelines.[6]

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[6] Even prior to *Booker*, this Court held that "[a]ny attempt to remove all judicial discretion in sentencing would raise serious concerns about the separation of powers." *United States v. Mandhai*, 375 F.3d 1243, 1250 (11th Cir. 2004). Obviously, supervening case law has clarified that district courts have authority beyond guideline restrictions to impose a sentence that complies with 18 U.S.C. § 3553(a). *See*, *e.g.*, *United States v. Hunt*, 459 F.3d 1180, 1184 (11th Cir. 2006) (*United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005), "restored to district courts a measure of discretion that the mandatory Guidelines had removed."). And the law is well established that "'[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.'" *United States v. Guidry*, 199 F.3d 1150, 1159 n. 5 (10th Cir. 1999) (quoting *United States Nat'l Bank v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 … (1993)). Prior to *Booker*, this Court denied defendants' motion for leave to brief *Blakely v. Washington*, 542 U.S. 296 (2004). Subsequently, non-constitutional issues have arisen with respect to the district court's independent sentencing authority. *See United States v. Claiborne,* 439 F.3d 479 (8th Cir. 2006), *cert. granted,* No. 06-5618, 2006 WL 2187967 (U.S. Nov. 3, 2006) (QUESTIONS: (1) Was the district court's choice of below-Guidelines sentence reasonable? (2) In making that determination, is it consistent with [*Booker*] to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances?); *Rita v. United States*, 177 Fed. Appx. 357 (4th Cir. 2006)(unpublished), *cert. granted*, No. 06-5754, 2006 WL 2307774 (U.S. Nov. 3, 2006) (QUESTIONS: (1) Was the district court's

In its answer brief, responding to the defendants' claim that the district court failed to evaluate the absence of real harm caused by the defendants and failed to permit the defendants to rely on the appropriate government official's actual evaluation of the harm, the government characterized the defense argument as: "[T]he sentencing judge improperly denied downward departure pursuant to Application Notes 2 and 3 of § 2M3.1." Gov't Br. 80. In its brief, the government recognized that the "commentary creates a presumption [contrary to the government, the word 'assumption' is actually used in the commentary] that the information at issue bears a significant relation to the nation's security," but allows departure nonetheless. *Id*. The government argues, however, that "contrary to Medina's claim, the [district] court did not fail to consider whether little or no harm was caused by their conduct and … correctly ruled that the top secret nature of the information appellants sought to obtain was sufficient in and of itself to deny the requested departure." Gov't Br. 81.

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choice of within-Guidelines sentence reasonable? (2) In making that determination, is it consistent with [*Booker*] to accord a presumption of reasonableness to within-Guidelines sentences? (3) If so, can that presumption justify a sentence imposed without an explicit analysis by the district court of the 18 U.S.C. Sec. 3553(a) factors and any other factors that might justify a lesser sentence?). These issues might be resolved by the time of a remand for resentencing in this case. In any event, appellant contends that the district court's categorical bar to applying the "likely to cause little or no harm" downward departure provision in this case rested on a misapprehension of both the guideline and the district court's discretion.

The record does not support the premise of the government's argument. Instead, the district court's ruling was plainly a categorical bar, not an independent determination of harm. *See* R129:51 (district court rules that "application note 2" under § 2M3.1 "is not applicable" where base offense level is set under § 2M3.1(a)(1), but rather only under "A2 level 37," i.e., § 2M3.1(a)(2)'s level 37). The district court refused to consider this guided departure on the ground that it is categorically unavailable to those whose base offense level is 42:

> That application note two would not be applicable as the – as that application note relates to little or no harm. And *by its definition* top secret information is information that if disclosed reasonably could be expected to cause exceptionally grave damage to the national security. Citing Executive Order 12356.

R134:13-14 (emphasis added).

The Court's legal conclusion that it had no authority to depart pursuant to this provision is unfounded. The plain language of the departure provision makes it applicable to all subsections of § 2M3.1, including level 42 offenses. Second, even if there is a reasonable expectation that disclosure of top secret information will cause exceptionally grave damage, such an expectation is not equivalent to an actual fact in any given case. Moreover, some top secret information, even if disclosed, is dangerous only if linked to other non-disclosed information, such that disclosure of the one may not cause any harm and may be correctable. Thus, the district court's failure to examine the case on a factual, rather than categorical, basis to

determine if the harm "assumption" was satisfied constituted an error of law.

Third, and most importantly, exclusive reliance on the government's estimation of potential harm would be an abdication of judicial responsibility to comply with the purposes and objectives of sentencing. Especially here, where no member of the conspiracy gathered or transmitted any closely-held national defense information, much less top secret information, nor were they close to doing so, the district court's erroneous conclusion that one of the objects involved "top secret" information does not preclude a finding of "little or no harm."

B. Departure under application note 3 to U.S.S.G. § 2M3.1.

In its responsive brief, the government argued that the district court correctly denied defense requests for assistance in obtaining information as to whether, notwithstanding the "top secret" presumption on which the prosecution relied at sentencing, the relevant and responsible officials in the government, including the President's designee, had reported on the damage, if any, caused by the defendants' actions. Despite the CIPA rulings, the defense contended that presentation of the United States government's true evaluation of the harm or threat posed by the conspiracy at issue would undermine the assumption of a grave risk of harm.

The government, in its brief, argued that the guideline "does not provide

appellants a right to engage in a fishing expedition in hopes that some government official might opine that they did not harm national security by their conduct." Gov't Br. 82. But, contrary to the government, there is much in the record to support the premise that full discovery would reveal that no harm was caused to national security by anything the defendants did or attempted to do. In press releases following Guerrero's arrest, the government acknowledged: "One of them worked in a military base, obviously. But there are no indications that they had access to classified information or access to sensitive areas." *See* Manny Garcia, "Alleged spies' damage limited, Cubans didn't steal military secrets, Pentagon says," *Miami Herald*, 1A (Sept. 16, 1998). The FBI agent in charge, Hector Pesquera, offered assurances that activities at military bases were "never compromised." Sue Ann Presley, "10 arrested on charges of spying for Cuba," *Washington Post*, 1A (Sept. 15, 1998). The defense request for an official evaluation of harm was erroneously denied in this case.

3. Because U.S.S.G. § 2M3.1(a)(1) does not expressly cover conspiracy, the district court erred in refusing to apply U.S.S.G. § 2X1.1.

A. 3-level reduction for uncompleted offenses under § 2X1.1.

The district court determined as a matter of law that the adjustments for conspiracy set forth in U.S.S.G. § 2X1.1 (applicable to conspiracy convictions not

expressly addressed by specific guidelines) did not apply to a conspiracy under 18 U.S.C. § 794. R129:2-3. The district court's interpretation of § 2X1.1, which relied on precedent interpreting prior version of the Hobbs Act guideline and RICO guideline cross-reference, *see United States v. Thomas*, 8 F.3d 1552, 1564 (11th Cir.1993); *United States v. Wai-Keung*, 115 F.3d 874, 877-78 (11th Cir. 1997), erroneously extended the reach of those decisions to the § 2M3.1(a)(1) guideline, where a review of the latter guideline shows that it does not *expressly* incorporate uncompleted acts, unlike § 2M3.1(a)(2), which more broadly applies to all § 794 convictions (presumably including conspiracies) where there were no completed acts of gathering or transmittal of top secret information. Moreover, as more recent precedent from other circuits has shown, because the legal basis for the *Thomas* and *Wai-Keung* decisions no longer withstand rigorous guideline interpretation, their holdings with respect to prior versions of the RICO and Hobbs Act guidelines should not be extended. Distinguishing, in this fashion, *Thomas* on its facts would avoid creating a circuit conflict, given that all other circuits to address the issue have now clarified that generic guidelines directed to addressing substantive offense conduct do not "expressly" cover conspiracy conduct.

The district court found that § 2M3.1 "expressly" applies to conspiracies to commit espionage because the statute of conviction, 18 U.S.C. § 794, includes

conspiracies and § 2M3.1 applies to § 794:

> I find pursuant to the Eleventh Circuit precedent in *Thomas* at 8 F.3d 1552, a 1993 decision by the Eleventh Circuit where the Eleventh Circuit held where the statutory section defining the offense of conviction prohibits conspiracy, and that section is expressly covered by a particular guideline – those guidelines are controlling and 2X1.1 does not apply.

R129:2-3.

In *Thomas*, the Eleventh Circuit held that the then-applicable Hobbs Act guideline, former U.S.S.G. § 2E1.5, which provided a cross-reference to the generic robbery guideline, expressly covered conspiracies. However, as noted, *supra* at 10, in the discussion of § 2B3.1, the robbery guideline cross-referenced by former § 2E1.5 contains express language indicating that uncompleted offenses are covered, while the contrary is true of § 2M3.1(a)(1), which refers unmistakably to completed acts of gathering and transmittal of a particular kind of material, i.e., material that the United States has actually designated to be top secret. Unlike the broader robbery and Hobbs Act guidelines, which are not limited to completed acts of robbery, but rather encompass in the base offense level the entire spectrum of robbery conduct, § 2M3.1(a)(1) is not so constructed and does not expressly apply to unsuccessful, inchoate, or uncompleted acts of conspiracy.

A similar distinction is seen in the RICO conspiracy guideline analysis conducted in *Wai-Keung*. The RICO guideline, U.S.S.G. § 2E1.1, applies broadly

to all "conduct relating to" RICO organizations. In relation to the conduct involved in *Wai-Keung*, the guideline cross-referenced "the offense level applicable to the underlying racketeering activity," specifically, the defendants' conspiracy to commit fraud. Thus, the cross-reference led to the fraud guideline, U.S.S.G. § 2F1.1 (now incorporated in § 2B1.1, discussed *supra* at 8). The fraud (now theft) guideline provides expressly for coverage of both completed conduct and "intended loss" conduct, such that it, like the Hobbs Act/robbery guideline, expressly comprehends conspiracy. The *Wai-Keung* Court's extended discussion of the application of the "intended loss" provision, *see* 115 F.3d at 877, supports this clear distinction from the present case. *See also* Gov't Br. 83 (conceding that "no case in this Circuit directly addresses the appropriate guideline for a conspiracy to commit espionage").

Thus, while *Thomas* and *Wai-Keung* were correctly decided, they do not lead to the same result here, because of the wholly different terminology of the guideline categorization of conduct covered by the base offense level in U.S.S.G. § 2M3.1. Significantly, the Commission explained in § 2M3.1, comment. (n. 2)(emphasis added), that "the Commission has set the base offense level in this subpart on the *assumption*" that it will be applied in cases in which specific information "bears a significant relation to the nation's security," a finding that cannot be resolved with

certainty in cases such as the instant conspiracy prosecution.[7]

Thus, the particular features of the guideline at issue in this case leads to the conclusion that mere conspiracy offenses were not encompassed by § 2M3.1(a)(1) and that the 3-level reduction under § 2X1.1 is applicable. *See United States v. Khawaja*, 118 F.3d 1454, 1459 (11th Cir. 1997) (plain error compelling reversal where district court failed to apply 3-level reduction under § 2X1.1 in money laundering case implicating § 2S1.1); *United States v. Puche*, 350 F.3d 1137, 1155-56 (11th Cir. 2003) (applying *Khawaja* and remanding for resentencing with application of 3-level reduction under § 2X1.1 in money laundering case where defendants were "crucial steps" short of completing what they needed to do to effect a major money laundering transaction).

Significantly, more recent precedent from other circuits addressing the meaning of "expressly covered" has confirmed that decisions such as *Thomas*, and the now-superseded case on which it relied, *United States v. Skowronski*, 968 F.2d

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[7] When construing the sentencing guidelines, the court is required to consider the guideline and commentary together. *See Stinson v. United States*, 508 U.S. 36, 38, 113 S.Ct. 1913, 1915 (1993) ("[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline."). *See also* U.S.S.G. § 2X1.1, comment. (n. 1) (noting that § 2M6.1 expressly includes conspiracy offenses, but not referencing § 2M3.1 as covering conspiracies).

242, 250 (2d Cir.1992), should be limited to their facts. *See United States v. Amato,* 45 F.3d 1255, 1261 (2d Cir. 1995) (limiting *Skowronski* to prior version of Hobbs Act guideline); *United States v. Martinez*, 342 F.3d 1203, 1206 & n. 4 (10th Cir. 2003) (explaining that key focus is on terms of the guideline under review) (citing *United States v. Villafranca*, 260 F.3d 374, 381 (5th Cir. 2001) (focusing on terms of bribery/extortion guideline, U.S.S.G. § 2C1.1)).[8] The government's contrary view, *see* Gov't Br. 84, which seeks unnecessarily to create a stark circuit conflict, goes beyond the scope of the legal analysis necessary to resolve the instant case, i.e., that uncompleted offenses are not covered by the *express language* of U.S.S.G. § 2M3.1(a)(1).

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[8] The Second Circuit has, in its most recent discussion of the subject, reiterated the *Amato* reasoning without any reference to *Skowronski*, and held that "where a defendant was convicted only of conspiracy, and was not charged with a substantive offense that was an objective of the conspiracy, the Section 2X1.1(b) (2) three-step downward adjustment should be made … ." *United States v. Reifler*, 446 F.3d 65, 107 (2d Cir. 2006). *Reifler* explains that the common sense intent of the guidelines is to punish fully realized crimes more harshly than inchoate crimes such as conspiracy, unless the guidelines specifically provide otherwise. In *Reifler*, the Second Circuit noted that the defendants were convicted of the substantive offenses as well as conspiracy, and thus sustained the district court's decision to apply the substantive offense's base level rather than a reduced base level pursuant to § 2X1.1. *Reifler,* 446 F.3d at 108-09. In the case at bar, the government elected not to charge any substantive crimes, but successfully sought to have the defendants sentenced as though it had charged and proven a completed act of espionage in which top secret material was gathered and transmitted.

B. Application of § 2X1.1 to the nearly-completed conspiracy analysis argued by the government.

The government has argued, in the alternative, that a 3-level reduction is not warranted under § 2X1.1 because the facts in this case would establish a nearly-completed espionage offense. Gov't Br. The government's argument, which was not adopted by the district court at sentencing, is without merit. Contrary to the government's contention, no such obtaining of top secret material was just around the corner. Further, to the extent the record or findings by the district court remain unclear, the correct resolution would be to vacate the sentence and remand for resentencing. *See, e.g., United States v. Dodds*, 347 F.3d 893, 902 (11th Cir. 2003) (Where an evidentiary issue raised on appeal by the government was unresolved in the district court; the court was "not prepared, in the first instance, to determine Dodds's appropriate sentence after resolving the definitional question above. Thus, we remand for the district court to conduct a new sentencing hearing to consider evidence and argument of counsel to determine whether sufficient evidence exists to support" the guideline enhancement sought by the government.).

Indeed, the appropriate application of § 2X1.1 requires that the district court not employ enhanced base offense levels, such as level 42 for gathered/transmitted top secret material, unless the "intended offense conduct [is] established with a *reasonable certainty*." U.S.S.G. § 2X1.1(a). Unsurprisingly, therefore, in the only

espionage conspiracy sentencing decision cited by the government, *see* Gov't Br. 84 (citing *United States v. Pitts*, 973 F.Supp. 576, 583 (E.D. Va. 1997), in which the defendant was an FBI agent assigned to a Foreign Counter Intelligence squad in New York City who had actually transmitted a classified surveillance report to foreign intelligence agents, the district court employed the lower, "otherwise" offense level of 37 under § 2M3.1. The *Pitts* court lacked the reasonable certainty necessary to reach level 42 based on transmission of top secret material. On appeal of the sentence, while affirming on other appealed issues, the Fourth Circuit noted: "Pitts also passed FBI surveillance information concerning Soviet diplomats and information concerning at least one FBI human asset who had been reporting covertly on Russian intelligence matters. *The full extent of Pitts's treason may never be known*." *United States v. Pitts*, 176 F.3d 239, 242-43 (4th Cir. 1999).[9]

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[9] There are a handful instances in which a life sentence has been imposed by federal courts for a completed espionage offense, but those cases involve extreme damage to the national security and may well represent the type of harm the Sentencing Commission contemplated in the level 42 setting of U.S.S.G. § 2M3.1(a)(1). There is simply nothing in the instant record to suggest that the appellants belong in this category of actual espionage defendants who truly harmed national security: John Walker (sentenced in 1986 to life imprisonment; FBI investigation revealed Walker, Jr., a U.S. Navy specialist, sold classified military material to Soviet agents for 18 years; at least one million classified messages from U.S. military services and U.S. intelligence agencies were compromised through information Walker provided to the Soviets; billions of U.S. taxpayer dollars were expended to repair leaks created by Walker and his network) (source: Wikipedia, http://en.wikipedia.org/wiki/John_Anthony_Walker; Robert Hanssen (sentenced in

If in *Pitts*, where there were well-established actual transmissions of classified information to a hostile power that acted on the information, the district court nevertheless rested on the "otherwise" section for an offense level of 37. In the instant case, where there was no such transmission of any classified material, the government's claim of nearly completed transmission of top secret material defies credibility and wants for evidentiary support. *See also United States v. Rome*, 207 F.3d 251, 254 (5th Cir. 2000) ("'*Speculative offense characteristics will not be applied.*'") (quoting § 2X1.1, comment. (n. 2) (emphasis added by Fifth Circuit); *id*. at 256 ("To allow such inferences to support this sentencing enhancement would essentially charge every burglar with intending to steal every visible item within a targeted location so long as it would be 'possible' to load all of the items into a getaway car."; recognizing that often, it is more important to the defendant or

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2001 to life imprisonment, while serving as an FBI agent gave the Soviets, and later the Russians, 6,000 pages of documents and 27 computer diskettes cataloguing secret and top secret programs, with significant consequence when acted upon by his handlers) (source: http://www.cnn.com/SPECIALS/2001/hanssen/overview.html); Aldrich Ames (sentenced in 1994 to life imprisonment; as a CIA agent Ames identified over ten top-level CIA and FBI sources reporting on Soviet activities. CIA officials testified that Ames provided the "largest amount of sensitive documents and critical information, that we know anyway, that have ever been passed to the KGB in one particular meeting"; he revealed more than 100 covert operations and betrayed at least 30 agents, 10 of whom were later executed by the Soviets) (source: http://www.cnn.com/SPECIALS/cold.war/experience/spies/interviews/ames/).

wrongdoer to avoid being caught, than to take greater risks by committing further offenses).

Here, the district court's reliance on Guerrero's colloquial use of the term "'top secret'" activity, R128:46, which use actually manifested Guerrero's doubts about the matter by his insertion of quotation marks around the term, was inherently ambiguous and plainly not a matter of "reasonable certainty." The fact that defendants refer to something as "top secret" does not necessarily mean that the defendants are using the term as defined in the statute or sentencing guidelines, i.e., information that would cause exceptionally grave damage to the national security. The very idea that a building at Boca Chica, an open-to-the-public airbase, would have such gravely important materials is questionable on its face, thus supporting the Guerrero's doubting use of quotation marks.

In closing argument, the government made the point that when the defendants referred to "secret [it] does not necessarily refer to the United States classification system," and that the Cuban use of the word "secret" was much broader that U.S. classification. R121:14001-02. ("[S]ecret. The point is that this shows the Cuban Intelligence Service makes a distinction between information they consider to be public and that they consider to be secret."). The government's own comments reflect that the evidence on which the district court relied was speculative at best and

was insufficient to make the necessary finding of a "reasonably certainty" that the defendants would engage in an attempt to obtain material classified as "top secret" by the United States.

C. Government actions under CIPA.

Equally importantly with respect to the defendants' ability to defend against claims of top secret intent was the government's withholding of otherwise discoverable material under CIPA. At sentencing, the defendants were precluded from introducing evidence showing the complete nature of the conspiracy, because numerous documents relating to the defendants' conduct, as well as any intelligence damage assessments, were not disclosed in whole or in part. The government repeatedly contended that it did not need to produce those documents because it was only attempting to prove a general conspiracy to acquire defense information, and of course the jury verdict contains no determination with respect to classified information of any kind, much less top secret information. *See*, *e.g.*, R127:10 (prosecutor claims limiting allegations to conspiracy obviates need for disclosure of more focused information sealed under CIPA).

Appellant Medina adopts the additional procedural and substantive CIPA arguments addressed in the supplemental brief of Gerardo Hernandez. Plainly, as

part of a remand for resentencing, this Court should direct the district court to reconsider and conduct further proceedings on whether additional CIPA-excluded documents should properly be subject to discovery, by national-security-cleared *counsel*, with whatever limitations on dissemination to the defendants may be appropriate.

Issue II: Imposition as to Guerrero of an Enhancement for Abuse of a Special Skill under U.S.S.G. § 3B1.3 Based on Intelligence Training and Engineering Studies.[10]

Standard of Review: The district court's interpretation of sentencing guidelines is reviewed *de novo*. *See Johnson*, 375 F.3d at 1301 (11th Cir. 2004).

Argument: The district court applied a 2-level special skills enhancement under U.S.S.G. § 3B1.3, thereby elevating Guerrero to the mandatory life sentencing guideline range of offense level 44. R134:14-16. The district court's justification for this enhancement was that Cuba had trained its agents in intelligence work (including sending and receiving encrypted messages) and had apparently matched the knowledge possessed by its intelligence employees with the specific intelligence gathering activities to which they were assigned, and that because Guerrero had trained as a civil engineer and had taken a course relating to airport engineering, Cuba assigned him to the Boca Chica Naval Air Station. R134:16 ("I

[10] This issue was raised in Antonio Guerrero's initial brief, pages 58-60, and argued in his reply brief, pages 28-29.

find that he was instructed and tasked to gain employment at Boca Chica Naval Air Station just because of his training. Not only as an agent but his training as a civil engineer and this advanced course that he took at the Institute in Kiev so he could provide the information which he did provide to the Government of Cuba *regarding the construction* of the A1125 building at Boca Chica.") (emphasis added).

1. Skills within the ordinary range for the type of offense and offender.

For several reasons, the district court's findings do not warrant a 2-level special skills enhancement under U.S.S.G. § 3B1.3. First, any skills in question were provided to him by the Cuban government, both before and after he became an intelligence agent for Cuba and were not abused skills, but skills appropriate for the employment obtained by the defendant. Thus, in the United States, an intelligence agent will have typically obtained a college degree and often a post-graduate degree in particular fields, such as international relations or politics and will often have studied certain foreign languages before ever joining the CIA or other intelligence agencies.[11] This prior training is a prerequisite to become a qualified agent, with additional internal and on-the-job training preceding assignment for fieldwork. Such training is for utility as an employee in a particular branch of

[11] *See*, *e.g.*, Scott Shane, "Change at the Pentagon, Man in the News: Robert Michael Gates," *New York Times*, 1A (Nov. 9, 2006) (describing international studies degrees of former CIA agent and later Director, Robert Gates).

government – in this case, as a trained intelligence agent.

As an initial matter, therefore, such ordinary training, including on-the-job training, fails to constitute "abuse" of a sufficiently "special" skill to distinguish the defendant's conduct from that of others who have committed the offense. Under *United States v. Mainard*, 5 F.3d 404, 405-07 (9th Cir. 1993), and *United States v. Young*, 932 F.2d 1510, 1512-1515 (D.C. Cir.1991), developing skill as an intelligence agent cannot be "abuse" of special intelligence skills, given that all agents have special skills stemming from their training to observe, to make mental notations, and to act with circumspection. There is in no real sense an *abuse* of skill in this context, therefore; there is simply a person with training and aptitude who obtained employment as an intelligence agent for his country.

Further, the weight of relevant precedent establishes that the special skills enhancement would not apply to an engineering background where any marginal advantage of study as an engineer pales in comparison to the actual intelligence training that every agent receives.

That everyone with any sort of degree – e.g., foreign languages or international relations – who becomes an agent or a soldier might find his assignment affected by his knowledge of certain fields is obvious; the question here, however, is whether the defendant *abused* the skills that Cuba provided him.

The fact that Guerrero took a single course relating to the engineering

involved in airports, and thus had some knowledge of that subject, does not distinguish his individual culpability from that of another agent who may know how to operate a plow and, as a consequence, might be sent to conduct intelligence work in an agrarian region. Moreover, Guerrero's lone course in aviation engineering would not, in itself, qualify as a special skill under the guideline definition of a skill "usually requiring *substantial* education, training, or licensing," § 3B1.3, comment. (n. 4), thereby suggesting something much more than a single semester- or quarter-long course.

2. Absence of significant facilitation of offense by special skill.

The government presented no evidence as to how anything other than the intelligence training and Guerrero's native intelligence facilitated his ability to describe features of the interior of a building, particularly the relatively simple building A1125. It simply does not take an engineer to notice that a building's floor is made of concrete or that metal grates cover windows and other openings to prevent unauthorized entry. R48:4274. The testimony of FBI specialist Hoyt confirmed that there was no evidence suggesting Guerrero was ever asked to place "a listening device," any "type of bug," or do "any type of technical penetration in any building at" Boca Chica. R45:3915.

Guerrero was not a building contractor. *Cf. United States v. Hickman*, 991 F.2d 1110, 1111 (3d Cir.1993) (reversing special skills enhancement for defendant

building contractor, on basis that defendant, in failing to build home pursuant to contract while falsely advising purchasers that home was being built, did not use his skills as building contractor to facilitate the fraud). Nor was the building in some way related to airport operations: It was a storage and meeting room, not an aircraft control building. The building could have been anywhere on land or barge. An airport course would not help one look at the ceiling in this unfinished building.

Such a speculative enhancement – particularly here, where it raised Guerrero's sentence minimum from 30 years to life without parole – should not be applied on a haphazard basis. Instead, only "significant" facilitation of the offense through use of the special skill will qualify to allow an enhancement for abuse of a special skill. *See United States v. Foster*, 876 F.2d 377, 378-79 (5th Cir. 1989) (reversing special skill enhancement given to a printer convicted of counterfeiting offense because he had only photographed the notes and there was no evidence his skill in printing facilitated the photography). The government failed here to prove *any* form of facilitation stemming from his engineering background, much less significant facilitation.

The guidelines are not a roulette wheel used to place a defendant in a jackpot; they are meant, instead, to make sense in differentiating harms and culpability. In

Guerrero's case, the enhancement clearly does not apply to him, as a reasonably well-educated man who joined an intelligence agency and was trained to be an intelligence agent, even if he tried to use all of his life experience to aid him in doing his job.

The reasoning of the court in *United States v. Harper*, 33 F.3d 1143 (9th Cir. 1994), applies with equal force here:

> Harper also contends that an increase in her sentence for using "special skills" was not warranted. We agree.
>
> Section 3B1.3 allows a two-level increase '[i]f the defendant … used a special skill, in a manner that significantly facilitated the commission or concealment of the offense.' The government contends that the knowledge Harper gained as an employee of both Bank of America and Pedcom (an ATM service company) qualifies as a special skill under the Guideline. Specifically, the government points to Harper's knowledge of ATM service procedures, her knowledge of how ATM technicians enter ATM rooms and open ATM vaults, her knowledge of how to disarm ATM alarm systems, and her knowledge of when ATM vaults are likely to contain large amounts of cash. This knowledge, however, is not sufficient to sustain an adjustment for the use of special skills. …
>
> What Harper learned during her employment with the Bank of America and Pedcom cannot be reasonably equated with the skills developed and possessed by "pilots, lawyers, doctors, accountants, chemists and demolition experts." The application note stresses that "special skills" usually require substantial education, training or licensing. If Harper's knowledge, gained from her former employment, were sufficient to sustain the adjustment for special skills, then almost any insider who uses her special knowledge of her own institution and

its procedures to commit a crime would be eligible for the enhancement. The application note clearly indicates that the Sentencing Commission did not intend that result.

We have held that a defendant's preexisting education and skill in printing was insufficient to justify imposition of the special skills adjustment for the crime of photographing federal reserve notes. *United States v. Green*, 962 F.2d 938, 944-45 (9th Cir. 1992). We noted in *Green* that "[c]ourts have generally rejected application of the guideline merely because the offense was difficult to commit or required a special skill to complete." *Id.* at 944. In *Green*, we also cited approvingly to *United States v. Young,* 932 F.2d 1510 (D.C. Cir.1991), in which the District of Columbia Circuit rejected an argument that all people who manufacture PCP are subject to the "special skill" adjustment simply because most people in the general public do not possess the skill to manufacture PCP. The *Young* court stated:

> [T]he syllogism … cannot easily be confined to the manufacture of PCP. Employing the same logic, the government could also argue that a § 3B1.3 enhancement is due whenever an offense involves some skill that the general public does not possess: counterfeiting U.S. Currency or manufacturing a bomb are two likely examples. In essence, the government is contending that if the offense is a difficult one to commit, the mere ability to commit it evidences a "special skill" sufficient to justify an enhancement under § 3B1.3.

Young, 932 F.2d at 1512-13. That court also noted that "[n]othing in the commentary suggests that § 3B1.3 applies to a criminal who, like appellant, bones up on the tricks of his trade and becomes adept at committing a crime that the general public does not know how to commit." *Id.* at 1514. We agree.

Id. at 1151-52.

Crucially, the special skills enhancement does not apply unless the defendant, however highly skilled, actually *used* those skills to commit the crime. *See United States v. Weinstock*, 153 F.3d 272, 281 (6th Cir.1998) ("Weinstock's status as a podiatrist, standing alone, does not automatically mean that he used his medical skills to facilitate the crime."; rejecting government argument that "being a podiatrist gave him the opportunity to submit false bills," because it was the falsification of the bills that was at issue and whatever line of work defendant was in, he could have submitted bills; podiatry does not facilitate falsification); *United States v. Gandy*, 36 F.3d 912, 915 (10th Cir.1994) ("the mere fact that a defendant possesses a special skill is not enough to warrant his sentence being enhanced"); *United States v. Garfinkel*, 29 F.3d 1253, 1261 (8th Cir.1994) (defendant, a psychiatrist, did not use his special skills to *commit* the false statement and mail fraud offenses and therefore the § 3B1.3 special skills enhancement was inapplicable; fact that being a psychiatrist provided defendant opportunity to participate in drug research study was not the same as facilitation of the fraud offenses themselves through a special skill).

It is, of course, not inconceivable that engineering skills could play a significant role in an offense. *See United States v. Sain*, 141 F.3d 463, 477 (3d Cir.

1998) (special skills enhancement for engineer affirmed where defendant had to design engineering plan as part of fraudulent scheme involving water treatment company; "those skills gave credence to Sain's insistence to the Army that only virgin carbon and only 20,000 pounds of it per change out would properly treat the waste water [and] Sain's skills enabled him to determine that less expensive carbon and less of it would still clean the waste water as effectively as the amounts and types described in the claims he submitted to the Army"); *United States v. Hubbard*, 929 F.2d 307, 309 (7th Cir.1991) (affirming special skill enhancement where appellant, who had been convicted of constructing one dozen bombs, "had an electrical and engineering background that provided him with the expertise to manufacture the bombs").

But Guerrero's case is not comparable to Sain's or Hubbard's. Guerrero did not obtain a job at Boca Chica by claiming to be an engineer; he instead obtained a job as a ditch digger, and then did other handyman work as a mechanic's helper. R33:2258; R74:7962. The government established at trial that any skills he had at visual surveillance and undercover work were provided to him by the Cuban intelligence training he received and that even after that he still was not "not familiar with military aircraft and helicopters, signs of reconnaissance, [or] reading airplane tails to locate aircraft." R48:4321 (testimony of FBI agent Giannotti). And

there is not a single occurrence in this case in which Guerrero did any engineering work or analysis. He neither engineered, nor purported to engineer, anything in this case.

Nor is Guerrero an architect, draftsman, construction expert, or building contractor; his observation of security measures and other goings-on at Boca Chica was not significantly facilitated by any engineering skills he possessed. Guerrero was not asked to engineer a way to bring down any buildings or design new spyware. Merely having some skills does not mean they were employed or that they played any significant role in his efforts on Cuba's behalf. *See United States v. Mizell*, No. 95-5236, 1996 WL 528956 (6th Cir. 1996) (not published in Federal Reporter) ("The critical inquiry is whether his skills or position significantly facilitated the commission or concealment of the offense. *See United States v. Moored*, 997 F.2d 139, 144 (6th Cir.1993) ('[T]he evidence must show that the defendant's position with the victim of the offense significantly facilitated the commission of the offense.'). There is no evidence in the record that Mizell's training as an engineer or his other unique skills enabled him to facilitate this offense."). The imposition of the enhancement in this case should be reversed based on the district court's misapplication of the abuse of special skills guideline.

Issue III: <u>Imposition of Consecutive Sentences Beyond the Authorization and Instruction of the Sentencing Guidelines</u>.[12]

Standard of Review: Review of the district court's interpretation and application of governing sentencing statutes and guidelines is *de novo*. *See United States v. Johnson*, 375 F.3d 1300, 1301 (11th Cir. 2004); *United States v. Crawford*, 407 F.3d 1174, 1177-78 (11th Cir. 2005).

Argument: Under the federal sentencing guidelines, both in the mandatory form that was applied at the time of sentencing and the present advisory version, where the defendant is convicted of a conspiracy as to which the indictment charges more than one object, the conviction "shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." U.S.S.G. § 1B1.2(d); *see United States v. Venske*, 296 F.3d 1284, 1292 (11th Cir. 2002). The conspiracy charged in Count 1 of the indictment was a dual object conspiracy, with no guideline for the conspiratorial object of acting as a foreign agent without giving notice, but with a clearly applicable guideline for the object of interfering with government functions. R130:97.

The core of Gonzalez's argument with respect to the district court's imposing

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[12] This issue was raised in Rene Gonzalez's initial brief, pages 38-44, and reply brief at 28-31, and adopted by appellants Medina, Guerrero, Hernandez, and Campa, for whom the facts are essentially identical.

consecutive statutory maximum sentences as to the Count 1 conspiracy and the substantive counts of acting as a foreign agent is that the district court bypassed the guideline process essential to avoiding sentencing disparity.[13]

As the government observed in its responsive brief, the district court stated it would consider that the component of the Count 1 conspiracy dealing with interfering with governmental functions must be scored as a level 10 under the sentencing guidelines and further adopted the government's argument that an 8-level increase (yielding a 27-33 month guideline range) would be appropriate because Gonzalez obtained, from the office of a Congressperson, a superfluous letter of support for his wife's immigration after his wife had been granted a visa to enter the United States. R130:97. Nevertheless, in imposing the sentence, the district court did not rely in any way on this guideline or explain how a consecutive sentence would be justified in light of a guideline range that was only half of the statutory

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[13] In Gonzalez's case, it is at the very least unusual to see a defendant with no criminal history receive consecutive statutory maximum sentences for conspiring to commit and committing an offense, particularly one involving failure to give notice. With respect to Gonzalez, an American citizen, the giving of notice to the *government* that he was acting on behalf of Cuba could not in itself have stopped any of the actions he undertook in infiltrating certain exile organizations Cuba suspected of terrorism: the U.S. government could not have deported or arrested him simply for his anti-terror investigations or political actions. It was, instead, his exposure to the public upon arrest in this case that put an end forever to his ability to act as an agent investigating violent exile organizations.

maximum for Count 1. *See* R131:43-44 (in explaining imposition of consecutive maximum sentences, district court relies merely on 18 U.S.C. § 3553(a)(2)(A)-(D) (punishment, deterrence, protection, and correction), without any acknowledgment of either the crucial § 3553(a)(4) factor of the mandatory guidelines or any other numbered subsection of § 3553(a) other than § 3553(a)(2)).[14]

Although the instant claim – that the district court was unjustified in imposing the consecutive maximum sentences while failing to appropriately account for sentencing guideline factors, not only as to the offense level, but specific offense characteristics – arose in a period when the guidelines were mandatory, the error was not harmless even recognizing that the guidelines are now merely advisory, because the sentencing in this case shows that the district did not give even advisory weight to the then-binding guideline range for one of the objects of the Count 1

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[14] The district court, *see* R131:42-44, and the government, *see* R131:26 (re-asserting pleading stressing need for "incapacitation" of Gonzalez because "he will in fact continue to persist in his activity"), focused on the one potential harm – recidivism – that was an impossibility as to Gonzalez. Suggesting that Rene Gonzalez could again operate as a foreign agent in the U.S. amidst violent anti-Castro exile organizations, without notice to the government and the community, is illusory. Clearly, the exile community now knows who the five Cuban "spies" are; and the government well knows that Gonzalez was a Cuban agent. If, upon release from prison, Rene Gonzalez were to operate in the United States, it would clearly be with notice to the government; the government could not possibly have more notice. His cover now blown to both the target organizations and the government, the suggestion that Gonzalez could just start all over and operate as an agent *without notice* is clearly mistaken.

conspiracy. The reason offered by the government for the district court's failure to incorporate the guideline analysis into its § 3553(a) sentencing decision, that it would have been "unduly cumbersome," Gov't Br. 77 n. 56, is plainly an inadequate excuse for the district court's failure to appropriately incorporate guideline determinations.

Notably, this Court has held that even after *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005), the district court must, in every sentencing, still perform the guideline analysis required in *pre-Booker* cases. *United States v. Crawford*, 407 F.3d 1174, 1178 (11th Cir. 2005) (reversing departure that violated, in part, this Court's *pre-Booker* departure precedents); *United States v. Shelton*, 400 F.3d 1325, 1332 n. 9 (11th Cir. 2005) (*Booker* does not change district court's guideline application obligations); *United States v. Jordi*, 418 F.3d 1212, 1215 (11th Cir. 2005) ("As we have previously stated, '[a] sentencing court under *Booker* still must consider the Guidelines, and, such consideration necessarily requires the sentencing court to calculate the Guidelines sentencing range in the same manner as before *Booker.*'") (quoting *Crawford,* 407 F.3d at 1178-1179). The district court failed to undertake the requisite complete guideline analysis in this case by failing to afford any weight to the guideline range required under the sentencing guidelines. Consequently, the consecutive sentence was imposed improperly and the case should

be remanded for resentencing.

Issue IV: U.S.S.G. § 3C1.1 Enhancement for Obstruction of Justice Based on Provision of Name to Magistrate Judge at Initial Appearance.[15]

Standard of Review: "In the context of applying enhancements pursuant to specific offense characteristics and for obstruction of justice, this Court has held that our scope of review is *de novo*." *United States v. Taylor*, 88 F.3d 938, 942 (11th Cir. 1996) (citing *United States v. Hansley*, 54 F.3d 709, 715 (11th Cir. 1995) (specific offense characteristics); *United States v. Ruff*, 79 F.3d 123, 125 (11th Cir.1996) (obstruction of justice)).

Argument: Three of the appellants, Medina, Hernandez, and Campa, received a 2-level obstruction of justice enhancement for stating, at their initial appearance in response to the magistrate judge's direction to "state your full name," the names under which they had lived in the United States. The government, in its answer brief, sought to expand the basis for the enhancement to other supposed false statements upon arrest or to court officers, *see* Gov't Br. 78 (referring to "biographical information" given following arrest and in a pre-hearing interview), but the district court did not find materiality in such statements or otherwise rely on

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[15] This issue was raised in Medina's initial brief at 45-48 and reply brief at 19-20, and adopted by Hernandez and Campa, as to whom the facts are indistinguishable.

those accusations in imposing the enhancement. The focus of the enhancement is squarely on the one response by the defendants to the first directive by the magistrate judge at the initial appearance, to "state your full name."

There are numerous decisions providing that false statements made to a magistrate judge at an initial appearance *may* warrant an obstruction of justice enhancement under U.S.S.G. § 3C1.1 *if they are materially false*. *See*, *e.g.*, *Ruff*, 79 F.3d at 126 (defendant, seeking to obtain appointment of counsel, told magistrate judge that he had no bank accounts or safe deposit boxes when he in fact co-leased three boxes containing over $37,000). However, every case must be analyzed contextually, according to its own unique circumstances, for a determination of both materiality and falsity. *Id*.

The district court erred in determining categorically that all such statements to a magistrate are material and in failing to place into context the relevant facts. Here, for several reasons, the name Luis Medina given by the defendant in response to the magistrate's telling the defendant to "state your full name," R130:10, was not a materially false response when considered in the context of the government's presentation of Medina's case to the magistrate and Medina's years of prior consistent use of only that name in the United States. The same is true for Campa

and Hernandez.

The record shows that this is one of the rare cases where providing something other than one's birth name was not materially false, because the defendants did not manufacture their names as a ruse to fool the magistrate, but had exclusively used those very names in the United States, so that all of their relevant records – e.g., traffic, criminal history, financial, real estate lease – and other incidents of life were under the names that they provided in court. There simply was no intention by Medina or the other defendants to gain, much less any likelihood that they would gain, any advantage from the magistrate by merely giving the only names under which they had lived in the United States, absent some other use of that identification to mislead or seek to obtain an advantage in the proceeding. *See*, *e.g.*, Gov't Br. 18 n. 16 (observing that "Medina lived for years" under that name). The district court's conclusion, some three years after the initial appearance, that Medina should also have given his birth name or invoked the Fifth Amendment and that "[a]ll the information that a Magistrate Judge collects" is material, R130:9-11, sweeps much more broadly than the obstruction guideline contemplates. *See* U.S.S.G. § 3C1.1, comment. (n. 6) (defining material statement as one that "would tend to influence or affect the issue under determination").

In magistrate's court, these defendants, all of whom were *charged* with being foreign agents who were withholding their true names and were living under the names Medina, Hernandez, and Campa, were never asked by the magistrate judge or any other court official, 'what is your birth name?' If they had been asked that question by the government or the magistrate, i.e., a question directed to an allegation in the complaint, defense counsel would have interposed a Fifth Amendment objection, and the objection would have been sustained. But clearly, in the context of this case, the names were not offered for the purpose of disputing an allegation of the complaint; instead, there is inherent ambiguity[16] in the far less-precise direction to the defendant to provide his name, particularly where, as here, the clerk had just called the defendant to the podium using the name Luis Medina, and where Medina was the name the government used in the complaint as the identification under which the defendant was "known."

Use of a name other than one's birth name is a common fact of modern life,

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[16] As to the related concept of perjury, this Court requires examination of contextual ambiguity in a question or response to determine material falsity. *See, e.g.*, *United States v. Shotts*, 145 F.3d 1289, 1298 (11th Cir. 1998) ("A perjury conviction must rest on the utterance by the accused of a false statement; it may not stand on a particular interpretation that the questioner places upon an answer.").

particularly for foreign-born persons who come to live in the United States.[17] The the magistrate judge's purpose in obtaining a name from the defendant at the initial appearance in this case did not turn on whether Medina's true birth name in Cuba was Medina or Smith or Jones. And the "state your full name" question itself focused instead on whether Medina would cooperatively respond to the magistrate in a way that would confirm his identity as the Medina who lived at the house where a warrant was just executed for the arrest of Medina.

If anything, the admission of the use of the name Luis Medina was self-inculpatory, rather than misleading. His answer was an appropriate compliance with the magistrate's directive and was consistent with allowing the proceedings to move forward in a fair and orderly fashion. If it was false, the answer was not materially so in relation to the specific question and the purpose for its asking at the very instant that the defendants were called up by the magistrate. It is indistinguishable from an affirmative answer to the magistrate's question, "Are you Luis Medina?" There may be ambiguity depending on exactly what information a

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[17] Well-known examples of political, entertainment, and business figures in American history who used altered or assumed names are Gary Hart, Marilyn Monroe, and Connie Mack. To cite a well-known example, Cary Grant was really Archibald Leach, but if he had come to court and given his stage name, Cary Grant, no one would claim a material misstatement, *unless the particular proceeding turned in some way on whether his birth name was Grant or Leach*.

questioner was seeking, but here, "state your full name," after an introduction as Medina is certainly not enough, in context, to show material falsity.

What the government really complains of is that the defendants did not *confess* their birth names at an earlier stage of the investigation so as to effectuate simpler prosecution. *See* Gov't Br. 79 (government argues Medina "now claims his true name is Ramon Labañino," implying that learning the name Labañino did nothing to aid the government's case and that the government continues to proceed as if it does not know Medina's birth name). However, this concern raised by the government both conflicts with the right against self-incrimination and ignores that the materiality focus in the context of this case is not on whether the government would have benefitted from obtaining more information from Medina at an earlier stage of the case, but rather on whether the information Medina provided to the magistrate judge tended to mislead in a way that would influence the proceedings.

The double-edged nature of the government's argument shows that given the warrant in this case, which called for the arrest of a person known as Luis Medina, it would have been obstruction for Medina to *deny* that he was Medina either to the arresting agents or the magistrate judge. Answering to the clerk's call of Medina was not obstructive, and where he never was asked for more detailed information about the basis of his use of the name Medina and never testified that any allegation

of the complaint was false, including allegations relating to his name, his proceeding under the name by which he was identified in charging documents simply does not meet the test for obstruction under this Court's precedents. *See Ruff*, 79 F.3d at 126 ("[T]the sole question before us is whether his statement was *material*. As previously noted, the commentary defines a material statement as one that, 'if believed, would tend to influence or affect the issue under determination.' U.S.S.G. § 3C1.1 comment. (n. 5). Ruff's statements [misrepresenting his assets] were material because they led to the appointment of counsel, which was the issue under consideration at the hearing.") (emphasis added).

Unlike cases where actual or even theoretical materiality might warrant an enhancement for a name given to a judge, the imposition of the enhancement in the context of this case amounts to piling on of a nature that the guidelines do not intend. *Cf. United States v. Banks*, 347 F.3d 1266, 1269-71 (11th Cir. 2003) (remanding for resentencing where it was unclear, under the facts of the case, how the defendant's failure to give "truthful identification at the time of arrest and during pretrial periods thereafter" had a tendency to affect the proceedings in a material way). The guideline focus on *materiality* in § 3C1.1, and thus on the actual tendency to obstruct proceedings, necessarily recognizes that sometimes the Shakespearian rhetorical question, "What is in a name?," is a truism. As this Court

recently explained in *Banks*, materiality, not nominalism, is the focus of the § 3C1.1 analysis regarding accurate self-identification. Here, there was no obstruction by Medina, Hernandez, or Campa in answering the clerk's call of the names under which they had long been living, under which their relevant financial and criminal records could readily be found, and which the government was using to identify them in charging documents and warrants used to arrest and prosecute them. At a minimum, the matter should be remanded in light of the district court's erroneous categorical analysis with respect to self-identification before a magistrate judge at an initial appearance.

Issue V: Imposition as to Campa of an Aggravating Role Enhancement under U.S.S.G. § 3B1.1 Based on Temporary Management of Assets.[18]

Standard of Review: The district court's interpretation of sentencing guidelines is reviewed *de novo*. *See Johnson*, 375 F.3d at 1301 (11th Cir. 2004); *Crawford*, 407 F.3d 1174, 1177-78.

Argument: The Court has stressed that an enhancement for role in the offense requires a showing that the defendant managed people, not assets. *United States v. Glover*, 179 F.3d 1300, 1302-03 (11th Cir. 1999) ("To the extent that our words

[18] This issue was raised in Ruben Campa's initial brief, pages 63-67, and argued in his reply brief, pages 30-32.

may have previously indicated that a defendant's management of assets might alone serve as grounds for an increase in base offense level, we now draw the line. We now squarely decide that a section 3B1.1 enhancement cannot be based solely on a finding that a defendant managed the assets of a conspiracy."); *United States v. Harness*, 180 F.3d 1232, 1235 (11th Cir. 1999) (reversing role enhancement for defendant who managed assets of victims of his housing program fraud; "The probation officer's recommendation that the court enhance Harness's offense level because he had management responsibility over the assets of the victim was error, because these facts support only a discretionary decision to depart, not a mandatory enhancement under section 3B1.1(c).").

In Campa's case, the government conceded in its responsive brief that the district court erred in imposing a 3-level enhancement for Campa's role in the offense based on the management of assets in connection with the immigration document counts of conviction. Gov't Br. 85 (conceding that district court's role-in-the-offense ruling was in "apparent contravention of *Glover*"). The government's argument for harmless error analysis is particularly inapt in the post-*Booker* period, where on remand the district court is not bound to follow the same formulation for sentence computation. Moreover, there is, as the district court found, no other

evidence to support a § 3B1.1 enhancement as to the guideline-based component of Campa's sentence. *See* R133:111. Specifically, the district court rejected the government's argument that Campa managed co-defendant Medina, whom the government conceded was at least his "co-equal." R132:19-21. This matter, therefore, should be remanded for resentencing without the role enhancement. At most, given the district court's failure to make findings on the government's alternative theory, the case should be remanded for *de novo* resentencing at which time the parties may address any such arguments.

The government's argument that Campa did not "specifically" alert the district court that its role enhancement constituted error, Gov't Br. 85, is belied by the record. Campa objected, before and after imposition of sentence, to the § 3B1.1 enhancement. Campa specifically argued at sentencing that: "The Court in order to sustain this enhancement must find vis-à-vis *someone*, [that Campa] played this managerial role. There is no evidence he had any control over Mr. Medina nor did he have any control or supervisory responsibilities over *anyone* who has been identified to this Court." R132:19 (emphasis added). Campa also preserved the objection following imposition of the sentence. *See* R133:133.

CONCLUSION

Appellant requests that the Court reverse the contested sentencing enhancements and remand for resentencing.

Respectfully submitted,

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William M. Norris
William M. Norris, P.A.
8870 SW 62nd Terrace
Miami, FL 33173
Tel: (305) 279-9311/Fax: (305) 279-9024
Attorney for Luis Medina

CERTIFICATE OF WORD COUNT

I CERTIFY that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7). According to the WordPerfect program on which it is written, this brief contains 13,674 words.

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William M. Norris

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was mailed this 20th day of November 2006, to Caroline Heck Miller, Assistant United States Attorney, 99 N.E. 4th Street, Miami, Florida 33132-2111; Paul A. McKenna, Esq., 2940 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131; Orlando do Campo, Assistant Federal Public Defender, 150 West Flagler Street, Suite 1500, Miami, Florida 33130-1555, Miami, Florida 33131; Philip R. Horowitz, Esq., Two Datran Center, 9130 South Dadeland Blvd., Suite 1910, Miami, Florida 33156; and Leonard I. Weinglass, Esq., 6 West 20th Street, Suite 10A, New York, NY 10011.

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William M. Norris