IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 01-17176-B

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

-versus-

LUIS MEDINA, III,

Defendant/Appellant.

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

INITIAL BRIEF OF APPELLANT

William M. Norris

United States v. Luis Medina, III.
Case No. 01-17176-BB.

Certificate of Interested Persons

Jack R. Blumenfeld, trial counsel for Antonio Guerrero.

David M. Buckner, Assistant United States Attorney.

Ruben Campa, defendant.

Orlando do Campo, Appellate counsel for Ruben Campa.

Honorable Robert L. DubΘ, United States Magistrate Judge.

Rene Gonzales, defendant.

Antonio Guerrero, defendant.

Gerardo Hernandez, defendant.

Phillip R. Horowitz, counsel for Rene Gonzalez.

Marcos A. Jimenez, United States Attorney.

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Honorable Joan A. Lenard, United States District Judge.

Guy A. Lewis, United States Attorney.

Paul A. McKenna, counsel for Gerardo Hernandez.

Luis Medina, defendant.

Case No. 01-17176-BB.

Joaquin Mendez, counsel for Ruben Campa.

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STATEMENT REGARDING ORAL ARGUMENT

Due to the voluminous record and complexity of the issues, oral argument will materially assist the Court' s decisional process.

CERTIFICATE OF TYPE SIZE AND STYLE

The size and style of type used in this brief is 14 point Times New Roman, a scalable font.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Sentencing Commission Guideline Manual

Other

STATEMENT OF ADOPTION OF BRIEFS OF OTHER PARTIES

Appellant Luis Medina, pursuant to Fed. R. App. P. 28(i), hereby adopts the following portions of the appellate briefs filed in this case by co-appellants Gerardo Hernandez, Antonio Guerrero, Ruben Campa, and Rene Gonzalez:

Brief of Gerardo Hernandez: All portions of the brief concerning his Issue III (prosecutorial misconduct in closing argument) and Issue V (insufficiency of the evidence to prove a conspiracy to transmit national defense information in violation of 18 U.S.C. § 794 as alleged in count two), including the statement of the issues, standard of review, summary of the argument, argument and citations of authorities, and any reply argument as to those issues.

Brief of Antonio Guerrero: All portions of the brief concerning his Issue I (improper denial of motion for change of venue) and Issue II (insufficiency of the evidence to prove a conspiracy to transmit national defense information in violation of 18 U.S.C. § 794 as alleged in count two), including the statement of facts and proceedings, statement of the issues, standard of review, summary of the argument, argument and citations of authorities, and any reply argument as to those issues.

Brief of Ruben Campa: All portions of the brief concerning Issue I (improper denial of motion for change of venue), Issue II (prosecutorial misconduct violating the defendants' right to due process), Issue III (improper use of the Classified Information Procedures Act to exclude defense counsel from relevant proceedings and to suppress material subject to discovery under Fed. R. Crim. P. 16, resulting in a violation of the defendants due process rights and impairment of their ability to present a defense), and Issue IV (improper denial of motion to suppress fruits of searches under the Foreign Intelligence Surveillance Act), including the statement of facts and proceedings, statement of the issues, standard of review, summary of the argument, argument and citations of authority, and any reply argument as to those issues.

Brief of Rene Gonzalez: All portions of the brief concerning Issue I (Batson violation), Issue II (insufficiency of the evidence as to the count one conspiracy to violate 18 U.S.C. § 951 and 28 C.F.R. § 73.01 et seq., and counts alleging substantive violations of those provisions, Issue III (failure of the district court to instruct the jury regarding the specific intent element of both conspiracy to violate and substantive violation of 18 U.S.C. § 951 and 28 C.F.R. § 73.01 et seq.), and Issue IV (prosecutorial misconduct and denial of motion for mistrial based on misconduct by a hostile witness),

including the statement of facts and proceedings, statement of the issues, standard of review, summary of the argument, argument and citations of authority, and any reply argument as to those issues.

STATEMENT OF JURISDICTION

The district court had jurisdiction of this case pursuant to 18 U.S.C. § 3231 because the defendant was charged with an offense against the laws of the United States. The court of appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which give the courts of appeals jurisdiction over all final decisions and sentences of the district courts of the United States. The appeal was timely filed on December 20, 2001, from the final judgment and commitment order entered on December 20, 2001.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 01-17176-BB

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

LUIS MEDINA, III,

Defendant/Appellant.

STATEMENT OF THE ISSUES

1. Whether the government failed to present sufficient evidence from which a reasonable jury could infer that a conspiracy existed with the purpose of transmitting national defense information to Cuba.

2. Whether the sentencing court erred in selecting the base offense level 42 pursuant to U.S.S.G. § 2M3.1(a)(1) when there was no finding that top secret information was gathered or transmitted.

3. Whether the sentencing court employed a flawed fact-finding process, and imposed sentence without inquiring into the nature of harm caused by the defendant or permitting the defense to use means designed by the Sentencing Commission for reliable fact-finding on this core issue.

4. Whether the sentencing court erred in refusing to apply U.S.S.G. § 2X1.1, even though U.S.S.G. § 2M3.1 does not expressly cover conspiracy.

5. Whether the sentencing court erred in adding two levels pursuant to U.S.S.G. § 3C1.1 for obstruction of justice for conduct which was an inherent part of the § 2M3.3 offence of conviction.

6. Whether the sentencing court erred by failing to offset a role enhancement based on charged conduct with a role reduction based on appellant's proven role within his larger organization.

PRELIMINARY STATEMENT

Appellant's true name is Ramon Labañino. In his work for his country, he used the name Luis Medina, III, but this is not his true name. The government knew that Medina was not a true name, and indicted Ramon Labañino as "John Doe No. 2." He is called by his true name in this brief.

While Mr. Labañino's true identity was obscured to facilitate his work, the tasks in which he was engaged were crystal clear. Labañino wrote meticulously detailed monthly reports and received specific instruction in return. In addition to his reports, which were seized and read by the government, the Federal Bureau of Investigation extensively monitored Labañino's activities. This surveillance confirmed that Labañino's reports were accurate; he actually did what he reported he had done.

In this brief, Labañino seeks review of his conviction and sentence on Count II of the second superseding indictment, which charged him, together with Antonio Guerrero and Gerardo Hernandez, with conspiracy to violate 18 U.S.C. § 924(c) (DE#224, record excerpts).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below:

Ramon Labañino adopts the statement regarding the course of proceedings and disposition in the Court below presented in the initial brief of codefendant Rene Gonzales.

Appellant is incarcerated, serving the life sentence imposed in this case.

B. Statement of facts relating to Count II:

In Count II of the indictment, Ramon Labañino, called "John Doe No. 2," was charged with conspiracy, together with Antonio Guerrero and Gerardo Hernandez to "communicate, deliver and transmit, directly and indirectly, to *** the Republic of Cuba, information relating to the national defense of the United States" in violation of 18 U.S.C. § 794(a) (DE#224:11, record excerpts).

1. La Red Avispa:

Mr. Labañino was part of a group identified as "La Red Avispa," or the Wasp Network. This group was charged with the task of infiltrating, monitoring and disrupting the work of certain militant Cuban exiles in South Florida. For over four decades, some exiles have advocated and actively supported the violent overthrow of the Government of Cuba. During its part of the trial, the defense established that there had been a recent spike in terrorist activity, in the form of bombings in Havana, Cuba, aimed at disrupting foreign tourism in that city. These bombings had been traced to Miami-based exiles, and the information on which the Cuban government based this connection was shared with the Federal Bureau of Investigation. The expected, or at least hoped-for, enforcement of American neutrality laws by that agency never materialized. Instead, the defendants were arrested and charged with espionage.

In addition to their tasks regarding Cuban exile groups, some members of the Wasp Network undertook observation and reporting of publicly visible military activity. It was the defense contention that this activity was careful "watching" that did not rise to the level of espionage. The government conceded that this conduct did not rise to the level of espionage, but contented that there was a plan that, at some unknown date and in some unknown manner, the defendants eventually would engage in

espionage. This was the area of dispute at trial and this is the area in which Mr. Labañino seeks review by this Court.

2. Southcom:

The government's star witness was a member of the Wasp Network who had pleaded guilty and was cooperating with the prosecution. He was called to testify early in the trial, just after the government presented the fruits of its many searches, and he spent four days on the witness stand. This witness was Joseph Santos, an American-born Cuban recruited and trained by Cuban intelligence and returned for operational purposes to the country of his birth. The most important question Mr. Santos had to answer was what those operational purposes were. Oddly, Mr. Santos could not answer that question in a way that supported Count II of the indictment. Unable to offer direct testimony from their star witness to establish the predicate for espionage, the government was left urging the inference that since Santos was trained as a spy, he surely would be employed as a spy.

Santos is an extremely well educated man, holding an advanced degree in electrical engineering and teaching in the Cuban university system. He did not use that education in the United States. He was recruited into the intelligence community and given extensive training in a wide variety of "tradecraft" (T:3193-3216). Code-named "Mario," Santos and his wife,

code named "Julia," were employed as a team known by the acronym MAJU. Notwithstanding the efforts by the government to draw inferences from his training, Santos did not use the spy craft training in the United States (3478-82), any more than he used his electrical engineering degree.

It is interesting to note that notwithstanding his extensive spy craft training, Santos was originally scheduled for assignment to Puerto Rico, where his task was to watch, and report, American troop movements (T:3492). Instead, Santos assigned to Miami.

In Miami, Santos was directed to do a study of the unified command for South and Central America, called Southcom, and to get a job there. He did a study based on what he could see from the street, but never applied for a job.

To what end was Santos to seek employment at Southcom? The prosecutor asked "Based on your training *** is there a particular kind of information that is more valuable than others?" Santos answered that classified information was more valuable (T:3302), but there is no support in the record, and Santos never claimed, that he actually sought to put this training into effect. He never obtained any classified information, he never tried to obtain any classified information, and no one in the Wasp Network ever instructed him to make any attempt to obtain any classified information.

Lieutenant Colonel Christopher Winne, assigned to the intelligence directorate ("J-2") (T:4026), described Southcom as headquarters of one of five "geographic or war fighting commands" of the United States military (T:4009). He described this as an "open storage facility" in which classified material was left out, on people's desks, rather than secured in classified material containers (T:4019). In some regards, Winne's testimony was more enthusiastic that accurate. He declared that there were signs directing that no photographs be taken of the facility (T:4052), but he gave a detailed description of the facility using a low altitude aerial photograph placed in public evidence by the government (T:4015, GEX 708, 708A). Ultimately, Winne concluded, security depended on trust: "beyond a certain point *** you have to trust the person" (T:4025).

Winne's ultimate reliance on trust for security was not shared by the general officer who commanded Southcom, General Wilhelm, USMC (ret), during the period that the defendants were doing what ever it is they were doing. General Wilhelm scoffed at Winne's claimed reliance on trust in matters of national security, described the internal security measures within the "open storage" environment of Southcom, and opined that our national defense secrets were safe within that environment (T:11211-12).

Unfortunately, the government played a shell game with the classified information issue, repeatedly attempting to mislead the jury to a belief that the defendants had in fact obtained classified information.

During the examination of Santos, the government elicited the answer that Santos was trained to obtain classified information (T:3302). The government then developed the fact that Santos had produced items that were referred to in Cuban summaries of his reports as "military" and "secret" (T:3306). This was clearly intended to create the impression that he had actually engaged in espionage, by gathering non-public information, when in truth and in fact Santos had done no such thing.

3. Boca Chica:

The Key West Naval Air Station has several component parts, but its core is a naval air base at Boca Chica. Codefendant Antonio Guerrero worked there for several years.

Key West NAS is principally a training facility, using the good weather and open air-space of the southern Gulf of Mexico to hone the skill of naval aviators. It was run on an open-base philosophy, with no guard at the entrance during the day (T:7910, 7918). As the officer commanding said: "All you had to do to get on the base was to drive on" (T:7967). As a public relations gesture, the base provided a viewing deck for the public to

watch and photograph aircraft on the runway# (T:7915). This, indeed, was Guerrero's assigned task: he watched and reported on aircraft that came to and went from Boca Chica.

During the waning moments of the government's case in chief, the prosecution called Captain Linda Hutton, United States Navy, who was the officer commanding Key West Naval Air Station during August 1995 to August 1997. Captain Hutton's testimony was significant in that it was a change in the government's theory. Through Captain Hutton, the government tried to show that the defendants had actually gathered and transmitted classified information. Regarding a description of interior of Building A1125 contained in DG123, the prosecutor asked "Is the interior of that building something that a member of the general public would have regular access to?" Captain Hutton answered "Absolutely not." The follow-up question "Is the layout of the inside of that building something that the Navy publishes for public perusal?" was answered, simply, "No" (T:7930). Essentially the same question, reasked, again was answered "Absolutely not, no" (T:7931).

The government ascribed core significance to this effort to characterize the defendants' conduct at Key West NAS.# The significance of this bit of testimony was acknowledged by the defense during argument

on Rule 29 motions. Standing alone and taken in the light most favorable to the government, Captain Hutton's testimony might show that the defendants conspired to engage in the gathering and transmission of closely guarded information (T:8098).

Since Captain Hutton had identified the defendants as engaged in an act of espionage on her base, it was something of a surprise to discover, on cross-examination, that the Federal Bureau of Investigation had never informed the officer commanding that there was a spy on her base. It was a surprise that Captain Hutton, with such significant testimony, was left to the end of the case and that she was added to the witness list as an apparent after thought, not having been mentioned in opening statement. An even greater surprise came during the defense case when it was shown that Captain Hutton was simply wrong. Clearly, she was testifying about details in the operation of a large and complex command, and she simply had the details wrong. The defense obtained a floor plan of this building from the Department of the Navy under the Freedom of Information Act. Members of the public were permitted in the facility during its renovation. The ice-cream lady and the coke-man and the carpet installers all had access to the building, and could see the floor plan and communicate that knowledge to anyone they wished.

In the calm of appellate review, the government's use of this testimony should be seen as what it really was. Speculation. The simple truth is that Guerrero never entered Building A1125 after it was actually used for classified information storage; he made no effort to enter the building; he made no effort to discover anything about the contents of the building; he was not instructed to enter the building; he was not instructed to gain any classified information from the building and in fact was instructed to do nothing to jeopardize his position at the Naval Air Station. Antonio Guerrero was simply instructed to watch and report on aircraft movement.

4. A "communist intelligence organization" ?

At its heart, the prosecution of the espionage count was not about anything that the defendants actually did during the many years they were present in the United States. Rather, it was about things the prosecution claimed the defendants might do in the future. The prosecution in this case created a model that would match the indictment, and then carefully combed thought many thousands of pages of documents looking for isolated words and phrases that would match that model.

The prosecution in this case played to their audience - a jury drawn from Miami-Dade County, Florida. No subtlety was employed. This was

the trial of "Cuban spies." So that no one would miss the message, the government raised the bar in rebuttal, and described the means and methods of "communist intelligence organizations" (T:13102).

The defense conceded in opening statement that, indeed, the Cuban government employed the defendants. However, the defense also established that they were tasked with infiltrating elements of the Cuban exile community. The true targets of the defendants' activity were those persons responsible for acts of terrorism, the bombing of hotels and nightclubs in Havana.

The government responded to this defense explanation of their purpose but calling Lieutenant General James R. Clapper, Jr., USAF (ret), former Director of the Defense Intelligence Agency, on rebuttal. Clapper escalated the conclusion; the defendants were not simply Cuban spies. Clapper's "general conclusion" after reading "a nine or ten inch stack" of disk documents provided by the prosecution, was that "this operation had all of the classic earmarks of a communist type human intelligence operation#" (T:13101).

Clapper provided the government with an explanation of why it was that the defendants had never committed espionage, despite the long time that had been at their task. He concluded this was "the textbook template,"

in which the defendants "were in the preliminary phases of exploring way and means of gaining access to Southcom and one way you do that, of course, is to acquire all the open public information as much as you can and build on that to facilitate gaining access to the facility of the people who are in it" (T:13281).

Clapper opined (T:13294):

> In the course of the directions and instructions that this network is given, this [recruitment] was a constant topic of discussion about ways and means of recruiting, spotting, assessing and the classical practices and procedures and concerns when one is bent on recruiting. * * * In fact the notion of open source information is incompatible with the characteristics and attributes of a penetration, recruiting and all the secrecy and clandestineness that is associated with such activities. Those two notions are sort of incompatible.

The problem with Clapper's comments is that they were based on nothing more that an overly imaginative reading of the government's exhibits. One of the "recruitment targets" identified in this exhibit (DAV114, p.20) was Tim Carey. Clapper was unaware that Tim Carey had testified at trial as a witness for Antonio Guerrero (T:13312).

In their case in chief, the government presented Stuart M. Hoyt, Jr., a retired special agent of the Federal Bureau of Investigation, who testified as "an expert in intelligence matters, intelligence techniques and intelligence organizations, with respect to Cuba" (T:3698). Hoyt provided a detailed picture of the organizational structure of intelligence agencies in the Cuban

government, but when he began to speak of operational techniques, he slid from acceptable expert testimony about his knowledge about "practices and procedures" to objectionable testimony speculating about what these particular defendants could have or might have been doing (See, e.g. T:3721-22).

On this appeal, Ramon Labañino seeks reversal of a prosecution built on speculation, speculation that drove the government's case and infected the verdict.

STANDARDS OF REVIEW

1. The first issue challenges sufficiency of the evidence to sustain the conviction on Count II. When a conspiracy conviction is challenged, the reviewing court conducts a de novo review of the sufficiency of the evidence. United States v. Keller, 916 F.2d 628, 632 (11th Cir. 1990). In order to sustain such a conviction, the evidence must be found to be substantial. "[W]hen the sufficiency of the evidence to support any criminal conviction, including conspiracies, is challenged on appeal, the correct standard of review is substantial evidence...viewed in the light most favorable by the government." United States v. Toler, 144 F.3d 1423, 1426-7 (11th Cir. 1998). See, United States v. Mercer, 165 F.3d 1331, 1333 (11th

Cir. 1999) (is there "substantial evidence to support the conspiracy verdict"); United States v. Adkinson, 158 F.3d 1147, 1152 n.10 (11th Cir. 1998).

2. The balance of this brief addresses sentencing issues on Count II, for which Mr. Labañino was sentenced to life in prison. This Court reviews the sentencing court's application of the Sentencing Guidelines de novo. See United States v. Miller, 166 F.3d 1153, 1155 (11th Cir.1999); United States v. Gonzalez-Lopez, 911 F.2d 542, 549 (11th Cir.1990) (application of a guideline to uncontested facts is subject to plenary review).

SUMMARY OF ARGUMENT

1. The evidence established that Labañino had entered into an agreement to gather and transmit information to Cuba. Indeed, he had done so for several years. However, he was charged with conspiracy to gather and transmit "national defense information," which is a category of information with limited scope. The only way a jury could conclude that he was guilty of this charge is to engage in leaps of inference, as demonstrated by the Court's reasoning in orders denying Rule 29 relief, that are improbable extrapolations from documents in the record and that are inconsistent with the clearly proven conduct of members of the alleged conspiracy.

To sustain his conviction the court would have to conclude "first, that it is permissible for the jury to infer an illegal purpose from conduct which supports both a legal and an illegal inference and second, for the jury to infer that the discussions that took place were in furtherance of the illegal, not the legal, activity." United States v. Wieschenberg, 604 F.2d 326, 336 (5th Cir.1979). This should not be done.

2. The judiciary has had little experience in sentencing foreign nationals convicted of conspiracy to commit espionage, yet, as with virtually every other aspect of our criminal code, such a sentencing proceeding is subject to sentencing guidelines. The court below sentenced Ramon Labañino to life in prison, having concluded that his offense level was 46. This was error in several regards. The base offense level of 42 was selected in error. The plain language of § 2M3.3(a) requires a base offense level of 37. The court below next failed to apply § 2X1.1 despite the clear application of that section requiring the reduction of 3 offense levels. Finally, the court below erred in adding two levels for obstruction of justice under § 3C1.1, when the conduct on which the obstruction was based was an inherent part of the defendant's conduct in furtherance of the espionage conspiracy and in adding two levels for supervisory role under § 3B1, when this enhancement should have been offset by a reduction to reflect his subordinate position in

the Cuban intelligence service. Thus, Ramon Labañino's offense level should have been level 34, with a sentencing range of 151 to 181 months at criminal history category I.

ARGUMENT

I. THE GOVERNMENT FAILED TO PRESENT SUFFICIENT EVIDENCE FROM WHICH A REASONABLE JURY COULD INFER THAT A CONSPIRACY EXISTED FOR THE PURPOSE OF TRANSMITTING NATIONAL DEFENSE INFORMATION TO CUBA.

Count II of the indictment charged Ramon Labañino, together with Antonio Guerrero and Gerardo Hernandez, with engaging in a conspiracy to "penetrate and spy on United States military installations in the Southern District of Florida and to obtain and report to the Republic of Cuba information, including non-public information, relating to the national defense of the United States" in violation of Title 18, United States Code, Section 794(c) (DE#224:12, record excepts).

The government often tries conspiracy cases in the Southern District of Florida, and the prosecutor tells the jury that in a conspiracy case, there is no written agreement and that they, the jury, must infer the nature of the agreement from the actions of the defendant. This case is different. There was a written agreement. It is a voluminous agreement, consisting of tens of

thousands of pages of instruction from Cuba to the defendants and detailed reports from the defendants to Cuba about their execution of those instructions. The government agreed that these documents were the best evidence of the agreement, claiming during opening statements that the documents were "the clearest, most powerful window into [the defendants'] intentions and goals in this entire case" (T:1588).

This written record shows that the defendants did have an agreement regarding collection of military information, but it was an express agreement to gather only public information. The gathering of public source information is not espionage.

Undaunted, the government presented what amounts to "profile" evidence, establishing the profile of customary "Communist" intelligence gathering, and invited the jury to speculate that the defendants might meet that profile. The Miami-Dade County jury convicted, but that verdict is not supported by substantial evidence. The verdict must be reversed.

A. Section 794(c) requires proof that the object is "national defense information:"

The court below instructed the jury carefully (T:14594-95):

In order to establish a violation of Count 2 of the indictment, the government must prove all of the following beyond a reasonable doubt.

[] That the information the defendants conspired to communicate delivers or transmit related to the national defense.

[] That information that the defendants conspired to communicate, deliver or transmit was of a type that the government sought to protect or safeguard from public disclosure.

[] That the defendants acted with the intent or with reason to believe that the information would be used to the injury of the United States or to the advantage of a foreign nation.

The court went on to explain (T:14595):

The term "national defense," is a broad term, which refers to the United States military and naval establishments and to all related activities of national preparation.

To prove that information relates to the national defense, there are two things that the government must prove.

First, it must prove that the disclosure of the material would be potentially damaging to the United States or might be useful to an enemy of the Unite States, and second, it must prove that the material is closely held by the United States Government.

Where the information has been made public by the United States Government and is found in sources lawfully available to the general public, it does not relate to the national defense.

Similarly, where sources of information are lawfully available to the public and the United States Government have mad not effort to guard such information the information itself does not relate to the national defense.

The evidence at trial, when viewed in the light most favorable to the government, did not consist of substantial evidence that such a conspiracy existed. The evidence adduced by the government to support this charge more correctly is viewed as related to Count I, the conspiracy to defraud the United States, rather than Count II, the espionage conspiracy. Indeed, in her Order deny the motions for judgment of acquittal, the Court below actually used the evidence that the Government presented as their strongest evidence of espionage to support the denial of defense motions for judgment of acquittal.#

A review of the law on which the court's instruction was based is an important prerequisite to review of the sufficiency of the evidence. Section 794(c) proscribes only conspiracies whose goal is to transmit "national defense information" to a foreign government. Agreements to gather and transmit other types of information are not illegal under that statute.

Conspiracy is, at its heart, an agreement, but to rise to the level of a felony, the agreement must be illegal. United States v. Toler, 144 F.3d 1423, 1426 (11th Cir.1998).

Stressing the limited nature of the statute's reach, Judge Learned Hand wrote in United States v. Heine, 151 F.2d 813, 815 (2nd Cir. 1945), that: "The section is aimed at the substance of the proscribed information." Since transmitting information to a foreign government is ordinarily protected by the First Amendment, punishment may be imposed only in those limited instances that fall within the narrow confines of "national defense information." Heine excluded public information from the prohibited term "national defense information."

Heine was a German national who collected information for the German Third Reich. The content of the information concerned the production of aircraft "so that the Reich should be advised of our defense in the event of war." Judge Hand found that the transmitted information "came from sources that were lawfully accessible to anyone who was willing to take the pains to find, sift and collate it." Consequently, Heine's conduct fell outside the statutory definition of national defense information since there could be "no reasonable intent to give an advantage to a foreign government" when "the army allows access to all comers."

As Judge Hand observed in Heine, 151 F.2d at 815, a careful reading of the scope of the language of the statue is necessary to harmonize its prohibitions with our interest in the free flow of information: "Obviously, so drastic a repression of the free expression of information it is wise carefully to scrutinize, lest extravagant and absurd consequences result."

Most recently, the Fourth Circuit Court of Appeals, in United States v. Squillacote, 221 F.3d 542 (4th Cir. 2000), reviewing the cases decided since Heine, concluded:

> These decisions stand for the simple proposition that an inference of bad faith on the part of the accused may not be justified where the national defense information' alleged in the charge is generally accessible to the public....

Identical language was approved in United States v. Truong, 629 F.2d 908, 918 n.9 (4th Cir. 1980), where the jury was informed that "transmission of publicly available information did not fall within the statutory prohibition." #

Intelligence professionals have reached the same conclusion as the Courts. Lieutenant General James R. Clapper, Jr., U.S.A.F. (ret), former Director of the Defense Intelligence Agency, testified for the government on rebuttal. He agreed with the defense contention at trial that gathering publicly available information, while important for national decision-making, did not constitute espionage. (T:13156; 13207)

The threshold inquiry, therefore, must address the character of the information allegedly sought by those who were jointly charged in the espionage conspiracy count.

B. The espionage statute protects information, not buildings:

At trial, the government proved that La Red Avispa was interested in certain buildings. The defense challenged as speculative the government's efforts to link an interest in a building with an intent to obtain the classified contents of the building. The prosecutor reacted sharply to the court's rulings that limited speculation (T:7934):

Your honor, the government is entitled to marshal the evidence in a way that enables us to carry our burden before this jury, which is, that this case and the issue of conspiracy to commit espionage is hotly contested. This case is one in which these defendants targeted particular buildings and particular facilities. In order to show that those particular buildings and facilities had the characteristics of being protected by the United States Government, of housing national defense information, being areas within the ambit of our charges, we are entitled to focus this witness' attention and the jury's attention on the specific things... (emphasis added).

The prosecutor was correct in that the issue of conspiracy to commit espionage is hotly contested, but she was wrong in her attempts to focus the

attention of the court and the attention of the jury on the "particular buildings and facilities." The statute does not protect buildings and facilities. The statute protects the classified information those building might contain. There was proof of curiosity about certain buildings, but not evidence at all that any of the defendants ever made any effort to obtain classified material.

The statement made by the prosecutor declared an intention to seek conviction of the defendants for conspiracy to commit espionage, not by showing that they cared about the classified information, but by showing that they cared about buildings that might contain classified information. Indeed, this was the nature and the full extent of their proof.

This issue was joined at the sentencing hearing. The defense objected to Paragraph 8 of Labañino's presentence report because it stated as a fact that the defendants "intended to gather information not available through conventional means and the information of most value to the [defendants] was the classified or restricted" (12.12.01:110-11). The defense objected to this because it took Santos' basic training, years ago in a foreign land, as equivalent to his "intent." The government read into the record a series of questions and answers from Santos' testimony that reaffirmed the fact that he had received certain training in Cuba many years ago. The defense

countered that Santos had never been told to get a security clearance, had never been told to get classified information, had never been instructed to gather anything other than open source material, either in that basic training or, more important, while in Miami.

The court allowed the objected to paragraph to stand (Id. at 114). The defense then sought to supplement the PSI with the statement that Santos had never been instructed to gain a clearance, enter a secured area or obtain classified information, but the government objected to amendment "on the fly" (Id.). On the merits, the government referred to the nature of the building in which Southcom was located and asserted that getting a security clearance was implicit in getting a job at that facility (Id. at 115).

Defense counsel made clear to the court that the government's attempts to draw inferences went to the heart of the issue. It goes to the heart of this appeal.

The court ruled that probation should add the following language to paragraph 8 of the PSR: "While Joseph Santos was not specifically tasked to retrieve classified information, the majority of the Southern Command headquarters building is an open storage secret facility with a top secret work area within the building" (Id. at 116).

The sentencing issues that flowed from this exchange are discussed in following sections of this brief. What is important to the issue in this section, whether Ramon Labañino's conviction for conspiracy to commit espionage should stand, is the fact that this exchange shows that the prosecutor urged, and the court ultimately accepted, the rationale that is said to motivate mountain climbers. "Because it is there." Because Southcom held, and building A1125 was designed to hold, classified, top secret, information, then this must be what Ramon Labañino was after, notwithstanding the fact that he never obtained or instructed anyone else to obtain, anything other that open source information.

A conviction obtained in this way was obtained in violation of the statute and should not stand.

C. The government did not present substantial evidence showing, or supporting an inference that, Labañino conspired to obtain "national defense information:"

At trial, the government's proof established that Labañino and his co-defendants engaged in concerted activity while acting as agents of the Government of Cuba; and, in fact, transmitted information to Cuba. However, no substantial evidence was produced from which a reasonable jury could have found that they agreed to transmit national defense

information. Indeed, the government took care in their opening statement not to promise such proof (T:1588):

One thing you will not see, ladies and gentlemen, is any classified document that these defendants were able to gather and pass through to the Government of Cuba.

In this case, if one started with the conclusion that all minions of Fidel Castro are criminals, as the majority of Miami-Dade Country residents would take as self-evident, then there are whispers of evidence that could be found to support this preordained conclusion. However, there is not substantial evidence from which a reasonable jury could infer that the defendants conspired to commit espionage.

The touchstone must not be forgotten. In their opening, the government said there were no classified documents. In their rebuttal case, they called a senior member of the intelligence community, Lieutenant General Clapper, who reinforced and broadened this conclusion (T:13340):

Q. In your review of these documents, did you come across any secret national defense information that was transmitted? Did you come across any?

A. Not that I recognized, no.

The defendants had been in Florida for years, but had never obtained prohibited information. How, then, could the jury return a verdict of guilty as to Count II? The court below, in her orders denying defendants' motions under Rule 29 for judgment of acquittal and motion for new trial, showed the path through the evidence that must be taken to yield such a verdict (DE#1259; DE#1392; record excerpts). It is a false path, a path that requires reversal.

The court below, denying motions for judgment of acquittal, found that "reasonable inferences from the Government's evidence presented in its case-in-chief can be made that Defendants Hernandez, Medina III, and Guerrero were transmitting information, relating to the national defense,' to the Cuban government" (DE#1259:27). The principal ember that the government attempted to fan into flame in this case was the instruction to Antonio Guerrero, in response to his report about the remodeling of Building A1125. Guerrero had reported that the former ready room for pilots at the naval air station, known as the "hot pad," was being renovated (DG106):

> [The renovations in building A1125] continues to be priority work for public work. I haven't been able to determine the reason for the renovations. I do have information that the structure will be used for some "top secret" activity.

Guerrero used the term "top secret" in quotation marks and he used the term in English, rather than in his mother tongue, Spanish. He was not reporting a fact he knew, but rather he was reporting what people said.

Guerrero was instructed, in response to this information: "If possible, expand on why they say this is for top secret and anything else that you can get related to the use of that building" (DG 141, T:13280). Guerrero sent a "mental blueprint" of the building, which the government claimed, falsely, was closely held information. The defense proved that this was a false claim by placing in evidence an actual blueprint, obtained by the defense from the Department of the Navy. Guerrero did nothing in response to the instruction from his superiors and never even mentioned the building again in his reports.

The court below concluded that from these isolated references in Exhibits DG123 and DG 138, "one can reasonably infer that Defendant Guerrero made an effort to comply with the Cuban Intelligence Service's request by transmitting additional descriptions of the hot pad' building as well as its floorprint to Defendant Hernandez" (DE#1259:27). If Guerrero had been arrested shortly after he was instructed to "expand on why they say" the hot pad was going be used for top secret, then it might be possible to speculate that he was being told to gather and transmit national defense

information. The truth is that in the many months after he was given this instruction,# Guerrero, Medina III and Hernandez did absolutely nothing with respect to Building A1125. Guerrero's inaction on this subject speaks so loudly that the conjecture invited by the Government and accepted by the court below as an inference must be dismissed as speculation and as a false speculation.

The court also spoke of the "greenhouse," a Plexiglas structure that was used as a mobile air-control facility# and contained radios preset to frequencies that Captain Hutton claimed were closely held. Apparently unknown to Captain Hutton, and certainly not revealed by the government, was the fact that this information was not closely held at all. The Plexiglas structure was parked in a public parking lot, open to observation by anyone.

The third instance taken by the court to sustain an inference of espionage was Guerrero's reporting on the Joint Interagency Task Force, an installation in the Truman Annex portion of the Naval Air Station command. Guerrero's reporting was, again, about unclassified matters and based on information that he had collected from open sources (T:7996-97). The court below found that this reporting raised "a reasonable inference" that Guerrero reported to Hernandez (DE#1259:28), but the important question is whether this reporting contemplated gathering and transmitting national

defense information. It is interesting to compare what Guerrero wrote about this facility, which resulted in a sentence of life in prison for these defendants, with what General Wilhelm said about equivalent facilities in Southcom. General Wilhelm testified, under oath and with prior approval of the Department of Navy, to far more detailed information than Guerrero reported about the Truman Annex (T:11211-12). Similarly, Captain Hutton gave more detailed description of the security measures taken at Building A1125 (T:7927-28).

The government witness who read into the record portions of a number of the documents seized from the defendants made clear that the target was open-source information. "List any changes that arise in the situation and operational regiments in the installation that could indicate a heightening of the level of combat preparedness and readiness" (T:4244). "Discover and timely report indications that denote the preparation of military aggression against our country" (T:4239).

When asked to summarize the main thrust of Guerrero's reports to Cuba, this government witness replied, "...the reporting of the coming and goings of aircraft and military units" (T: 4289). This is "open-source," (T:13156, 13207) and does not support a verdict that there has been a violation of the statute.

To counter the government's assertion that these were communist spies up to no good, the defense established that Mr. Laba□ino and his codefendants were engaged in a reasoned and limited response to the fact that their homeland was under siege from Miami, Florida-based terrorists. This was, in essence, a concession to the objects clause of Count I. But this explanation of their actions not only negated the inference of espionage presented by the government; it also presented a potential mitigating factor. The Presentence Report identified this a factor that may warrant a departure (PSR ¶140):

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.

Clearly, there was more than one way of viewing the trial evidence.

D. The verdict should be overturned:

The court below, in her opinions denying defense motions for judgment of acquittal and for new trial, takes instances which are "open-source" intelligence gathering and infers from the fact that open source

gathering is taking place, that the defendants had espionage as their ultimate goal. There is no link in fact, in law or in reason for this leap. Ramon Labañino has adopted the change of venue arguments filed by Antonio Guerrero and Ruben Campa, the prosecutorial misconduct arguments filed by Gerardo Hernandez and Ruben Campa, as well as the sufficiency of the evidence argument filed by Antonio Guerrero. All of these arguments arrive at the same spot. Ramon Labañino was not fairly convicted.

The Former Fifth Circuit reversed a conspiracy conviction involving technology exports to the Soviet Union, in United States v. Weischenberg, 604 F.2d 326, 332 (5th Cir.1979):

> It is not enough for [the government] merely to establish a climate of activity that reeks of something foul. The law requires proof that the members of the conspiracy knowingly and intentionally sought to advance an illegal objective. Involvement by individuals in a clandestine agreement that appears suspicious may be ill advised or even morally reprehensible, but, with out proof that an illegal aim, it is not criminal.

The isolated references in voluminous documents seized by the government do not rise to the level of "substantial evidence" of the existence of a conspiracy to commit espionage. There may well have been a conspiracy to collect open-source intelligence concerning a buildup that might threaten Cuba, but no more.

To sustain Labañino's conviction, the court would have to conclude "first, that it is permissible for the jury to infer an illegal purpose from

conduct which supports both a legal and an illegal inference and second, for the jury to infer that the discussions that took place were in furtherance of the illegal, not the legal, activity." United States v. Wieschenberg, 604 F.2d 326, 336 (5th Cir.1979). This should not be done. "Evidence that at most establishes no more than a choice of reasonable probabilities cannot be said to be sufficiently substantial to sustain a criminal conviction upon appeal." United States v. Sauders, 325 F.2d 840, 843 (6th Cir.1964).

II. THE SENTENCING COURT ERRED IN SELECTING THE BASE OFFENSE LEVEL OF 42 PURSUANT TO U.S.S.G. § 2M3.1(a)(1) BECAUSE THERE WAS NO FINDING THAT TOP SECRET INFORMATION WAS GATHERED OR TRANSMITTED.

The Sentencing Guideline that is applicable to convictions under 18 U.S.C. §794 is Section 2M3.1, which provides for a base offense level of 42 if top secret information was gathered or transmitted, or level 37 in all other cases.

The district court ruled offense level 42 applied to all the defendants in Count II based on a finding that "/t/he defendants by their own words conspired to acquire top secret information at Boca Chica airbase." 11.11.01:46. However, the presentence report, adopted by the court, never

suggest ant any classified information of any level, much less "top secret" information was ever actually gathered or transmitted. The presentence report simply concludes that "the offense involved an attempt to collect top secret information." PSR:36. The government also acknowledged the defense right to disclosure of any classified documents, and concluded that "/t/his is a conspiracy case and that answers the point the defendant makes." 12.10.01:10.

The flaw in the sentencing court's ruling is that it draws the distinction between prong 1 (or level 42) and prong 2 (or level 37), based on the object of the offense conduct, rather than on the conduct itself. The rule of law is clear. The language of the Sentencing Guidelines is to be given its "plain and ordinary meaning." United States v. Maung, 267 F.3d 1113, 1119 (11th Cir.2001) (citing United States v. Tham, 118 F.3d 1501, 1506 (11th Cir.1997); United States v. Pompey, 17 F.3d 351, 354 (11th Cir.1994).

Section 2M3.1(a) must be interpreted to mean what it says: if "top secret" information was "gathered or transmitted" then 42 is the base offense level; in all other circumstance amounting to a violation of the applicable statute, the base offense level is 37.# Both attempts and conspiracies to gather and transmit top secret information, as well as the

completed gathering and transmitting of less than top secret information require the assignment of a base offense level of 37.

Consequently, the sentencing court's imposition of a base offense level of 42 was contrary to law, as an erroneous application of the Guideline.

This Court must reverse the sentence, and remand with directions to apply a base offense level of 37.

III. THE SENTENCING COURT EMPLOYED A FLAWED FACT-FINDING PROCESS, AND IMPOSED SENTENCE WITHOUT INQUIRING INTO THE NATURE OF THE HARM CAUSED OR PERMITTING THE DEFENSE TO USE MEANS DESIGNED BY THE SENTENCING COMMISSION FOR RELIABLE FACT-FINDING ON THIS CORE ISSUE.

The sentencing guidelines are empirically based; reflecting a comprehensive survey of sentencing practices that existed before their formulation. The lodestar for the sentencing process is reliable fact-finding: "Reliable fact-finding is essential to procedural due process and to the accuracy and uniformity of sentencing." U.S.S.G., Introductory Commentary to Part A, Chapter Six.

While the wording of U.S.S.G. § 2M3.1(a) is utterly simple, the factual environment in which that guideline must be applied is complex.

The Sentencing Commission gave sentencing courts guideposts to reliable fact-finding in this complex environment. The application notes to this guideline show that the Sentencing Commission was fully aware of two pertinent points: first, that reasoned sentencing in an espionage case requires an evaluation of the harm caused by the defendant, and, second, individuals in the court system may lack the experience necessary to make this evaluation.

Application Note 2 to U.S.S.G. § 2M3.1 provides:

> The Commission has set the base offense level in this subpart on the assumption that the information at issue bears a significant relation to the nation's security, and that the information at issue bears a significant relation to the nation's security, and that the revelation will significantly and adversely affect security interests. When revelation is likely to cause little or no harm, a downward departure may be warranted. See Chapter Five, Part K (Departures).

This Application Note teaches that the harsh sentences provided for by the Guideline are based on an assumption. A downward departure from that harsh sentence is either "encouraged" or "invited," as those terms are used in Koon v. United States, 518 U.S. 81, 116 S.Ct. 2035, 135 L.Ed.2d

392 (1996), by the Application Note "when revelation is likely to cause little or not harm."

In this case, the government never established that any harm would be caused by the defendants' conduct. The defense called several witnesses who testified that Cuba is simply not a military threat to the United States. The government countered this by calling Cuba an "asymmetric threat." This probably is gibberish, but even if Cuba poses real threat to the United States on any level, the government never showed how anything the defendants did would serve that threat or cause any harm at all to the United States.

Application Note 3 to U.S.S.G. § 2M3.1 provides guidance, establishing at least one way in which the basis for this departure can be established:

The court may depart from the guidelines upon representation by the President or his duly authorized designee and the imposition of a sanction other than authorized by the guideline is necessary to protect national security or further the objectives of the nation's foreign policy.

Labañino filed several motions seeking identification of the President's duly authorized designee. The government opposed these motions on the ground, variously, that the motion was premature, or that this

application note provided only a means for an upward departure. The court denied Laba□ino's motions. He was, consequently, unable to present a competent, qualified witness to compare the harm of his conduct with the harm caused by the conduct of others who had violated this statute.

Uniformity in sentencing is one of the goals of the Sentencing Guideline regime. The sentencing court's failure to make inquiry into the harm caused by Labañino's actions has resulted in a sentence that is arbitrary and not uniform. In United States v. Pitts, 176 F.3d 239 (4th Cir.1999), an FBI agent assigned to a Foreign Counter Intelligence squad in New York City crossed the line on July 15, 1987, turning a classified surveillance report over to a Soviet. Thereafter, from October 1987 to October 1992, Earl Edwin Pitts spied for the KGB for pay. Pitts' service to the Soviet Union continued after he was transferred to a supervisory special agent position in records management and security programs at FBI headquarters in Washington, D.C. Pitts deactivated himself, but when the FBI learned of his past, they re-recruited him in a sting called Operation False Flag and ran classified documents through him from August 1995 until his arrest in December 1996. "The full extent of Pitt's treason may never be known." Id. at 243. Pitts' base offense level was set at 37 under U.S.S.G. § 2M3.1(a)(2).

Ramon Labañino, who never laid hands on a single classified document, was sentenced with a base offense level of 42. Would reasoned, informed evaluation show Labañino to be that much worse that Pitts?

Unfortunately, the sentencing court ignored the application notes and, in so doing, lost reliable fact-finding under the controlling sentencing guideline. The sentencing process is consequently flawed. The sentence should be vacated and the case remanded, with direction for the sentencing court to follow the application notes, permit the defense access to the president's designee, and revisit the question of the harm to the nation's security interests.

IV. THE SENTENCING COURT ERRED IN REFUSING TO APPLY U.S.S.G. § 2X1.1, EVEN THOUGH U.S.S.G. § 2M3.1 DOES NOT EXPRESSLY COVER CONSPIRACY.

The United States Sentencing Guidelines clearly instruct, in plain language, how the calculus for Count II should be conducted. U.S.S.G. § 1B1.2(a) provides in part: "If the offence involved a conspiracy, attempt, or solicitation, refer to § 2X1.1 (Attempt, Solicitation, or Conspiracy) as well as the guidelines referenced in the Statutory Index for the substantive offense."

Section 2X1.1 directs that the sentencing court use "the base offense level from the guideline for the substantive offense," and reduce that base offense level by three levels unless "all the acts necessary for successful completion of the substantive offense" were completed. An exception to this three level reduction is provided by § 2X1.1(c)(1): "When an attempt, solicitation, or conspiracy is expressly covered by another offense guideline section, apply that guideline section."

The guideline section that applies to the substantive offence here makes absolutely no reference to conspiracy, and clearly fails to "expressly cover" conspiracies as required for the exception of § 2X1.1(c)(1) to apply. Nevertheless, the sentencing court found that § 2M3.1 "expressly" covers conspiracies to commit espionage because the statute of conviction, 18 U.S.C. § 794, expressly refers to conspiracy (12.12.01:2-3):

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.

Both the express language of Appendix A and the heading, cross-reference (§ 2C1.1(c)), and comment (n. 1) of U.S.S.G. § 2X1.1, required §

2X1.1 to have been employed in this case. Indeed, in light merely of the binding application note, see Stinson v. United States, 508 U.S. 36, 38-39 & n. 1, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993), the district court clearly was in error in failing to apply U.S.S.G. § 2X1.1 to determine the extent of applicability of the underlying substantive guideline, U.S.S.G. § 2B3.1. Under § 2X1.1, although the substantive guideline provides a starting point for determining the base offense level, see § 2X1.1(a), the court must, in the case of an attempt or conspiracy, reduce that base offense level by thee levels. The district court's failure to apply § 2X1.1 in this case was erroneous.

The Eleventh Circuit case on which the sentencing court relied, United States v. Thomas, 8 F.3d 1552 (11th Cir.1993), adopted, without independent analysis, the conclusion of the Second Circuit in United States v. Skowronski, 968 F.2d 242, 250 (2nd Cir.1992). Skowronski, and Thomas by adoption, concluded that § 2X1.1does not apply to convictions for Hobbs Act conspiracies under 18 U.S.C. § 1951. While the Guideline applicable to Hobbs Act sentences does not expressly cover conspiracy, the statute itself does. Skowronski reasoned that "where the statutory section defining the offense of conviction prohibits conspiracy, and that section is expressly

covered by particular guideline, the offense level provided by that guideline is controlling, and § 2X1.1 does not apply." 968 F.2d at 250.

Skowronski's reasoning is valid only if the Sentencing Commission did not appreciate the difference between "guideline," the word used in § 2X1.1, and "statute," the meaning Skowronski read into the word used by the Sentencing Commission. The Second Circuit Court of Appeals has specifically rejected this reasoning in United States v. Amato, 45 F.3d 1255, 1261 (1995):

> It is true that Skowronski [] noted that the Hobbs Act included conspiracy in its explicit terms, as well as the substantive offenses it covers, and inferred an intent of Congress to have such conspiracies sentenced similarly to the substantive violations. Skowronski, 968 F.2d at 249-50. Nonetheless, we view the court's discussion of Congressional intent as supportive reasoning, rather than basic justification.... After all, the determinative passage in § 2X1.1(c)(1) makes this turn not on the content of the criminal statute in question, but rather on whether the Guidelines assign a particular class of conspiracy to a section other than the general conspiracy section.

Nevertheless, the court ruled on the premise that Skowronski, through Thomas, remains good law in the Eleventh Circuit. That is the issue on appeal.

V. THE SENTENCING COURT ERRED IN ADDING TWO LEVELS PURSUANT TO § 3C1.1 FOR OBSTRUCTION OF JUSTICE FOR CONDUCT WHICH WAS AN INHERENT PART OF THE § 2M3.3 OFFENSE OF CONVICTION.

Ramon Labañino used a carefully constructed and thoroughly memorized cover identity as part of the conduct on which his espionage conviction was based. This cover identity, or legend, was that of Luis Medina, III. When Labañino was swept up by the Federal Bureau of Investigation and haled into court, he was to the bar as "Luis Medina," and asked to state his name. Labañino did what his position required of him. He stood by his legend and stated that he was Luis Medina.

At his sentencing, the court below added to his base offense level for espionage two levels for obstruction of justice under § 3C1.1 because of this statement.

At trial, the government called as an expert witness a retired Special Agent of the Federal Bureau of Investigation, Stuart M. Hoyt, Jr. The government, through Hoyt, established that the conduct on which the enhancement was based is an essential and an inherent part of the espionage for which Laba□ino was convicted and for which he was to be sentenced.

Hoyt repeatedly returned to this point during his testimony (T:3723):

Q. [W]hat are the characteristics of an illegal officer...?

A. [T]hey will have a false identity.

Hoyt described this false identity as a "legend," and made clear that the practitioner of espionage had to actually become his legend:

> In adopting a legend, you have to be able to be convincing should someone ask you questions about it. You have to be able to explain where you are born, whom your parents were, where you live, what work you might have had, where you studied. At the normal things a person would have in their background (T:3724-250.
> ***
>
> You will be given documents to prove, to reflect you are who you say you are; so you would be given a passport, a driver's license, you would be able to show it and it would be in the name that your were than (sic) pretending to use (T:3725).
> ***
>
> [W]hen you adopt a legend, you are given a cover story, a legend, you have to be plausible in passing yourself off as that person. In order to do so, you have to have a lot of details of your background in case you become friendly with someone or you meet someone and they would ask you who you are and what you do, you would appear credible (T:3727).
> ***

They have to be able to pass themselves off as whatever they are intended to be. If they pass themselves off as Puerto Rican, they should adopt an accept or mannerisms of someone from that country (T:3729).

In short, the government proved during its case in chief that Ramon Labañino's use of the legend Luis Medina was part of his conduct for which he was convicted. "Section 3C1.1 does not apply to conduct that is part of the crime itself." United States v. Lloyd, 947 F.2d 339, 340 (8th Cir.1991). See, United States v. Kirkland, 985 F.2d 454 (11th Cir.1993) (conduct

furthering scheme of conduct which constitutes the crime of embezzlement by a bank officer is not obstruction).

He was called by the name Luis Medina to the bar of court and swore that it was his name. This was not done with "a clear mens rea" to obstruct justice as required for imposition of the sentencing enhancement; the defendant must be shown to "consciously act with the purpose of obstructing justice." United States v. Burton, 933 F2. 916, 918 (11th Cir.1991) quoting United States v. Stroud, 893 F.2d 504, 507 (2nd Cir.1990). Proof of a specific intent to obstruct justice, that is that the defendant consciously acted with the purpose of obstructing justice, is required to support the enhancement. United States v. Labella-Szuba, 92 F.3d 136 (2nd Cir.1996). In addition, "a district court applying the enhancement because a defendant gave a false name at arrest must explain how that conduct significantly hindered the prosecution or investigation of the offense." United States v. Alpert, 28 F.3d 1104, 1108 (11th Cir.1994)(en banc).

This is particularly true with respect to Labañino's appearance for the magistrate. The charging document identifies him a "John Doe No. 2" because the government knew full well before his arrest that his true name was not Luis Medina. His sworn statement that he was Luis Medina obstructed nothing and was not intended to obstruct justice. It was intended

to maintain his legend, as Stuart Hoyt testified he had been trained, and as he had lived for many years.

It was, therefore, error for the sentencing court to impose a sentencing "enhancement" under Chapter 3 of the Sentencing Guidelines for conduct which was an inherent part of the Chapter 2 offense of conviction.

VI. THE SENTENCING COURT ERRED BY FAILING TO OFFSET A ROLE ENHANCEMENT BASED ON CHARGED CONDUCT WITH A ROLE REDUCTION BASED ON PROVEN ROLE IN HIS ORGANIZATION.

The government in its case-in-chief offered the expert testimony of retired FBI Special Agent Stuart Hoyt establishing the complex hierarchical structure of the Cuban intelligence service, a structure in which Ramon Labañino played a subordinate role. He simply was a small cog in a big machine.

The sentencing court imposed a sentence enhancement for Labañino's role in the offense of conviction, because he acted as a supervisor of others, pursuant to U.S.S.C. § 3B1.1(b). Labañino requested that a corresponding reduction, or downward adjustment, be made pursuant to U.S.S.C. § 3B1.2, to reflect his lesser role in the overall organization.# The broader focus

requested by Mr. Labañino is consistent with the Introductory Commentary to Part B - Role in the Offense, of Chapter 3: "The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of the § 1B1.3 (Relevant Conduct), i.e., all conduct included under § 1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction."

United States v. Tsai, 954 F.2d 155, 157 (3rd Cir.1992), concluded that an offset as requested by Labañino could be made under the guidelines, and directed that it be considered on remand. "/W/e hold that the two adjustments are not logically inconsistent and that, on remand, the district court should determine whether there is any basis for defendant's contention that he was a minor figure because he was merely carrying out instructions from others." The sentencing court erred in failing to offset the role enhancement with a corresponding reduction, proven by the government during its discourse on the Cuban intelligence service.

CONCLUSION

Ramon Labañino has adopted the change of venue issues briefed by Antonio Guerrero and Ruben Campa. He has adopted the prosecutorial misconduct in closing argument issues briefed by Campa and Gerardo Hernandez. He has adopted the sufficiency of the evidence as to Count II

issue briefed by Guerrero. All of these issues go to the same point, presented in the first issue in this brief: Labañino was not fairly convicted. The evidence shows that he was engaged in open-source intelligence gathering and that is not a violation of the statute under which he was convicted. It is only if the government's evidence is addressed to a Miami-Dade County jury, predisposed to convict, and therefore willing to make the inappropriate leaps of inference, that guilty verdict will be obtained. Such a verdict should not stand.

If this court leaves the verdict intact, it should not accept the many errors that produced the life sentence Mr. Labañino now serves. Several of these issues raised on this appeal are technical errors, but the predisposition against the government of the Republic of Cuba and the willingness to make unsupported assumptions about Ramon Labaniño as the agent of that government, that lead to his conviction also lead to his sentence to live in prison. The issues on sentencing should be clarified and the case remanded for resentencing.

Respectfully submitted,

_____

William M. Norris
Attorney for Ramon Labañino

CERTIFICATE OF COMPLIANCE WITH SPACE/VOLUME LIMITATIONS

I HEREBY CERTIFY that this brief contains 10,415 words in text, plus approximately 710 words in footnotes, within the space volume limitation set by Rule 32(a)(7).

The government used all the tools in its box. High frequency radio intercepts, physical surveillance, debriefing associates, wiretaps, monitoring cameras, and surreptitious searches were all used. No tool produced evidence of espionage.
Record citations are to docket entry numbers, except for trial testimony, which is referred to as "T" with the page number.

The question of when all of this was supposed to happen was left to conjecture. Lt.Gen. Clapper assured the jury that "Communist" intelligence organizations, of which the Wasp Network was supposed to be a "textbook template," are committed to long-term operations. Of course, the government proved, and the defense conceded, that Antonio Guerrero had been counting airplanes at Key West NAS for years and years, and before that Ramon Laba□ino counted airplanes at McDill AFB in Tampa, Florida. The government clearly thought that this conspiracy began even earlier, justifying hearsay testimony from Santos about conversations in Cuba in 1984 as being in furtherance of the Wasp Network conspiracy. This would have given the coconspirators fourteen years to acquire at least a single piece of national defense information. The fact that they never did raises real doubt that this was their true purpose.

The point is this: if Santos, with all of his spy craft training, was scheduled to go to Puerto Rico to gather open-source intelligence, why should his transfer to Miami occasion a fundamental shift in his methodology, that is, why infer that his Miami work would be espionage, rather than open-source gathering?

Captain Hutton explained: "We want somebody to come on board and take a look at the base and find out how the taxpayer dollars are being spent" (T:7955). As Judge Learned Hand cautioned, if the military "allows access to all comers," information gained by visual observation of the base could not be deemed national defense information. United States v. Heine, 151 F.2d 813, 816 (2nd Cir. 1945).

"Your Honor, the government is entitled to marshal the evidence in a way that enables us to carry our burden before this jury, which is, that this case and the issue of conspiracy to commit espionage is hotly contested. This case is one in which these defendants targeted particular building and particular facilities. In order to show that those particular buildings and facilities had the characteristics of being protected by the United State

Government, of housing national defense information, being areas within the ambit of our charges, we are entitled to focus this witness' attention and the jury's attention on the specific things.... (T:7934).

"I am very familiar with the pattern and the organization and the philosophy, the doctrine and the approach that communist intelligence organizations undertake" (T:13102).

The Court discusses instruction from the Cuban intelligence service to Antonio Guerrero about the "hot pad" as supporting inferences that Guerrero "has an ongoing, professional relationship with the Cuban government as one of its officials" (DE#1259:21). That inference supports Count I. Count II is an entirely different matter, but the court below uses the same evidence to draw inferences of espionage. This inference is discussed below.

See 70 AM JUR. 2nd SEDITION, SUBVERSIVE ACTIVITIES, AND TREASON, Section 35, 43 (1987) ("The jury should be specifically instructed that the transmission of publicly available information does not fall within the statutory prohibition"). See also, Sand, Siefert, Loughlin & Reiss, 1 MODERN FEDERAL JURY INSTRUCTIONS (Criminal) Par. 29.01, nt 29-5 ("Only information relating to our national defense which is not available to the public at the time of the claimed violation falls within the proscription of this section.")

Geurrero made his report on the hot pad in December 1996. He was not arrested until September 1998.

The court misidentifies this structure as a "sentry box" (DE#1259:28).

The language of this Guideline is spare. The plain meaning of the language is made clearer by the presentation of the words. U.S.S.G. § 2M3.1(a), in its entirety, reads:

> (a) Base Offense Level:
> (1) 42, if top secret information was gathered or transmitted; or
> (2) 37, otherwise.

Laba□ino anticipated this issue, and sought disclosure of relevant facts in the knowledge of the government, the party that call expert witness Stuart

Hoyt. The government opposed this request for exculpatory information for use at sentencing, claiming that the government had no obligation to build "some universe of extrarecord history of the Cuban Intelligence Service" (DE1331:5).

n on the specific things.... (T:7934).
"I am very familiar with the pattern and the organization and the philosophy . . ."