No. 01-17176

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/appellee,

v.

ANTONIO GUERRERO,

Defendant/appellant.

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

SUPPLEMENTAL BRIEF OF THE APPELLANT ANTONIO GUERRERO

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

SUPPLEMENTAL STATEMENT OF ADOPTION OF BRIEFS

Appellant Antonio Guerrero adopts the supplemental briefs filed by appellants Luis Medina, Gerardo Hernandez, Ruben Campa, and Rene Gonzalez. In prior briefing, appellant has adopted all other issues that pertain to him and that were raised by the appellants in their initial briefs.

SUPPLEMENTAL STATEMENT OF THE ISSUE

Whether extensive prosecutorial misconduct at trial, considered cumulatively and in the context of the trial evidence, substantially prejudiced the defendants and warrants reversal of the convictions.

SUPPLEMENTAL STATEMENT OF THE CASE

The *en banc* Court held that the district court did not abuse its discretion in denying either the initial motion, or later renewals of the motion, for change of venue or the motions for new trial based upon newly-discovered evidence relating to venue. *See United States v. Campa*, 459 F.3d 1121 (11th Cir. 2006) (*en banc*). While the Court plainly rejected all aspects of the defendants' venue-related claims, the *en banc* Court *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;[1] (2) insufficiency of the evidence; (3) erroneous jury instructions; (4) improper application of the Classified Information Procedures Act and the Foreign Intelligence

[1] Although this Panel had found that the pervasive community prejudice in the venue was compounded by events both in and outside the courtroom–including prosecutorial comments "regarding the evils of Cuba and Cuba's threat to the sanctity of American life," *United States v. Campa*, 419 F.3d 1219, 1261 (11th Cir. 2005), the Panel nevertheless reserved the issue of prosecutorial misconduct, *id*. at 1223 n. 1, and the government went to great pains, both in its petition for rehearing *en banc* and in its *en banc* brief, to frame its question and argument narrowly, with the hope that the *en banc* Court would not separately address pervasive, non-venue-related misconduct at trial. *See, e.g.*, Gov't *En Banc* Br. at 44 (arguing that appellants' claim of a "torrent of misconduct . . . flooding the trial" need not be considered *en banc* because it "goes beyond the questions posited by the *en banc* Court").

Surveillance Act; (5) *Batson* violations; and (6) sentencing errors–all of which it remanded back to this Court for final resolution. *Campa*, 459 F.3d at 1126 n.1 (11th Cir. 2006).

The instant brief addresses only the issue of non-venue-related prosecutorial misconduct, and asks this Court to determine whether–in view of the complexity and novelty of the government's claims as to murder and espionage conspiracy, the specific intent defenses presented by the defendants, and the lack of substantial evidence to sustain convictions of several counts–the pervasive and cumulative nature of the prosecutorial misconduct at trial, particularly the highly improper closing arguments, warrants reversal.

Standard of Review

In contrast to the deferential "abuse of discretion" standard employed by the *en banc* Court to review the denial of the motions for change of venue and the motion for new trial alleging venue-related misconduct, where, as here, prosecutorial misconduct at trial is raised as an *independent* ground for relief, the Court's review is *de novo*. *United States v. Delgado*, 56 F.3d 1357, 1363 (11th Cir. 1995) ("our review is plenary"); *United States v. Eyster*, 948 F.2d 1196, 1206 (11th Cir. 1991) (recognizing plenary review standard).

And in fact, where, as here, there are numerous, repeated instances of misconduct at trial, the Court should *not* review each instance individually for its

prejudicial effect, but rather should consider the cumulative effect of the misconduct. *United States v. McLain*, 823 F.2d 1457, 1462 (11th Cir. 1987). In determining the prejudicial effect of prosecutorial misconduct, the Court must consider, *inter alia*, the weight or sufficiency of the evidence of guilt. Reversal is mandated where the evidence of guilt is *not* "overwhelming." *See, e.g., United States v. Boyd*, 131 F.3d 951, 955 (11th Cir. 1997).

Summary of the Supplemental Argument

At no time in this appeal has the government ever contended that its evidence of guilt on all counts was overwhelming. In its Petition for Writ of Prohibition to this Court, quite notably, the government conceded the weakness of its case on at least two of the major conspiracy counts, noting its fears that "[t]he jury might well acquit the defendants of two of the three major conspiracy instructions" given the wording of the instructions. Gov't Pet. for Writ of Prohibition (No. 01-12887) at 5-6. In its response brief on appeal, the government did *not* address the weight of the evidence in relation to prosecutorial misconduct. It argued simply that there *was* no misconduct at any time during the trial.

The government's claim that it committed no misconduct at trial simply does *not* withstand record review. There were an unprecedented number of impermissible and inflammatory remarks made by the government during closing arguments in this case, all aimed at overcoming what the government perceived as insurmountable

obstacles of proof on the most serious counts. This misconduct included, *inter alia*:

> • attempting to shift to the defense the burden of explaining inadequacies in the government's case in opening statement, telling the jury that waiting until defense closing to point out inadequacies in the government's case was too late, and branding the defense as mere trickery, consisting of "throwing up ideas that are false and coming up with other ideas," all inimical to the "one truth;"
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> • alluding to supposed facts and information not in evidence and using highly inflammatory language such as "the bosses in Havana," giving a cabdriver a "tune-up," and "wiping out" a witness's entire family;
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> • vouching for the "fabulous" job done by the FBI and the good character of its witnesses;
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> • denigrating defense counsel and defense witnesses with false, unsupported assertions of wrongdoing;
>
> • falsely accusing the defendants of uncharged crimes–bombings and sabotage–more serious than the charges;
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> • three times falsely claiming the defendants sought to destroy the United States, suggesting, in the process, sinister evidence not presented to the jury;
>
> • putting forth a strawman argument as to what the defense position was and then–tarring in one stroke both the defendants and their counsel–using the strawman to equate that position with historical acts of genocide; and
>
> • putting the jury above the law by telling them do the government's work in this "extremely important case" for the United States, by thinking up arguments to use against the defense and urging them to "do [their] job" and "do the right thing."

The government's tactical use of essentially *every type* of closing argument misconduct–notwithstanding clear precedent warning of the improprieties–was so pronounced and persistent in this case that the verdicts, particularly as to the counts

of conviction for which the evidence was not overwhelming, should be vacated and remanded. Both the closely contested nature of the evidence on these counts, and the record speed with which the jury rendered its verdict–even on counts for which the government conceded it had insufficient proof under the instructions as given–confirm the prejudice from its misconduct, and require a new trial here.

SUPPLEMENTAL ARGUMENT AND CITATIONS OF AUTHORITY

PROSECUTORIAL MISCONDUCT UNDERMINED THE RELIABILITY OF THE VERDICTS ON COUNTS FOR WHICH THE EVIDENCE OF GUILT WAS NOT OVERWHELMING.

A. The government's presentation at trial of evidence directed to passion, sympathy, prejudice, and fear provided a foundation for the government's improper closing arguments.

From the commencement to the conclusion of its case-in-chief, the government's evidence carried the weight of highly emotional issues, the centerpiece of the trial being a matter of great concern, the killing of persons the government described as innocent humanitarians. *See*, *e.g.*, R29:1597 (government opening statement focuses on shootdown victims as rescuers who sacrificed their lives trying to help Cubans seeking freedom); R54:5299 (government witness testifies to victims' "humanitarian effort"). Knowing the inherent emotional content of the prosecution, the government went well beyond what relevance considerations demanded in order to draw out sympathy and passion in this unique case that combined an unprecedented

murder conspiracy theory with an unprecedented espionage conspiracy theory.[2] At trial, the government's case veered from criminal to political[3] to fear-based themes, as the government sought to convince the jury to accept the government's highly-disputed interpretation of a documented record of communications by and to the defendants. But for introduction of emotional evidence–later made indelible in the highly prejudicial and improper closing argument,[4]–the resolution of the case may have been different.

The seeds for the government misconduct in closing argument were sown throughout trial. Notably, at every juncture during the trial, the government sought

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[2] Day after day throughout the entire lengthy trial, family, lawyers, and associates of shootdown victims were assigned prominent seating, immediately adjacent to the government. R25:714-717. Space farther back in the courtroom was afforded to visiting members of the defendants' families. Behind them sat the media attendees. Only one side of the courtroom was available for seating. The courtroom was so small and cramped that the seats on one side of the courtroom had to be removed to allow seating for defense counsel, defendants, and deputy marshals.

[3] R58:6007-10 (government reads to the jury the Concilio Cubano petition to Fidel Castro appealing for freedom and invoking the aid of the United Nations); *see*, *e.g.*, R36:2666-67, 2748 (prosecutor argues defendants' objective was to make Miami Cuban exiles, including Cuban American National Foundation, look like "fanatics; which is squarely relevant to this case").

[4] Such evidence included including extensive testimony by members of an "exile rescue" organization, an anti-Castro activist who related testimony as to persecution in Cuba, and a minister whose family suffered the loss of a young child. *See*, *e.g.*, R40:3177; R54:5295 (Guillermo Lares); R56:5575 (Arnaldo Iglesias); R58:5989 (Leonel Morejon of Concilio Cubano).

to introduce prejudicial evidence with marginal relevance, serving merely to characterize the defendants as agents of an evil, repressive, and lawless state with no regard for human life–evidence which it was later able to seize upon as fodder for its highly improper attacks on the defendants and their counsel in closing. The government intentionally insisted upon presenting what it referred to as "dead baby" evidence, *rejecting* a defense offer to stipulate,[5] so that it could later falsely suggest murderous intent on the part of Cuba and the defendants. R124:14480 (government closing: "They killed four innocent people and they use in these identities dead babies, dead children to establish who they are.")

The government also unnecessarily made Fidel Castro *personally* a central issue in the case. *See*, *e.g.*, R58:5993 (prosecutor argues that anti-Castro activities

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[5] The government rejected the defense offer to stipulate to the true identities of the Cuban agents and their use of concocted false identifications, so that the government could offer three witnesses–family members of deceased children, including a clergyman–to give emotional testimony that false identities used by the non-U.S. citizen defendants–Hernandez, Medina, and Campa–were obtained from decades-old death certificate information pertaining to individuals who died before reaching adulthood. *See* R30:1712 (counsel notes defense motion *in limine* to exclude this testimony under Fed. R. Evid. 403: "Your Honor, any testimony comparable to the one we just heard a moment ago regarding the child's birth, his illness, his death, the pain and anguish a parent suffers as a result of that is unduly prejudicial [and] is being offered solely for the purpose as you saw a moment ago today to introduce a ... human passion ... that plays no role in this case."); R30:1716 (objecting to continued asking of "macabre" question, "look around the courtroom and tell us if you see your son"); *See also* R33:2164 ("Q [by prosecutor]. Does Florida law allow you to obtain driver's licenses and false identifications under the name of a dead baby?").

of dissident group Concilio Cubano "is at the center of this case"). While the jury presumably knew what Castro looked like and did not need to be reminded nearly *three hundred* times at trial that Castro is the Cuban head of state, or that his regime is Communist, the government followed up on its dead-children evidence by taking pains to display at length an enlarged image of Castro projected on a big screen,[6] and then repeatedly (approximately 200 times) characterized a term used by Cuban intelligence–"compañero" or companion–as "comrade," to suggest Communist fervor,[7] introduced testimony as to the repressiveness of the regime,[8] including

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[6] The government did this on the first full day of testimony, using the photograph of Castro seized from Rene Gonzalez's daughter's bedroom. R31:1947.

[7] *See* R31:1937; R36:2676-77; R37:2720-21; R39:3048-50 (FBI specialist admits *changing* other translations by FBI specialists in order to increase appearance of term "comrade" and confirms the actual Spanish word for "comrade" is "camarada," not "compañero").

[8] The government introduced further graphic evidence of Fidel Castro and political repression through the testimony of FBI specialist Stuart Hoyt. R44:3699-3700 (government demonstrative exhibit places Fidel Castro "at the top of the Cuban intelligence pyramid"). When Hoyt explained that Cuba has "two agencies within the Ministry of the Interior that are intelligence related," he added that "[t]he first one, and ... you only see it briefly in the documents, is the DCI, the Directorate of Counterintelligence. ... This is an organization that works almost exclusively on the Island of Cuba and their primary responsibility is internal control, to insure that people don't speak out against the government ... ." R44:3704. Hoyt returned to the theme of repression in Cuba after the prosecutor twice read to him lengthy descriptions in which Hernandez noted a taxi driver's criticism of the Cuban government; the government, in turn, sought to align Hernandez with repression in Cuba through this single incident of his complaining about a taxi driver –his only such complaint in four years of communications. R44:3705-06; R46:3970-71. Hoyt

suggestions that Cuba employs the "death penalty" for minor offenses, R73:7807, and called witnesses who frequently reminded the jury of Castro throughout trial–not merely FBI agents but lay witnesses such as BTTR and Concilio Cubano activists, *see supra* at 6 n. 2– forcing the defendants to shoulder anti-Castro hostility.[9]

One example requires mention: In an effort to create a false impression that the defendants were violent, the government introduced and then made repeated reference to a February 1994 memorandum by an unindicted agent discussing an idea–that was rejected and never acted on–of sending a phony package made up to superficially look like a "book bomb" to a CIA agent and attributing it to an exile organization. R37:2773. Unwilling to stick to the evidence of a *rejected* idea of a *phony* bomb, however, the government had an FBI specialist testify that the Spanish term

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further opined that the Cuban intelligence service's interest in exile groups was not limited to those seeking to harm Cuba but applied to the entire exile community. R44:3715 ("Q. There is a term that appears in the document as CR. Are you familiar what that means? A. Yes. It means counter revolutionary. Q. What does that refer to? A. That means the exile community."). In redirect examination, the government returned to the theme of suppression of rights in Cuba as part of the purpose of the Cuban intelligence service. R46:3969 ("Q. Would you remind us again, what are the various roles and responsibilities of the Cuban Directorate of Counterintelligence, their jobs? A. It is internal control, but they have internal security; things of that nature. ... To make sure there is no counter-revolutionary activity within Cuba. That there is no dissent within the Island of Cuba.").

[9] Even on appeal, the government has not abandoned the premise of its rebuttal closing argument that evil and criminal intent by the defendants can be inferred from the fact that Castro is the Cuban head of state. Gov't Br. 72 (arguing that government arguments did not constitute misconduct because they were case-related).

"*plastilina*" used in the memo actually meant the real-bomb, highly explosive substance "plastique" (rather than "malleable clay"–the definition for "*plastilina*" in every Spanish dictionary[10]). When the defense challenged the government specialist's mistranslation of "*plastilina*," and attempted to introduce a Spanish dictionary to counter it, the government fought introduction of the dictionary and succeeded. R40:3171-3173.

B. Improper Argument in the Government's Initial Closing Argument

In its initial closing argument, the government began to tap into irrational fears and passions by grossly exaggerating the evidence. It argued, for instance, that the effect of the defendants' actions resembled a society overtaken by invading aliens, as in "Invasion of the Body Snatchers," "where [the world is] taken over by pod people ... with new pods ... ready to be sown," R121:13939-40, premising this argument on defendants' obtaining false identification using the names of "infants who died." R121:13929. The government then repeatedly linked the murder conspiracy count to Cuban "propaganda," R122:14071-72, 14078, 14082-83, 14095-96, 14100, 14113, 14119, and using the same term to suggest that all of the defenses were based on propaganda, stated that the charges "have been proved beyond a reasonable doubt," so "it is time now for the propaganda to end." R122:14119. The

[10] S*ee*, *e.g.*, Simon & Schuster's Int'l. Spanish Dictionary (English/Spanish; Spanish/English) (2d ed. 1997).

government also stirred up bitterness towards the defendants and the defense by arguing, falsely and without record evidence, that Cubans lack "due process where there are courts and defenses allowed." R122:14072.

C. Pervasive Misconduct During Rebuttal Argument

Even this purple prose in initial closing argument–so patently laced with emotion and fear to tarnish the defendants and the defense–was mild when compared to the government's rebuttal closing argument, which not only drew three dozen defense objections and mistrial motions, including more than two dozen *sustained* objections, but pointedly violated every precept of proper argument, using prosecutorial passion and position to secure a conviction on the closely-contested counts here, in the following underhanded and hard-hitting manner:

1. The Government Misstated the Record and the Law on Multiple Occasions, Improperly Shifted the Burden of Proof to the Defense, Distorted the Jury Instructions to Lower the Government's Burden of Proof, and, Indeed, Even Urged the Jury Not to Follow the Instructions. This Court has held that it is impermissible, and indeed, reversible error for the government to misstate the evidence in the record, *United States v. Hands*, 184 F.3d 1322, 1333 (11th Cir. 1999); to mischaracterize the defense, *Davis v. Zant*, 36 F.3d 1538, 1547 (11th Cir. 1994), and to misstate applicable law and the instructions, *Romine v. Head*, 253 F.3d 1349, 1370 (11th Cir.

2001), either by shifting the burden of proof, *United States v. Simon*, 964 F.2d 1082, 1086 (11th Cir. 1992), or lowering the government's own burden of proof. Remarkably, the government committed each and every one of these classic forms of misconduct in rebuttal argument here.

First, the government seized on the false "plastique" evidence it had planted during its case-in-chief to falsely suggest that the defendants–who neither authored nor acted on the fake-bomb memo and some of whom were not even in the United States at the time–were involved in sending *actual* bombs. R124:14476, 14480 (prosecutor's closing: "Book bombs. ... They sponsor book bombs ... ."). Such knowing use of false testimony–to create a misimpression as to much more damaging evidence, when there never was any such evidence actually presented to the jury–goes far beyond the prosecutor's mere failure to correct a false impression left by his cross-examination, which the government conceded was misconduct in *United States v. Alzate*, 47 F.3d 1103, 1109 (11th Cir. 1995), and which resulted in reversal in that case.

In addition to blatantly misrepresenting the evidence to the defendants' detriment in asserting that they actually "sponsor book bombs," the government also misrepresented defense counsel's arguments and the defense as to the Count 3 murder conspiracy charge, by claiming falsely–given defense counsel's clear Hernandez-is-a-

scapegoat contention at the heart of the defense opening at the beginning of trial, R29:1624–that counsel failed to announce in opening that Hernandez was not involved in the shootdown, and that defense reliance on the presumption of innocence as to Count 3 was therefore improper because it was not announced in opening statement. R124:14511.

In so obviously and intentionally falsifying the defense opening statement, the government plainly sought to (a) shift to the defense the burden of proof and production as to the presumption of innocence and (b) implicitly comment on the defendant's silence in failing to more clearly distance himself from Cuba during trial, R124:14511(claiming defense counsel "argues to you *now* his client didn't know anything about it. It is not a multiple choice test. Somebody dies and it is justified, you are involved in it. *If you don't know anything about it, tell us from the beginning, Mr. McKenna. Why do we spend months determining where the location of the shootdown was? If your guy doesn't know anything about it, let's go home.* That is because he changes horses in the middle of the stream. *He throws up what might be good day one and then uses what may be good day two.* ... You don't dance around it, you don't throw up ideas that are false and come up with some other ideas. You tell the jury the truth and you go and that is what they make their decision on. You make a decision based on truth.") (emphasis added). As if these burden-shifting

misstatements were not enough, the government clearly violated all ethical precepts when it intentionally misstated governing law and the jury instructions by repeatedly, and over multiple sustained objections, *understating* its *own* proof burden on the murder conspiracy count, R124:14514-518 (seven objections sustained, one remark stricken), and falsely telling the jury that examining the evidence of "why [Cuba] send[s] spies into our country is something that is not proper for your decision making" and that defense counsel McKenna's references to the "Cuban Government's point of view" as focusing on stopping terrorism rather than seeking military advantage reflected an improper concern for Cuba which the jury should not have. R124:14487-88.

The government also argued–in essence–that the jury could and should nullify and disregard the court's Count 3 instructions, by first misleadingly telling the jury that jurisdiction over the conspiracy charge was shown simply because a shootdown occurred in international airspace, (R124:14517), and then, after the court sustained an objection to that improper remark, continuing:

> MR. KASTRENAKES: The judge will instruct you we must prove it occurred in international air space.
>
> MR. McKENNA: Objection.
>
> MR. KASTRENAKES: It is in the instruction.

(R124:14517).

Contrary to the prosecutor's assertion, proof of occurrence in international airspace was *not* sufficient to meet the government's burden, as the prosecutors well knew. The government had just argued unsuccessfully for such an instruction both in the district court and, after that request was denied, in this Court of Appeals, where the government unsuccessfully sought a writ of prohibition. Even though the district court had specifically rejected the government's proffered instruction, the government nevertheless argued that it was the law:

> MR. KASTRENAKES: There is an element that *requires the proof of the crime occurring in international air space.*
>
> MR. McKENNA: Objection. It is a misstatement. It is an agreement.
>
> THE COURT: Sustained.
>
> MR. KASTRENAKES: Ladies and gentlemen, you read the instructions.
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> MR. McKENNA: He is now arguing with the Court what the instruction says.
>
> THE COURT: Sustained.
>
> MR. KASTRENAKES: You will be given a copy of the instructions. I ask you to go back and read them closely concerning the crime and the elements that are charged. *The United States of America has proven that the shootdown occurred in international air space.*
>
> MR. McKENNA: I object to this argument by counsel and I ask it be stricken. That is not what must be proven.
>
> THE COURT: Sustained.

MR. KASTRENAKES: I am merely telling the jury.

MR. McKENNA: I object to him arguing with you about the law.

THE COURT: Sustained. Move on.

R124:14517-18 (emphasis added). Despite the sustaining of multiple defense objections, the government remained undeterred in misstating the law to avoid its burden of proof. Notably, in another portion of rebuttal argument, the government improperly sought to reduce its burden in general:

> MR. KASTRENAKES: The United States must prove there was a conspiracy to kill and we have proven the conspiracy to kill.
>
> MR. McKENNA: Objection. They have to prove more than that.
>
> THE COURT: Sustained.

R124:14515.

As defense counsel correctly objected, the jury instructions plainly required the government to prove much more than a conspiracy to kill–that Hernandez agreed to perpetrate murder, an unlawful killing, with malice aforethought and premeditation, in the special U.S. maritime and territorial jurisdiction. R125:14596. It was only because the government did not win the jury instructions it desired, that it pulled out "Plan B" (the emergency writ of prohibition to this Court[11]), and after that request

[11] Gov't Emergency Petition for Writ of Prohibition at 21 (arguing that given "the evidence presented in this trial," the jury instructions present "an insurmountable hurdle for the United States ... and will likely result in the failure of the prosecution").

was denied, resorted to a desperate "Plan C" (its argument to the jury to apply the law *not* as decided by the district court, but the law that it wanted), because, as the government had admitted, it could *not* prove the offense as charged and instructed. The government's utter dearth of proof was obvious, given that all the Cuban messages pointed towards nothing more than what was universal knowledge: a possible confrontation with BTTR due to its incursions into Cuban airspace.

The intentionality of the government's actions and the urgency with which it viewed the jury instructions on Count 3 are plain from the misstatements it made to this Court in the petition for prohibition, several of which drew harsh comments from the district court. R121:13918 (finding that government made an "outrageous misrepresentation of fact ... to the Eleventh Circuit"); R121:14025 ("THE COURT: I am very disappointed that the government would have made such gross misrepresentations concerning both my findings ... and the status of the jury instructions before the Eleventh Circuit in its motion for stay ... .")[12]

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[12] Although the government claimed in its response brief that its misstatement of proof obligations in closing, R124:14514-17, was due to interruptions by defense counsel's objections (and, apparently, the district court's sustaining of those objections), Gov't Br. 75, in so stating, the government clearly took out of context its closing argument that Hernandez was "[a]bsolutely" guilty of being a "partner" with Cuba, in order to claim that statement cured repeated misstatements of its proof burden. *Id.* The quoted statement–made as part of the government's misleading and highly improper "in-for-a-penny-in-for-pound" argument–was *not* contemporaneous with the government's repeated misstatement of the offense elements, R124:14514-14517, but came considerably later, *see* R124:14520, during another series of

It is also seen in the government's highly improper exhortations to the jury to join the prosecution team by thinking up any "argument in your head that blows [defense counsel's] arguments away"–telling the jurors "don't be afraid to use it," R124:14510. If, as a matter of law, a *criminal defendant* has no legal right to a nullification verdict, and may not urge the jury in closing to disregard the instructions as given, *see, e.g., United States v. Funches*, 135 F.3d 1405, 1408-1409 (11th Cir. 1998); *United States v. Trujillo*, 714 F.2d 102, 105-106 (11th Cir. 1983), clearly the same rule applies to the *government*.[13] Here, the government's none-too-subtle, but highly prejudicial attempt to circumvent its conceded proof obstacles, by emboldening the jury not to be "afraid" to convict the defendants based upon any "argument in your head that blows [defense counsel's] arguments away"–whether or not such argument had a basis in law–was misconduct, pure and simple.

2. The Government Improperly Vouched by Means of Prejudicial and Improper Statements Regarding the Evidence and Surrounding Events. This Court has held that prosecutorial vouching, both by manifesting personal beliefs in the witnesses and

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inflammatory attacks on Hernandez. Rather than "curing" the problem, it simply added to the prejudice.

[13] *Cf. United States v. High*, 117 F.3d 464, 470 (11th Cir. 1997) (in misinstruction context, as a matter of law, where court is unable to determine with "absolute certainty" that proper legal theory was employed by jury, reversal is required.).

the defendants' guilt and by suggesting and insinuating the existence of facts not in evidence, is reversible error. *United States v. Eyster*, 948 F.2d 1196, 1207 (11th Cir. 1991); *United States v. Sims*, 719 F.2d 375, 377 (11th Cir. 1983); *United States v. Butera*, 677 F.2d 1376, 1382 (11th Cir. 1982) (collecting cases). As the Supreme Court explained in *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629 (1935), prosecutorial vouching is particularly insidious because of the danger that a jury will be swayed to convict, based not upon actual evidence but upon the judgment of "the government"–a judgment which undoubtedly carries great weight:

> The United States Attorney is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done . . .
>
> It is fair to say that the average jury, in a greater or lesser degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Id., 295 U.S. at 88, 55 S.Ct. at 633; *see also United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 1048 (1985) ("the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its view of the evidence").

Here, the prosecutor violated these explicit prohibitions repeatedly in rebuttal

argument. He vouched continually for the quality of the government's prosecution, characterizing it alternatively as "fabulous," "superb," "high mark for future performance," "extraordinary job, worthy of the highest praise," "impeccable," "extremely credible," R124:14472, 14503, 14523, and went to great pains to point out the express "approval of the United States District Judges" given to the government in order for the government to conduct "surveillance" and "searches" in this case (where the defense had not challenged the *legality* of any search but rather questioned whether these defendants were really involved in espionage).

More than this, however, and most egregiously, is that the prosecutor actually expressed his own personal belief in the defendants' guilt, when he emphatically declared "My God, these guys are spies!" R124:14510. Few statements convey personal belief as effectively as the invocation of God–turning the assertion here into the equivalent of a sworn oath as to the matter asserted. Plainly, such a means of conveying belief is much stronger than the "I think it's fraud" comment, condemned in *Young*, 470 U.S. at 5, 105 S.Ct. at 1041.

In direct contravention of Circuit precedent warning in *United States v. Garza*, 608 F.2d 659, 666 (5th Cir.1979), that a prosecutor may "not suggest that evidence which was not presented at trial provides additional grounds for finding defendant guilty, " or "impress on the jury that the government's vast investigatory network, apart from the orderly machinery of the trial, knows that the accused is guilty or has

non-judicially reached conclusions on relevant facts which tend to show he is guilty," or offer "his opinion of the [government witnesses'] motives" or "integrity" to "bolster their testimony," *see also United States v. Hands*, 184 F.3d 1322, 1333-34 (11th Cir. 1999); *United States v. Russell*, 703 F.2d 1234, 1248 (11th Cir. 1983), the prosecutor here unabashedly vouched

> • that if there *was* exculpatory evidence, it would have been presented by the "bosses in Havana," R124:14493;
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> • that there was no "credible evidence [of Cuban-exile terrorism in] this community" because if there was any such evidence, the prosecution would discover and act on it, R124:14492 ("I will find out and prosecute the case");
>
> • that the Cuban government is obstructing legitimate investigations of criminal activity by exiles, R124:14493, when there was no such evidence presented;
>
> • for the credibility of witness Basulto–who had attacked defense counsel–as being someone committed to bringing democracy to the oppressed nation of Cuba and who took personal risks to do so, R124:14475 (Basulto was working for the "overthrow of the communist country of Cuba as he is today, he wants to see Democracy restored"), R124:14473 (Basulto was not "indicted" and is not on trial);
>
> • that the defendants support using "goon squads" to brutalize not merely dissidents, but anyone who even complains about the Cuban government, R124:14495.

While each and every one of these remarks was improper and objectionable, viewed together the remarks evidence a carefully orchestrated attempt by the prosecutor to mislead the jury into convicting based upon "a wink and a nod," rather

than the actual witness testimony. Circuit precedent, cited above, establishes that his is a clear violation of Due Process.

3. The Government Leveled Multiple Unfounded Personal Attacks on the Defendants. As a matter of law, it is improper for the government to engage in personal attacks against the defendants–as the government did here by suggesting that the defendants supported using "goon squads" that beat up or torture innocent persons, where there was no such evidence. See R124: 14495 ("smearing the defendant's character, by speculating that what "Hernandez is all about" is having a "goon squad" give a "tune-up" to an innocent cabdriver"); *cf. Hands*, 184 F.3d at 1333 (reversing conviction where prosecutor improperly referred to defendant as a "monster" who was "wicked and vicious"); *United States v. Blakey*, 14 F.3d 1557, 1561 (11th Cir. 1994) (absent evidence of other criminal conduct, prosecutor may not argue this to the jury because it brands the defendant as something he is not–a torturer, or a hoodlum); *Hall v. United States*, 419 F.2d 582, 587 (5th Cir. 1969) ("shorthand characterizations that are not based on the evidence, such as calling the defendant a "hoodlum," are especially prejudicial because they are "especially likely to stick in the minds of the jury and influence its deliberations").

Such improprieties occurred here additionally through the repeated false allegations–made with bombshell effect by the prosecution–that the defendants sponsored " book bombs" in the United States, R124:14476, 14480, and indeed, that

they were "bent on destroying the United States." In the latter regard, the government first falsely accused Campa, who was not even charged with espionage conspiracy, of being "a Cuban spy sent to the United States to destroy the United States." R124:14481-83. Notably, the government did not limit its "bent on destruction" claims to Campa; it thereafter broadened its attack to include *all* of the defendants. R124:14482 (defendants are "bent on destroying the United States, [with trial counsel] paid for by the American taxpayer"); R124:14535-36 (final paragraph of rebuttal closing: "they truly are ... bent on the destruction of the United States of America"). Although defense objections were raised following the final two of these three unfounded "destruction" arguments, R124:14482, 14537, *no curative instructions were given at any time on the day of the rebuttal argument*. While three days afterwards, the district court, as part of its general instructions to the jury, belatedly stated, "Remember that anything the lawyers say is not evidence in the case," R125:1458, plainly such a delayed instruction could not "unring the bell." *Cf. Wilson*, 149 F.3d 1298, 1303 (prosecutorial misconduct rendered harmless "where the district court gives an *immediate* curative instruction, *and* the evidence of the defendant's guilt is *overwhelming*") (emphasis added).

These unfounded "destruction" attacks were exceedingly improper, particularly given the defendants' failure to offer any evidence of good character during the trial. *United States v. Rodriguez*, 765 F.2d 1546, 1559 (11th Cir. 1985) ("The government

may not rely on the accused's bad character to win a conviction unless character has been put in issue by the defense;" prosecutor improperly argued that the defendant is "a liar ... Ladies and gentlemen, he's phony. [The defendants are] phony. They have disrespect of the law. They disregard people. They spit on the country that's accepted them." Such comments constituted misconduct, where the defendants "did not present any evidence of [their] general good character"; noting need for immediate and repeated instructions; focus on strength of the government's case in determining reversibility); *United States v. Barker*, 553 F.2d 1013, 1025 (6th Cir. 1977) (defendant's argument that the evidence does not prove his guilt does not make his character fair game for prosecutorial attack unless defendant claims absence of "specific trait related to the act charged").

Notably, and contrary to the government's suggestion in its response brief, defense evidence–*documented* in the communications seized by the government–showing that an object of the agents' mission was investigating anti-Cuba terrorism and seeking to deter violations of Cuban neutrality does not constitute introduction of good character evidence, does not open the door to character attack arguments and did *not* in any way "invite" the government to invent the overwhelmingly prejudicial accusation that the defendants wanted to destroy the United States. *See Young*, 470 U.S. at 18-19; 105 S.Ct. at 1048 (rejecting invited-reply excuse for improper argument even absent *any* defense objection to government

closing); *accord Darden v. Wainwright*, 477 U.S. 168, 182, 106 S.Ct. 2464, 2472 (1986) (invited reply does not excuse misconduct even where defense counsel has actually made improper comments).

4. The Government Improperly Attacked the Defendants for Having Court-Appointed Counsel, in Derogation of the Sixth Amendment Right to Counsel. As if its unsupportable claim that the defendants were "bent on destroying the United States" was not enough, the government added even more fuel to its fire by emphasizing to the jury that notwithstanding the defendants' alleged intent to "destroy" the United States, they were accorded the benefit of appointed counsel paid for by the American taxpayer. R124:14482. *See Goodwin v. Balkcom*, 684 F.2d 794, 806 (11th Cir. 1982) (even where defense counsel is responsible for the comment, "reminding a jury that [counsel's] undertaking is not by choice, but in service to the public, effectively stacks the odds against the accused").

The government's claimed justification for this clearly unjustifiable comment–that *one* defense attorney, in closing, mentioned his court-appointed status solely in order to praise the American system of justice–is off-base. Contrary to the government's suggestion in its response brief, this broad attack against all of the defendants and their court-appointed counsel, in plain violation of the guarantees of the Sixth Amendment, was in no way "invited" by one attorney's praise of the American system of justice for allowing a foreign agent to have a court-appointed

counsel. Praising the American justice system cannot and should not be twisted into an invitation to prejudice the defendant's exercise of the Sixth Amendment right to counsel. Even if the one attorney's mention of his court-appointed status could somehow have "invited" a reply to *that* attorney, the remark could in no way have "invited" the government to negatively comment on the court appointment for *all* of the defendants. *See United States v. Rodriguez*, 765 F.2d 1546, 1559-60 (11th Cir. 1985) (differential invited error standard applies to response to defense arguments in a multi-defendant case; government cannot simply strike out at all defendants based on one counsel's remarks; instead, a defendant-by-defendant invited-error analysis applies).

5. The Government Improperly Infringed Upon the Defendants' Sixth Amendment Rights By Complaining to the Jury That The Defendants Went to Trial and Cross-Examined Witnesses. A prosecutor's complaint that the defendants forced the government to prove their guilt beyond a reasonable doubt, *see* R124:14482, ("Look, they are Cuban spies. ... They forced us to prove their guilt beyond a reasonable doubt"), improperly conveys not only the prosecutor's belief in the defendant's guilt, but violates this Court's holding that a prosecutor may not begrudge in front of the jury the defendant's exercise of the Sixth Amendment right to a jury trial. *Cunningham v. Zant*, 928 F.2d 1006, 1019 (11th Cir. 1991) ("prosecutor's comments improperly implied that Cunningham had abused our legal

system in some way by exercising his Sixth Amendment right to a jury trial"). The argument was also patently false–at least in part–here, given that the government had, only one week previously, represented to this Court that Hernandez and Campa "have acknowledged in open court, through counsel, that they were operating in the United States as covert agents of the Republic of Cuba;" that Hernandez's counsel stipulated that he while in the United States, he was "conducting the affairs of the Government of Cuba in a covert way;" and that Gonzalez's counsel agreed that Gonzalez was a foreign agent. Gov't Pet. for Writ of Prohibition (No. 01-12887) at 17.

6. The Government Intentionally Violated Court Orders, Improperly Vouched for Evidence Not Presented to the Jury, and Violated the Defendants' Fifth Amendment Right to a Grand Jury Indictment on All Charges, By Suggesting That There was Additional Espionage Activity Involving Campa, Who Was *Not* Charged in the Espionage Conspiracy. It is improper, and reversible error, for the government to knowingly paint a distorted picture of the realities of the case, *Davis v. Zant*, 36 F.3d at 1546-51, and to baselessly suggest that a defendant has been involved in uncharged acts of misconduct. *See Hands*, 184 F.3d at 1329-30 (erroneous introduction of evidence that defendant abused his wife compelled reversal where evidence of guilt not overwhelming, even if sufficient to sustain conviction); *United States v. Reed*, 700 F.2d 638, 642-45 (11th Cir. 1983) (reversing conviction based on irrelevant references to embezzlement defendant's past personal bankruptcy and prior

use of marijuana). Here, the government's purely speculative–but nonetheless relentless–suggestions that Campa spied on military bases in North Carolina impermissibly encouraged the jury to convict based on charges that had never been brought and facts that did not exist and prejudiced the defendants who were actually charged with espionage conspiracy.

The numerous, improper suggestions that Campa might have engaged in uncharged acts of espionage actually began in opening statement, when the prosecutor improperly speculated that Campa might have spied on Fort Bragg. *See* R29:1583. The district court sustained objections to the government's actions and granted a motion to preclude further unwarranted suggestions of spying on military facilities. R54:5277-82; R68:6935. But that did not deter the government, and the district court later had to clearly re-instruct the government to *refrain* from further improper insinuation and speculation about illegal activity by the defendants. R68:6957-58 (ordering government "not to bring up in closing argument" speculation about other crimes or acts of espionage "unless you have and can proffer concrete evidence"); *see also* R76:8272-73 (sustaining objection to prosecutor's attempt to prejudice Campa by innuendo during testimony of retired Admiral Carroll; instructing jury to disregard government's improper suggestion).

During rebuttal closing, the government, after arguing Campa's intent to destroy the United States, dramatically turned to Campa to again imply that he had

spied at Fort Bragg. R124:14483. The district court found that Campa's claim of substantial prejudice presented a "close question." R124:14543-45. These improper prosecutorial "suggestions, insinuations, and assertions" were certainly more egregious than those that resulted in reversal in other cases. In *United States v. Blakey*, 14 F.3d at 1559-60, this Court reversed a defendant's conviction on bank fraud based on improper closing arguments which merely included references to the lack of quality witnesses called by the defense at trial, an attack on the defendant's character based on the number of aliases he possessed, and the statement that the defendant was "a professional, a professional criminal," where there had been no evidence concerning the defendant's prior criminal record introduced at trial and the defendant's prior record consisted of only two relatively minor offenses. "Thus," the Court held, "the prosecutor's comment went outside the evidence, and impugned Blakey's character with an inaccurate characterization." *Id.* at 1560. The impugning of the defendants in a myriad of ways here, including the baseless insinuations of additional espionage used to fill the evidentiary gaps in the government's case, exceeded in quantity and degree the improper characterizations in *Blakey*, and should compel relief here.

7. The Government Repeatedly–and Improperly–Belittled Defense Counsel and Counsel's Role in the Trial. Since "the function of counsel is almost as important as that of the judge," it is decidedly improper for a prosecutor to "discredit defense

counsel in front of the jury." *United States v. McLain*, 823 F.2d at 1462. Where, as here, the prosecutor makes repeated critical remarks about the character of defense counsel, and accuses defense counsel of intentionally misleading the jury and witnesses and of lying at trial, such remarks–even where unobjected to–are considered plain reversible error, as they necessarily affect the substantial rights of a defendant. *Id.* Indeed, personal attacks on defense counsel are so highly prejudicial to a defendant that even where the trial court instructs the jury to disregard such comments, this Court does not trust the jury to disregard them. *See id.* & n. 8. Moreover, in instances such as the present case, in which the prosecutor's remarks risk a serious distortion of the jury's understanding of defense counsel's role as an advocate, a defendant should be granted a new trial. *See United States v. Friedman*, 909 F.2d 705 (2nd Cir. 1990) (reversing conviction where prosecutor accused defense counsel of willingness to make unfounded arguments that were not made, district court gave no curative instruction).

The relentless attacks upon defense counsel by the prosecutor in rebuttal argument, characterizing counsel as liars and tricksters, or worse, were certainly comparable to–and arguably even more egregious than–the comments that resulted in the reversals in *McLain* and *Friedman*. Here, the government told the jury that

- "in the world of criminal defense attorneys law enforcement never does

exactly the right thing" so they cannot see that the FBI did "a fabulous job" (R124:14472);

• "When you are a defense attorney, you have to dance around plain English." (R124:14501);

• the defense arguments were mere "lawyer talk," the defense concession at the commencement of trial that defendants were Cuban agents and had in fact used false identities was just "talk" (falsely telling the jury that the defendants actually "dispute it [because] they pled not guilty" (R124:14480, 14489));

• defense counsel had simply fabricated their defenses and in fact, had "invented the Disney World defense." (R124:14476);

• with regard to counsel's arguments that the defendants were engaged in non-espionage activities, "I wonder why they say those sorts of things to you" (R124:14471) (suggesting that the defense lawyers had a hidden motive for presenting phony arguments);

• the defense had paid exorbitant sums to expert witnesses–$75,000 to one witness, which the government claimed was the "motive" for his "incredible testimony" regarding the territorial sovereignty of nations (i.e., border control) (R124:14533)–which argument was patently false, the prosecutor simply made up that figure, and well knew that any fees paid to experts were limited by CJA reimbursement limitations; and

• consistent with their outrageous attack on the defendants themselves for exercising their Sixth Amendment right to court-appointed counsel, the government similarly attacked the defense attorneys themselves for *being* court-appointed, and draining the U.S. treasury by defending the defendants (R124:14482).

But the prosecutor could not even stop with these general attacks on defense counsel and the defense function. He also made *personal* attacks against each one of

the defense attorneys, stating:

> • as to Campa's counsel, that "[e]very [terrorism or neutrality violation] case [defense counsel] Mendez brought before you resulted in somebody getting arrested and prosecuted" (R124:14471-72)–which was not true;
>
> • as to Gonzalez's counsel, that defense attorney "Horowitz did not tell you the correct version of the evidence in this case"; "Horowitz' argument is, it is ridiculous" (R124:14490, 14492);
>
> • as to Guerrero's counsel, that defense attorney "Mr. Blumenfeld's argument to you; they want you to ignore your common sense" (R124:114501); demeaning "[w]hat Mr. Blumenfeld told" the jury as mere "lawyer talk." (R124:14509);
>
> • as to Medina's counsel, that the "hollow words of [attorney] Mr. Norris he is *sorry* that his client stole the identity of some child *isn't enough.* ... Mr. Norris' words ring very hollow." (R124:14481-82) (emphasis added);
>
> • as to Hernandez's counsel, that defense attorney McKenna mentioned or invoked "the Final Solution" (which was untrue, *see infra*); that he did not care about the shootdown victims (R124:14474); and that "Paul McKenna's law is" the "law of the jungle" (R124:14514).[14]

While admittedly, attacks on defense counsel–though improper–will not result in reversal *if* the attacks were prompted by personal attacks on the prosecutors by defense counsel, *see, e.g., United States v. Castro*, 89 F.3d 1443, 1456-57 (11th Cir. 1996) (refusing to "condone" prosecutor's remark that "these fellows here, these

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[14] The government's tactic was clear: if counsel apologized for events, the government claimed the apology was a fraud, as they did regarding Medina's counsel, and if counsel failed to apologize, the government labeled the attorney as lawless and conscienceless. There was no way for defense counsel to escape a personal attack.

guys are prosecutors, they're sworn to be prosecutors, to pursue justice. These defense counsel, they represent their clients, they come in here and say what they want to help their clients," but refusing to reverse the conviction because defense counsel had first argued "that the prosecutors were liars and suborners of perjury"); *United States v. Cotton*, 631 F.2d 63, 66 (5th Cir.1980) (where defense counsel referred to government agents as liars, and persons engaged in cover-ups, government was entitled to respond), in the instant case–by contrast to *Castro* and *Cotton*–defense counsel made *no* personal attacks on the prosecutors or agents; defense counsel even noted that the counterintelligence section of the FBI is competent and would have been capable of determining any actual espionage activity in this case had it occurred. R123:14321. There is simply no justification for the government's blatant misconduct in this regard.

8. The Government Improperly Attacked Defense Counsel for Properly Arguing all Available Grounds for Acquittal in Closing. The prosecutorial abuses here are remarkably akin to those held to require reversal in *Davis v. Zant*, 36 F.3d 1538, 1546-51 (11th Cir. 1994), which, like the present case, involved an emotionally-wrenching murder accusation. In *Davis*, the Court explained that the prosecutor's closing–which was marked by misleading accusations, arguing that the "defense was a last minute fabrication," "disparaging and egregious comments with

a rambling and highly improper commentary on the defense management of the trial," and highlighting counsel's failure to explain the defense in opening statement–was fundamentally unfair and, absent overwhelming evidence of guilt, required a new trial. Here, the government exceeded even the *Davis* limits, sparing no impropriety to inflame the jury against the defendants and their counsel.

Although the government may comment on the failure of the defense to counter or explain evidence of guilt, *see United States v. Norton*, 867 F.2d 1354, 1363 (11th Cir. 1989), and may, in a second trial, comment on a defendant's failure to testify in a first trial, *see United States v. Isaacs*, 834 F.2d 955, 956 (11th Cir. 1987), the same is not true of comments on defense counsel's failure to specify in opening statement every reason why the government, at the end of the day, has failed to prove its case.

Attacking the defense for holding the government to its burden of proof both impairs the right to silence and shifts the burden to the defendant to disprove elements even before the government begins its case. *See United States v. Simon*, 964 F.2d 1082, 1086-87 (11th Cir. 1992) (impermissible burden shifting to argue that defendant should have produced exculpatory evidence at earlier point in case, where defendant has no burden to produce any evidence to prove his innocence and may rely on the failure of the government to meet its burden); *United States v. Blankenship*, 382 F.3d 1110, 1127 (11th Cir. 2004) (impermissible for prosecutor to

argue that if the defense wants jury to disbelieve a fact or element, defense must present evidence to support fact, because burden never shifts with respect to government's obligation to prove case); *Blakey*, 14 F.3d at 1559 (impermissible burden shifting to argue that defendant presented insufficient exculpatory evidence to warrant continued presumption of innocence).

9. The Government Improperly Asserted that the Case and Verdict Were "Extremely Important" to the United States. In *United States v. Cole*, 755 F.2d 748 (11th Cir. 1985), the Court held that it was impermissible for the government to tell the jury in opening statement: "It is a very important case for the government." *Id.* at 768-769. Notwithstanding–or in flagrant violation of–the prohibition in *Cole*, the government proceeded to make identical and even more prejudicial arguments throughout final rebuttal argument here, stating:

> • "This is an extremely important case. Your decision is extremely important." (R124:14471);
>
> •"do your job," (R124:14487), "do the right thing" and convict because a foreign enemy wanted the defendants to be acquitted, (R124:14536); and that
>
> • the jury should join the prosecution team by thinking up any "argument in your head that blows [defense counsel's] arguments away," and telling the jurors "don't be afraid to use it," R124:14510.

While the Court in *Cole* found the harm from the single comment in opening

was alleviated where district court gave a specific and immediate curative instruction to disregard the government's assertion of the importance of the case, no specific curative instruction was given immediately–or at all–here.

10. The Government Improperly Appealed to Patriotism and Passion. The government's repeated references to the importance of the verdict were tied to other highly emotional appeals to patriotism, passion and fear and to the government's claim that the case was "huge[ly]" important to Cuba, a nation the government repeatedly described as a hostile enemy and threat to the United States. *See* R124-14512, 14519, 14532 (repressive" Cuba–described as America's enemy and a friend of America's enemies–had a "huge" stake in the case). As a matter of law, appeals to patriotism and passion-tinged characterizations are impermissible. *Cunningham v. Zant*, 928 F.2d 1006, 1020 (11th Cir. 1991) (prosecutor linked defendant to Judas Iscariot). The prosecutor's concluding argument–"I want you to remember that when you think about how long this trial has lasted, from Thanksgiving to Memorial Day, a day we commemorate people who have fought for our country"–combined with its earlier argument that the Cuban government had a "huge" "stake in this case," was a particularly strong appeal to patriotism as a ground for returning guilty verdicts. *See also* R124:14532, 14535; R124:14530-31 (prosecutor argues: Cuban government's "lies" are "an abomination to the Lord;" Cuban government witnesses

offered "garbage;" Cuban government, like any other criminal "caught" by "this great country of ours," will "destroy the evidence").

While reference to political or legal environments is not necessarily misconduct, *see United States Musser*, 856 F.2d 1484, 1485 (11th Cir. 1988) (referring to drug business as a dirty business), it *is* misconduct for the government to exhort the jury to join its side in any political or legal fight, because it diminishes the jury's responsibility as a dispassionate judge of the facts. *See United States v. Beasley*, 2 F.3d 1551, 1560 (11th Cir. 1993) (improper invitation to jurors to choose sides in drug war); *see also United States v. Boyd*, 131 F.3d 951, 955 (11th Cir. 1997) (government admits impropriety in argument that drug war is more "pernicious" than Desert Storm and Bosnia, because it is being "fought on our land and in our streets," and "unless we win the war [on drugs], we will all be doomed"); *United States v. Gainey*, 111 F.3d 834, 836 (11th Cir. 1997) (jury cannot be asked to find defendant's guilt based on media reports or widespread community fears of guilt or bad character of other persons; "[T]he law does not permit jurors to construe accounts of current events, gleaned from sources extraneous to the case record ... as somehow applicable to the question of a particular defendant's guilt or innocence.").

It is likewise improper to focus passionately on the victims of a class of crimes in order to arouse the passions of the jury. Here, the government improperly appealed

to the jury's concern for the community, by *falsely* claiming that defense counsel had smeared the entire "Miami Cuban exile community," R124:14471, and then focusing upon the rescued and humanitarian Cuban exiles in the Miami area, ennobling such individuals based on their opposition to the very Cuban government that the prosecutor claimed, based solely on his own opinion, had a huge stake in receiving a defense-favorable verdict. *United States McLean*, 138 F.3d 1398, 1405 (11th Cir. 1998) (misconduct where prosecutor spoke to the jury "on behalf of the crack addicted babies languishing in hospitals around the country"); *Boyd*, 131 F.3d at 955 (focusing on "blood" of victims of drug traffickers).

11. The Government Improperly Argued That the Verdict was Necessary to Protect and Defend the Human Rights of the Cuban People and Maintain Their Ability to Protest and Revolt. "[I]t is beyond the bounds of propriety for a prosecutor to suggest that unless this defendant is convicted it will be impossible to maintain 'law and order' in the jurors' community." *United States v. Barker*, 553 F.2d 1013, 1025 (6th Cir. 1977) (reversing conviction and remanding for new trial). The government's appeal went beyond the alien invasion and society takeover theme and to a more dire insistence that Cuban dissidents will never stand up for their rights unless the lesson is learned that someone will be punished for the BTTR shootdown. *See* R124:14520 ("If their own people see that ... people inside those planes are going

to be murdered brutally, mercilessly and nothing happens, what people in Cuba are going to stand up for their rights? Zero."). The government improperly gave the jurors to understand that their "very important" verdict could advance the cause of world freedom by holding *Cuba* to account in this trial.

12. The Government Made Other Highly Inflammatory Arguments Directed to Passions and Emotions: Prosecutorial statements "'calculated to inflame [the] jury,'" and to "persuade jurors to render a decision based upon their emotional response," rather than the evidence at trial, are not only improper, but extremely prejudicial, where they are "among 'the last . . .spoken to the jury.'" *Hands*, 184 F.3d at 1333 (citations omitted). In addition to the government's blatantly improper use of highly prejudicial and inflammatory language of death and terror, such as "they use ... dead babies," R124:14480, and "dead children," R124:14481; the government's false linkage of the defendants to "book bombs" and "sabotage," R124:14476, 14480; the government's appeal to the jurors' most fundamental fears by making three separate emotional arguments, both at the beginning and end of the rebuttal, falsely claiming that the defendants were trying to "destroy the United States of America," implying the existence some sinister untold plot of which the prosecutor was aware, R124:14481, 14482, 14535; as well as the government's repeated appeal to patriotism–discussed at length *supra*–the government sought to further inflame the jury into convicting on purely emotional grounds by:

• thrice appealing to God, R124:14475 ("We are not operating under the rules of Cuba, thank God."), R124:14510 ("My God, these guys are spies. What do you think they are doing here in this country."), R124:14530 ("lies" the prosecutor attributed to the Cuban government "are an abomination to the Lord");

• appealing to anti-communism, R124:14475 (referring to the "enemy" "communist country of Cuba" as contrasted with the laws of "our great country"); R124:14519 (claiming Cuba did not believe in human rights); R124:14520 (conveying a dire warning to the jury that their concern should be for democratizing Cuba because dissidents in Cuba would not "stand up for their rights" if no one were punished for the shootdown); and R124:14482 (noting that as to Rodolfo Frometa, "Castro wiped out his entire family," as if to suggest that anyone linked to Castro acts with murderous intent), and most egregiously,

• equating the defendants' actions to Hitler's "Final Solution," R124:14474 ("It doesn't matter in the world of George Buckner who [the victims] are. All that matters to George Buckner and Mr. McKenna is Jose Basulto. What kind of justification is that, to shoot people out, or *in Mr. McKenna's word, the Final Solution. I heard that word in the history of mankind*.") (emphasis added).

Contrary to the prosecutor's mischaracterization of attorney McKenna's argument, Mr. McKenna *never* at any time used the "word, the Final Solution." Rather, McKenna had used the phrase "final option," which properly referred to the "last resort" instruction demanded by the government;[15] and was consistent both the instruction, and with the concept of "last resort" and "final option" used regularly by

[15]R125:14610 (jury instruction stating: "It is for you to determine whether or not an aircraft acted as a state aircraft or a civil aircraft. Interception of civil aviation will be undertaken only as a *last resort*.") (emphasis added). Petition for Writ of Prohibition (No. 01-12887) at 31-33 (referring to above-quoted instruction as permitting "the jury to divine and the attorneys to argue the legal significance of those provisions in the ICAO").

the United States in discussing the military option as the final option.

This intentional twisting of defense counsel's words into a false and damning equation of the defendants and their attorneys with Hitler's "Final Solution"–with a suggested common disregard for human life–was absolutely unsupportable. Precedent has long put the government on notice that it approaches a dangerous precipice when seeking to compare the defense with the Nazi regime. *See, e.g., Bowen v. Kemp*, 769 F.2d 762, 679 (11th Cir. 1985) ("It is clear that the Hitler analogy was an improper statement of the prosecutor's personal opinion" of comparison to the defendant.), *opinion vacated and habeas relief ordered on reh'g*, 832 F.2d 546 (11th Cir. 1987) (*en banc*); *United States v. Frost*, 61 F.3d 1518, 1525 (11th Cir. 1995) (noting disapproval of prosecutor's reference to Nazi Germany during closing argument); *Martin v. Parker*, 11 F.3d 613, 616 (6th Cir. 1993) ("Here, we find especially deplorable the prosecutor's attempt to suggest to the jury through cross-examination and final argument a similarity between Martin and Adolf Hitler. Such a comparison creates an overwhelming prejudice in the eyes of the jury. *See United States v. North*, 910 F.2d 843, 895 (D.C. Cir.) (favorably comparing defendant's strategy to that of Adolph Hitler "[u]nquestionably inflammatory") ...; *United States v. Steinkoetter*, 633 F.2d 719, 720-21 (6th Cir. 1980) (prosecutor's comparison of defendant to Pontius Pilate and Judas Iscariot mandates reversal). ... These unwarranted characterizations reach the level of impermissible "foul blows."

Steinkoetter, 633 F.2d at 720-21.").

That the remark here clearly focused upon the worst aspect of the Nazi Regime–the "Final Solution," a code-word for genocide–and that the government made this offensive comment during *rebuttal* closing argument, when the defendant had no opportunity to again speak to the jury in an effort to put the lie to the improper attack, compounded the ensuing prejudice. *Cf. North*, 910 F.2d at 895 & n. 32 (initial closing argument by special prosecutor in which he linked the defendant's strategy favorably to Adolf Hitler's strategy was "[u]nquestionably inflammatory;" declining to reverse, however, because the defense had a full opportunity to respond to the charge in its own closing argument and effectively did so[16]), *amended on other grounds on reh'g*, 920 F.2d 940 (D.C. Cir. 1990).

This final egregious instance of misconduct, considered in combination with the unprecedented number of other instances of misconduct throughout the trial but particularly in final rebuttal argument, and viewed through the prism of the closeness of the evidence of guilt, compels reversal. *See Martin v. Parker*, 11 F.3d at 617 ("[W]here, as here, the evidence of guilt is at best conflicting, egregious prosecutorial misconduct of this kind rises to the level of a constitutional deprivation, denying the

[16]The defense responded, for example, that "worst still and beyond anything I have heard in a courtroom, and outrageous to the extent that it should send a course of rage through everybody in this room, is the reference to Adolf Hitler" and that "anyone that will link Colonel North to Adolf Hitler is not credible and should not be believed." *Id.*

defendant a fundamentally fair trial.").

D. Review for the Cumulative Prejudicial Effect of the Government's Persistent and Pervasive Misconduct

The entire rebuttal closing argument, previously highlighted as an appendix to the Hernandez Reply Brief, reflects 34 defense objections to improper government arguments, 28 of which were sustained by the district court without a curative instruction, and two motions for mistrial. Although "a jury cannot always be trusted to follow instructions to disregard improper statements,'" *United States v. Crutchfield*, 26 F.3d 1098, 1103 (11th Cir. 1994) (quoting *United States v. McLain*, 823 F.2d 1457, 1462 n. 8 (11th Cir.1987)); *Romine v. Head*, 253 F.3d 1349, 1368-71 (11th Cir. 2001), here no instructions, curative or otherwise, were given by the district court on the day of the argument or for the next two days. Three days *after* the rebuttal, as part of the general instructions, the district court advised the jury that the lawyer's arguments are distinct from the trial evidence, but did not otherwise seek to cure any specific impropriety by the government. *Cf. United States v. Rodriguez*, 765 F.2d 1546, 1559 (11th Cir. 1985) (explaining need for district court to give *immediate* and *repeated* curative instructions to minimize effect of extensive prosecutorial misconduct in argument); *United States v. Modica*, 663 F.2d 1173, 1180 (2d Cir. 1981) ("The trial judge should have sustained the objection *and* taken corrective

action.") (emphasis added).[17]

While admittedly, the defense did not specifically object to each and every impropriety discussed *supra*, the defense did make two motions for mistrial, both of which were denied, and when it became so patently clear that the case would indeed go to the jury, there were diminishing returns–and possibly more prejudice to be suffered–through further objections. *See Wilson,* 149 F.3d at 1302 n. 5 ("defense counsel objected sufficiently so as to permit our standard review of prosecutorial misconduct"); *United States v. Garza*, 608 F.2d at 666 ("[W]hile defense counsel could and, indeed, should have objected to the first instances of improper comment by the prosecutor, at some point the transgressions of this prosecutor cumulated so greatly as to be incurable; then objection to these extremely prejudicial comments would serve only to focus the jury's attention on them."); *United States v. Young*, 470 U.S. at 13, 105 S.Ct. at 1045 (recognizing that "interruptions of arguments, either by an opposing counsel or the presiding judge, are matters to be approached cautiously").

Notably, where as here the misconduct is so flagrant, persistent, and pervasive,

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[17] As to one objection, the district court struck an misstatement of the law by the prosecutor, but, undeterred, the prosecutor immediately repeated his improper statement in outright defiance of the district court. R124:14517 (government insists that proof of location of the shootdown establishes essential element of the conspiracy offense).

the Court does *not* parse the improprieties, and review them individually–under varying standards for preserved and unpreserved error–but rather for their effect on the defendant's substantial rights. Instead, the Court considers the misconduct *cumulatively*, to determine if the *cumulative* effect of the errors denied the defendants a fair trial. *See Hands*, 184 F.3d at 1334 (notwithstanding counsel's failure to draw court's attention to prosecutor's misconduct in closing, "We assess not the prosecutorial misconduct alone, but the combined impact of [all] errors on the verdict); *McLain*, 823 F.2d at 1462 (even if some errors would not in and of themselves have warranted reversal, reversal is mandated where cumulative effect of errors "denied the defendants a fair trial"); *United States v. Labarbera*, 581 F.2d 107, 110 (5th Cir. 1978) (same).

In assessing whether the combined effect of the errors rendered the trial fundamentally unfair, the Court considers several factors: the flagrancy of the misconduct; whether the misconduct is deliberate or accidental; the number of instances of misconduct (whether isolated or extensive); and importantly, the relative strength of the government's competent proof to establish the defendant's guilt. *Davis v. Zant*, 36 F.3d at 1551 (notwithstanding fact that counsel failed to object to every instance of misconduct, reversing convictions "in light of all the circumstances – including *inter alia*, the fact that the misconduct consisted of intentional

misrepresentations which were both highly misleading to the jury and prejudicial to Davis, the fact that the misrepresentations were calculated to undermine the crux of the defense, the fact that the misconduct was pervasive and the fact that there was a substantial conflict in the relevant evidence"); *see also Hands*, 184 F.3d at 1333-1334 (reversing where government introduced highly inflammatory, irrelevant evidence; government's case depended upon jury's assessment of credibility, and in final rebuttal argument–to which defense could not respond–prosecutor conducted himself in a completely overzealous manner, deliberately and repeatedly using inflammatory "shorthand" to pejoratively describe the defendant, where such characterizations bore no relationship to the evidence; prosecutor misstated the evidence in several ways; and prosecutor vouched that an uncalled witness would corroborate its case).

Here, the government's misconduct was flagrant, deliberate, and extensive – more so than in *Hands* or *Davis*, and more than in any other prior reported Circuit case. And in fact, this case is likewise unique in that on several of the most serious counts–e.g., the counts carrying lifetime penalties–the government's case was not merely "not overwhelming;" it was absolutely insufficient (as the government appeared concede, at least in part, in its Petition for Writ of Prohibition). Under such circumstances, the pervasive misconduct in final rebuttal argument–the final words heard by the jury here–could not but have influenced them in favor of conviction on these closely-contested counts.

E. The Government's Arguments for Ignoring the Misconduct or Treating it as Non-Prejudicial Do Not Withstand Scrutiny in Light of the Disputed Evidentiary Issues at Trial and the Conceded Absence of Overwhelming Evidence.

The government acknowledged to the jury that no actual espionage was committed by any of the defendants during their many years in the United States and that only by accepting a disputed inferential interpretation of the evidence could jurors find an espionage conspiracy. R29:1588 (government opening statement: "One thing you will not see, ladies and gentlemen is any classified document that these defendants were able to gather and pass through the Government of Cuba."); R115:13340 (testimony of government witness and former Director of U.S. Defense Intelligence Agency, Lt. Gen. James Clapper: after examining government's entire case files, he never "came across any secret national defense information that was transmitted" by any of the defendants); R124:14496-97 (government closing: arguing that even if it was "impossible for them to commit the crime," defendants still could have conspired to commit espionage).

As precedent for its prosecution of defendants Guerrero, Hernandez, and Medina for espionage conspiracy, Count 2 of the indictment, despite the absence of even an attempt by the defendants to actually commit the underlying substantive offense, the government cited in its response brief a single Cold War case, the prosecution of a Colonel in the KGB some *50 years ago* in which the chief witness

for the government, a double-agent American military officer, testified as to actions taken to obtain espionage information about an atomic plant, clearly linked to the key military/national security secrets of the Cold War. Gov't Br:32 (citing *United States* v. *Abel,* 258 F. 2d 485, 488 (2nd Cir. 1958) for proposition that no successful espionage need be proven). In *Abel*, however, evidence of the conspiracy was so strong that it required little discussion: the government had presented an unequivocal Cold War atomic espionage case with a clear target of secret national security information. *Id*.

In the instant case, the circumstances are very different, with layers of ambiguity and interpretative conflict that the government's extrapolation from the defendants' own words in seized communications was insufficient to resolve. *See*, *e.g.*, Hernandez Supplemental Brief (Issue I(b)). Apart from the interpretive hurdle the government had to overcome–in that the seized message traffic simply did not seem to relate to *government* secrets–the underlying facts of the case instead relating to the unique fears by Cuba of *non-governmental* actors in the United States, i.e., groups of persons who represent a threat to Cuba, but who have no government secrets to reveal–made the government's proof hurdles even more onerous. Plainly, this case presents a first impression extension of the espionage conspiracy law to a much more nuanced set of intelligence issues than prevailed in a Cold War atomic secrets case, the only other reported case of an espionage conspiracy prosecution with

no allegation of the commission of any substantive espionage offense.

Recognizing these evidentiary difficulties, the government has simply contested any misconduct on its part, arguing that because of the nature of the case–with the defense contending that these Cuban agents were sent not to commit classic espionage, but rather to focus on (1) Cuban exile groups responsible for hostile actions against Cuba and (2) visible signs of potential U.S. military action against Cuba, and the government arguing, to the contrary, that three of the defendants conspired to obtain closely-held U.S. military secrets and that one of them conspired to commit murder–the government's appeals to passion and patriotism, arguments regarding political change in Cuba, attack on the defendants' character, linking of defense counsel to Cuban propaganda, affirming the prosecutors' personal belief in their witnesses, and resting on an us-versus-the-enemy approach at trial should not be viewed as misconduct. *See* Gov't Br. 74-78.

The government's plea for excusal–essentially an admission that it needed extra help in this case–should be rejected by this Court. The closing argument abuses are plain on the record. Even plainer were the challenges the government faced in attributing the shootdown to Hernandez. The failures of proof on Count 3are numerous, as discussed at length in the Hernandez briefs in this case, most recently Hernandez's Supplemental Brief (Issue I(a)). The government's unprecedented admission that it faced "insurmountable" obstacles to proving the murder conspiracy

case against Hernandez is enough in itself to end any question as to whether evidence of guilt was overwhelming.

But the government's proof difficulties also extended to other counts, such as Count 7, in which the government sought to attribute to Campa possession of a false document that was actually possessed by Hernandez (albeit a document potentially useful to Campa when and if Hernandez chose to turn it over to him). The evidence at trial did not establish whether Campa even knew of the document, much less actually possessed it. Plainly, evidence of his possession of the document was not overwhelming. Similarly, the government's theory of a conspiracy to defraud the U.S. government, one of the two objects of the Count 1 conspiracy, which led to enhancement of the sentences, was questionable, particularly as to Gonzalez, who committed no immigration offenses and, despite government references to his mere *contact* with the FBI, in a voluntary capacity where he gave some valid information to agents regarding crimes committed in relation to anti-Castro exile organizations, and with a member of Congress, to seek a letter of support for his wife's already-approved immigration to the United States, are not clearly sufficient to meet the burden of proving an intent to defraud an agency of the United States under 18 U.S.C. § 371. Indeed, in its petition for writ of prohibition, the government observed that it anticipated great hurdles in obtaining a conviction under Count 1. *See* Pet. for Writ of Prohibition (No. 01-12887) at 4.

Given the highly disputed and unique prosecutorial theories, including a *respondeat inferior* murder conspiracy theory and vague, amorphous, and open-ended theory of espionage conspiracy that might only become clear "*years*" into the future, *see* R45:3809 (FBI witness Hoyt); the tactical purpose of the government's misconduct (coming on the heels of the government's failure to obtain what at the time it conceded was an "unprecedented" writ of prohibition as to the jury instructions, and as to which the government, as the district court found, made numerous misrepresentations[18]); the complex nature of the jury instructions–particularly as to the murder conspiracy; the highly emotional nature of the shootdown charges and fears raised by the espionage allegations; and the absence of overwhelming evidence of guilt (even if, as to some such counts, the evidence could be seen as sufficient to sustain a conviction); the clearly proscribed misconduct in this case rose to the level of substantial prejudice creating a reasonable probability of an effect on the outcome of those counts of the indictment.

"A defendant's substantial rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome [of the trial] would be different." *United States v. Hall*, 47 F.3d 1091, 1098 (11th Cir.1995). A reasonable

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[18] *See* Pet. for Writ of Prohibition (01-12887) at 4; R121:13918 (district court finding of "outrageous misrepresentation"); R121:14025 ("gross misrepresentations" by government).

probability of prejudice is a probability sufficient to *undermine confidence in the outcome*. *United States v. Adams*, 74 F.3d 1093, 1097 (11th Cir. 1996); *see also Wilson*, 149 F.3d at 1302 (holding that what is "[m]ost important" in determining whether prosecutorial misconduct warrants reversal is whether "evidence of Defendant's guilt is overwhelming").

For that reason, it is respectfully submitted that the Court should reverse the convictions and remand for a new trial. Alternatively,[19] the Court should remand for a new trial on those counts as to which the evidence was insubstantial–e.g., Counts 2 (espionage conspiracy), 3 (murder conspiracy), 7 (charging Campa's constructive

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[19] This Court has given somewhat conflicting indications of the appropriate relief for error that could be viewed harmless as to some counts, as to which the evidence is overwhelming, but not harmless as to counts where the evidence was not overwhelming. *Compare United States v. Eason*, 920 F.2d 731, 737-38 (11th Cir. 1990) ("Where a defendant is tried on several counts in one trial, highly prejudicial evidence is wrongfully introduced regarding some of those counts, and the jury convicts on those counts, we cannot know whether the jury was able to compartmentalize the evidence and the counts. That is, we cannot know whether the jury applied the improper evidence only to certain counts. *See United States v. Mann*, 557 F.2d 1211, 1217-18 (5th Cir.1977). We thus cannot say beyond a reasonable doubt that the introduction of Eason Sr.'s conviction was harmless error in regard to the tobacco counts.") *with United States v. Stephens*, 365 F.3d 967, 977, 980 (11th Cir. 2003) (reversing several convictions based on evidentiary error, but failing to reverse as to count of conviction for which evidence was overwhelming; "The exclusion of the proffered testimony could not have had an impact on the jury's deliberations regarding [allegations in count nine]; consequently, we affirm Stephens's conviction on count nine. The Government lacks such *concrete* evidence regarding counts two through eight of the indictment, however, and its case against Stephens suffers from a wide range of disturbing flaws."; remanding for a new trial on counts as to which the error "could very well have played a fairly important role in the jury's deliberations") (emphasis added).

possession of a document possessed by Hernandez)–and remand for resentencing as to the remaining counts, including Count 1, whether or not the government seeks to retry the defendants on counts that are reversed. *See United States v. Hernandez*, 145 F.3d 1433, 1440-41 (11th Cir. 1998) (vacation of sentencing package mandates remand for resentencing).[20]

Particularly in the instant case, in which the government highlighted for the jury the absence of due process in Cuba and where among the government's many harmful and strident arguments in closing was an attempt to use against the defendants the greatness and generosity of the American criminal justice system, as if the defendants had improperly exercised rights under that system by "forcing" the government to trial, this Court's enforcement of the fundamental principles at issue would well serve the interests of justice.

CONCLUSION

Appellant requests, based on the arguments raised in this brief and in the initial and reply briefs on this issue, that the Court reverse the convictions and remand for a new trial or, alternatively, reverse as to counts of the indictment for which the evidence of guilt was not overwhelming and remand for a new trial on such counts and resentencing as to any remaining counts of conviction.

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[20] *See also* Appellants' prior briefing of these misconduct issues: Hernandez Br. at 44-54; Hernandez Reply Br. 24–28; Campa Br. 52-60; Campa Reply Br. 23-27.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7). According to the WordPerfect program on which it is written, the numbered pages of this brief contain 13,343 words.

Leonard I. Weinglass

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was mailed on this 20th day of November, 2006, to Caroline Heck Miller, Assistant United States Attorney, 99 N.E. 4th Street, Miami, Florida 33132; Orlando do Campo, Assistant Federal Public Defender, 150 West Flagler Street, Suite 1500, Miami, Florida 33130-1555; Philip R. Horowitz, Esq., Two Datran Center, 9130 South Dadeland Blvd., Suite 1910, Miami, Florida 33156; William M. Norris, 8870 SW 62nd Terrace, Miami, FL 33173, and Paul McKenna, Esq., 2940 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131.

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