NO. 01-17176-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/appellee,

v.

RUBEN CAMPA,
Defendant/appellant.

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

BRIEF OF THE APPELLANT RUBEN CAMPA

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THIS CASE IS ENTITLED TO PREFERENCE
(CRIMINAL APPEAL)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Ruben Campa
Case No. 01-17176-B

Appellee Ruben Campa files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Jack Blumenfeld	Former counsel for Guerrero
David M. Buckner	Assistant United States Attorney
Ruben Campa	Defendant
Orlando do Campo	Assistant Federal Public Defender
Hon. Robert L. Dubé	United States Magistrate Judge
Rene Gonzalez	Defendant
Antonio Guerrero	Defendant
Gerardo Hernandez	Defendant
Philip R. Horowitz	Counsel for Gonzalez
Marcos Daniel Jiménez	United States Attorney
John S. Kastrenakes	Assistant United States Attorney
Richard C. Klugh, Jr.	Assistant Federal Public Defender
Hon. Joan A. Lenard	United States District Judge

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Anne R. Schultz	Assistant United States Attorney
Leonard I. Weinglass	Counsel for Guerrero
Kathleen M. Williams	Federal Public Defender

STATEMENT REGARDING ORAL ARGUMENT

The defendant respectfully submits that oral argument is necessary to the just resolution of this appeal and will significantly enhance the decision making process.

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STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER APPELLANTS

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

Brief of Gerardo Hernandez: All portions of the brief concerning his Issue III (prosecutorial misconduct in closing argument), including the statement of the issue, standard of review, summary of the argument, argument and citations of authorities, and any reply argument as to that issue.

Brief of Luis Medina: All portions of the brief relating to his Issue V (improper sentencing guideline adjustment for obstruction of justice under U.S.S.G. § 3C1.1), including the statement of facts and proceedings, statement of the issue, standard of review, summary of the argument, argument and citations of authorities, and any reply argument as to that issue.

Brief of Antonio Guerrero: All portions of the brief concerning his Issue I (improper denial of motion for change of venue), including the statement of facts and proceedings, statement of the issue, standard of review, summary of the

argument, argument and citations of authorities, and any reply argument as to that issue.

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 as to counts alleging substantive violations of those provisions, specifically, as to Campa, counts 16 and 17), Issue III (failure of the district court to instruct the jury regarding the specific intent element of both a conspiracy to violate and a substantive violation of 18 U.S.C. § 951 and 28 C.F.R. § 73.01 et seq.), Issue IV (denial of motion for mistrial based on misconduct by a hostile witness), and Issue V (improper imposition of consecutive sentences on non-guideline offenses), 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.

STATEMENT OF JURISDICTION

The district court had jurisdiction of this case pursuant to 18 U.S.C. § 3231 because the defendant was charged with offenses against the laws of the United States. The court of appeals has jurisdiction over this appeal under 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which give the courts of appeals jurisdiction over final

decisions and sentences of United States district courts. The appeal was timely filed on December 20, 2001, from the final judgment and commitment order entered on December 20, 2001, that disposes of all claims between the parties to this cause.

STATEMENT OF THE ISSUES

I. Whether the district court violated Fed.R.Crim.P. 21 and the defendants' due process right to a fair trial by denying the defendants' motions for change of venue.

II. Whether the district court, in ruling on Classified Information Procedures Act issues, erred both procedurally and substantively by: (1) conducting ex parte proceedings and excluding defense counsel from the crucial CIPA § 4 hearing to resolve disputed discovery issues, thereby violating the statute and due process; (2) failing to disclose non-classified portions of the hearing ex parte CIPA hearing; (3) failing to reconsider its CIPA rulings in light of defenses raised at trial revealing the relevance of the CIPA evidence; and (4) permitting the government to improperly suppress discoverable evidence in violation of CIPA, Fed.R.Crim.P. 16, and due process.

III. Whether the searches and surveillance conducted under the Foreign Intelligence Surveillance Act violated the defendants' Fourth Amendment rights against unreasonable searches and seizures.

IV. Whether the cumulative effect of multiple, continuous, and sustained instances of prosecutorial misconduct violated due process by unfairly prejudicing Campa's right to a fair trial.

V. Whether the evidence was sufficient to show that Campa illegally possessed a false passport.

VI. Whether the district court erred in imposing a 3-level upward adjustment under U.S.S.G. § 3B1.1 for aggravating role in the trafficking of false identification documents.

STATEMENT OF THE CASE

Course of Proceedings, Disposition in the District Court, and Statement of Facts

Fernando Gonzalez Llort, a.k.a. Ruben Campa (hereinafter "Campa"), was indicted on five counts of a multi-defendant indictment. (DE224). Count 1 charged conspiracy to defraud the government and to act as a foreign agent without proper notification as required under 18 U.S.C. § 951 and 28 C.F.R. § 73.01, et seq., all in violation of 18 U.S.C. § 371. Counts 16 and 17 charged substantive violations of the foreign agent registration provisions. Count 7 charged possession of a false U.S. passport, in violation of 18 U.S.C. § 1546. Count 8 charged Campa with possessing eight improperly-issued identification documents, in violation of 18 U.S.C. § 1028. Campa proceeded to trial, was convicted of these charges, and was thereafter sentenced to 228 months' imprisonment. (DE1439). Campa is incarcerated.

Campa was born on August 18, 1963, in Havana, Cuba, where he grew up and later obtained a master's degree in international relations. During the period covered by the indictment, Campa lived in south Florida on two brief occasions. He lived in an apartment belonging to codefendant Gerardo Hernandez from November 1997 until February 1998, when he returned to Cuba. He re-entered the United States on July 4, 1998, (DE1556:11278), and shared an apartment with

codefendant Ramon LabaZino, a.k.a., Luis Medina, until their arrest on September 12, 1998. Prior to arriving in Florida, Campa resided in Fayetteville, North Carolina for two short periods of time. (DE1525:6927-30).

While he lived in south Florida, Campa, as he conceded at trial, worked secretly on behalf of the Cuban government. Along with several of his codefendants, Campa gathered and relayed to Cuba information concerning the activities of numerous local extremist anti-Castro groups and individuals.

Prior to, during, and after the period in which Campa resided with them, Hernandez and Medina were subjected to searches and surveillance pursuant to the Foreign Intelligence Surveillance Act. Prior to trial, Campa unsuccessfully challenged the propriety of the FISA searches and the manner in which the procedures of the Classified Information Procedures Act were implemented. In addition, Campa and his codefendants sought a change of venue due to prejudicial pretrial publicity and the pervasive community prejudice against persons associated with the Cuban government. (DE329).

During the eight-month trial, the defendants pursued multiple objections and motions for mistrial based on prosecutorial misconduct that prejudiced their right to a fair trial and ability to present a defense. Such misconduct included improper suggestions that Campa engaged in espionage, and an inflammatory closing

argument asserting that the defendants desired to destroy America after having taken advantage of taxpayer-funded counsel. (DE1583:14470-14536).

Standard of Review

A district court's discretionary decision to deny a motion for change of venue is ordinarily reviewed for abuse of discretion. See United States v. Williams, 523 F.2d 1203, 1208 (5th Cir. 1975). However, where the defendant claims a violation of his due process right to a fair trial based on denial of a change of venue and resulting articulable prejudice at trial, the Court must "undertake an independent evaluation of the facts established in support of such an allegation." Id. (citing, inter alia, Irvin v. Dowd, 366 U.S. 717 (1961); Pamplin v. Mason, 364 F.2d 1 (5th Cir. 1966)).

Interpretation of the Foreign Intelligence Surveillance Act (FISA) and the Classified Information Procedures Act (CIPA) presents questions of law reviewed de novo. See United States v. Hooshmand, 931 F.2d 725, 737 (11th Cir. 1991) ("The interpretation of a statute is a question of law subject to de novo review."). Regarding CIPA decisions resting on evidentiary grounds such as relevancy, review is two-fold. The district court's interpretation of the rules of evidence is reviewed de novo. United States v. Paul, 175 F.3d 906, 909 (11th Cir. 1999). Individual evidentiary rulings are reviewed for abuse of discretion. See, e.g., Mills

v. Singletary, 161 F.3d 1273, 1288 (11th Cir. 1998) (district court's "discretion in limiting the scope of cross-examination ... is limited to the requirements of the Sixth Amendment's guarantee of the right of confrontation"). The district court's discretion "does not extend to the exclusion of crucial relevant evidence necessary to establish a valid defense." United States v. Williams, 954 F.2d 668, 671 (11th Cir. 1992).

Prosecutorial misconduct is reviewed de novo and requires reversal if there is a reasonable probability that the misconduct prejudiced the defendant's substantial rights. United States v. Beasley, 72 F.3d 1518, 1525 (11th Cir. 1996).

Sufficiency of the evidence is a question of law subject to de novo review. United States v. Kelly, 888 F.2d 732, 739 (11th Cir. 1990). "If there is a lack of substantial evidence, viewed in the Government's favor, from which a reasonable factfinder could find guilt beyond a reasonable doubt, the conviction must be reversed." Id. at 740.

A district court's determination of a defendant's role in the offense will be reversed for clear error; however, whether the "aggravating role" guideline applies to the facts of the case is a question of law reviewed de novo. United States v. Yates, 990 F.2d 1179, 1182 (11th Cir. 1993).

SUMMARY OF THE ARGUMENT

ISSUE I: The district court improperly denied Campa's motion for change of venue because there was considerable evidence that the defendants, who admitted to having worked secretly on behalf of the Cuban government in south Florida, could not receive a fair trial in Miami. Evidence of pervasive, insurmountable community prejudices against persons, such as Campa, associated with the Castro regime included a large selection of newspaper articles and editorials reflecting a forty-year ideological cause of fervent opposition to the Cuban government.

Evidence of such widespread local hostilities also included the results of a public opinion survey authorized by the district court, which showed that 69 percent of all respondents in Miami were prejudiced against persons charged with offenses such as those set forth in the indictment. Further evidence of Campa's inability to be tried by an impartial jury in Miami included the answers Campa's prospective and actual jurors gave during voir dire, acknowledging personal prejudices against the defendants, strong disapproval of the Cuban government, and fear of public reprisals in the event they returned verdicts favorable to the defendants. Particularly in combination with the manner in which the prosecution proceeded at trial, including prosecutorial appeals to prejudice and other events

both inside and outside the courtroom which evoked renewals of the motion for change of venue and motions for mistrial, the denial of a change of venue should be reversed and the case remanded for a new trial.

ISSUE II: The erroneous application of CIPA procedures deprived the defendants of their rights to discovery and to present a defense. Prior to and during trial, the district court improperly permitted ex parte communications by the government with no sufficient showing of need and an unauthorized ex parte hearing to determine the scope of evidence the defendants could offer in their defense at trial. The ex parte hearing violated due process and the express requirements of CIPA section four. Further, through the erroneous application of CIPA procedures, the government deprived the defendants of access to voluminous documents–nearly all of which had been seized from the defendants themselves–that were needed by defense counsel to prepare for trial and fully present their defense. The erroneous CIPA rulings in this case substantially prejudiced the defendants–both procedurally and substantively–and warrant a new trial or, alternatively, a remand for further proceedings.

ISSUE III: The FISA searches violated the Fourth Amendment because they were improperly directed primarily at gathering law enforcement information. The history of omissions and misstatements by the FBI in applying for FISA

warrants further suggests FISA impropriety in this case. Further, the use of FISA searches as to Campa lacked probable cause; indeed, neither his existence nor any indication of criminal or intelligence actions by him were known to the government prior to the searches. The evidence seized pursuant to FISA should have been suppressed.

ISSUE IV: Although Campa was not charged with espionage, and there was no evidence that he ever committed espionage, the prosecution improperly referred repeatedly during trial to Campa's spying on U.S. military bases. Despite repeated objections–sustained by the district court–the government persisted in such improper references throughout trial, including rebuttal closing argument. Further, in closing, the government falsely accused Campa and the other defendants of trying to "destroy the United States," DE1583:14481-82,14535-36, and disparaged them for having court-appointed counsel paid by American citizens. DE1583:14482. This continual barrage of improper remarks and character attacks deprived Campa of a fair trial.

ISSUE V: The evidence was insufficient to support Campa's conviction for illegal passport possession. Where the government offered no evidence Campa was even aware the passport's existed, the mere fact that it was found in a

codefendant's home long after Campa's brief stay there cannot sustain his conviction for illegally possessing the passport.

ISSUE VI: The district court erred–factually and legally–at sentencing by enhancing Campa's sentence under U.S.S.G. § 3B1.1 for managing a false document trafficking network. This ruling was erroneously premised on the theory that, Campa, who merely possessed a handful of such documents for personal use, performed other actions that included briefly "managing the assets" of codefendant Medina, while Medina was temporarily in California. DE1453:21. The record fails to show Campa's management of false document assets; moreover, even if the record could be so viewed, this Court's unequivocal precedent confirms that such evidence is insufficient to establish that Campa managed a false document trafficking operation. Hence, the enhancement should be reversed.

ARGUMENT

I. THE DISTRICT COURT VIOLATED THE DEFENDANTS' RIGHTS UNDER FED. R. CRIM. P. 21 AND THE DUE PROCESS CLAUSE IN DENYING MOTIONS FOR CHANGE OF VENUE.

Prior to trial, the defendants advised the district court that they would not, at trial, deny having gathered intelligence on behalf of the Cuban government. DE1245:45-52. Instead, they would show that their focus was protecting Cuba from acts of aggression carried out by local (Miami) extremist anti-Castro groups and individuals. They would show that, despite being part of the Castro regime, they had not acted "wilfully" and had not sought or transmitted "national defense information," and that, as for Hernandez, his cooperation with Cuba did not make him responsible for Cuba's response to provocations and illegal flights by Brothers to the Rescue.

To establish these defenses, Campa and his codefendants would rely heavily on the testimony of Cuban citizens and government officials. Thus, the defendants would, at trial, explain their actions in a context that ran counter to all that is truly sacred to the dominant and virulently anti-Castro Cuban exile population of Miami, and would use witnesses sympathetic to the Castro regime to do so. If there were ever a case that should not have been tried in Miami, therefore, this was certainly it. Only the enormous hostility towards Timothy McVeigh in Oklahoma

City after the bombings there, which resulted in a change of venue to Denver, Colorado, United States v. McVeigh, 918 F.Supp. 1467, 1472 (W.D.Okla. 1996), possibly compared to the pervasive community prejudice the defendants faced in Miami.

Moreover, this case probably could have been tried fairly in any other city in the United States, since the community prejudices and pre-trial publicity confronted in Miami simply did not exist in other parts of the country. Indeed, the defendants agreed that a transfer of the trial to Fort Lauderdale would satisfy their concerns.

Accordingly, Campa requested a change of venue, pursuant to Fed.R.Crim.P. 21(a), his constitutional rights under the Fifth and Sixth Amendments, see Irvin v. Dowd, 366 U.S. 717 (1961); Pamplin v. Mason, 364 F.2d 1 (5th Cir. 1966), and the district court's broader, federal supervisory power to ensure that defendants receive a fair trial. See Wheat v. United States, 486 U.S. 153, 160 (1988); United States v. Haldeman, 559 F.2d 31, 145 (D.C. Cir. 1976) (MacKinnon, J., dissenting).

Campa requested a change of venue because he was constitutionally entitled to "a trial before a jury drawn from a community free from inherently suspect circumstances" and prejudices, Pamplin, 364 F.2d at 7, and he could not get that in

Miami. In support of his motion, Campa relied partly on a public opinion survey prepared by Gary Moran, Ph.D., an expert jury researcher.

Moran found that 69% of all respondents, and 74% of all Hispanic respondents in Miami-Dade County, were **prejudiced** against persons charged with engaging in the types of activities outlined in the indictment. DE321:Ex. at 10. Nearly 49% of all respondents, and nearly 57% of all Hispanic respondents in Moran's survey actually said they **could not be fair** or impartial. Id. at 12. Furthermore, approximately 90% of the respondents said that there were no circumstances that would change their opinions. Id. at 13. Almost 36% of all respondents said they would be at least somewhat **worried about being criticized in their community** if they failed to convict the defendants. Id. at 11-12.

As expected, many of the prospective jurors acknowledged that they strongly opposed the Castro regime and admitted they could not be fair or impartial. Others also admitted they feared a "mob mentality" and were concerned about a potentially adverse public reaction to a verdict favorable to the defendants. See DE1473:1068, 1069-70, 1024-25, 1026, 1012, 1018, 938, 945; DE1474:1120, 1122, 1277.

Of course, others, including the twelve members of the jury, essentially opined that they could be fair. Even among these jurors, however, there was also

strong disapproval of the Castro regime. See DE1272:743; DE1274: 1296-97; DE1272:861.

Despite jurors' claims of fairness, Campa's right to an impartial jury was inadequately protected. Especially in cases, such as this one, involving "inherently suspect circumstances" of prejudice, courts should place "emphasis on the feeling in the community rather than the transcript of the voir dire." Pamplin, 364 F.2d at 7. "It is immaterial [whether] voir dire [demonstrated] community prejudice." Id. at 6; accord Irvin v. Dowd, 366 U.S. at 728; Rideau v. Louisiana, 373 U.S. 723 (1963). Here, however, voir dire of the venire, events at trial, and post-trial concessions by the government confirmed the prejudice.

The summary manner in which the jury–after eight months of trial–quickly returned verdicts of guilty as to all defendants on all counts (with no questions or notes) confirmed everyone's worst fears about the possibility of fairly conducting this trial in Miami. See Pamplin, 364 F.2d at 3 (jury's imposition of statutory maximum penalty itself indicated existence of prejudice against defendant). Indeed, the government itself admittedly believed a fair and impartial jury would acquit the defendants based on the evidence at trial and the jury instructions given. See Emergency Petition for Writ of Prohibition with the Court of Appeals (11th Cir. No. 01-12887) at 4, 6, 21 (district court's jury instructions created

"insurmountable barriers for a prosecution involving foreign agents;" instruction rendered "prosecution of such offenses a virtual impossibility;" instruction on count three "presents an insurmountable hurdle for the United States in this case") (emphasis added).

Throughout this case, the government consistently contended it was a fallacy to speak of "pervasive community prejudice" in connection with a "large, heterogenous" community such as Miami. The government, therefore, argued that Pamplin, a principal case upon which Campa relied, had no application to the determination of the defendants' venue motions. The district court incorrectly agreed.

It remains to be seen what position the government will take on appeal concerning the applicability of Pamplin, since the government subsequently took an impermissibly contrary position respecting the factual and legal applicability of Pamplin in Ramirez v. Ashcroft, Case No. 01-4835-Civ-Huck, another politically-charged case filed in the Southern District of Florida. In Ramirez, the government was the defendant, and the plaintiff accused the government (and in particular, the Immigration and Naturalization Service, his employer) of engaging in various employment practices that were insensitive, if not offensive, towards the local Cuban population, especially with respect to the Elian Gonzalez affair.

Relying heavily on Pamplin, the government asked the district court to move the trial out of Miami for exactly the same reasons Campa and his codefendants stated they could not receive a fair trial in Miami. The government, however, cannot have it both ways: it cannot claim the presence of pervasive prejudice against the U.S. government in the Ramirez civil litigation, and yet deny that Miami's community would be capable of such prejudice in this prosecution involving espionage and murder conspiracy allegations leveled against admitted agents of Fidel Castro.

In addition to relying on the declaration of Moran, the defendants submitted a large number of newspaper articles that reflected the existence of "prejudicial and inflammatory" pretrial publicity that had "saturated the community" in which the trial was to be held, further raising a "presumption of prejudice" among potential jurors and requiring a change of venue. See Murphy v. Florida, 421 U.S. 794, 798-99 (1975); Spivey v. Head, 207 F.3d 1263, 1270 (11th Cir. 2000); Mayola v. Alabama, 623 F.2d 992, 997 (5th Cir. 1980). Copies of such articles were attached to Campa's motions and memoranda concerning the change of venue. See DE329; DE397; DE455; DE483; DE498; DE1638; DE1669.

Local newspaper articles highlighting the government's allegations in this case appeared almost every day throughout the eight-month trial. Indeed, the

considerable media attention given to this trial upset several jurors as well as the district court, who was especially concerned about interviews that could "pollute the jury pool." DE1245:113; DE1473:1026; DE1245:111-12; DE1540:9005; DE1585:14644-45,14645,14646. Similarly, the government's arguments and evidentiary focus at trial exacerbated juror susceptibility to community fears and prejudices, compounding the error of denying a change of venue. See United States v. Williams, 523 F.2d 1203, 1207-1209 (5th Cir. 1975) (conviction reversed for improper closing argument in tandem with prejudicial pretrial publicity).

Widespread and intense community prejudice, exacerbated by distinctly adverse media publicity, tainted the impartiality of the defendants' trial. The bias and prejudice were compounded by events both inside and outside the courtroom, including witness outbursts, juror intimidation concerns, local public events, and prosecutorial comments improperly directed to fanning jurors' fears and passions.

The denial of repeated defense requests to transfer venue and to grant a mistrial, see DE1527:7130-33; DE1540:8949; DE1579:13894-95, in this extraordinarily emotional and sensational prosecution in the eyes of the local community, resulted in a judicial proceeding lacking rudimentary fairness. Justice compels that the convictions in this case be reversed, and the case remanded for a new trial.

II. THE DISTRICT COURT, IN RULING ON CLASSIFIED INFORMATION PROCEDURES ACT (CIPA) ISSUES, ERRED BOTH PROCEDURALLY AND SUBSTANTIVELY BY: (1) CONDUCTING EX PARTE PROCEEDINGS AND EXCLUDING DEFENSE COUNSEL FROM THE CRUCIAL CIPA § 4 HEARING TO RESOLVE DISPUTED DISCOVERY ISSUES, THEREBY VIOLATING THE STATUTE AND DUE PROCESS; (2) FAILING TO DISCLOSE NON-CLASSIFIED PORTIONS OF THE EX PARTE CIPA HEARING; (3) FAILING TO RECONSIDER ITS CIPA RULINGS IN LIGHT OF DEFENSES RAISED AT TRIAL REVEALING THE RELEVANCE OF THE CIPA EVIDENCE; AND (4) PERMITTING THE GOVERNMENT TO IMPROPERLY SUPPRESS DISCOVERABLE EVIDENCE IN VIOLATION OF CIPA, FED.R.CRIM.P. 16, AND DUE PROCESS.

A. Background: CIPA's Purpose and History.

The Classified Information Procedures Act (CIPA), 18 U.S.C. App. III, was enacted in 1980 to regulate the use and stem the potential abuse of classified information in a criminal trial. CIPA creates a procedural framework in which the orderly use of classified information at trial can be regulated.

Section one of CIPA defines classified information as "any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data … ." 18 U.S.C. App. III, § 1. CIPA applies only if the discovery at issue meets this definition.

CIPA also contemplates that either the defense or the government may invoke its procedures. Id. at § 2.

Section four of CIPA sets forth a mechanism for discovery of classified information. It permits the district court, upon sufficient showing, to: (1) delete certain items of classified information from discovery; (2) substitute a summary in lieu of classified information; or (3) substitute a stipulation that the suppressed classified information would prove certain facts.

CIPA does not create any new substantive law and does not alter either the Federal Rules of Evidence or the government's discovery obligations. United States v. Johnson, 139 F.3d 1359, 1365 (11th Cir. 1998). Section four is an elaboration of a court's power under Federal Rule of Criminal Procedure 16(d)(1) to determine issues of discovery. Richard P. Salgado, Note, Government Secrets, Fair Trials, and the Classified Information Procedures Act, 98 Yale L.J. 427, 431-32 (1988). While CIPA permits the district court to redact or substitute certain otherwise discoverable evidence, it does so under the same strictures provided in Fed.R.Crim.P. 16(d)(1). While section four of CIPA permits suppression or substitution "on a sufficient showing," that sufficient showing must be interpreted as the same showing sufficient for a court to order that "discovery or inspection

should be denied, restricted, or deferred" under Rule 16(d)(1). See Salgado, 98 Yale L.J. at 431-32.

CIPA also provides that the government may be permitted to submit an ex parte written request for authorization to suppress or substitute classified information. Like Rule 16(d)(1), section four provides that if the ex parte submission is accepted, the text of the government's submission shall be sealed and preserved for purposes of appeal.

B. Relevant CIPA Proceedings in the District Court.

On October 7, 1998, the government invoked CIPA's procedures by moving for a protective order for any classified information to be used in the prosecution and for a pretrial hearing pursuant to 18 U.S.C. App. III, §§ 2, 3. DE104. The district court granted the motion on the day it was filed. DE105. The government thereafter requested an ex parte hearing, ostensibly under the auspices of 18 U.S.C. App. III, § 4. DE156. The district court summarily granted the government's request. DE158. Nevertheless, defendants' counsel, upon receiving the requisite national security clearances permitting review of classified material, filed a motion requesting that the district court reconsider its granting of the government's request for an ex parte hearing. DE210, 219. The district court denied the motion, DE232, and permitted the government to proceed with presentation and argument at an ex

parte CIPA hearing on May 26, 1999. DE247. It is unclear whether there were other ex parte hearings or presentations pursuant to the ruling permitting ex parte proceedings.

While the government's request for an ex parte CIPA hearing offered no justification for defense counsel's exclusion from the section four hearing, it did describe what the government intended to accomplish at the hearing: "[T]he government will seek the Court's approval to redact the excluded information on the basis of its irrelevance." DE156:3 (emphasis added). The government's representations were that in the ex parte hearing some substitutions would be offered and irrelevant material "redacted." Id. Defense counsel objected that there had been no showing made for why defense counsel should be excluded, and that if relevancy determinations were to be made at such a hearing, defense counsel had a right to participate. DE210:2-4. The government responded that some of the subject materials were irrelevant or partially-irrelevant, for which the government would seek partial or total redaction. DE212:6. The government also indicated there were other documents as to which redaction would not protect against disclosure of partially-irrelevant, classified information, and in those instances the government would propose substitutions. Id.

C. There Was No Basis for Excluding Defense Counsel from the CIPA Hearing and That Exclusion Substantially Prejudiced the Defendants' Ability to Present a Defense.

The district court's holding of an ex parte CIPA § 4 hearing was error that substantially prejudiced the defendants' due process rights. Section four does not authorize such ex parte hearings, but rather contemplates, on a case-by-case basis, that the district court **may** permit a **written** statement under that section to be submitted first to the district court for its review. Moreover, CIPA contains no suggestion that a written submission under section four should ordinarily be ex parte. Indeed, the very language of the statute illustrates that provision of even written submissions on an ex parte basis is neither automatic nor necessarily the norm:

> The court **may** permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone. **If** the court enters an order granting relief following such an ex parte showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

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

The limited, conditional language authorizing ex parte written submissions demonstrates that section four otherwise anticipates defense counsel's participation in CIPA proceedings. "In statutory construction, the plain meaning of the statute controls unless the language is ambiguous or leads to absurd results." United States

v. Carrell, 252 F.3d 1193, 1198 (11th Cir. 2001) (internal quotation marks omitted). Congress could easily have provided that ex parte submissions were the standard or that only in rare circumstances would defense counsel be permitted to see them. But Congress did not draft section four so as to exclude defense counsel participation or encourage nonadversarial proceedings, with the limited exception–on a discretionary basis by the district court–of specific written submissions, with expressly-provided review guarantees. See United States v. Koonce, 991 F.2d 693, 698 (11th Cir.1993) (recognizing the canon of statutory construction that express inclusion of one matter implies exclusion of others; "inclusio unius est exclusio alterius").

In its motion for an ex parte, in camera CIPA hearing, the government offered no reasons warranting defense counsel's exclusion. DE156. In fact, the government later asserted that CIPA § 4 **required** an ex parte hearing. DE212 at 4.[1] However, section four merely contemplates ex parte written submissions, and only as a permissive, not a required, procedure. Ironically, the government cited United States v. Klimavicius-Viloria, 144 F.3d 1249, 1261 (9th Cir. 1998), for the proposition that an ex parte submission is justified where "the government

[1] When the government invoked CIPA procedures on October 7, 1998, it submitted a "Memorandum of Law Concerning Relevant Provisions of CIPA," describing a section four **submission** and ostensibly conceding that an ex parte **submission** would be warranted only upon a showing of need. DE107:3-4.

explained the specific damage to national defense if [the] information were disclosed." DE212:4. The government did not, nor has it yet, articulated what damage to national defense would occur if defense counsel had participated in the CIPA hearing in the instant case; nor did the government make a record showing of need for such extraordinary measures. Nor did the district court provide an explanation for defense counsel's exclusion from the crucial CIPA hearing.

There was no justification to exclude defense counsel from the hearing, while several reasons indicate why their participation was warranted. Ex parte hearings are disfavored even when expressly permitted by the federal rules. United States v. George, 786 F.Supp. 11, 16 (D.D.C. 1991). "Ex parte communications generally are disfavored because they conflict with a fundamental precept of our system of justice: a fair hearing requires a reasonable opportunity to know the claims of the opposing party and to meet them." United States v. Microsoft Corp., 56 F.3d 1448, 1464 (D.C. Cir. 1995). An ex parte hearing compels the district court to discern the defendant's possible defenses and then determine whether discovery of particular items would be appropriate. Jencks v. United States, 353 U.S. 657, 669 (1957). This is a particularly difficult task when the district court is entirely unaware of the defendant's theory of the case. See United States v. Dennis, 384 U.S. 855, 875 (1966) ("In our adversary system, it is enough for judges to

judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate").

Additionally, ex parte communications between the government and the court deprive the defendant of notice of even the general content communications and an opportunity to respond. In re Taylor, 567 F.2d 1183, 1187-88 (2d Cir. 1977). Ex parte communications thereby create the appearance of impropriety as well as the possibility of actual misconduct.

> Even where the government acts in good faith and diligently attempts to present information fairly during an ex parte proceeding, the government's information is likely to be less reliable and the court's ultimate findings less accurate than if the defendant had been permitted to participate. 'However impartial a prosecutor may mean to be, he is an advocate, accustomed to stating only one side of the case.'

United States v. Napue, 834 F.2d 1311, 1318 (7th Cir. 1987) (quotation omitted).

There would have been no prejudice to the United States by having defense counsel participate in the CIPA hearing. Apparently **all** of the documents subject to the ex parte hearing were seized **from the defendants** through FISA searches. As such, the defendants already knew the contents of those documents.

In United States v. Rezaq, 156 F.R.D. 514 (D.D.C. 1988), the court denied the government's request for an ex parte CIPA submission: "The government asks too much, however, when it expects this court to exclude defendant's counsel from reviewing the CIPA statements." 156 F.R.D. at 527. In doing so, the court heavily relied on the fact that ex parte hearings are disfavored and that the government had failed to articulate why defense counsel's presence would prejudice the government. Id. at 526. However, the Rezaq court did prevent the defendant from viewing the government's CIPA submissions largely because much of the subject classified matters were documents the defendant had never seen before. Id. Similarly, in United States v. Pringle, 751 F.2d 419, 427 (1st Cir. 1984), rev'd on other grounds, sub nom. United States v. McAfee, 479 U.S. 805 (1986), the court affirmed use of an ex parte CIPA written submission, in part because **none** of the defendants had possessed the subject classified material.

Of course, even with respect to classified information seized from a defendant, the government may claim an interest in protecting methods of collecting intelligence and confidential sources. However, neither of those concerns was present here. At trial, the government called FBI Special Agents Vincent Rosado, Julio Ball, Michael McAuliffe, and Joseph Hall to testify regarding the FBI's evidence collection methods. These agents testified as to how

they infiltrated the defendants' apartments and were able to surreptitiously download data from their computers. Agent Rosado testified in great detail about how the FBI was able to crack the defendants' encryption program using Norton's Disk Utility. DE1477:1779-1784. They also testified about the manner in which they planted listening devices and cameras in the defendants' homes. In sum, the government did not appear to conceal its intelligence-gathering methods at trial.

The government also clearly did not need an ex parte CIPA proceeding to protect its intelligence sources. Indeed, the government's voluntary disclosure of a great number of other classified documents minimized any claim that intelligence methodologies were compromised merely by disclosures of materials. Nevertheless, even if there were other data collection methods or intelligence sources the government wanted to protect, it could easily have done so without resorting to an ex parte hearing. The names or identifying traces to intelligence sources or any passages revealing secret data collection methods could have been redacted if necessary. The district court also could have not only sealed the courtroom, but issued a protective order prohibiting defense counsel from sharing the contents of the classified documents at issue with their clients. See Rezaq, 156 F.R.D. at 526. Instead, the government disclosed broad classes of documents and materials and withheld the rest based on claims of irrelevance.

Perhaps the most compelling argument against the holding of an ex parte hearing was that although three defendants were charged with conspiring to transmit national defense information in violation of 18 U.S.C. § 794, **none** of the defendants in this case had ever transmitted such information and no such documents could have been seized from them or included in the group of documents as to which the government successfully sought CIPA protection. Thus, the documents themselves had no national security implication. Unlike espionage cases, in which the defendant has actually possessed or transmitted such documents and the government might thereby be concerned with their disclosure, here those concerns were not present, thereby further lessening any need to conduct CIPA hearings ex parte.

D. The District Court's Holding of an *Ex Parte*, in Camera, Face-to-face Hearing for at Least Half a Day with the Government Improperly Injected the District Court into the Presentation of Both the Government's and the Defendants' Presentation of Their Respective Cases.

The manner in which the ex parte hearing was held prejudiced defendants and violated their due process rights. Section four of CIPA contemplates that the district court may "permit the United States to make a request for [deletion, redaction or substitution of discovery] in the form of a written statement to be inspected by the court alone." 18 U.S.C. App. III, § 4. Based on the section four's

plain language, the ex parte, in camera communication should take the form of a written submission. Here, the district court held an ex parte, in camera **hearing** with the government. In its request, the government explicitly asked the district court to set aside at least **one-half day** for the hearing. DE156:3.

The government placed primary reliance on a single reported instance in which, despite the plain statutory language, an ex parte CIPA hearing was held to be valid. Klimavicius-Viloria, 144 F.3d at 1260-61 (affirming ex parte proceeding conducted by district court **after** submission of written document where written submission was insufficient to resolve district court's inquiry; "Such a hearing is appropriate **if the court has questions** about the confidential nature of the information or its relevancy.") (emphasis added); cf. United States v. Yunis, 867 F.2d 617, 619-620 (D.C. Cir. 1989) (noting, without addressing propriety of, section four submissions **followed** by some form of ex parte meetings of government attorney with court to clarify issues raised by written submissions). Contrary to the government's broad reading of Klimavicius-Viloria, it is clear that the preferred practice, consistent with other cases addressing ex parte matters, is for the government to proceed simply by way of a written submission without non-statutory ex parte hearings. United States v. Rezaq, 134 F.3d 1121, 1142 (D.C. Cir. 1998) (documents submitted by government ex parte which district court

subjected to detailed review and prepared a list of the materials that it considered discoverable); United States v. Sarkissian, 841 F.2d 959, 962, 965 (9th Cir. 1988) (section four proceedings by way of submission); Pringle, 751 F.2d at 425-426 (same).

Klimavicius-Viloria is apparently the only case in which a court has been called upon to determine the propriety of an ex parte CIPA meeting between the government and the district court, as opposed to a written submission as spelled out by the language of section four. Based ostensibly on the absence of directly-contrary language in section four, Klimavicius-Viloria held that ex parte hearings are "not ruled out." Id. But this statutory analysis is incomplete and ignores the principle that the expression of one form of extraordinary relief implies the exclusion of others. See United States v. White, 118 F.3d 739, 742 (11th Cir. 1997) ("If Congress had wanted to so provide it would have been easy to do so. The selection of the statutes set forth reflects an intent to omit all others.") (citing Koonce, 991 F.2d at 698); United States v. Anderson, 200 F.3d 1344, 1348 (11th Cir. 2000) (applying statutory interpretation maxim "inclusio unius est exclusio alterius" to sentencing guidelines). Nor did the Klimavicius-Viloria court consider the constitutional implications–impinging on the right to due process and effective counsel–of its reading of the statute. See Almendarez-Torres v. United States, 523

U.S. 224, 238 (1998) (stating doctrine of constitutional doubt as principle of statutory construction applied to best reflect congressional will).

Clearly, CIPA section four express language does not permit ex parte meetings between the government and district court. The expansion of section four outlined by the Klimavicius-Viloria court is not binding on this Court. But even if adopted, the Klimavicius-Viloria test was not met here, where the government simply bypassed the submission procedure, the district court had no special concern or need for further inquiry (nor were any post hoc findings to that effect made), and the entire statutorily-prescribed section four procedure was avoided. The approach successfully taken by the government here–in effect, using Klimavicius-Viloria's limited exception (even assuming that exception were not precluded by the statute and by due process concerns) to turn the CIPA hearing into an ex parte mini-trial of relevancy–should not become the law of this Circuit.

E. The Ex Parte Nature of the CIPA Hearing Has Resulted in Continuing Procedural Prejudice to the Defendants.

In preparation for this appeal, the defendants moved that the district court unseal some or all of the record as to the ex parte hearing. DE1622. Defendants attempted to perfect the record on appeal and to permit appellate counsel to obtain merely a glimpse of what occurred in the ex parte hearing. Defendants asserted that after three years and the events of an eight-month trial on the merits, the

government's security concerns had lessened and the partial unsealing of the ex parte hearing would be proper. DE1622:3-4. The defendants sought unsealing of non-sensitive portions of the ex parte hearing, and requested a status conference to determine if some non-privileged portions of the transcript could be unsealed. DE1622:4-5. The government contended the district court had no jurisdiction to grant the request and any disclosure would harm national security. DE1623. However, seeking to show that not all aspects of a hearing could possibly affect national security, the defendants posed some innocuous queries, the answer to which would assist appellate counsel in preparing this appeal without prejudicing the government:

> How many hours did the hearing last?
>
> How many lawyers participated and argued at the hearing, and who were those lawyers?
>
> Were witnesses called at the hearing?
>
> Did the government present affidavits in lieu of witnesses?
>
> Did the government present unsworn proffers from other government officials not present at the hearing?
>
> Did the government make factual proffers without affidavits or witnesses?
>
> Did the government make representations as to what type of evidence would or would not be relevant to the defense at trial, i.e., did the government make representations as to what the defenses would or could be?

> In doing so, did the government make any assertions as to the extra-record representations by defense counsel or the defendants?
>
> Similarly, did the government make any representations as to its own anticipated litigation strategies for trial?
>
> Can those representations now be disclosed?
>
> Did the government make any representations as to whether certain information was already available to the defendants and hence that discovery was unnecessary?
>
> Can any of those representations now be disclosed?
>
> Did the government cite any case authority in the course of its hearing for its non-disclosure position?
>
> Did the government produce all such documents for actual review or did the government present summaries?
>
> Did the government number and categorize the materials at issue?
>
> Did the government present certified translations of foreign language documents and did the government identify the certified translator?

DE1652:6-7. With this information, appellate counsel would have been in a far more reasonable position to focus its arguments before this Court and could have more accurately presented the relevant issues in this submission. The district court, however, denied defendants' request. DE1676.

The secret nature of the hearing leaves defense counsel at a considerable disadvantage in challenging its propriety. They are not unlike the subjects in John

Godfrey Saxe's poem, The Blind Men and the Elephant. The poem, based on an ancient Indian fable, tells of six blind men studying the nature of an elephant, each reaching wildly different impressions of the nature of the beast. Appellants' counsel are similarly disadvantaged because the district court foreclosed disclosure of any aspect of the ex parte hearing, even under a stipulated protective order. Of course, CIPA § 4 provides that written **submissions** will be preserved for appellate review and this Court will presumably have access to a transcript of the hearing. However, the continued unfairness of one-sided litigation on all aspects of the hearing is unnecessary. Hence, the defendants seek this Court's direction to the district court to unseal portions of the section four hearing that will not affect national security in order to permit adequate appellate presentation and consideration of the first-impression issues raised by the CIPA procedures and rulings in this case.

F. The Government's Basis for Suppressing Discovery under CIPA Was Contrary to Fed.R.Crim.P. 16 and Contributed to the Prejudice of Resolving CIPA Issues on an *Ex Parte* Basis.

There is considerable circumstantial evidence in the record from which to conclude that the ex parte section four hearing served to deprive the defendants of discovery to which they were entitled. For example, in its own submissions

requesting an ex parte hearing, the government illustrated its intent to preclude access to documents whose relevancy was not apparent to the government:

> Many of the classified documents that the government has reviewed and determined to be arguably relevant to this case also reflects information that we believe is **irrelevant** to this case. As to classified relevant information, the government will either provide such information to cleared counsel, or, alternatively, will, pursuant to Section 4 of CIPA, submit for the Court's consideration proposed substitutions for certain classified information which substitutions will summarize the contents of the underlying documents to the extent that such documents contain currently discoverable information. As to the latter category of proposed production, the government will seek the Court's approval to **redact** the excluded information on the basis of its **irrelevance**.

DE156:3 (emphasis added). Given the number of CIPA materials withheld by the government, the "redaction" referred to by the government appears to mean a withholding or suppression, rather than a cut-and-paste or marking-out sort of true redaction.

The government's claims regarding its purpose in having an ex parte CIPA hearing merit careful scrutiny. In both its request for a section four hearing and its objections to the defendants' motion for reconsideration, the government claimed the purpose of the ex parte hearing was to redact **irrelevant** information. But the government does not usually need the strictures of CIPA to avoid discovery of irrelevant information. The government's discovery obligations, as outlined in Rule 16(a) and the trial court's standing discovery order, are all largely premised

upon the government's providing relevant and material information. The government is well aware that it does not need the district court's guidance or approval to withhold irrelevant information. United States v. Quinn, 123 F.3d 1415, 1421-22 (11th Cir. 1997); see also DE212:7 (government's response motion regarding CIPA § 4 hearing). The government's assertions that the ex parte hearing was intended solely to eliminate irrelevant information can only mean that the items at issue were those seized from the defendants.

The only conceivably discoverable, but "irrelevant," evidence was the property seized from the defendants. While Fed.R.Crim.P. 16(a) largely limits the discovery of statements, books, papers, documents, photographs, or other tangible objects to those that are either relevant or material to the preparation of a defense, that rule does not subject the discovery of items taken from the defendant in a search to a relevancy test. Items that were seized from a defendant are discoverable **regardless** of their relevancy or materiality. United States v. Rodriguez, 799 F.2d 649, 652 (11th Cir. 1986). Thus, if the government's representations in its pleadings are taken at face value, then the documents constituting the subject of the ex parte hearing were items seized from the defendants as to which discovery was presumptively mandated.

Given that CIPA does not alter a defendant's rights to discovery, Anderson, 872 F.2d at 1514, the government cannot use CIPA to deprive a defendant of discovery to which he would otherwise be entitled under the controlling case law and Rules of Criminal Procedure. In Yunis, in which the government claimed that disclosure would reveal methods of intercepting conversations and damage national security, Id. at 620, the Court outlined the proper inquiry for a court to follow in determining whether an item should be discovered in the context of a CIPA section four hearing. Id. at 619-621.

First, the item in question must be relevant–an obvious prerequisite for discoverability of most material under Fed. R. Crim. P. 16–as determined by reference to Fed. R. Evid. 401, providing that relevant evidence is that which has a tendency to make an issue at stake in the controversy more or less probable. Id. at 622. Second, a court should determine whether the government is asserting a claim of privilege. Id. at 622-23.

Once the government has asserted a privilege, the court must determine whether the government's claim of privilege is colorable. Id. at 623. "Obviously, the government cannot turn any run-of-the-mine criminal case into a CIPA action merely by frivolous claims of privilege." Id. Assuming the government's claim of privilege is colorable, the court should then balance the defendant's need for the

discovery against the government's asserted privilege, as established in Roviaro v. United States, 353 U.S. 53 (1957). To overcome the government's claim of privilege under Roviaro, a defendant must demonstrate that the information is helpful to the defense. Id. at 60-61. "[W]here disclosure…is relevant and helpful to the defense of an accused, or essential to a fair determination of a cause, the privilege must give way." Id. In Yunis, the court found that the conversations that were the subject of discovery were not at all helpful to the defense and therefore a request for the recordings could not overcome the government's claim of privilege. Yunis, 867 F.2d at 625.

Applying Yunis to the ex parte hearing here, it is important to reiterate that items seized from the defendants are discoverable irrespective of relevance. Rodriguez, 799 F.2d at 652. Next, the government's claim of privilege here as to items seized from the defendants cannot withstand scrutiny. With respect to the contents of the items seized, it is clear that the defendants **already possessed** the information; virtually all of it was taken from them. With respect to the government's methods of obtaining the items seized from the defendants, it became a matter of public record at trial how these items were obtained through FISA searches. However, even if the government's claim of privilege is colorable, disclosure would still be warranted since the evidence seized from the defendants

was extremely helpful to the defense and essential to fair determination of their case.

At trial, defendants admitted that they were cooperating with the Cuban government by monitoring private groups and individuals that for decades have conducted violent and disruptive activities against Cuba, including bombing campaigns. Defendants attempted to show that their purpose here was not to engage in espionage or otherwise to violate U.S. laws. Hernandez sought to show that he did not conspire to murder.

The government simply could not be counted on to produce all discovery necessary to these defenses. For example, the government revealed that it intercepted 350 high frequency messages that passed between various defendants and Cuba. However, the government provided only 44 such messages in trial. These messages revealed both instructions from the Cuban government and reports and requests from certain of the defendants. Plainly, the entirety of the message-traffic was the best indicator of the nature of the "conspiracy" or agency relationship between Cuba and these defendants. That was the very core issue at trial: defining and explaining the nature of the agency activities performed by the defendants, their understanding of what Cuba wanted to do and wanted them to do, and the limitations of their agreements and employment relationships with Cuba.

In any case examining the nature of the agency-employment relationship, such message-traffic would clearly be discoverable as not only relevant but the **best** evidence on the crucial issue at trial. See, e.g., United States v. Todd, 108 F.3d 1329, 1331 (11th Cir. 1997) (conviction reversed for exclusion of defense evidence showing aspects of employer-employee relationship contrary to government theory of antagonistic relationship).

Similarly, other documents, reports, compilations, as well as the pattern of such reports and transmissions to Cuba, would have shed the best light on the true nature of the "conspiratorial" activity involved, and how the defendants themselves viewed the context of their actions, a matter of particular concern as to the specific intent requirements of various counts. See United States v. Word, 129 F.3d 1209, 1211 (11th Cir. 1997) (reversing conspiracy conviction for exclusion of evidence that defendants' relationship–which government characterized as close and romantic, implying shared conspiratorial knowledge–was instead abusive and stormy).

By disclosing only a small portion of this material, the government predetermined the visible landscape of the defendants' activities, making the government's characterizations of this activity difficult to disprove and skewing the broader picture of the defendants' actions and–most importantly–agreements.

This imbalance of access to key evidence violated due process. United States v. Williford, 764 F.2d 1493, 1499 (11th Cir. 1985) (recognizing admissibility of "[e]vidence not part of the crime charged but pertaining to the chain of events explaining the context" of the offense or "a natural part of an account of the crime").

"[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 690 (1986) (internal quotations omitted). This Court has consistently ruled that, while a district court has discretion in evidentiary matters, that discretion "does not extend to the exclusion of crucial relevant evidence necessary to establish a valid defense." United States v. Brazel, 102 F.3d 1120 (11th Cir. 1997); United States v. Frazier, No. 01-14680, 2003 WL 480129, *6 (11th Cir. Feb. 26, 2003) (exclusion of defense forensic expert's testimony on meaning of evidence discovered by government compelled new trial); United States v. Kelly, 888 F.2d 732,743 (11th Cir. 1989) (district court cannot exclude "crucial relevant evidence necessary to establish a valid defense."). Further, all doubts about the admissibility of such evidence should be resolved in favor of the accused. Todd, 108 F.3d at 1331; United States v. Wasman, 641 F.2d 326 (5th Cir. 1981). The government's decisions as to what aspects of the defendants' actions and knowledge were

relevant to their "criminal" knowledge unfairly deprived the defendants of the ability to present defenses. See United States v. Lankford, 955 F.2d 1545, 1548 (11th Cir. 1992); United States v. Cohen, 888 F.2d 770, 777 (11th Cir. 1989).

G. The District Court Erred in Failing to Reconsider its CIPA Ruling after Learning of the Manner and Theory of the Defenses Presented at Trial.

In conducting the ex parte CIPA hearing more than a year before trial, the district court lacked not only the input of defense counsel on relevancy and other concerns, but also the ability to accurately predict the defenses to be raised at trial. Thus, at the CIPA hearing, the district court may have believed the defendants would stand silent, present no evidence, and simply force the government to prove its case, including proving the defendants' identities and the fact of their relationship to Cuba. Indeed, the government may have argued the defendants would claim they were not the agents the government believed them to be, due to mistaken identity or otherwise. But that is not the case that was tried. Instead, at trial, it was clear that the defendants **acknowledged** relationships and government employment status with Cuba. The defense invited the jury to examine the whole of the defendants' activities in the U.S., in order to show that the defendants' **agreements**–the conspiratorial allegations at the center of the case, i.e., counts 1, 2, and 3–were not to defraud or otherwise to commit criminal acts as alleged. The

defense use at trial of whatever message-traffic, reports, and related information was turned over by the government to establish their defense undermines the government's relevancy objections. Such evidence of internal and external communications, as well as defendants' compilations and reports, was fundamental to the preparation and presentation of their defenses. This material was, as this Court described similarly conceptual evidence in Frazier, the "heart of the defense case." 2003 WL 480129 at *6 (citing Crane v. Kentucky, 476 U.S. at 690)).

The district court's failure to reconsider the CIPA rulings and thereby reduce the prejudice of the pretrial rulings, even after observing the defense case and the obvious relevance of the complete message-traffic and reports–the only hard evidence available to overcome natural skepticism as to the defendants' secret activities in this country–violated the defendants' rights under CIPA and the Due Process and Confrontation Clauses.

H. Alternative Requests for Relief.

Based on the government's production of discovery after the ex parte hearing, it appears the government withheld hundreds, if not thousands, of documents relating to the defendants' activities in the United States. The government seized approximately one thousand floppy disks from the defendants through FISA searches. Hundreds, if not thousands, more documents were

obtained in FISA and post-arrest searches. Apparently several dozen computer disks seized from the defendants were never reviewed (decrypted) by the government. Had these documents not been suppressed, they would have provided convincing evidence that the focus of the defendants' activities was not to commit espionage or violate U.S. laws, but rather to monitor activities of groups associated with or directly involved in acts of terrorism committed in Cuba.

The wholesale suppression of documents seized from the defendants unfairly impeded their defense. The ex parte hearing precluded a fair adversarial evaluation of the relevance and defendants' need for the material. Under a Yunis balancing test, any government claim of privilege in the CIPA hearing should have yielded to the defendants' need for the documents. Moreover, the harm to the defendants did not end at trial, but carried over to restricting the defense in presenting relevant discovery-violation and due process arguments on appeal.

Therefore, the Court should reverse the district court's procedural and substantive CIPA rulings and remand for a new trial after full disclosure as required under Fed.R.Crim.P. 16. Alternatively, the Court should remand the matter to the district court for an adversarial CIPA hearing to allow full exposition of relevant arguments and issues. Finally, the Court should, alternatively, remand for record reconstruction of non-classified portions of the CIPA hearing and

preparation of an inventory and categorization of suppressed material to permit defense counsel to adequately represent the defendants on appeal of the substantive CIPA rulings.

III. THE DISTRICT COURT ERRED IN DENYING MOTIONS TO SUPPRESS FRUITS OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT SEARCHES IN VIOLATION OF THE DEFENDANTS' FOURTH AMENDMENT RIGHTS.

The defendants were victims of several FISA searches conducted from August 1996 through April 1998. DE1477:1739-45, 1750-56. The government seized upwards of 1,000 floppy disks containing data, and hundreds of hours of audio-taped conversations. Id. These items constituted most of the government's evidence at trial.

The defendants filed a pretrial motion to suppress, asserting that the searches were unlawful in that the surveillance and physical intrusions did not conform to FISA's requirements. DE288:4. Pursuant to 50 U.S.C. § 1806(f), the Attorney General filed an affidavit stating that disclosure of FISA materials or an adversary hearing on the motion to suppress would harm national security. The district court reviewed the motion to suppress and the government's affidavits in camera and denied the motion. DE639.

Due to the secrecy of the FISA procedures, defendants do not know why the FISA search was granted, whether the district court determined that the FISA searches had a primary purpose of gathering foreign intelligence information, and whether required minimization procedures were employed. Based on information and belief, defendants assert that the FISA searches failed to comply with these requirements.

As initially enacted,[2] FISA permitted federal officials to obtain orders authorizing electronic surveillance "for the purpose of obtaining foreign intelligence information." 50 U.S.C. § 1802(b). In 1994, FISA was amended to permit physical intrusions to obtain foreign intelligence, 50 U.S.C. § 1822, and in 1998, to permit pen registers and trap-and-trace devices. 50 U.S.C. § 1842. The requirement that foreign intelligence information be the primary objective of the surveillance is grounded in the language of §§ 1802(b) and 1804. FISA applications must contain a certification by a designated executive branch official that the purpose of the surveillance is to acquire foreign intelligence information and must set forth the basis for the certifying official's belief that the information sought is the type of foreign intelligence information described. Id. at §1804(a)(7).

2 The recent USA Patriot Act of 2001, Pub.L.No. 107-56, 115 Stat. 272 (Oct. 26, 2001), may have modified FISA's scope and requirements. See In re Sealed Case No. 02-001, 310 F.3d 717, 735 (U.S. Foreign Intell. Surveil. Ct. Rev. 2002) ("Patriot Act amendment…eliminated any justification for the FISA court to balance the relative weight the government places on criminal prosecution as compared to other counterintelligence responses"). Any such changes to FISA in the USA Patriot Act occurred well after, and are inapplicable to, the FISA searches here.

FISA contains a mechanism for suppressing evidence obtained in contravention of its procedures. 50 U.S.C. § 1806(e). Virtually every court that has addressed the validity of a FISA search has acknowledged that the primary purpose cannot be for law enforcement, but rather for the acquisition of foreign intelligence. United States v. Megahey, 553 F. Supp. 1180 (E.D.N.Y. 1982) aff'd sub nom., United States v. Duggan, 743 F.2d 59 (2d Cir. 1984). This Court has also held that even though evidence obtained under FISA may subsequently be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance. United States v. Badia, 827 F.2d 1458, 1464 (11th Cir. 1987).

The primary purpose test is to insure that FISA is not "used as an end-run around the Fourth Amendment's prohibition of warrantless searches." Johnson, 952 F.2d at 572. The government should not be permitted to turn an investigation into foreign intelligence into a "pro forma justification for any degree of intrusion into the zones of privacy guaranteed by the Fourth Amendment." United States v. Brown, 484 F.2d 418, 427 (5th Cir. 1973) (Goldberg, J., concurring). The primary purpose test is vital to protect against the tendencies, no matter how well-intentioned, of law enforcement authorities to obtain a conviction by means of unlawful seizures. Berger v. New York, 388 U.S. 41, 50 (1967).

To insure that FISA applications are not used as a statutory or constitutional "end-run," the statute provides for the Attorney General to institute "minimization procedures," which minimize the acquisition and retention, and prohibit the dissemination, of non-publicly available information concerning unconsenting United States persons, consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information. 50 U.S.C. § 1801(h)(1). The United States Foreign Intelligence Surveillance Court ("FISC") will not authorize electronic surveillance unless it finds that the minimization procedures proposed in the government's application comply with § 1801(h). 50 U.S.C. § 1805(a)(4). In its order, the FISC must specifically direct that the approved minimization procedures "be followed." 50 U.S.C. § 1805(b)(2)(A). See generally ACLU Found. v. Barr, 952 F.2d 457, 466 n. 9 (D.C. Cir. 1991).

There is considerable circumstantial evidence that the information gathered in the FISA searches was unlawful in this case because the primary purpose of the FISA searches here was to gather law enforcement information. The FISA searches spanned almost two years, during which, the government seized approximately one thousand floppy disks of data belonging to the defendants and captured hours of conversations involving the defendants. None of these documents or conversations yielded any evidence that the defendants acquired or

were about to acquire documents harmful to national security. One of the flexibilities that FISA provides over Title III, is that the searches can last for one year before the FISA application must be renewed. 50 U.S.C. § 1805(e). Assuming the initial FISA application here was given immediately before the first FISA search, the application would have been renewed sometime in August 1997. Given that no national defense information had been obtained through the FISA searches during that first year, it is difficult to understand why the application would have been renewed by the FISC.

The government's behavior towards codefendant Guerrero also indicates that the FISA searches were conducted primarily for a law enforcement purpose. Prior to his arrest, Guerrero secured employment as a maintenance man at Boca Chica Naval Air Base. The government learned of Guerrero's association with the other codefendants at least as early as February 25, 1997, through the FISA searches. DE1490:3626-31. The government also learned that Guerrero was employed at the naval base. Nevertheless, the government permitted Guerrero to continue working at Boca Chica until his arrest in September 1998. Furthermore, the government took no precautions against the possibility that Guerrero would compromise national security. The government's complacency in permitting Guerrero to work in a military installation strongly indicates that its primary

objective in conducting FISA surveillance was gathering law enforcement information

There is also circumstantial evidence that the government may have violated its minimization procedures in conducting the FISA surveillance. On May 17, 2002, the FISC issued its first written opinion in over twenty years of existence. In re All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, (D.D.C. 2002) (hereinafter "In re FISC"). This opinion concerned the FISC's partial rejection of the government's proposal to revise its minimization procedures. Although later reversed, on other grounds, by the Foreign Intelligence Surveillance Court of Review in In re Sealed Case No. 02-001, 310 F.3d 717 (U.S. Foreign Intell. Surveil. Ct. Rev. 2002), the FISC rejected the government's proposed minimization procedures based on the following findings of previous misconduct:

- Improper sharing of FISA information with FBI and United States Attorney.
- Erroneous statement by FBI Director concerning targets of FISA searches.
- FBI false swearing regarding overlapping intelligence and criminal investigations.
- Omissions of material facts from FISA affidavits.
- Counterintelligence and law enforcement FBI working together on FISA searches.

Id. at 620-21.

Although the FISC's holding in In re FISC, was reversed by In re Sealed Case No. 02-001, the findings of misconduct by the FBI remain troubling. Furthermore, nothing in the decision in In re Sealed Case No. 02-001 would affect the FISA searches in the instant matter since the Review Court's decision was based on recent amendments to FISA. See 310 F.3d at 735 (passage of USA Patriot Act in 2001 lessened need for separation between counterintelligence and law enforcement personnel). The misconduct revealed by the FISC in its opinion near the relevant time period of the instant FISA searches raises the specter of procedural irregularities that may have persisted and tainted the FISA process here.

Additional grounds warrant suppression as to defendant Campa. When the government was procuring and executing its FISA applications, Campa's existence was not known, nor did the government know that he had resided with other defendants. Only after the FISA applications were made did the government learn of a "Ruben" who may have been involved in other defendants' activities, and it was entirely serendipitous that the government arrested Campa at Medina's apartment. Furthermore, even when the government agents encountered and arrested Campa, they did not know who he was. The government could not have satisfied even the meager procedural requirements of FISA vis-B-vis Campa at the

time the applications were made, particularly given that the government did not even know he existed. Therefore, based on both the procedural irregularities of the FISA searches and the impropriety of the government's FISA searches of Campa in particular, the defendants request that the Court reverse the denial of their motion to suppress FISA searches and seizures.

IV. CAMPA'S CONVICTION SHOULD BE REVERSED DUE TO PROSECUTORIAL MISCONDUCT.

Campa's conviction should also be reversed because of the government's numerous, improper suggestions that Campa engaged in espionage while living in Fayetteville, North Carolina, despite the absence of any evidence that Campa was involved in such unlawful conduct. DE1525:6935. The government's relentless suggestions that Campa spied on military bases in North Carolina, therefore, impermissibly encouraged the jury to convict based on charges that had never been brought and on facts that did not exist. See United States v. Hand, 184 F.3d 1322 (11th Cir. 1999) (erroneous introduction of evidence that defendant abused his wife required a new trial); United States v. McLain, 823 F.2d 1457 (11th Cir. 1987) (new trial required based, in part, on prosecutor's improper remarks regarding defense counsel's character); United States v. Reed, 700 F.2d 638 (11th Cir. 1983) (new trial required based on irrelevant references to embezzlement

defendant's past personal bankruptcy and prior use of marijuana); Romine v. Head, 253 F.3d 1349 (11th Cir. 2001) (prosecutor's references to biblical passages indicating that mercy was out of the question and death penalty was mandatory for defendant who killed his parents required new sentencing hearing); Davis v. Zant, 36 F.3d 1538 (11th Cir. 1994) (prosecutorial misconduct and misstatements in closing arguments required new trial).

The government's campaign to convict Campa by improper suggestions and innuendo began in opening statements and continued through closing arguments, despite the district court's repeated rulings and admonishments. In opening statement, prosecutor David Buckner told the jury that, prior to moving to Miami, Campa had lived for some time in Fayetteville, "a stone's throw from Camp LeJeune Marine Base." DE1476:1583. Fayetteville's supposed proximity to Camp LeJeune (as shown below, Mr. Buckner must have meant Fort Bragg) was irrelevant to any issue, and initially appeared to be only a passing remark. It turned out, however, to be a key part of the government's trial strategy and merely one of many such inappropriate salvos the government launched at trial.

The government attempted to suggest that Campa was spying on military bases in Fayetteville when it sought, through the testimony of Campa's former landlord in Fayetteville, to introduce a map of the area, prominently displaying the

locations of Fort Bragg army base (not Camp LeJeune) and Polk Air Force base. The government claimed it sought only to illustrate exactly where, in Fayetteville, Campa lived. The district court saw through the government's proffer and properly sustained an objection to the admissibility of the map. DE1525:6935. The district court had previously granted Campa's motion in limine to preclude further unwarranted suggestions that Campa was spying on military facilities in Fayetteville. DE1501:5277-78, 5282.

Given the government's obvious, improper purpose in calling Campa's former landlord in Fayetteville to the stand, defense counsel requested that the witness, a retired military man, be excused before he blurted anything out about the military bases located there. The government, however, insisted on asking Olin Baggett additional questions which ultimately elicited the evidence the government improperly sought to put before the jury: that a military base was located near Baggett's home in Fayetteville. DE1525:6938.

The district court denied Campa's motion for a mistrial following the completion of Baggett's testimony. However, the district court once again clearly instructed the government to refrain from any further insinuation that Campa was involved in anything illegal regarding military bases in Fayetteville: "I will order the government not to bring up in closing argument this connection, and I don't

believe Mr. Kastrenakes or anybody else would do so. ... I have previously granted the motion in limine. I am instructing the government you are not to present testimony unless you have evidence that connects this defendant to activities involving the air force base or the military reservation near Fayetteville. ... I will order the government not present any further evidence concerning a connection unless you have and can proffer concrete evidence that there is a connection between his presence in Fayetteville and military bases that were there and it not be brought up in closing argument as I have ordered before." DE1525:6957-58.

Unfazed by the district court's clear ruling and instructions, the government persisted in this improper attempt to convict Campa by innuendo during the testimony of retired U.S. Admiral Eugene Carroll. Thus, with no apparent motive in mind other than to reestablish a point the district court had already ruled was irrelevant, unsupported by the record, and unduly prejudicial, Mr. Buckner asked Admiral Carroll to tell the jury where Fort Bragg was located. After the witness said it was located in North Carolina, Mr. Buckner cavalierly asked: "Do you recall what city it is near," hoping to have the jury be told Fort Bragg was located near Fayetteville. DE1533:8272. An objection was sustained before the witness answered the question.

Clearly, the government was again improperly suggesting that Campa, who had not been charged with any espionage-related offense, was spying on military facilities in Fayetteville. The government's blatant violation of the district court's rulings caused the court to issue an instruction advising the jury to disregard the government's improper suggestion. DE1534:8373. The district court, however, denied Campa's renewed motion for a mistrial.

Still undeterred by the district court's clear rulings, the government again, during its rebuttal closing argument, suggested that Campa was spying on military bases in Fayetteville. Thus, after vehemently describing Campa and his codefendants as people "bent on destroying the United States," prosecutor John Kastrenakes dramatically turned to Campa and demanded to know: "Let's ask, why are you on military bases? Why are you in Key West, Florida at Boca Chica Naval Air Station? Why are you in Fayetteville, North Carolina?" DE1583:14482-83. Following defense counsel's objection and renewed (now, third) motion for a mistrial, the district court held that the matter was a "close question," but denied Campa's motion. DE1583:14543-45.

During his closing arguments, which drew 28 sustained objections, Mr. Kastrenakes also improperly referred to the fact that Campa and his codefendants had been represented by court-appointed counsel. Thus, he said the defendants

were "people bent on destroying the United States" whose defense had been "paid for by the American taxpayer." DE1583:14482.

The prosecutor also improperly referred to the defendants' potential punishment. Respecting Campa's defense that his conduct was necessary to protect Cuba from further acts of violence by local anti-Castro elements, the prosecutor improperly told the jury that it was for the Court, not the jury, to consider such evidence, which he claimed was relevant only for sentencing purposes. "[W]hen you find someone guilty," the prosecutor argued, the Court "takes into account all other factors that may be relevant for what would be the appropriate sentence. ... Do not nullify a guilty verdict because you don't trust Judge Lenard to do her job. She will do her job if you do your job." DE1478:14487.

While federal courts have long recognized that prosecutors should "prosecute with earnestness and vigor," they have also long acknowledged their parallel "duty to refrain from improper methods calculated to produce a wrongful conviction." Berger v. United States, 295 U.S. 78, 88 (1935). Thus, prosecutors "may not make suggestions, insinuations, and assertions to mislead the jury." United States v. Rodriguez, 765 F.2d 1546, 1560 (11th Cir. 1985). Federal courts have consistently granted requests for new trials when such improper "suggestions,

insinuations, and assertions" prejudice a substantial right of the defendant. Id. at 1559.

The government's several improper "suggestions, insinuations, and assertions" that Campa was spying on military installations in Fayetteville were even more egregious than those which have traditionally resulted in new trials being granted. For example, in United States v. Blakey, 14 F.3d 1557 (11th Cir. 1994), this Court reversed a defendant's conviction on various bank fraud and counterfeit security charges based on the prosecutor's improper closing argument to the jury. The prosecutor's comments included a reference to the lack of quality witnesses called by the defense at trial and an attack on the defendant's character based on the number of aliases he possessed.

The prosecutor's "most damaging" and inappropriate remark, however, was his statement that the defendant was "a professional, a professional criminal." Id. at 1559. There had been no evidence concerning the defendant's prior criminal record introduced at trial and, in fact, the defendant's prior record consisted of only two relatively minor offenses. Id. at 1560. "Thus," the Court held, "the prosecutor's comment went outside the evidence, and impugned Blakey's character with an inaccurate characterization." Id. The trial court's curative instruction that no evidence concerning the defendant's prior record had "been

offered before [the jury]" and that the jury should, therefore, "disregard the statement" was held to be inadequate; indeed, the instruction was thought to have made the problem worse. Id.

As this Court noted, the prosecutor's assertion that the defendant was "a professional criminal" was "clearly improper because it encouraged the jury to convict Blakey based on facts not admitted as evidence." Id. Similarly, the government's repeated "suggestions, insinuations, and assertions" that Campa was spying on military bases in Fayetteville improperly encouraged the jury to convict him based on evidence that was never introduced at trial and, in fact, simply did not exist. The prosecutor's further, outrageous remark that Campa and his codefendants were "bent on destroying the United States," presumably because of the continued insinuation that Campa had penetrated military bases in Fayetteville, was equally improper and prejudicial. See 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"). The prejudicial impact of the government's outrageous assertion that Campa intended somehow to destroy the United States was further aggravated by the additional, improper remarks relating to how the taxpayers were

having to foot his legal fees and the suggestion that the defendants would receive lenient sentences if convicted.

The remarks that required a new trial in Blakey were all made during closing arguments. However, the government's improper "suggestions, insinuations, and assertions" that Campa was spying on military facilities in North Carolina were made at various times throughout the trial, despite clear orders from the Court directing the government to refrain from making such remarks.

The government's repeated, improper "inquiries and innuendos" concerning Campa's penetration of military facilities in North Carolina were unwarranted by the evidence at trial, blatantly violated the Court's specific rulings, and greatly prejudiced Campa, who had not been charged with any espionage-related offense at all. Such improper assertions and innuendo were intended solely to suggest that the government had greater and more serious evidence of wrongdoing against Campa than it actually introduced into evidence at trial. The district court's curative instruction was insufficient to undo the prejudice caused by such improper trial tactics. This Court, therefore, should vacate Campa's convictions.

V. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT CAMPA POSSESSED A FALSE PASSPORT.

The government charged that from May 1994 until September 1998, Campa possessed a false U.S. passport. However, at trial, the government failed to prove Campa's knowledge of or dominion over the passport. The passport was found not in Campa's possession, but in the residence of codefendant Hernandez, in September 1998. The government's theory was that because Campa once stayed temporarily with Hernandez, he could have possessed the passport at that time.

This Court's precedents show that such a tenuous theory of constructive possession–premised on incomplete circumstantial evidence–is insufficient to carry the government's burden of proof. Constructive possession is "the knowing exercise of, or the knowing power or right to exercise, dominion and control over the proscribed [item]." United States v. Glasgow, 658 F.2d 1036, 1043 (5th Cir. Unit B 1981). Although constructive possession need not be exclusive, and may be proven through circumstantial evidence revealing ownership, dominion, or control over the item or the premises where it is located, see United States v. Poole, 878 F.2d 1389, 1392 (11th Cir.1989), it is not enough to show that the defendant simply visited or made temporary use of the premises. Minnesota v. Olson, 495 U.S. 91, 99 (1990) (guest lacks "ultimate control" of contents of premises); United States v. Rackley, 742 F.2d 1266, 1272 (11th Cir.1984) (defendant who often stayed at house and "had a key, as well as the right to

exclude others from the house," but "did not stay in the house immediately preceding the search and seizure," was not shown to have constructive possession of contraband found in search).

To sustain a possession conviction, first, there must be evidence the defendant knew of the item's existence in order to exercise dominion and control over it. United States v. Gonzalez, 71 F.3d 819, 834 (11th Cir.1996); United States v. Mieres-Borges, 919 F.2d 652, 657 (11th Cir.1990). The government failed to prove such knowledge. There was no evidence when the document was produced, whether Campa had ever been advised of its existence, or whether he had ever seen it. Moreover, even knowledge of its existence and willingness to possess the item–as with the government's theory that Campa could have used the passport to leave the United States–still would not establish Campa's possession of the item. Nor was Campa charged with possessing it by aiding and abetting another's possession or by means of a conspiracy to possess it; and the jury was not instructed on such theories. See Rewis v. United States, 401 U.S. 808, 814 (1971) (criminal conviction cannot be affirmed on the basis of theory not presented to jury); accord United States v. Porter, 591 F.2d 1048, 1055-56 n. 6 (5th Cir. 1979).

Instead, the government proceeded simply on the legally unsustainable theory of possession due to past temporary stay in another's premises, a theory

repeatedly rejected by this Court. Consequently, the evidence was insufficient to establish the passport possession offense charged in count seven.

VI. THE DISTRICT COURT ERRED IN IMPOSING A 3-LEVEL UPWARD ADJUSTMENT UNDER U.S.S.G. § 3B1.1 FOR AGGRAVATING ROLE IN TRAFFICKING FALSE IDENTIFICATION DOCUMENTS.

The government failed to establish that Campa played an aggravating role, within the meaning of U.S.S.G. § 3B1.1, in "trafficking" false identification documents, for which Campa was sentenced under an uncharged relevant conduct analysis. See U.S.S.G. § 2L2.2. The district court concluded that the enhancement was warranted based on its finding that Campa "manag[ed] the assets of the search by [codefendant Luis Medina] to obtain death certificates that would subsequently be utilized for false identification documents." DE1453:21. The district court's conclusion is both factually erroneous and legally insufficient to sustain the aggravating role enhancement.

This Court has squarely rejected the asset-management theory on which the district court relied in enhancing Campa's sentence. "To the extent that our words may have previously indicated that a defendant's management of assets might alone serve as grounds for an increase in base offense level, we now draw the line. We now squarely decide that **a section 3B1.1 enhancement cannot be based**

solely on a finding that a defendant managed the assets of a conspiracy." United States v. Glover, 179 F.3d 1300, 1302-1303 (11th Cir. 1998) (emphasis added). For that reason alone, the district court's role enhancement decision should be reversed.

Further, there is no foundation for the role enhancement. Essentially, the district court found that Campa acted as a caretaker for Medina's affairs in south Florida while Medina went to California to obtain information for the possible later use of false identification documents. The district court characterized this activity as "managing" Medina's assets and equated this characterization with the management of the assets of a document-trafficking operation.

The district court's asset-management theory is contrary not only to the express language of the aggravating role guideline, but also to decisions of this Court holding that the aggravating role adjustment must arise out of charged conduct. Here, assuming Campa "managed" any assets within the meaning of the guideline, he did not manage assets of an illegal document-trafficking operation, but rather assets related to offenses under 18 U.S.C. § 951, **non-guideline** offenses for which Campa was separately sentenced to 15 years imprisonment. DE1439; see United States v. Eidson, 108 F.3d 1336, 1345 (11th Cir. 1997) (sentencing court "should only consider 'conduct immediately concerning' the offense of

conviction in determining an adjustment under § 3B1.1(a)"); United States v. De la Rosa, 922 F.2d 675, 680 (11th Cir. 1991) (U.S.S.G. § 3B1.1 aggravating role adjustment "requires that the sentencing court focus on the defendant's role in the offense of conviction rather than some other criminal conduct in which he may have engaged").

Further, the management of assets to which § 3B1.1, comment. (n. 2), refers as a ground for upward departure–an issue not reached by the district court–requires more than briefly "minding the store" while the actual manager is away, but rather having the managerial authority over the disposition and handling of assets. Thus, a drug mule does not manage of assets of an immigration conspiracy simply because he keeps an eye on the drug owner's property, in caretaker fashion, while the drug owner engages in related immigration offenses. Instead, there must be a more direct connection between the defendant's role in the guideline-sentenced offense and the management of assets of that offense.

The district court's finding as to Campa's management of "the assets of the search" is without factual support in the record and is clearly erroneous. "[T]he government has the burden of proving by a preponderance of evidence the existence of the aggravating role." See United States v. Glinton, 154 F.3d 1245, 1260 (11th Cir. 1998) (reversing aggravating role enhancement under U.S.S.G. §

3B1.1 in cocaine distribution conspiracy where government failed to prove by preponderance defendant's "managerial control or supervision of others" involved in the criminal conduct for which the defendant was sentenced under the guidelines); United States v. Sepulveda, 115 F.3d 882, 890 (11th Cir. 1997) (government must prove sentence enhancing factors with "reliable and specific evidence," by preponderance of evidence); Johnston v. Singletary, 162 F.3d 130, 138 (11th Cir. 1998) (clear error shown where record lacks evidentiary support). The evidence clearly established that Medina managed the assets of the search. Hence, even if the district court's asset-management theory were otherwise appropriate to the immigration-offense guideline relevant here, the underlying finding was clearly erroneous.

CONCLUSION

Based upon the foregoing, the Court should reverse Campa's convictions and remand for entry of a judgment of acquittal on count 7 and a new trial on the remaining counts. Alternatively, Campa requests that the Court remand for resentencing without the role-in-the-offense enhancement.

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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 13,983 words.

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